

(2019) 06 J&K CK 0022

In the Jammu And Kashmir High Court

Case No : Writ Petition (WP) No. 1747, 1749 Of 2019, VM No. 3669 Of 2019, CM No. 3662 Of 2019

Manisha Sharma

APPELLANT

Vs

State Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 06-06-2019

Acts Referred:

Constitution of Jammu And Kashmir, 1956 — Section 124
Jammu And Kashmir Civil Service Decentralization And Recruitment Act, 2010 —
Section 6, 13, 13(1), 13(2), 15
Jammu And Kashmir Civil Services Decentralization And Recruitment Rules, 2010 —
Rule 13, 13(4),

Citation : (2019) 06 J&K CK 0022

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : H.C. Jalmeria, M.K. Sharma, H.A. Siddiqui, Amit Gipta, M.K. Sharma

Final Decision : Disposed Off

Judgement

Sanjeev Kumar, J

1. The selection of respondent No.5 as Female Multipurpose Health Worker/ANM (Health and Medical Education Department), District Cadre, Samba made by respondent No.2 pursuant to Advertisement Notification No.01 of 2017 dated 20.07.2017 is subject matter of challenge in this writ petition filed by the petitioner Manisha Sharma.

2. Briefly stated the facts are that the petitioner-Manisha Sharma as well respondent No.5- Anu Radha Sharma responded to Advertisement Notice No.01 of 2017 dated 20.07.2017, issued by respondent No.2 and submitted their online applications for the post of Female Multipurpose Workers (for short ?FMPHW?), Health and Medical Education Department, District Cadre, Samba. Indisputably, both possess the requisite qualification prescribed for the post. There were three posts in all notified for selection which included one post of FMPHW/ANM in the

open category. The petitioner as well as respondent No.5 both are candidates belonging to general category and therefore, applied for the lone post notified under the open merit category. The cut-off date, i.e. last date for submission of online application forms as indicated in the advertisement notification was 23.08.2017 on which date the candidates applying were supposed to possess the requisite eligibility to apply for the post. Apart from possessing minimum educational/technical qualification, the candidates were also required to meet the following eligibility criteria:-

- (i) Should be permanent residents of J&K State;
- (ii) In respect of District Cadre Posts only those candidates who are residents of the concerned district were eligible to apply except the candidates belonging to scheduled caste category, who were eligible to apply for the said reserved vacancies in any district irrespective of the district of their residents;
- (iii) The person shall be deemed to be residents of a particular district if he/she has resided in such district for period not less than 15 years before the date of applying for a particular post and is actually residing in the said area;
- (iv) If the candidate is woman who had married outside her district, the period of residence of 15 years shall not operate as bar for applying to a post provided her husband is a resident of that district for period of not less than 15 years.

3. Both the petitioner and the respondent No. 5 claiming to be eligible in terms of the eligibility criteria prescribed in the Advertisement Notification submitted their candidature for the singular post of FMPHW/ANM in question, which was borne on the district cadre of the Health and Medical Education Service. The respondent No.2 after conducting the selection process came up with the provisional short list which was notified by its Notice No. SSB/Sel/Secy/2017/1390-93 dated 05.02.2018 in which the respondent No.5 was shown at S.No. 1 and the petitioner was shown at S.No.2. Being aggrieved of the placement of respondent No.5 ahead of her, the petitioner approached this Court, through SWP No. 1724/2017 and assailed the provisional short list prepared by the respondent No.2, inter alia, on the ground that the respondent No.5 being not the resident of district Samba for the last 15 years and also not actually residing in the area was ineligible to be considered. It is claimed that this Court vide its interim order dated 29.08.2018 while issuing notice to the respondents to file objections, directed the respondent No.2 not to finalize the selection of respondent No.5. It further transpires that aforesaid writ petition was later on dismissed for non-prosecution by this Court on 05.04.2019, which paved the way for issuance of final select list by respondent No.2. In the final select list, as was obvious, the respondent No.5 was shown selected, but, the recommendation in her favour was withheld subject to verification of her permanent resident certificate from the Deputy Commissioner, Samba. The petitioner objected to the placement of respondent No.5 in the select list and claims that she submitted all the proofs in the shape of different documents to the respondent No.2 to demonstrate the fact

that the respondent No.5 was a resident of District Udhampur and had not resided in District Samba for a period of 15 years nor was she actually residing at the time of submission of her application form for the post in question.

4. In the backdrop of the aforesaid assertions made by the petitioner-Manisha Sharma, she assails the selection of respondent No.5 on the grounds enumerated in the writ petition. The primary ground of challenge is with regard to the eligibility of the respondent No.5 to apply for the post. In support of the plea of ineligibility of the respondent No.5, the petitioner-Manisha Sharma has relied upon the eligibility criteria prescribed in the Advertisement Notification. To demonstrate that the respondent no.5 does not fulfil the requisite eligibility criteria with reference to her residence, she has placed strong reliance on certain documents, which include ration card of the family of respondent No.5, the documents pertaining to the land and house constructed by the father of respondent No.5 in Udhampur.

5. The respondents have appeared in the matter, but, have not filed the reply. However, writ petition filed by the respondent No.5 which is clubbed with this writ petition WP(C) No.1747/2019 is itself reply to the averments made by the petitioner in WP(C) No.1749/2019. Before considering the submissions made by learned counsel for the parties and appreciating the controversy in the light of settled legal and factual position, it would be necessary to refer to the case set up by the respondent no.5 in the clubbed writ petition.

6. As indicated hereinabove, it is the respondent No.5 in WP(C) 1749/2019 and petitioner in WP(C) No. 1747/2019, who has been selected by the respondents against the post of FMPHW/ANM in the general category. The grievance of the petitioner in this writ petition is that though she fully meets the eligibility criteria made in the Advertisement Notification, her recommendation has been withheld by the respondent No.2 on the plea that her permanent resident certificate is required to be verified from the office of Deputy Commissioner, Samba. The writ petitioner- Anu Radha Sharma is at all pains to demonstrate that she fully meets the eligibility requirements laid down in the Advertisement Notification. She has appended with her writ petition certain documents to demonstrate that not only she has been residing in the District Samba for the last 15 years, but, she was also actually residing in Samba District when the Advertisement Notification was issued and the applications for the post in question were invited. The strong reliance has been placed by the petitioner Anu Radha Sharma on the report submitted by the Deputy Commissioner, Udhampur to the respondent No.2 vide his communication dated 20.09.2018 wherein it is indicated that the petitioner is permanent resident of Muthi Khurd, Tehsil Ghagwal, District Samba and her parents are currently putting up at Jakhani in Tehsil and District Udhampur. They have also constructed their house in Kh.No.393 of village Jakhani. The petitioner Anu Radha Sharma, it is stated in the report, is married in Tehsil and District Reasi. There is another report of District Commissioner, Samba submitted to the respondent No.2 vide communication dated 22.09.2018 wherein Deputy

Commissioner, Samba has intimated that the petitioner Anu Radha Sharma is also resident of Muthi Khurd, Tehsil Ghagwal, District Samba and is also having her other residence at village Jakhani, Distt. Udhampur. Relying upon the aforesaid two reports, one by Deputy Commissioner, Udhampur and one by Deputy Commissioner, Samba, the petitioner Anu Radha Sharma, submits that she has demonstratively proved that she fulfils the eligibility criteria laid down in the Advertisement Notice and therefore, cannot be denied the appointment. The residential status claimed by the petitioner Anu Radha Sharma is, however, vehemently disputed by the writ petitioner Manisha Sharma, writ petitioner in WP(c) No.1749/2019.

7. As is evident from the narration of facts given above, both the candidates, i.e., Manisha Sharma and Anu Radha Sharma, who have filed two writ petitions, are contesting their claims to the lone post of FMPHW/ANM in question. There is no dispute with regard to the fact that in the selection, the writ petitioner Anu Radha Sharma has been found to be more meritorious than Manisha Sharma and, therefore, has been placed in the select list. Manisha Sharma, however, has been placed in the wait list of the general category. The petitioner Manisha Sharma claims that in view of the ineligibility of Anu Radha Sharma, she is the only candidate left and is, therefore, entitled to be selected and appointed against the post in question. There is, however, a very serious factual dispute having arisen between the parties, i.e., Manisha Sharma and Anu Radha Sharma. The dispute is with regard to the residential status of the Anu Radha Sharma, the selected candidate. The contention of the petitioner Manisha Sharma is that Anu Radha Sharma is a resident of Jakhani, Udhampur and was actually residing there when she submitted the application form for the post-in-question, and, therefore, she is not eligible to be considered.

8. Per contra, it is stated by the petitioner Anu Radha Sharma that she has been issued permanent resident certificate, which clearly indicates that she is a resident of village Muthi Khurd, Tehsil Ghagwal, Distt. Samba which falls in District Samba. It is claimed that not only she possesses of the permanent resident certificate indicating her residence in village Muthi Khurd falling in District Samba, but, she has also resided in District Samba for more than 15 years preceding the date of submission of application form. The petitioner further asserts that at the time of submission of her application form, she was actually residing in Muthi Khurda, Ghagwal, Distt. Samba. She has, however, not specifically denied that his father has constructed one residential house in Jakhani, Udhampur as well, but, submits that his father along with other family members is residing in the aforesaid house since the year 2013.

9. Having heard learned counsel for the parties and perused the record, it is necessary to first refer to the relevant provisions of J&K Civil Service Decentralization and Recruitment Act, 2010 (hereinafter referred to as the Act, 2010) and the Rules framed thereunder. As is evident from its preamble, the Act has been enacted to provide for equitable opportunity of employment in civil

services in the State keeping in view its complex socio-economical, geographical/topographical/linguistic/security concerns and matters connected therewith and incidental thereto. The Act categorizes the posts borne on different civil services of State into three cadres viz., (a) District Cadre; (b) Divisional Cadre; and (c) State Cadre and provides the eligibility criteria and mode of recruitment to the post in a service borne on these cadres. Section 6 of the Act, 2010 which provides for the eligibility of appointment to the district Cadre posts needs to be noticed and the same is, therefore, reproduced here under:-"6. Appointment to District Cadre posts.

A person shall be eligible to the appointment to a District cadre post only if he,-

(i) is a permanent resident of the State.

(ii) is a resident of the concerned district,; and

(iii) possesses the prescribed qualification, eligibility and experience for the post as specified under the rules/orders regulating recruitment to such posts."

10. In the instant case, the dispute is only with regard to the eligibility No.(ii). With a view to further understand, we may have to refer to Section 13 of the Act, 2010, which, for expedience, is also reproduced here under:-

13. Residence.

(1) A person shall be deemed to be resident of a particular District or Division if he/she has resided in such District or Division, as the case may be, for a period of not less than 15 years before the date of applying for a particular post and is actually residing in the said area.

(2) Notwithstanding anything contained in sub-section (1), a person shall not be disentitled from claiming the residence in a particular District or the Division only on the ground that his/her father/mother or the person on whom he/she is dependent is living in a place outside the said District or the Division, as the case may be, on account of his/her employment, business, profession, vocational reasons or temporary dislocations from his/her original place of residence due to security reasons.

(3) Notwithstanding anything contained in sub-section (1), the candidates applying under Scheduled Caste Category for any post in the Divisional or District Cadre shall, irrespective of their place of residence in the State, be eligible for selection against the posts reserved for the said category at such selection.

(4) Notwithstanding anything contained in sub-section (1) if a woman marries outside her District/Division, the period of residence of 15 years under the said sub-section (1) shall not operate as a bar for applying to a post provided that her husband has resided in that District/Division, as the case may be, for a period not less than 15 years."

11. A plain reading of Sub Section (1) of Section 13 makes it clear that a person

shall be deemed to be resident of a particular District if he/she

has resided in such District for a period of not less than 15 years before the date of applying for a particular post, i.e., cut-off date mentioned in the Advertisement Notification and also is actually residing in the said area. Sub Section (2) of Section 13, however, carves out an exception in favour of a person, who may not have resided in the District of his domicile for a period of 15 years or more for the reasons that his/her father/mother or the guardian of such person has been living in a place outside said District on account of his/her employment, business, profession/vocational reasons etc.etc. The rest of the sub sections are not relevant for the disposal of the controversy involved in these petitions. The Government in the exercise of powers conferred under Section 124 of the Constitution of J&K and Section 15 of the Act, 2010 has promulgated J&K Civil Services Decentralization and Recruitment Rules, 2010 (hereinafter called the Rules of 2010) and Rule 13 is relevant in the context of controversy and is, therefore reproduced here under:-

"13. Procedure for inviting applications by the Board and eligibility for applying to different cadres.- (1) The Board shall advertise all State cadre vacancies referred to it by the requisitioning authority and invite applications for selection to the said posts from the permanent residents of the State and possessing the prescribed qualification, eligibility and experience for such posts.

(2) The divisional offices of the Board shall advertise the Divisional cadre vacancies of the concerned division referred to it by the requisitioning authority and invite applications for selection to the said posts from such permanent residents of the State who are residents of that Division and possess the prescribed qualification, eligibility and experience for such posts.

(3) The district offices of the Board shall advertise the District cadre vacancies of the concerned district referred to it by the requisitioning authority and invite applications for selection to the said posts from such permanent residents of the State who are residents of that District and possess the prescribed qualification, eligibility and experience for such posts.

(4) For purposes of this rule, the permanent resident certificate shall be the conclusive proof of residence of a candidate in a particular District or the Division. (Emphasis supplied).

(5) Notwithstanding anything contrary contained in sub rule (2) and (3), for vacancies reserved for the Scheduled Caste category in any Divisional or District cadre, candidate belonging to that category shall be eligible to apply for the said reserved vacancies irrespective of their residence in the concerned District or Division.

(6) The advertisement notices shall be given wide publicity through Government Gazette, Employment and Counselling Centres, print and electronic media."

12. From the perusal of Rule 13, it is abundantly clear that it only obligates the

J&K Service Selection Board to follow the eligibility criteria laid down in Section 6 read with Section 13 of the Act of 2010. The only additional features contained in Rule -13 is reflected in Sub Rule (4) which explicitly provides that permanent resident certificate shall be the conclusive proof of residence of a candidate in a particular District or the Division as the case may be. On the face of it, Sub Rule 4 of Rule 13 does not appear to be in consonance with the provisions of Section 13 of the Act, 2010, which clearly defines the Residence for the purposes of considering a candidate for a post in a particular district cadre. If we go by the provisions of Section 13 of the Act, a person to be eligible to apply for a post need not possess only a permanent resident certificate indicating his/her residence in the concerned District, but, further provides that such residence in the district concerned should be for a period of not less than 15 years and also that he/she should be actually residing in the said area.

Harmonizing the provisions of Section 13 Sub Section (1) of the Act with Sub Rule 4 of Rule 13 of Rules 2010, it can be safely held that not only the candidate should possess a permanent resident certificate indicating his/her residence in a particular district, but, he/she will have to further demonstrate by reference to some documentary evidence that he/she has resided in the district concerned for a period of not less than 15 year before the date of applying for a particular post and also that he/she was actually residing in the said area at the relevant point of time.

13. Viewed thus, the petitioner Anu Radha Sharma, who stand at S.No.1 in view of her merit for the post in question has to demonstratively prove not only that she possesses the permanent resident certificate indicating her residence in the District Samba, but, she is also obliged to demonstrate that she has resided in District Samba for 15 years or more and was also actually residing when she submitted her application for the post in question. Both sides have placed on record several documents in support of their claims and counter claims made in their respective writ petitions. While there is no dispute with regard to the residence of the petitioner Manisha Sharma, but, there is serious question mark on the residential status of the petitioner Anu Radha Sharma. The Jammu and Kashmir, service Selection Board too is not sure and taking cognizance of the complaint filed by Manisha Sharma, has withheld the recommendation of Anu Radha Sharma pending verification of her permanent resident certificate from the Deputy Commissioner, Samba. I have gone through the provisions of Act 2010 and Rules framed thereunder minutely to find out the mechanism, if any, provided to ascertain the residence of a candidate in a particular district in terms of Section 13 of the Act. Unfortunately, there is no provision laying down any guidelines to ascertain the residence of a candidate in a particular district. This has presented a very anomalous situation. Sub Rule 4 of Rule 13 is, in essence, is totally misleading and declares a person resident of a particular district only on the basis of permanent resident certificate. If that interpretation of Sub Rule (4) of Rule 13 is accepted, then the same would not be sustainable in view of contradictory provision provided in Section 13 of the Parent Act, i.e. Act of 2010.

Having said that, when controversy raised in these two writ petitions is adverted to, one finds himself on cross-roads. This Court not being a Court of fact is not equipped to determine the disputed questions of fact. In the wake of allegations and counter-allegations and the documents placed on record by the parties, the residential status of the petitioner Anu Radha Sharma in terms of Section 13 of the Act, 2010 and as per clear stipulation in the Advertisement Notice has become a serious disputed question of fact, which cannot be determined by this Court in the writ jurisdiction. I, therefore, refrain from expressing my opinion on this disputed question of fact and leave it to the respondent Board to get the matter fully inquired into by the Deputy Commissioner, Samba and Deputy Commissioner, Udhampur. I am aware that both the Deputy Commissioner, Samba and Deputy Commissioner, Udhampur have given their reports on the request of the respondent-Board, but, both these reports are incomplete and do not specifically address the issue. In the given facts and circumstances of this case and with a view to put quietus to the controversy raised in these petitions, I deem it appropriate to direct the Deputy Commissioner, Samba and Deputy Commissioner, Udhampur to sit together to determine the aforesaid disputed questions of fact. It would be available to the Deputy Commissioners to call the petitioners Manisha Sharma and Anu Radha Sharma to put up and substantiate their respective claims. Let a joint inquiry by a Committee of two Deputy Commissioners aforesaid headed by the senior amongst two be conducted within a period of six weeks from the date certified copy of this order is served upon them. Based upon the findings of fact returned by the Committee aforesaid, the respondent SSB shall proceed ahead in the matter and recommend the selection of the eligible candidate. Needless to reiterate that the specific term of reference for the Inquiry Committee so constituted would be to find out as to whether the petitioner Anu Radha Sharma, who holds a permanent resident certificate indicating her residence in Muthi Khurda, Ghagwal, Samba has resided in District Samba for a period of not less than 15 years before filing of the application form and also that she was residing in the district concerned at the time of submission of her application form. In short, it shall be the endeavour of the Committee to determine the residence of petitioner Anu Radha Sharma in the light of provisions of Section 13 of the Act, 2010 reproduced hereinabove.

14. Before parting with this judgment, I deem it appropriate to bring to the notice of the competent authority to look into the lacunae in the Act 2010 and the Rules framed thereunder as pointed out by me herein above in this judgment. In absence of proper mechanism and the guidelines to determine the residence of 15 years in a particular district and the factum of a candidate actually residing in the district concerned at the time of applying for the post borne in the district cadre of said district, there is bound to be litigation. This would also provide an opportunity to the candidates to manipulate the certificates of residence from different authorities in the district. It is high time when the competent authority takes notice of the aforesaid lacunae in the Act 2010 and the Rules framed thereunder and makes necessary amends so that

there are clear guidelines and specific authorities prescribed to certify the residence of the candidate in a particular district strictly in terms of Section 13 of the Act, 2010. There is another aspect which needs attention of the official respondents. The Act 2010 as it stands today throws up another anomalous situation. For examine, if a candidate has resided in District ?A? only for fourteen (14) years and then shifted to District ?B? and is staying there for the last five years preceding the date of submission of application form, then going by provisions of S.13 of the Act, 2010, he/she would not be eligible to apply for a District cadre post in either of the District. He/she will not have a residence of fifteen year (15) either in District ?A? or District ?B?. There is, apparently, not solution to the conundrum provided either in the Act 2010 or the Rules framed thereunder. Let copy of this judgment be provided to the Chief Secretary of the State of Jammu and Kashmir to have a view on the matter and to take such remedial measures as he thinks fit to set the things right and minimize the possible litigation on the issue.

15. Disposed of as above along with connected CM(s).