
(2004) 04 J&K CK 0035

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 154 Of 2004

Manzoor Ahmad Mir

APPELLANT

Vs

State of J&K and others

RESPONDENT

Date of Decision : 01-04-2004

Acts Referred:

Civil Services Regulations, 1956 — Article 85
Constitution of India, 1950 — Article 16, 226, 311

Citation : (2004) LIC 3370 : (2005) 1 SCT 556 : (2004) 1 SriLJ 323

Hon'ble Judges : R.C.Gandhi, J

Bench : Single Bench

Advocate : A.M.Magray, R.A.Jan, Advocates appearing for the Parties

Judgement

1. Petitioner, by means of this petition, seeks to quash Government order No.130HME of 2004 dated 13.02.2004 whereby Government order No.

102HME of 2004 dated 10.02.2004 has been rescinded and respondent no.5 posted as Chief Medical Officer, Baramulla was attached with

Directorate of Family Welfare and petitioner Dr. Manzoor Ahmad , Asstt. Surgeon, District Hospital, Baramulla, posted as Chief Medical Officer,

Baramulla.

2. Respondent No.5 while working as Chief Medical Officer, Baramulla, in stopgap arrangement in his own pay and grade, was transferred and

attached vide Government order No. 102HME of 2004 dated 10.02.2004 with the Directorate of Family Welfare, pending enquiry in

embezzlement case against him as ExBMO, Ganderbal/Lar and in his place petitioner Dr. Manzoor Ahmad, Assistant Surgeon, District Hospital,

Baramulla was posted as Chief Medical Officer, Baramulla, in his own pay and grade, pending clearance by the DPC and without prejudice to the

seniority of others.

3. While respondent No.5 while working as Chief Medical Officer, Baramulla, filed petition SWP No. 1 295/03 which came to be disposed of on

04.08.03 directing the respondents to allow the petitioner to hold the charge of the post of Chief Medical Officer till the DPC is constituted and his

case is considered alongwith other eligible persons. On consensus of the parties, this petition was finally disposed of on 04.08.03.

4. The petitioner has challenged impugned order dated 13.02.04 on the ground that respondent no.5 being involved in an embezzlement case could

not have been promoted and permitted to work as Chief Medical Officer, Baramulla, and once the petitioner was posted as Chief Medical Officer,

Baramulla, in his own pay and grade, pending clearance by DPC should not have been withdrawn therefrom. It is averred that the order of transfer

of respondent No.5 has been issued with a design to frustrate the enquiry ordered to be instituted against him vide order dated 10.02.04 and that

he has wrongly used the order of Court dated 04.08.2003 and mislead the respondent No.2 to believe that order dated 10.02.04 could not have

been issued.

5. Respondent No.5 and other respondents have filed their reply separately controvert the averments of the petition. Respondent no.5 has

submitted that there was no enquiry pending against him on the date of issuance of the order dated 10.02.04. Respondent no.2 would not have

passed the order in presence of the direction of the Court dated 04.08.2003, directing the respondents to take steps to complete the process of

filling up of the post and till the process is complete, the present status of respondent no.5 shall not be disturbed.

6. Respondent no.1 to 4 has submitted that at the time of issuance of order dated 10.02.2004, the fact of judgement dated 04.08.2004 was not

placed before the Hon'ble Minister who is the approving authority for transfer and posting of the Chief Medical officers. Respondent no.5

represented to the Government and his case was examined afresh. It was found that according to the direction of the Court, respondent was

required to be continued as Chief Medical Officer till the post is filled up on substantive basis. It is also stated that by rescinding order dated

10.02.04, it has not caused any prejudice to the rights and interests of the

petitioner who is only an Assistant Surgeon and yet to become Block

Medical Officer which is the next promotional post for the Assistant Surgeon. The Assistant Surgeon cannot be promoted as Chief Medical Officer

under rules. Respondent no.5 is holding the post of Block Medical Officer since nine years. It is also submitted in para 6 of the reply that pendency

of an enquiry or departmental proceedings is no ground for attachment of the respondent No.5. The order dated 10.02.2004 was rescinded on the

ground being inconsistent with rules.

7. The petition is admitted to hearing. Objections filed by the respondents are treated as Counter. Affidavit. With the consensus of learned counsel

for the parties, this petition is taken up for final disposal.

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

9. Mr. R. A. Jan, learned counsel for the petitioner has urged that impugned order dated 13.02.2004, rescinding order dated 10.02.04 whereby

the petitioner was posted as Chief Medical Officer, Baramulla, is illegal on the face of it and is designedly issued to frustrate the enquiry directed to

be conducted against Respondent No.5. He could not have been permitted to function as Chief Medical Officer, Baramulla, being involved in

embezzlement and not having clean record of service.

10. Mr. A. M. Magray, learned counsel for the respondents has submitted that at the time of framing order dated 10.02.2004, order dated

04.08.2003 passed in SWP No. 1295/03 could not be brought to the notice of Minister, the authority for effecting transfers and postings against

the post of Chief Medical Officer. Respondent No.5 represented to the Government and brought to its notice the order of the Court and in

implementation of the said order, impugned order has been issued. The relevant portion of the order dated 04.08.03 for appreciation is extracted

below:

.....respondents will take steps to complete the process of filling the post of Chief Medical Officer, in accordance with rules and also consider the

case of the petitioner alongwith other eligible persons for promotion. Till the process is complete, the present status of the petitioner shall not be

disturbed.

11. Mr. Magray, has further submitted that there is no substance in the plea of

learned counsel for the petitioner that the impugned order has been framed to frustrate the enquiry ordered against respondent No.5. The enquiry has been instituted and he shall be dealt with in accordance with law.

His further submission is that adjustment of the petitioner, Assistant Surgeon as Chief Medical Officer is in violation of rules governing the services

known as The Jammu & Kashmir Medical (Gazetted) Service Recruitment Rules, 1970. The petitioner could have been adjusted/promoted to the

post of Block Medical Officer and not to the post of Chief Medical Officer. The relevant rule is extracted below:

Class Category Desig of the Minimum Method of Post Qualification Recruitment

1 2 3 4 5

II (a) District Medical Officers

[By promotion from category (b) of Class II, subject to Superintendents of Hospitals suitability and satisfactory record of service.]

Dy. Superintendents of Hospitals

(b) Medical officer 7yrs By promotion In charge experience in from Primary Health Centre Class II category (c) Class II (BMO) category)

(c) Assistant Surgeons By direct recruitment.

Including Unit Medical Officers, Medical Officers, Medical Officers, District Family Planning Officers Supervising Medical Officers, Medical

Lecturers cum Demonstrator, Epidemiologist, Dermatologist Ventriloquist Blood Bank Officer Anesthetist and Radiologists.

12. The aforesaid proposition of law envisages that an Assistant Surgeon can be promoted to the post of Block Medical Officer provided he has

an experience of seven years as Assistant Surgeon. Under rules an Assistant Surgeon cannot be promoted to the post of Chief Medical Officer

(earlier designated as District Medical Officer) being not the promotional post for Assistant Surgeon. The respondents are under legal obligation to

fill up the post from out of the eligible Block Medical Officers. There is a purpose to prescribe eligibility qualification to the post and the purpose is

that the officer becomes equipped with the experience to make the post functional. Respondents have posted the petitioner against the post of

Chief Medical Officer in blatant violation of the rules. Not only this Mr. Magray, learned counsel for the respondents has admitted also that while

framing the order dated 10.02.04, respondents have not taken into consideration another relevant provisions of law, contained in Regulation 85 of

the Jammu & Kashmir Civil Service Regulations which provides manner and method of appointment of an officer as in charge of a higher post

independent of his own duties. Regulation 85 reads as under:

(1) A Government servant may be:

(a) assigned the charge of another post in addition to his own duties; or

(b) appointed to be in charge of a higher post independent of his own duties.

(2) (1) where for administrative reasons or noncompletion of formalities for appointment to the higher post, a person cannot be appointed to that

post formally and is appointed in his own pay and grade to be in charge of the higher post and required to discharge full duties and responsibilities

of the post either in the same office or in a different office, in the same cadre/line of promotion or in a different cadre/line of promotion.

Government Instruction.(a) It is wrong in principle to appoint a Government servant to a higher post in his own cadre/line of promotion without

observing the required formalities of clearance from Departmental Promotion Committee etc. where, however, for reasons to be recorded, the

Administrative authorities cannot without detriment to public interests wait for formal appointments temporary stopgap arrangements maybe made

by them against such posts. In making such arrangements the competent authorities will ensure that only such officers are appointed who satisfy all

the requirements for higher appointments and can stand the scrutiny of the Departmental Promotion Committee etc.

13. The aforesaid regulation also stipulates that while making stopgap adjustment it must be ensured that the officer so appointed must satisfy the

requirement for higher appointment and should be eligible to stand the scrutiny by the Departmental Promotion Committee. The petitioner herein

can not be considered by the Departmental Promotion Committee for the post of Chief Medical Officer, being holding the post of Assistant

Surgeon which is not the source for promotion to the post of Chief Medical Officer. On this ground also the adjustment of the petitioner against the

post of Chief Medical Officer cannot be maintained. The stopgap arrangement

as herein this case, does not confer any right to continue against the post. This proposition of law has been settled by the Apex Court in case titled

Ramakant Shripad Sinai Advalpalkar vs Union Of India reported in AIR 1991 SC page 1145 asunder:

.... Asking an officer who substantively holds a lower post merely to discharge duties of a higher post cannot be treated as a promotion. In such a case he does not get the salary of the higher post; but gets only that in service parlance is called a "" Charge allowance."" Such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it. The person continues to hold his substantive lower post and only discharges the duties of the higher post essentially as a stopgap arrangement.

14. Petitioner in terms of rules governing the services is ineligible and unless he possesses his eligibility according to rules, he has no right to seek

Mandamus for his continuation against the post. This proposition of law also has been settled by Apex Court in case titled Umakant Saran vs State

of Bihar reported in AIR 1973 SC964 holding that:

.... while respondents were eligible for appointment as lecturers and the petitionerappellant was not, therefore he could not be regarded as aggrieved for the purpose of issue of mandamus for setting aside the appointments of the respondents.

15. The petitioner being ineligible is not found entitled for his continuation against the post of Chief Medical Officer.

16. It is also urged by learned counsel for the petitioner, Mr.R.A. Jan, that respondent No.5 is substantively holding the post of Assistant Surgeon

and has not been promoted as Block Medical Officer though he was adjusted as Block Medical Officer and thereafter as Chief Medical Officer

but not cleared by DPC, thus, is not entitled to hold the post of Chief Medical Officer. This ground has not been pleaded in the petition giving

opportunity to the respondents to meet it, therefore, is not entertained.

17. For the aforesaid reasons, the writ petition having found without merit is dismissed.