
(2000) 09 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : S.W.P. No. 295 of 2000

Kanta Devi

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 08-09-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21

Citation : (2001) 4 SCT 47

Hon'ble Judges : T.S.Doabia, J

Bench : Single Bench

Advocate : Neeru Goswami, Sudershan Sharma, Sunil Sethi, Advocates
appearing for the Parties

Judgement

T.S. Doabia, J.—In John Ruskin's Classic Unto this last, there is an anecdote. A merchant had collected a lot of gold while he was sailing

abroad a ship to another country. The ship started sinking. He had therefore, to dive into the sea with all his gold. But the burden of the gold took

him straight to the bottom of the sea. Ruskin asks at this point in the narrative a self answering question : ""did the man have the gold, or the gold

have the man ?

2. The petitioner in this case is in possession of gold, but she does not want to sink with it.

3. The Constitution guarantees several fundamental rights. Right to live appears to be the most valuable of them. In some judicial pronouncements

right to livelihood has also been treated as part and parcel of Article 21. Then, there is a right to be treated equally in the matter of opportunities

which are provided by the State in seeking public employment. Once a person gets into public employment, then what is mere expectation

becomes a hard reality and it acquires the protection of Article 16 also. The petitioner in this case is seeking protection of Article 16 as also Article

21 of the Constitution of India. Facts in brief be noticed.

4. The petitioner belongs to a backward area. She is resident of Chingam Inderwal, Tehsil Kishtwar, District Doda. She is 29 years of age.

Difficult situation in the area had displaced her and now she is staying in New Housing Colony Janipura, Jammu. Luck was on her side. She stands

selected by the J&K Public Service Commission. She stands appointed as Lecturer in Political Science on regular temporary basis in the pay scale

of Rs. 8,000-13,500 in Higher Education Department. She has been ordered to report in the Government Degree College for Boys Anantnag

(Kmr.). She submits that if she is forced to attend at Anantnag, she will have to face an atmosphere which is not very congenial and that too, in a

Boys College. She submits that asking her to join at Anantnag virtually amounts to denial of appointment. What is being given by one hand is being

taken away by other.

5. The State has filed objections. The stand taken by them is that a post of Lecturer is not available in the Jammu Province and, therefore, she has

been posted at Anantnag.

6. As indicated above, before a person joins the service, he/she has only a right of consideration. After he/she gets inducted into the service, then

this right acquires a different status. The equality clause has to be looked from a different angle. As to why other three persons have been

appointed in Jammu Province and as to why the petitioner has been sent to Anantnag (Kmr.), is a matter which has not been explained. It is here

the State has adopted a policy of pick and choose. As to what is the criteria adopted for sending the petitioner to Anantnag and retaining other

three persons at Jammu does indicate that in the matter of implementing the concept behind equality clause as contained in Article 16, the petitioner

has not been treated fairly. At this stage, what is at stake is not only her right conferred under Article 21 of the Constitution, but also the possibility

of the petitioner being deprived of her life and livelihood. In Lord Denning's Book the Discipline of Law, reference is made to a decision *Edward v.*

SOGT, 1971 Chancery 354. The continuance in service depended upon the continuance of membership of the workers union. One of the

conditions was that if the member failed to pay his contribution, then the "temporary membership was to terminate automatically". His membership

was terminated. This put his employment in jeopardy. It affected his right to work. He was to be deprived of his livelihood. The aggrieved

employee applied for readmission. The question arose whether such a man had any right which could be enforced, Lord Denning said :

.....I do not think this trade union, or any other trade Union, can give itself by its rules an unfettered discretion to expel a man or to withdraw his

membership. The reason lies in the man's right to work. This is now fully recognized by law. It is a right which is of special importance. It was

further said, if union card is withdrawn he has to leave the employment. He is deprived of his livelihood. The courts of this country will not allow so

great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules, nor in the enforcement of them.

The law has means at its disposal. A trade union exists to protect the right for each one of its members to earn his living and to take advantage of

all that goes with it. It is the very purpose of its being. If the union should assume to make a rule which destroys that right or puts it in jeopardy or is

a gratuitous and oppressive interference with it then the union exceeds its powers. The rule is ultra vires and invalid.....

7. In the present case, there is a stipulation in the order that in case the petitioner does not report for duty within thirty days, then her appointment

shall be deemed to have been cancelled. This inbuilt condition of termination would apparently be hit by the reasoning, which reasoning was

adopted by Lord Denning in the case referred to above. Her right to continue in service has been threatened. It affects her right to work which

stands crystallized after she was given appointment. This is now protected by Article 16. This affects her right to livelihood.

8. This above is one aspect of the matter.

In LPA (S) No. 127/1997 titled, Dr. Baldev Raj Sharma v. State of J&K and others decided by a Division Bench of this Court on 17.11.1999

similar was the situation. The appellants therein were directed to join at Srinagar. They came to this Court. Their plea was that when several other

Doctors who were similarly situated were adjusted at Jammu, then there was no reason to send them to Srinagar. What was said by the Division

Bench in the said LPA is being quoted below :

It be seen that under similar circumstances, the respondentState has been permitting the selectees to joint at Jammu. This was because of threat

perception which was there at the time when appointment letters were issued. As a matter of fact, some of the candidates came to this court. They

preferred writ petition. In the writ petition, agreed orders were passed. In this regard it would be apt to refer to a writ petition preferred by one Dr.

Ranbir Singh. Dr. Ranbir Singh and some other similarly situated persons were asked to assume duties at Srinagar. They were naturally reluctant.

They approached this Court. The matter was considered by this Court and ultimately the State Government agreed to post the employees at

places other then the valley. See ??Dr. Ranbir Singh v. State, decided on 16.7.1999.?? If the State gives concession to one set of candidates and

denies it to another, would it not be justifiable for the person who is denied the benefit to come forward with a plea that there is breach of Articles

14 and 16 of the Constitution.

Therefore, we are of the opinion, that the appellants when they approached this Court with a petition, they were seeking to enforce not only their

right which is conferred on them in terms of Article 16, but also they were enforcing their right in terms of Article 21. Once one set of employees

were allowed to migrate from Kashmir valley and they are being paid emoluments in terms of various Government orders noticed above, then

would it be apt to force the appellants to join in Kashmir valley. The situation there has never been static. Normalcy followed by violence are

events which have taken place in a cycle. No decision has been taken by the State Government so far for sending back the migrant employees.

This is itself suggestive of the fact that the situation in the valley is not conducive and there is no guarantee that the life and liberty or appellants

would be safe there. They have, therefore, through the medium of writ petition sought enforcement of not only the rights which vested in them in

terms of Article 16 but also in terms of Article 21 of the Constitution also.

When the State Government of its own realising the difficulties faced by the persons who were similarly situated as appellants allowed them to join

at Jammu and created a category of migrant employees who are getting full salary at Jammu and in some cases even the salary which they become

entitled to on promotion, then it cannot be said that the appellants were not well within their rights to contend that similar treatment be afforded to

them. The fact that the situation in the valley was noticed not only by the Administrative Authorities but this was also noticed by the Legislature

when it enacted Jammu and Kashmir Migrants Act of 1997. By this Act, the State gave certain benefits to the migrants. This legislative recognition

of the fact that the things in the valley were not under control is a factor which cannot be ignored. Therefore, the appellant are well within their right

to contend that by forcing them to work at Srinagar, their life and liberty would be put to jeopardy and, therefore, would be a consequent breach

of Articles 16 and 21 of the Constitution.

What was said by the Division Bench would equally be attracted to the facts of this case.

9. The petitioner has placed on record an additional affidavit wherein she has stated that a vacancy of Lecturer in Political Science has become

available now in Jammu Division. This affidavit is dated 28.8.2000 Para ""2"" of the affidavit reads, as under :

That as per Government Order No. 137/HE of 2000 dated 19.4.2000 the respondents have mentioned that there is no post in Jammu Division in

subject of Political Science available vacant. It is submitted in rebuttal to it that one Shri Netar Singh Lecturer Political Science, Government

M.A.M. College, Jammu has been promoted and posted as Principal, Govt. Degree College, Kishtwar, so a vacancy has got created in the said

college where the deponent can be adjusted very easily.

10. In this regard, it would be apt to mention that when a section of population migrated from Srinagar to Jammu and they had no alternate

accommodation, the Supreme Court of India in the case of ??Jawahir Lal Koul and others v. State of J&K and others?? give interim directions to not

to evict them from the Governments accommodation. This order was passed only with a view to see that the persons who had to shift from the

valley to Jammu are not put at disadvantageous position. Again, all these persons who were once upon a time serving in Kashmir Valley, are being

treated as on leave and are being paid their leave salaries at Jammu. Therefore, it would be an exercise in futility to make the petitioner to join in

Kashmir valley and then allow her to come in the category of a migrant and pay

her migrant leave salary at Jammu. This situation needs to be avoided.

I am, accordingly, of the view :

- (i) That situation in valley is not very congenial.
- (ii) That the petitioner's apprehension that there is danger to her life is well founded;
- (iii) That the facts of this case do disclose that there is threat to the life of the petitioner and in this situation, Article 21 would be attracted;
- (iv) That what is being given to one hand cannot be taken away by another;
- (v) That as to what parameters were adopted to push the petitioner to Anantnag (Kmr.) and allow others to stay in Jammu remains unexplained.

The State has adopted a policy of simple pick and choose;

- (vi) That the clauses contained in the appointment order provided for automatic cancellation of the letter of appointment, is unreasonable. It effects

the right of livelihood which right is protected by Article 21 also.

11. In view of the above, the respondents are accordingly, directed to reconsider the claim of the petitioner and in any case consider her case for

appointment against the vacancy which has now become available in Jammu Division, the respondents would see to it that the petitioner is adjusted

in Jammu province.