

(2020) 04 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Latter Patent Appeals No. 134 Of 2019

Madan Lal

APPELLANT

Vs

State Of J&K And Others

RESPONDENT

Date of Decision : 22-04-2020

Acts Referred:

Citation : (2020) 04 J&K CK 0002

Hon'ble Judges : Tashi Rabstan, J; Sanjeev Kumar, J

Bench : Division Bench

Advocate : Sudershan Sharma, Aseem Sawhney

Final Decision : Allowed

Judgement

Sanjeev Kumar, J

1. This intra Court appeal filed in terms of Clause 12 of the Letters Patent is directed against judgment dated 08.04.2019 passed by the learned Single Bench in SWP No.1875/2014 (Madan Lal v. State of J&K and others).

2. Briefly put, the facts relevant to the disposal of this appeal go as under:-

Pursuant to the recommendations made by the J&K Public Service Commission, the appellant came to be appointed as "District Youth Services and Sports Officer" in the department of Youth Services and Sports on 07.07.1987. He earned his first promotion to the post of Assistant Director, Youth Services and Sports on 17.11.1992, but this was in incharge capacity. However, the same was later regularized retrospectively w.e.f. 01.11.1992 vide Govt. Order No.140-Edu(Tech) of 2004 dated 24.06.2004. The posts of Assistant Director, Youth Services and Sports and Divisional Youth Services and Sports Officer are equal in status and grade and, therefore, transferable inter se. The appellant was, thus, adjusted as Divisional Youth Services and Sports Officer vide Government Order No.154-Edu(Tech) of 2003 dated 24.11.2003. The Government vide its Order No.140-Tech. Edu of 2006 dated 13.11.2006, upgraded the two posts of

Divisional Officers as Deputy Directors. The appellant, who at the relevant point of time was working against the post of Divisional Youth Services and Sports Officer came to be upgraded and re-designated as Deputy Director, Youth Services and Sports. On the retirement of one Mr. G.M.Dar, who was holding the post of Joint Director, Youth Services and Sports, the appellant being the senior most eligible Deputy Director was further adjusted as Joint Director on 01.01.2011 in his own pay and grade with the benefit of charge allowance. It is the claim of the appellant that by rendering three years service as Joint Director, the petitioner became eligible for consideration against the post of Director in terms of the Jammu & Kashmir Youth Services and Sports (Gazetted) Service Recruitment Rules, 2013 (hereinafter "the Recruitment Rules of 2013" for short). Since the post of Director, Youth Services and Sports was lying vacant since 15.03.2013, as such, the appellant claiming to be eligible for the post made a representation to the respondents. When the respondents failed to redress his grievance, the appellant filed SWP No.1244/2014. By way of an interim order, the Writ Court directed the respondents to consider and decide the representation of the appellant in terms of the Rules occupying the field. In compliance to the interim order passed in SWP No.1244/2014, respondent No.2 considered and rejected the claim of the petitioner for promotion to the post of Director, Youth Services and Sports.

The consideration order dated 07.07.2014 passed by respondent No.2 rendered the writ petition (SWP No.1244/2014) infructuous and the same was accordingly, withdrawn by the appellant with liberty to challenge the consideration order. The consideration order dated 07.07.2014 became subject matter of challenge in SWP No.1875/2014, wherein the Writ Court on 21.08.2014 passed an interim order directing the respondents that the post of Director, Youth Services and Sports shall not be filled up. The interim order passed on 21.08.2014 was later on modified by another interim order dated 29.10.2014, whereby it was made clear that the interim order dated 21.08.2014 shall not come in the way of the respondents to consider the claim of the appellant to the post of Director, Youth Services and Sports. Respondent No.2 once again considered the claim of the petitioner and vide Government Order No.218-Edu(Tech) of 2014 dated 04.12.2014 rejected the same.

The writ petition was contested by the respondents, who in their reply affidavit refuted the claim of the appellant for the post of Director, Youth Services and Sports on the ground that in the year 2006 the appellant was only holding the post of Assistant Director substantively when two posts of Divisional Officers were upgraded as Deputy Directors vide Govt. Order No.140-Tech.Edu of 2006 dated 13.11.2006 and was never promoted the post of Deputy Director. It was contended that the appellant without having any competence or authority fixed his salary on his own against the higher post. Further promotion of the petitioner as Incharge Joint Director made in the year 2011 was, however, not disputed by the respondents. The respondents, however, claimed that on the date of issuance of Government order No.308-GAD of 2016 dated 02.04.2016 when the post of

Director, Youth Services and Sports was provided to be filled up from KAS cadre, the appellant was not substantively holding the post of Deputy Director or Joint Director.

3. In the backdrop of aforesaid rival claims, the matter was considered by the Writ Court and vide judgment dated 08.04.2019, impugned in this appeal, the writ petition filed by the appellant was dismissed by holding that with the issuance of Government Order No.308-GAD of 2016 dated 02.04.2016, inter alia, providing for filling up the post of Director, Youth Services and Sports from special scale cadre of KAS, nothing survived in the petition for adjudication.

4. Being dissatisfied and feeling aggrieved, the appellant has filed the instant appeal challenging the impugned judgment, inter alia, on the following grounds:-

a) The Writ Court did not correctly appreciate the fact that the appellant by holding the post of Joint Director and acquiring the experience of three years as such had become eligible for promotion to the post of Director, Youth Services and Sports in the year 2014 when the post of Director was provided to be filled up by selection from Class-II i.e. Joint Director with three years experience as such or by transfer from KAS/IAS in case of non-availability of eligible/suitable candidate from the former category, in terms of the Recruitment Rules of 2013 and, therefore, the subsequent cadre rationalization by respondent No.1 vide Government Order No. 308-GAD of 2016 dated 02.04.2016 encadring the post of Director, Youth Services and Sports, J&K in the special scale of KAS was inconsequential, for, the right to be promoted/selected against the post of Director had already accrued to the appellant.

b) The Government Order No.308-GAD of 2016 dated 02.04.2016 cannot have the effect of amending the statutory recruitment Rules i.e. the Recruitment Rules of 2013.

c) When, admittedly, respondent No.2 vide Government Order No.126-Edu(YSS) of 2018 dated 22.11.2018 regularized the petitioner as Deputy Director w.e.f. 12.01.2007 and as Joint Director w.e.f. 01.01.2011, right to be elevated to the post of Director had accrued to the appellant on 01.01.2014.

5. The respondents have contested the claim of the appellant on the same grounds, reiterating their stand that with the issuance of Government Order No.308-GAD of 2016 dated 02.04.2016, the post of Director Youth Services and Sports, J&K became a KAS cadre post and, therefore, could have been filled up only by placing a special scale KAS officer. The appellant at the relevant point of time was substantively holding the post of Assistant Director and, therefore, no right had accrued to him to claim his elevation to the post of Director, Youth Services and Sports.

6. Heard learned counsel for the parties and perused the record.

7. The facts, which are not in dispute, are that based on the recommendations made by the Public Service Commission, the appellant came to be appointed as

District Youth Services and Sports Officer on 07.07.1987. He was promoted to the next higher post of Assistant Director, Youth Services and Sports on 17.11.1992 in incharge capacity but this incharge promotion was later on regularized w.e.f. 01.11.1992 on the basis of the recommendations of DPC/PSC. The posts of Assistant Director, Youth Services and Sports and District Youth Services and Sports Officer are the posts equal in status and grade and, therefore, inter-transferable and fall in Class-V of the J&K Youth Services and Sports (Gazetted) Service constituted vide SRO 415 dated 20.09.2013 (Recruitment Rules of 2013) and accordingly, respondent No.2 vide Govt. Order No.154-Edu (Tech) of 2003 dated 24.11.2003 transferred and posted the petitioner as Divisional Youth Services and Sports Officer, Jammu. Subsequently, consequent upon the cabinet decision dated 16.10.2006, the department of Youth Services and Sports, J&K was reorganized and vide Government Order No.140-Tech. Edu of 2006 dated 13.11.2006 apart from others, two posts of Assistant Directors and two of Divisional Officers were upgraded/re-designated as Deputy Directors. The appellant, who was already posted as Divisional Youth Services and Sports Officer, came to be automatically upgraded to the post of Deputy Director. During the appellant as holder of the post of Deputy Director, respondent No.2 further placed the appellant as Incharge Joint Director against the available post w.e.f. 01.01.2011 vide Government Order No.22-Edu(Tech) of 2011 dated 28.01.2011. In the aforesaid order, as is apparent from its reading, the appellant was further treated as Incharge Deputy Director. As noted above, during pendency of the writ petition, right of the appellant to hold the post of Deputy Director w.e.f. 12.01.2007 and as Joint Director w.e.f. 01.01.2011 has been acknowledged vide Government Order No.126-Edu(YSS) of 2018 dated 22.11.2018.

8. Viewed thus, it can be clearly held that the appellant, but for the delay in convening DPC/PSC, would have been Deputy Director substantively w.e.f. 12.01.2007 and Joint Director w.e.f. 01.01.2011. The delay in convening DPC/PSC is admittedly not attributable to the appellant nor to a cause beyond the control of the respondents. If, it is accepted that the appellant was entitled to hold the post of Joint Director substantively w.e.f. 01.01.2011, which fact has now been acknowledged vide Government Order dated 22.11.2018, it cannot be denied that in terms of Recruitment Rules of 2013, the appellant was eligible to be considered for the post of Director, Youth Services and Sports, which as per the Recruitment Rules of 2013 was required to be filled up from Class-II (Joint Director) with three years experience as such or by transfer from KAS/IAS in case of non-availability of eligible/suitable candidate from the former category. From 2014, till the post of Director was filled up by transfer and posting of a special scale KAS officer, the same remained available and it was required to be supplied in terms of the Recruitment Rules of 2013. The appellant being a senior most Joint Director was, thus, entitled to be considered against the said post. Failure of the respondents to regularize the promotion of the appellant as Deputy Director and Joint Director after convening DPC/PSC cannot be taken benefit of

by the respondents to deny claim of the appellant to the post of Director w.e.f. 01.01.2014 till superannuation of the appellant.

9. That apart, we are in agreement with the learned counsel for the appellant that cadre review of the J&K Administrative Service made vide Government Order No.308-GAD of 2016 dated 02.04.2016, whereby the post of Director, Youth Services and Sports, J&K was added to the special scale of KAS cannot ipso facto supersede the statutory Recruitment Rules of 2013. Till the Recruitment Rules of 2013 are amended, the same are required to be read harmoniously with Government Order No.308-GAD of 2016 dated 02.04.2016 and if it is done so, it is to be held that the post of Director, Youth Services and Sports is required to be filled up as per the Recruitment Rules of 2013 i.e. by selection from Class-2 with three years experience as Joint Director and in case eligible person in the department of Youth Services and Sports is not available, the same can be supplied or filled up by transfer from a special scale KAS officer. Government Order No.308-GAD of 2016 dated 02.04.2016 itself provides for carrying out necessary amendment to the J&K Administrative Service Rules, 2008 to the extent it requires but no such amendment has been brought to the notice of this Court.

10. Even if, we were to ignore this argument of the learned counsel for the appellant, we are still of the view that the appellant had acquired right to be considered for the post of Director w.e.f. 01.01.2014, when he completed three years experience as Joint Director and, therefore, his claim for such consideration could not have been denied by the respondents. Plea of the respondents that on 02.04.2016 when the post of Director, Youth Services and Sports was encadred in the J&K Administrative Service vide Government Order No.308-GAD of 2016 dated 02.04.2016, the appellant was not holding the post of Joint Director in substantive capacity needs to be considered for rejection only.

11. The appellant had been holding the post of Joint Director, though, in Incharge capacity w.e.f. 28.01.2011 and it is not disputed by the respondents that he was the senior most Deputy Director eligible to hold the post. This fact is acknowledged by the respondents by giving him retrospective promotion as Joint Director w.e.f. 01.01.2011 in substantive capacity. The petitioner was, thus, eligible to be considered for the post of Director w.e.f. 01.01.2014, the subsequent encadrement of the post of Director, Youth Services and Sports in KAS cadre notwithstanding.

12. The view which we have taken is also fortified by a judgment of the Supreme Court rendered in the case of State of Uttar Pradesh and others v. Mahesh Narain and others, (2013) 4 SCC 169, wherein similar issue fell for consideration and the Supreme Court in paragraph Nos. 14 to 16 held thus:-

14. Learned counsel for the respondents in support of this position has also cited the authority of this Court in the matter of Nirmal Chandra Bhattacharjee & Ors. vs. Union of India & Ors. 1991 Supp. 2 SCC 363 wherein this Court observed as

under:-

"3.....No rule or order which is meant to benefit employees should normally be construed in such a manner as to work hardship and injustice specially when its operation is automatic and if any injustice arises then the primary duty of the courts is to resolve it in such a manner that it may avoid any loss to one without giving undue advantage to other".

The Court further observed that the mistake or delay on the part of the department should not be permitted to recoil on the appellants, more so since, the restructuring order in the said case itself provided that vacancies existing on July 31, 1983 should be filled according to procedure which was in vogue before August 1, 1983. This Court therefore, restored the promotion order of the employees to which they were entitled prior to the change of service rules as it was held that the change of service rules cannot be made to the prejudice of an employee who was in service prior to the change. The Court further went on to hold that if the delay in promotion takes place at the instance of the employer, an employee cannot be made to suffer on account of intervening events.

15. The principle laid down in Nirmal Chandra case aptly fits into the facts and circumstances of this case as the subsequent amendment of 1990 laying down to fill in all the posts of Assistant Director Forensic Science by direct recruitment could not have been applied in case of the respondents who were already holding the post of Scientific Officer and hence were eligible to the promoted quota of 25% posts of Assistant Director after completion of five years of service as Scientific Officers in terms of the Rules of 1987 and, therefore, their experience of five years on this post could not have been made to go waste on the ground that the amendment came into effect in 1990 making all the posts of Assistant Director to be filled in by direct recruitment. In support of this view, the counsel for the Respondents also relied on the decision of this Court in the matter of B.L. Gupta & Anr. vs. M.C.D. (1998) 9 SCC 223 wherein this Court had held that any vacancy which arose after 1995 were to be filled up according to rules but the vacancies which arose prior to 1995 should have been filled up according to 1978 rules only.

16. As a consequence of the aforesaid analysis, we have no hesitation in holding that the High Court was right in taking the view that the respondents were eligible for promotion to the post of Assistant Director under the Rules of 1987 against 25 per cent quota to be filled in by promotion as they satisfied the conditions of five years of requisite experience on the post of Scientific Officer if the experience were to be counted from the date of publication of the Rules in the U.P. Government Gazette."

13. In view of the foregoing discussion, we are of the view that the judgment of the Writ Court is not correct in law and, therefore, deserves to be set aside.

Ordered accordingly.

Consequently, the writ petition is allowed. Government Order No.137-Edu(Tech) dated 07.07.2014 is quashed and the respondents are directed to consider the claim of the petitioner for his appointment against the post of Director, Youth Services and Sports w.e.f. 01.01.2014 strictly as per the Recruitment Rules of 2013 with all consequential benefits. Let an appropriate order in this regard be passed by the respondents within a period of eight weeks from the date certified copy of this judgment is made available to the respondents.

14. The appeal stands allowed in the above terms.