
(1974) 09 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : Writ Petition No 42 of 1970

Mohd.Amin Pandit and others	Vs	APPELLANT
State of Jammu and Kashmir and another		RESPONDENT

Date of Decision : 17-09-1974

Acts Referred:

Public Service Commission (Limitation of Functions) Regulations, 1957 — Rule 4(d)(ii)

Citation : (1974) JKLR 688 : (1975) KashLJ 76

Hon'ble Judges : Mufti Baha-Ud-Din Farooqi, J

Bench : Single Bench

Advocate : S.T.Hussain, P.L.Kaul, K.N.Raina, A.K.Malik, Advocates appearing for the Parties

Judgement

(1) This is a writ petition under Section 103 of the Constitution of Jammu and Kashmir . It is directed against Government Order No. 68ID of

1970 dated 2151970 which reads as under :

Government of Jammu and Kashmir Civil Secretariat Information Department.

Sub: Creation of the post of Deputy Director of Information.

Ref : Chief Secretary's No CSMisc/70 dated 234.1970.

Government Order No. 681D of 1970

Dated.....2151970,

Sanction is accorded to the creation of an additional post of Deputy Director of Information (Public Relations and Publications) in the Directorate

of Information in the scale of Rs. 5001100 by corresponding reduction of one post of Public Relations Officer (450900) and to the promotion of

Shri G. N. Turi, Assistant Director of Information, Kashmir (450900) thereto on a temporary basis subject to approval by the Public Service

Commission.

Shri S. L. Pir. Public Relations Officer, (450500) in the Directorate of Information is transferred and posted as Assistant Director of Information

Kashmir in place of Shri Turi.

This issues with the concurrence of the Finance Department conveyed vide their U. O. No. F. 1118 / 70Inf/1257 dated 1251970.

By order of the Government of Jammu and Kashmir.

Sd/ G. D Sharma,

Secretary to Government,

Information Department.

(2) The petitioners have challenged the order as being arbitrary, capricious and violative of the Powers of the Government under Rule 25 (2) of the

J and K Civil Services (Classification, Control and Appeal Rules, 1956 (hereinafter called the '19i6 Rules'). Their case is that, at the meterial time,

they, like respondent No. 2, were holding the scale of 45090 in the gazetted cadre of the Information Department and were due to be considered

for promotion to the next higher post of Deputy Director in the scale of 5001100; that the impugned order was made without their cases being

considered alongside the case of respondent No: 2: and in any case the order was not a speaking order as it should have been under Law.

RespondentState has put its case in reply in these words :

The appointment of respondent No. 2 was made when in the opinion of the Government an emergency had arisen and they were satisfied that is

was in the public interest to fill the vacancy immediately and there was likely to be undue delay in making the appointment/promotion in consultation

with the Public Service Commission / Departmental Promotion Committee* The Order of adhoc appointment made in anticipation of Cabinet

sanction was later referred to the General Department who conveyed the approval of the Cabinet in accordance with the procedure sanctioned for

such cases under regulation 4 (d) of the Public Service commission (Limitation of Functions Regulation 1957)',

(3) It is also stated that the regular appointment for the said post "was to be made on the recommendation of the Departmental Promotion

Committee to whom the cases of the petitioners and other officers eligible for

being considered have been referred.

(4) Viewed strictly on its terms, the impugned order sanctions promotion of respondent No. 2 on regular officiating basis as distinguished from an

adhoc basis. There is nothing in the order to suggest that the claims of other eligible candidates including those of the petitioners were considered

nor also was any anterior or contemporaneous record Produced to show that the order proceeded upon the consideration of the claims of all the

eligible candidates including the petitioners. The law is well settled that, in a case like the present, where meritcum seniority rule provided in Rule 25

(2) of 1956 Rules is applicable, the promotion order should be a speaking order and where the order is not a speaking order, it must be shown by

reference to the anterior or contemporaneous record that claims of the eligible candidates were considered before the order of promotion was

made. All these requirement are missing in the present case. The order, construed as order of regular officiating promotion, is therefore violative of

Rule 25 (2) of the J and K Civil Services (Classification, Control and Appeal) Rules, 1956 and cannot be sustained.

(5) Appearing for the State Mr. Malik however tried to justify the order on the ground that the promotion made there under was made purely on

adhoc basis. Taking a view favourable to the State let me assume that it was so. The question arises whether the adhoc promotion so made could

be operative for a period exceeding six months.

(6) Rule 4 (d) (ii) of the J and K Public Service Commission (Limitation of Functions) Regulations, 1957 provides that it shall not be necessary for

the Public Service Commission to be consulted on the suitability of candidates for :

"Officiating promotions or transfers to any service or post, when at the time of making the promotion or transfer there is reason to suppose that the

officiating promotion or transfer will be for not more than six months.

(7) This Rule clearly lays down that an officiating promotion cannot be made without the consultation of the Public Service Commission for a

period of more than 6 months. As such the Govt would be acting in excess of its powers if it direct such promotion for a period longer than six

months or for an indefinite period, as in the present case. In any case where the order does not specify the period or specifies a period longer than

six months, the order cannot remain operative for a period of more than six months. As suggested by Mr. Malik cases are conceivable where the matter is meanwhile referred to the Public Service Commission but the commission does not finalise its recommendations within the period. The question arises whether in such a case the Govt. would be competent to continue the adhoc appointment already made by it. I am not called upon to answer this question as it does not really arise in the present case. There is nothing in the record to indicate that at the expiry of the initial period of six months any order of continuation was made by the Govt. It would be therefore beside the point to consider whether the Govt. could make an order of continuation or not. As it is, the impugned order directed the promotion of respondent No. 2 for an indefinite period. In the view I have expressed above, it was, bad in law and could be effective for a period of six months and no more. That period has expired since. In fact more than four years have passed since the order was made. Presently, therefore, the respondent No. 2 holds the post of Deputy Director without any legal order to support it.

(8) Mr. Malik next argued that provisions of section 133 were directory and not mandatory and accordingly in the Govt. not complying with the provisions of that section or the rules styled as Public Service Commission (Limitation of Functions) Regulations made thereunder, it was not guilty of any constitutional infraction to entitle the petitioners to claim any relief in the matter. Assuming that the provisions of section 133 and rules made thereunder are merely directory in nature, what follows is that the Govt need not have consulted the Commission before making the order of promotion. But could it dispense with the necessity of the Govt. considering the claims of the eligible candidates including the petitioners as required under Rule of (2) of the J and K Civil Services (classification, Control and Appeal) Rules when it was making an order of promotion on regular officiating basis, as it would then amount to. Obviously not. Rule 26 (2) of 1956 Rules and Articles 14 and 16 of Constitution of India would stand in their way. Accordingly this argument of Mr. Malik does not advance the case of the respondent State and must fail.

(9) Appearing for respondent No. 2, Mr. Tassaduqe Hussain while adopting the arguments of Mr. Malik raised an additional argument that even if

it were conceded that the promotion of respondent No. 2 could enure for a period of six months only, he became an usurper in office at the expiry of that period and, that being so, the petitioners could only claim a writ of quowarranto and not a writ of certiorari. He further argued that even if it is assumed that a writ of quowarranto is included in the relief claimed by them in the petition, it cannot be allowed to them on the simple ground that the promotion was not substantive, as it should be where a writ of quowarranto is claimed. In this Mr. Tassadque Hussain seems to forget that the nature of the relief depends on whether the petitioner has personal right in the matter or not. Where the petitioner has personal right which he seeks to enforce, he can claim a writ of certiorari, whereas if the petitioner has no such personal right in the matter he can claim a writ of quowarranto. The distinction lies in the fact that in the one case the petitioner challenges the validity of the order on the ground that it is against Rules involving also infraction of his personal right in the matter whereas in the second case he challenges the validity of the order merely on the ground that it is against rules independently of having any personal right in the matter. The case of the petitioners clearly is that the appointment of respondent No. 2 was in violation of the Rules which involved the infraction of their personal rights in the matter and as such writ of certiorari could be legitimately claimed by them. In this view I find no merit in this argument which is repelled. (10) In these circumstances I accept this petition; quash the impugned order in so far as it provides for the promotion of respondent No. 2 beyond the period of six months : and, hereby direct that the said respondent shall be reverted from the post of Deputy Director and further that the post shall be refilled after considering the claims of the respondent No. 2 and the petitioners of such of them as are found eligible under rules for such consideration. In the peculiar circumstances of the case, I leave the parties to bear their own costs.