

(2018) 09 J&K CK 0065

In the Jammu And Kashmir High Court

Case No : Service Writ Petition Nos. 2220 Of 2012, 1054 Of 2014, IA Nos. 3 Of 2017, 1 Of 2018, 1 Of 2016, 1 Of 2017, 3398 Of 2012, 907 Of 2014

Lotika Khajuria @APPELLANT@Hash State Of Jammu & Kashmir And Others

Date of Decision : 25-09-2018

Acts Referred:

Jammu and Kashmir Drugs and Food Control (Gazetted) Service Recruitment Rules, 1997 — Rule 5

Citation : (2018) 09 J&K CK 0065

Hon'ble Judges : Dhiraj Singh Thakur, J

Bench : Single Bench

Advocate : Rahul Pant, D.C. Raina, F. A. Natnoo, Gagan Basotra

Final Decision : Disposed Off

Judgement

HIGH COURT OF JAMMU AND KASHMIR

1. Petition is admitted to hearing and with the consent of learned counsel for the parties, the same is taken up for final disposal.
2. In the present petition, the petitioner challenges the order bearing No.265-HMER of 2008 dt. 25.3.2008, whereby the private respondent No.3-Irfana Ahmad, was regularized as Assistant Controller Drugs/Assistant Drug Analyst retrospectively w.e.f. 30.6.2002, on the ground that the same was done in excess of quota provided for Senior Drug Inspectors.
3. Writ in the nature of mandamus is also sought prohibiting the official respondents not to place the said respondent No.3, above the petitioner in the seniority list.
4. With a view to understand the controversy in its correct perspective, the material facts are as under:
5. The petitioner was appointed as Assistant Controller Drugs, vide order No.260-HME of 2003 dt. 20.3.2003, by a process of direct recruitment. Respondent No.3,

was initially appointed as Drug Inspector and was subsequently promoted as Senior Drug Inspector and finally made Incharge Assistant Controller Drugs vide Order No.01HME of 2002 dt. 1.1.2002.

6. In the first round of litigation, the petitioner filed SWP No. 1825/05, seeking a direction to the respondents to fix her seniority in the Cadre of Assistant Controller Drugs. This court vide judgment and order dt. 25.10.2005, directed accordingly. A seniority list came to be framed by the official respondents vide order dt. 3.3.2006. The petitioner was shown at Sl.No.2, in the said seniority list below one Mohd Aslam Khateeb. One Nazir Ahamad Wani was shown at Sl.No.3. the petitioner was shown to be a direct appointee through PSC w.e.f. 20.3.2003.

7. It needs to be clarified that although in the said order the date of appointment of the petitioner has been shown as 4.8.1989, the same is reflected as the petitioner's initial appointment as Drug Inspector. That, however, is not relevant for the present controversy, inasmuch as, the petitioner was subsequently appointed by direct recruitment as Assistant Controller Drugs.

8. The petitioner as also the private respondent herein, both are governed by the Jammu and Kashmir Drugs and Food Control (Gazetted) Service Recruitment Rules, 1997 (here-in-after called the Rules of 1997). Rule 5 of the aforesaid rules envisages thus:

"5. Qualification and method of recruitment

(i) No person shall be eligible for appointment or promotion to any post in any class, category or grade in the service unless he/she possesses the qualifications as laid down in the schedule ?II? and fulfils other requirements or recruitment as provided in the rules and orders for the time being in force.

(ii) Appointment to the service shall be made -

(a) by direct recruitment (which will include appointment by transfer);

(b) by promotion; and

(c) partly by direct recruitment and partly by promotion in the ratio and manner mentioned against each post in the Schedule:

Provided that in case a post cannot be filled up by promotion according to the rules due to non-availability of suitable qualified person, the post shall be filled up by direct recruitment and vice-versa with the prior approval of the Commission."

9. Schedule II of the Rules of 1997, which prescribes the method of recruitment of Assistant Controller Drugs/Assistant Drug Analyst, for direct recruits as also by promotion is also relevant and is reproduced hereinunder:

Schedule II

Class

Category

Designation

Grade

Minimum

Qualification for direct recruitment

Method of recruitment

III

(a)

Assistant

Controller,

Drugs/Assistant

Drug Analyst

2125-

3600

(i) Post-Graduate in

Pharmacy or

Pharmaceutical

Chemistry or Medicine with

Specialization in

(i) 20% by direct recruitment.

(ii) 80% by

promotion amongst

Senior

Clinical

Pharmacology or Microbiology

from a

university established in

India by law.

(ii) Experience in the manufacture of testing of Drugs

from a approved laboratory or enforcement of the provisions of the Drugs and Cosmetics Act,

1956 for a minimum for Drug period of five years.

Scientific

Officers and Senior Drug

Inspector,

Instrument

Technicians of

Drugs and

food

(Subordiante) Service

subject to fulfillment of statutory

qualification laid down in the Drug and Cosmetic

Rules, 1945 for Drug

Inspector in following ratio:-

(i) Senior

Scientific

Officer 20%.

(ii) Senior Drug

Inspector

/

Instrumen

t

Technician 60%.

10. According to Schedule I of the said rules, the Cadre strength for the post of Assistant Controller Drugs and Assistant Drug Analyst as shown is 4. Subsequently, however, the petitioner filed a supplementary affidavit on 28.2.2018, to bring on record a copy of Government Order No.604 of 2007 whereby 7 posts of Assistant Controller Drugs were additionally created by the subsequent abolition of 7 posts of Sr. Drug Inspectors and another 4 posts were created by Government Order No.21 dt. 17.1.2011.

11. The basis of challenge to the impugned order dt. 25.3.2008, whereby the

private respondent No.3 was regularized as Assistant Controller Drugs/Assistant Drug Analyst retrospectively w.e.f. 30.6.2002, is on the ground that there was no post in the year 2002, in the quota meant for Senior Drug Inspector which could be filled up by respondent No.3 by way of promotion as Assistant Controller Drugs. With a view to support and buttress this assertion, attention of the court was drawn to the reply submitted by the Government in this regard. In para 6 of the response filed by the State, what is stated is as under:

"6.That the answering respondent No.1, further submits that while forwarding Agenda Note to the Public Service Commission regarding regularization of the Officers of Drug Control Organization and Assistant Drug Controller/Assistant Drug Analyst, it was mentioned in the note that no Senior Scientific Officer (SSO) is available for promotion to the post of Assistant Controller/Analyst against the 20% meant for this category and the private respondent was proposed to be considered against the post meant for the category of Senior Scientific Officer. The said proposal was agreed to by the PSC/DPC and subsequently on the recommendations of the PSC/DPC, Government Order No.265-HME of 2008 dated 25.03.2008 was issued...."

12. Mr Pant, learned Counsel for the petitioner urged that the Government had admitted that the private respondent No.3, was considered against a post, which was otherwise meant to be filled up from out of the category of Sr Scientific Officer. This was done firstly for the reason that there was no suitable candidate from out of the category of Sr.Scientific Officer, who could be promoted and secondly that the private respondent No.3 was so considered against the said quota in as much as she could not have been promoted within her own prescribed quota.

13. Learned counsel for the petitioner states that what was done by the Government in considering the private respondents for the post of Assistant Controller Drugs was contrary to the requirement of Rule 5 of the Rules of 1997 referred to above.

14. It was urged that in view of the proviso to Rule 5, if a suitable officer in the category of Senior Scientific Officer was not available, then that post ought to have been filled up by direct recruitment only with the prior approval of the Public Service Commission, which was not done in the present case.

15. It is pertinent to mention here that sanction was granted by the Government for appointment of the petitioner as Assistant Drug Controller/Assistant Drug Analyst vide order dated 20.03.2002. It appears that since the petitioner was on deputation, it was ordered that she would continue to remain on deputation. As a consequence of this, one Nazir Ahmed Wani, petitioner in SWP No. 1654/2009, was appointed as Assistant Drug Controller/ Assistant Drug Analyst against the vacancy allegedly created due to the deputation of the petitioner. As to what is the legality of the order of appointment passed in favor of Nazir Ahmed Wani may not be relevant at this stage except to mention here that Nazir Ahmed Wani

had figured in the waiting list.

16. Learned counsel for the petitioner further urged that insofar as, the respondent, Nazir Ahmed Wani is concerned, he came to be promoted from the post of Senior Drug Inspector as Incharge Assistant Drug Analyst vide order dated 01.01.2002 and was confirmed vide order dated 25.03.2008 as Assistant Drug Controller with effect from 30.04.2002. The case of the petitioner is that considering the cadre strength of Assistant Drug Controller in the year 2002, which was only four and that additional eleven posts were created only in 2007 and another four in the year 2011, there was no post against which the private respondent could have been considered for promotion in the year 2002. It was urged that assuming a post was available in the year 2002, yet according to the stand taken by the Government, the said respondent could not have been considered for promotion with effect from 2002, inasmuch as, as per the Government's response she was considered for promotion only against the post meant to be filled up from out of the Senior Scientific Officer's cadre.

17. Learned counsel for the petitioner placed reliance on the judgment of the Apex Court reported as "Keshav Chandra Joshi V/s Union of India" AIR 1991 SC 284, to urge that fortuitous appointments cannot be taken into account for the purpose of seniority and further that whenever direct recruitment is made, the direct recruits are entitled to their placement in the seniority as per the vacancies reserved for them in the ratio prescribed and the seniority determined as per the rules within the respective quota. Reliance was also placed upon M. S. L. Patil, Asstt. Conservator of Forests, Solapur (Maharashtra) etc V/s State of Maharashtra (SC), 1996(11) SCC 361, Madan Gopal Garg V/s State of Punjab, 1995(4) SLR 412 and Ashok Pal Singh V/s U. P. Judicial Services Association (SC), 2011 AIR (SCW) 109 to the same effect.

18. In the second writ petition bearing SWP No. 1054/2014, the petitioner challenges the final seniority list issued by the Government vide order dated 22.04.2014, whereby respondent No.3, has been shown senior to the petitioner in the cadre of Assistant Controller Drugs and her date of promotion has been shown as 30.06.2002. It was urged that in case this Court held that the promotion granted to the private respondent was bad, then as a necessary consequence, the seniority of the petitioner would have to be restored.

19. Per contra, Mr. Gagan Basotra, learned counsel for the private respondent submits that the promotion of the private respondent with effect from 2002 cannot be said to be bad, inasmuch as, the said respondent was duly qualified for promotion to the post of Assistant Drug Controller in terms of the rules. It was further stated that the Government, did not commit any mistake in promoting the said respondent, inasmuch as, no promotion had ever been made from the cadre of Senior Scientific Officer to the post of Assistant Controller Drug. It was further urged that the appointment of private respondent had, even otherwise, been upheld by a Co-ordinate Bench of this Court in SWP No.2810/2015, decided on 23.4.2018.

20. It appears that Nazir Ahmed Wani had challenged the retrospective promotion of the private respondent in SWP No. 1654/2009. The questions framed by the Writ Court in the aforementioned petition were as under:-

a. Whether posts of Assistant Controller Drugs/ Assistant Drug Analyst were available in promotional quota on the dates where from the private respondents were regularized vide Government Order No. 265-HME of 2008 dated 25th March, 2008.

b. Whether the respondents 1 and 2 while directing retrospective regularization of private respondents as Assistant Controller Drugs/ Assistant Drug Analyst exceeded the promotion quota.

21. In the aforesaid judgment, the Court observed as under:-

"In the circumstances, on the date the Recruitment Rules, 1997 came into force one post of Assistant Controller Drugs was vacant and on the date Ms. Lotika Khajuria and the petitioner were appointed as Assistant Controller Drugs/ Assistant Drug Analyst, two posts of Assistant Controller Drugs/ Assistant Drug Analysts were lying vacant and only six promotes were in place, which otherwise represented the promotion quota, having regard to the Recruitment Rules of 1997. The respondent No. 1, thus did not exceed the promotion quota nor did the private respondents usurp the quota meant for the direct recruits. There is in the circumstances, no substance in the petitioner's claim that the respondent No. 1 by directing retrospective regularization of the private respondents had violated the service Rules of prejudicially affected the seniority of Ms. Lotika Khajuria and petitioner. The petitioner's claim for the reasons discussed, is thus bereft of any merit."

22. Finally, the court concluded thus:-

"From the above discussion it emerges that violation of fundamental and constitutional rights as alleged by the petitioner in these writ petitions is devoid of any basis. Ms. Lotika Khajuria who was the only candidate recommended by respondent No. 2, for appointment as Assistant Controller Drugs and thus senior to the petitioner, who figured in the waiting list and was appointed only because of deputation of Ms. Lotika Khajuria, may have a better claim to her placement in the seniority list of Assistant Controller Drugs/ Assistant Drug Analysts, at a higher up place. But as Ms. Lotika Khajuria has opted not to question her placement in the seniority list, and is not before Court, it would not be proper to dilate on that aspect of the matter.

In the circumstances and for the reasons discussed SWP Nos. 1654/2009 along with all connected CMP's re-dismissed with costs."

SWP No. 2810/2015

23. This was a petition filed by Irfana Ahmad, respondent No. 3, herein challenging the Government Order No. 817-MME of 2015 dated 22.12.2015

temporarily giving the charge of the post of Controller Drugs Food Control Organization, J&K to the petitioner herein. A mandamus was also sought for allowing her (Irfana Ahmad) to perform the duties and discharge the responsibilities of Controller DFCO.

24. The basis of the claim in the aforementioned writ petition was that petitioner Irfana Ahmad (respondent No.3 herein) was the Senior most in the Cadre of Drug Analyst as per seniority list issued on 22.04.2014 where in she figured at Sr. No. 3.

25. Reliance was also placed on the decision of a Coordinate Bench of this Court dated 29.7.2010, rendered in SWP No. 1654/2009, referred to in the preceding paras.

26. The petitioner herein appears to have reiterated the stand taken in the present petition regarding the legality of the retrospective benefits given to Irfana Ahmad vide order dated 25.03.2008.

27. The Writ Court however, vide judgment and order dated 23.04.2018 refused to accept the plea raised by the petitioner herein citing the importance of binding precedent on the ground that the issue had already been decided in SWP No. 1654/2009, wherein it was held that the department had not exceeded the quota in favor of Irfana Ahmed Wani, when she was given the benefit vide order dated 25.03.2008.

28. From the facts and the rules mentioned hereinabove, it can be seen that in the earlier round of litigation being SWP No. 1654/2009, where the petitioner was not a party in the proceedings before that Court at all, the main emphasis of the Court was as to whether the official respondents in granting the benefit to respondent No. 3 herein by virtue of order dated 25.03.2008 had exceeded the promotion quota or usurped the quota meant for direct recruits. However, that was not the only issue which was required to be considered by the Court in those writ proceedings.

29. The assertion of the counsel for the petitioner that as on 30th of April, 2002, the cadre strength of Assistant Drug Controller/ Assistant Drugs Analyst was only four and that additional eleven posts were created only in the year 2007 and, therefore, there was no post against which private respondent could be considered for promotion in the year 2002, has been buttressed by the State in paragraph 6 of the objections filed by it.

30. It appears on a perusal of the objections filed by the State that the case of respondent No. 3, namely Irfana Ahmad was processed against the post of Assistant Drug Controller/Assistant Drug Analyst, from out of the quota meant to be filled up from the cadre of Sr Scientific Officers. This was done on the premise that there was no Sr Scientific Officer available for promotion meant for that category.

31. The Writ Court in SWP No. 1654/2009 failed to take notice of the fact that as

per proviso to Rule 5 of the Rules of 1997, which envisages that in case, a post cannot be filled up by promotion according to rules, due to non-availability of a suitable qualified person, the same shall be filled up by direct recruitment and vice versa with prior approval of the Public Service Commission. Thus, in case a Sr Scientific Officer was not available for promotion to the post of Assistant Drug Controller/ Assistant Drug Analyst, the said post could have only been filled up by direct recruit and that too with the prior approval of the Public Service Commission. This however, has not happened and instead private respondent No. 3 was regularized retrospectively with effect from 30.06.2002 in excess of the promotion quota, against which respondent No. 3 the petitioner could have been so considered.

32. The issue that arises for consideration in the present petition is whether the judgment dated 29.7.2010, rendered in SWP No. 1654/2009, followed in SWP No. 2810/2015, is a judgment per incuriam.

33. Per incuriam, according to the Black's Law Dictionary, 5th Edition means through 'inadvertence'.

34. In State of U.P. & Another vs. Synthetics & Chemicals Ltd. & Another, 1991 (4) SCC 139, the Apex Court in paragraph 40 held thus:-

"40. 'Incuria literally means 'carelessness. In practice per incuriam appears to mean per ignoratum. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law is avoided and ignored if it is rendered, 'in ignoratum of a statute or other binding authority. (Young v. Bristol aeroplane co. Ltd)."

35. In M/S. Fuerst Day Lawson Ltd vs Jindal Exports Ltd, (2001) 6 SCC 356, the Apex in paragraph Nos. 19 and 23 held thus:-

"19. In Mamleshwar Prasad v. Kanhaiya Lal, (1975)2 SCC 232 reflecting on the principle of judgment per incuriam, in paras 7 and 8, this Court has stated thus: (SCC p.235):

"7. Certainty of the law, consistency of rulings and comity of courts all flowering from the same principle converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgment per incuriam.

8. Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind."

23. A prior decision of this court on identical facts and law binds the Court on the same points of law in a latter case. This is not an exceptional case by inadvertence or oversight of any judgment or statutory provisions running counter to the reason and result reached. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment `per incuriam. It is also not shown that some part of the decision based on a reasoning which was demonstrably wrong, hence the principle of per incuriam cannot be applied. It cannot also be said that while deciding Thyssen, the promulgation of the first Ordinance, which was effective from 25.1.1996, or subsequent Ordinances were not kept in mind more so when the judgment of Gujarat High Court in Western Shipbreaking Corporation (supra) did clearly state in para 8 of the said judgment thus:....."

36. It is apt to quote what the Apex Court stated in Ganga Sugar Company V/s State of Uttar Pradesh. (1980)1 SCR 769, which is as under:-

".....it is wiser to be ultimately right rather than to be consistently wrong....."

37. In view of what has been stated hereinabove, it is held that the benefit of retrospective regularization granted to respondent No. 3 by virtue of order dated 25.03.2008 was contrary to rules and legally impermissible and hence is quashed. As a sequel to the above, the petitioner shall figure senior to the respondent No. 3 in the seniority list of Assistant Controller Drugs/Assistant Drug Analyst. The official respondents shall frame the seniority list accordingly. The seniority list impugned in SWP No. 1054/14, is consequently quashed.

38. Disposed of accordingly along with connected IAs.