

(2003) 12 J&K CK 0007

In the Jammu And Kashmir High Court

Case No : SWP No's. 491, 736, 1624 and 1625 of 2003

Mohd. Ashfaq and Others

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 22-12-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
Police Rules — Rule 176

Citation : (2004) 1 JKJ 576

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Advocate : S.S. Ahmed, N. Bhasin, Sonia Gupta and Anshuja Sharma, for the Appellant; K.S. Johal, AAG, for the Respondent

Judgement

Permod Kohli, J.—Common questions of law and fact are involved in the present petitions.

2. Reply has been filed only in SWP No. 491/2003, which is considered to be common in all the petitions as all the petitions have been heard on

the basis of the reply filed in the afore-said petition, with the consensus of the learned counsel for the parties.

3. The only question involved in the present petitions relate to the validity of the stipulation of 'two years actual experience at the bar' as prescribed

in the advertisement notice for the post of prosecuting officer.

4. Director General of Police issued advertisement notice published in Kashmir Times, a local English Daily, inviting applications for the post of

Prosecuting Officers and last date for receipt of application forms was 31-3-2003. As many as 53 vacancies were advertised, 29 in the Open

Merit Category and rest of the vacancies in reserved categories as prescribed in

the notification. Column II of the afore-said advertisement notice prescribed the Educational Qualification, age and physical standard for the post which are quoted hereunder:

(i) Educational Qualification:

Degree in Law from any recognized University;

(ii) Experience:

Two years actual experience (minimum) at the Bar.

(iii) AGE

The candidate must be within the age group of 18 to 30 years as on first day of January 2003. Upper age limit is, however, relaxable in case of

candidates belonging to Scheduled Caste and Scheduled Tribe categories as per the standing rules.

(iv) PHYSICAL STANDARDS

For Male Candidates:

Height 5' 6

Chest 32 (un-expanded)

33 (expanded)

However, for candidates belonging to Leh and Kargil Districts, the minimum height shall be 5'4".

For Female Candidates:

For female candidates Height 5'2" (minimum)

However for candidates belonging to Leh and Kargil minimum height shall be 5'0".

5. As regards the prescription of physical standard is concerned a Division Bench of this Court in LPA No. decided on, held that the physical

standard are not relevant for the post in question. Based upon the afore-said order such of the candidates, who did not possess the requisite

physical standard were permitted to participate in the selection process by interim order passed by this Court in various writ petitions. Regarding

the upper age limit as prescribed in this Notification the State Government has relaxed the upper age limit and extended the same upto 35 years.

This leaves the two qualifications to be possessed by a candidate for participating in the selection for the post of Prosecuting Officer, namely,

Educational Qualification i.e. Degree in Law from any recognized University and two years actual experience (minimum) at the Bar. The

controversy raised in the present petition is in respect to the condition of experience of two years actual practice at the Bar. All the writ petitioners

are graduates in Law and possess degree in Law from recognized Universities. However, all of them are fresher and do not fulfill the requirement

of two years actual experience at the Bar.

6. The notification has been challenged by the writ petitioners only to the extent of prescription of minimum experience of two years for the post in

question and consequently a direction is sought for quashing the stipulation of minimum two years experience at the Bar and a further direction to

allow the petitioner to participate in the selection for the post of Prosecuting Officer.

7. Main contention as raised in the writ petition and argued at the bar is that the police rule which prescribes the qualification for the post of

Prosecuting Officer do not specify any experience for the post in question and the respondents are not entitled to lay down any further qualification

for the post in the advertisement notice. The second limb of the argument of the petitioner is that in view of the later judgment of the Apex Court in

All India Judges Association and Others Vs. Union of India (UOI) and Others, no such experience of two years is needed for the post of

Prosecuting Officer, when the experience prescribed for the post of Munsiff in the Judicial Service has been dispensed with by the Apex Court on

the basis of the recommendations of the Shetty Commission.

8. Argument of the petitioners has been opposed by the respondents on the ground that it is prerogative of the employer to lay down the

qualification and the eligibility criterion for any post. The respondents in their wisdom considered two years experience at the bar as one of the

necessary qualification keeping in view the nature of the job to be performed by the prosecuting officer. In response to the argument of the

petitioners that rules do not prescribe any experience it is urged that the rules are silent. The employer can incorporate necessary condition for the

recruitment. On the question of application of the judgment of the Apex Court referred to above, it has been argued that the Prosecuting Officer

cannot be equated with the Judicial Officers. Therefore, the judgment of the Apex

Court in the case of All India Judges Association and others

(Supra) has no application.

Rule 176 in Chapter VII deals with the appointment of Prosecuting Officers which reads:-

176. QUALIFICATIONS FOR DIRECT APPOINTMENT AS INSPECTORS, SUB INSPECTORS OR ASSISTANT SUB

INSPECTORS (1) Applications for direct appointment to the rank of Inspectors, Sub Inspectors or Assistant Sub Inspectors shall at the

directions of the Inspector General be referred to the Supdt of the District in which the applicant resides direct for report in Form 25.

(2) The applications should be accompanied by the following certificates:-

(i) Education Certificate in original or a copy attested by a Magistrate or by any other gazetted officer;

(ii) Permanent residentship certificate.

(iii) Testimonial in support of the applicants having taken part in sport activities.

(iv) Age according to the Matriculation Certificate. The applicant must be between 18 and 25 years of age.

Applications of only such candidates will be considered for selection who conform to the following physical standards fixed by the Government:-

(i) Height 5'-6

(ii) Chest Un-expanded 32

Expanded 33 +

The minimum academic qualification for the post of an Assistant Sub Inspector is Matriculation and a candidate for Sub Inspector or

Inspectorship should ordinarily be a graduate. The Inspector General of Police may in special cases relax this educational qualification.

Note. Legal practitioners selected for appointment as Police Prosecutors may be enrolled upto the age of 30 years

9. This rule only prescribes the qualification of Law for the post of Prosecuting Officer in the Police department and no other qualification

whatsoever has been laid down. This rule even do not require enrolment as an Advocate for the purposes of securing the job of a prosecutor in the

Police Department. The issue which require consideration is where the rules do not prescribe any experience or any other condition for

recruitment, can the employer or for that matter the recruiting agency lay down any further condition like experience or even enrolment as an

Advocate for the post, in the Advertisement Notice. It is settled principle of law that to prescribe the qualification and other eligible criterion is the

prerogative of the employer and the expert bodies who are entrusted with the duty and job of making recruitment and also to prescribe the

qualification and eligibility criterion for the same. The Courts are not to venture and lay down the qualification and criterion for the same. However,

the power of Judicial review to examine the validity of the qualification and the criterion for a particular post has also been acknowledged.

Reference in this respect is made to the following judgments of the Apex Court, wherein similar issue came up for consideration before the Apex

Court. In case P.U. Joshi and Ors. v. Accountant General, Ahmedabad and Ors. AIR 2003 SCW 272 the Apex Court held as under:

x x x x. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of

qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of

policy and within the exclusive discretion and jurisdiction of the State, subject of course, to the limitations or restrictions envisaged in the

Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or

eligibility criteria or avenues of promotion or impose itself by substituting its views, for that of the State. Similarly, it is well open and within the

competency of the State to change the rules relating to the service and alter or amend and vary by addition/substruction the qualifications, eligibility

criteria and other conditions of service including avenues of promotions, from time to time, as the administrative exigencies may need or

necessitate.

10. The Apex Court also considered the question whether the selection authority and/or the employer has the absolute right to prescribe the

qualifications and other conditions are within the exclusive domain of the employer/ selection authority. This power is with the caveat that employer/

selection authority are not entitled to prescribe the additional qualification/eligibility criterion not envisaged by the rules if the rules prescribe such

qualification/eligibility criterion. Therefore, the prescription of experience of two years in the advertisement notification is an additional qualification

and criterion not provided for in the rules.

11. Assuming the employer is competent to prescribe experience or any other additional qualification, the same is also required to be examined

whether the same has any relevance, rationale and object sought to be achieved. It is in this view of the matter the issue is required to be examined.

The advertisement notice prescribes degree in Law as the educational qualification and two years actual experience at the bar, meaning thereby

that a person should be enrolled as an Advocate for a period of not less than two years. Every Advocate enrolled with any State Bar Council or

Bar Council of India has a right of audience before all the Courts in the Country. Every enrolled Advocate has a right of audience. Sections 29 &

30 of the Advocates' Act confers this right upon the Advocates enrolled with any State Bar Council. The same are quoted here-under:

29. Advocates to be the only recognized class of persons entitled to practice law -- Subject to the provisions of this Act and any rules made there-

under, there shall as from the appointed day, be only one class of persons entitled to practice the profession of law, namely, advocates.

30. Right of advocates to practice -- Subject to the provisions of this Act every Advocate whose name is entered in the (State roll) shall be entitled

as of right of practice throughout the territories to which this Act extends-

(i) in all Courts including the Supreme Court.

(ii) Before any tribunal or person legally authorized to take evidence; and

(iii) Before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice.

12. From the perusal of the above provision of the Advocates Act, it transpires that an enrolled Advocate shall have the right to practice

throughout the country in-all the Courts, Tribunals and Forums, authorized to take evidence or where an advocate is entitled to practice under any

statute. Right of such a person extends even upto the Supreme Court. There is no embargo for an enrolled Advocate for appearance and practise

as regards the minimum experience is concerned. Therefore, an Advocate of even one day standing can conveniently appear and argue even

before the highest Court of the land. The nature and object of a prosecuting

officer is to represent the State and police department in criminal matters presented before the Magistrates and all other criminal Courts. As a matter of fact their job is akin to that of an Advocate, though confined to only one branch of law i.e. Criminal Administration of justice. If an Advocate without any past experience to his credit can successfully and legally appear in any criminal case or for that matter any other case in all the courts including the Apex Court, it fails to stimulate the logic why a law graduate needs two years at the bar experience to represent the State/police Department for conducting their cases. It is also prescribed under rules that on being recruited as prosecutor he is required to undergo a training of six months in a police training school/academy. Much emphasis is laid on the judgment of the Apex Court referred to above. In this judgment the Apex Court considered the earlier direction issued in All India Judges' Association and Others Vs. Union of India and Others, wherein one of the directions at para 52 (a) was, ""the legal practice of three years should be made one of the essential qualification for recruitment to the judicial posts at lowest rung in the judicial hierarchy."" After the afore-said judgment the Government constituted a National Judicial Pay Commission under the Chairmanship of Justice K.K. Shetty. The terms of the reference of the said Commission were-

(a) To evolve the principles which should govern the structure of emoluments of Judicial Officers belonging to the Subordinate Judiciary all over the country.

(b) To examine the present structure of emoluments and conditions of service of Judicial Officers in the States/Uts taking into account the total packet of benefits available to them and make suitable recommendations having regard, among other relevant factors, to the existing relativities in the pay structure between the officers belonging to subordinate judicial service vis--vis other civil servants.

(c) To examine and recommend in respect of minimum qualifications, age of recruitment, method of recruitment, etc. for judicial officers. In this context, the relevant provisions of the Constitution and directions of the Supreme Court in All India Judges Association case and other cases may be kept in view.

(d) To examine the work methods and work environment as also the variety of

allowances and benefits in kind that are available to Judicial

Officers in addition to pay and to suggest rationalization and simplification thereof with a view to promoting efficiency in Judicial Administration, optimizing the size of the judiciary etc.

13. The Shetty Commission submitted its report. Apex Court considered these recommendations and on consideration of the same following order has been passed:

In the All India Judges' Association and Others Vs. Union of India and Others, this Court has observed that in order to enter the judicial service,

an applicant must be an Advocate of at least three years' standing Rules were amended accordingly. With the passage of time, experience has

shown that the best talent which is available is not attracted to the Judicial Service. A bright young law graduate after three years of practice finds

the Judicial Service not attractive enough. It has been recommended by the Shetty Commission after taking into consideration the views expressed

before it by various authorities that the need for an applicant to have been an Advocate for at least three years should be done away with. After

taking all the circumstances into consideration, we accept this recommendation of the Shetty Commission and the argument of the learned Amicus

Curiae that it should be no longer mandatory for an applicant desirous of entering the Judicial Service to be an Advocate of at least three years'

standing. We accordingly, in the light of experience gained after the judgment in All India Judges' case, direct to the High Courts and to the State

Government to amend their rules so as to enable a fresh law graduate who may not even have put in even three years of practice, to be eligible to

compete and enter the judicial service. We, however recommend that a fresh recruit into the Judicial Service should be imparted with training of

not less than one year preferably two years.

14. The Apex Court by accepting the recommendations of the Shetty Commission held that three years practice for the judicial service is not

necessary as the best talent which is available is not attracted to the judicial service. The rationale beyond as is evident from the afore-said

direction that once a law graduate person starts practice and gains some experience is more interested in the private practice which may be more

lucrative. Accordingly a direction was issued to all the States to amend the

service rules so as to enable the fresh law graduates, who may not even have put in even three years of practice to be eligible to compete and enter the judicial service.

15. Admittedly, the prosecuting officers have to appear before the Judicial Officers and if a person who has to decide the cases, if requires no

experience at the bar, one fails to understand why a person who has to project his case before the Judicial Officer needs two years experience. A

Judicial Officer is required to decide the cases pertaining to all branches of law, whereas a prosecutor has only to deal with the Criminal law that

too upto the Magisterial level as under the prevalent system in the State, the State is represented by Public Prosecutors to deal with the State

cases, particularly the criminal matters before the Court of Sessions.

16. There is another aspect of the matter in Judges' case the prescription of two years experience was done away with on the basis of the

recommendation of an expert body, who examined the issue in its depth and after a detailed study made certain recommendations which have been

again accepted by the Apex Court considered to be the final authority as far as the institutions of law are concerned. A prosecutor is also dealing

with law and only law. It has not been brought to the notice of the Court that the issue of prescription prescription of two years experience was

examined and recommended by any expert person, body or authority who has examined and studied the question and made such

recommendations. Mr. Johal was directed to produce the record showing that the issue has been examined by any expert body or person and

based upon his recommendation the qualification has been incorporated in the advertisement notice. No such record has been produced.

17. On consideration of the various aspects including the judgment of the Apex Court, referred to above, I am of the considered opinion that

prescription of two years experience for the post of Prosecuting Officer has no rationale, relevance and object. Same is not required to be

incorporated in the advertisement notice.

18. Since I have held that the condition of two years experience is required to be quashed but this judgment will operate prospectively i.e. it will

apply to only future selections and it will not affect the impugned advertisement for which the process has already been completed.

19. In all these petitions, the petitioners were permitted to appear in the examination by interim orders passed by the Court. In SWP No.

1624/2003 petitioners though were not permitted to participate in the examination despite the Court direction, whereas in all other writ petitions,

the petitioners herein, have been permitted to appear in the examination. On account of the judgment that this judgment will operate prospectively

no directions are required to be issued in respect to the selection of the petitioners.

These writ petitions are accordingly allowed in the manner indicated above. The connected CMPs are also disposed of.