
(2000) 05 J&K CK 0011

In the Jammu And Kashmir High Court

Case No : LPA (SW) No. 02/99 c/w, LPA (SW) No. 24/99, LPA (SW) No. 01/99

Mohinder Singh & 11 others

APPELLANT

Vs

State of J&K and 2 Others

RESPONDENT

Date of Decision : 24-05-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Constitution of Jammu and Kashmir, 1956 — Section 124

Citation : (2002) 1 SCT 43 : (2000) 1 SriLJ 199 : (2000) SriLJ 199

Hon'ble Judges : A.M.Mir, J and O.P.Sharma, J

Bench : Division Bench

Judgement

Sharma,J.

1. The concept of equality of opportunity in matters relating to Public Employment is enshrined in Article 16 of the Constitution. It provides that all citizens shall have equality of opportunity in matters relating to Public Employment or appointment to any post in the State. Unlike other rights to equality, after equal opportunity has been given to all citizens, the person selected becomes an employee of the State and a part of the machinery for governing the State. H.M. Seervai, in Constitutional Law of India, 4th Edition Volume I while tracing the historical background of Article 16 writes:

In the United State not only was there no equality of opportunity in the matter relating to Public Employment but it is opposite, the Spoils System prevailed. Far from Public Employment being considered as a matter of right the Spoils System was based on the theory that no one had the right to Public Employment.

2. After reproducing Article II. Sec. 2(2) of the United States Constitution the author writes as under:

The existence of the Spoils System in the United States is relevant, because that system was well known to the framers of our Constitution, and

they knew that in the United States the doctrine of equality did not carry with it, as a necessary corollary, the doctrine of equality of opportunity in

matters of Public Employment which was governed by the law of master and servant. Consequently, the right was expressly conferred by Art. 16,

since we have not adopted the Spoils System.

3. We thus notice the difference between the right to equality in public employment and the ""Spoils System"" based on the theory that ""to the victor belongs the Spoils of victory in the matter of distribution of Public Offices.

4. However, even in the United States the position is not the same as it was fifty years ago because the jurisdiction of the Civil Services

Commission has been enlarged by successive legislations which holds open competent examination.

5. PartIX of the Constitution of Jammu and Kashmir deals with The Public Services. Section 124 of this chapter reads as follows:

124. Recruitment and conditions of service of persons serving the State Subject to the provisions of this Constitution, the Legislature may by law

regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with die affairs of the State:

Provided that it shall be competent for the Governor of such person as he may direct, to make rules regulating the recruitment, and the conditions

of service of person appointed, to such services and posts untill provisions in that behalf is made by or under and Act of the Legislature under this

section and any rules so made shall have effect subject to the provisions of any such Act.

6. So the Recruitment and conditions of service of persons serving the State has to be regulated either by the Legislature or the Governor i.e. the

Government as the case may be. It was in exercise of this power that the Governor constituted Jammu and Kashmir Service Selection Board and

framed Recruitment Rules for nongazetted services. These Rules were notified vide SRO 194 of 1992 dated 18081992. These Rules are known

as Jammu & Kashmir Subordinate Services Recruitment Rules, 1992.

Under these Rules, it is the duty of every department to refer vacancies to the Recruitment Board and the recruitment has to be made after inviting

applications from all the eligible candidates in terms of the Recruitment Rules applicable to the service in which appointment is to be made.

Somehow the classIV posts were kept out of the purview of Recruitment Board and for sometime these remained with the District Board of which

Deputy Commissioner of the District used to be the Chairman. However, Government took a policy decision to entrust recruitment to classIV post

to the Head of the Department and issued government order No. 1786GAD of 1997 dated 11111997 which reads as under:

In supersession of all previous orders on the subject. it is hereby ordered that recruitment to classIV posts in different departments of the

Government shall be made by the concerned Head of the department in accordance with the Rules and procedure. By order of the Government of

Jammu and Kashmir.

Sd/

Commr. & Secretary to Government General Administration Department.

7. In exercise of his powers under this order, the Director Health Services, Jammu issued appointment orders in favour of 58 persons on

31031998 the day on which he superannuated. In making the appointments Dr. M.P. Gupta appears to be guided by ""Spoils System"" by

completely ignoring the mandate of Article 16 of the Constitution because applications were not invited for recruitment to the post on which

appointments were made by him. When this fact came to the notice of his successor, he vide order dated 01041998 kept all these appointments in

abeyance. It appears some persons challenged this order of keeping the order of appointment in abeyance in this court. But while these petitions

were pending, government vide order dated 12051998 cancelled all the appointments made by Dr. Gupta on 31031998. This order cancelling the

appointments was challenged by some of the appointees in a bench of writ petitions. All these petitions were dismissed by a learned Single Judge

of this Court vide his judgment dated 15021999.

8. Appellants in these appeals are those who have been appointed on different posts. The judgment of the writ court is challenged mainly on the

ground that the Government Order cancelling the appointments made by the

appointing authority is bad because it has been passed without affording any opportunity to them.

9. Mr. Sawhney appearing for some of the appellants argued that the respondents have adopted a pick and choose policy in the matter of appointment. While some orders passed by Director Health Services without inviting applications have not been cancelled the appellants have been singled out for a differential treatment. He further argued that since the order by virtue of which the Director, was empowered to make appointment does not prescribe the procedure. therefore, the appointment made by the Director could not be cancelled because he was competent to make such appointments as no particular procedure was prescribed which he violated. Mr. Sawhney also pointed out that before the cancellation order was issued the matter was subjudice as some of the appointees had challenged the order passed by the Director keeping these appointments in abeyance. The government, therefore, could not have cancelled the appointment when the interim directions of the court were operating. This according to him vitiates the order of cancellation.

10. Mr. Anand appearing for the appellant Atul Kumar tried to distinguish his case on the ground that the petitioner had already joined duty and therefore his service could be terminated only after giving him a showcause notice which procedure has not been followed. These arguments have been adopted on behalf of the others. The contention of Mr. Kohli appearing for the State is that the expression "in accordance with rules and procedure" occurring in the government order dated 11/11/1997 means a procedure which was just and fair procedure. The Rules and Procedure for recruitment according to the learned counsel even in the absence of Rules framed under section 124 of the Constitution have to be consistent with Article 14 and 16 of the Constitution of India. Merely because no mode of recruitment is prescribed for appointment to class IV posts under section 124. it does not follow that the appointing authority according to the learned counsel could act arbitrarily and appoint persons without inviting applications from those eligible for the post.

11. We have given out thoughtful consideration to the rival contentions. The judgment of the writ court proceeded on the basis that since petitioners came to be appointed without following due procedure for

recruitment, they cannot ask for procedural safeguard i.e. right of hearing before their services were terminated. The argument that petitioners were entitled to be heard before their services were terminated came to be rejected primarily on the ground that if the order of termination is quashed on this ground it would restore the orders which were not only illegal but also issued in violation of Article 16 of the Constitution. Before examining the application of the principle of Audi Alteram Partem to the facts of the case in which admittedly the appointments were made without inviting application. We may consider what is the scope of making appointments "in accordance with the Rules and Procedure" as occurring in the order dated 11.11.1997 (supra). The only argument put forward on behalf of the appellants is that in the absence of any statutory rule, the Director Health Services was not required to invite applications. Such an argument if accepted will set at naught the principle of "Equality of Opportunity in matters of public employment ensured to the citizens of the country by Article 16 of the Constitution." Existence of Statutory Rule is therefore not a condition precedent for making appointment to any public post but the procedure to be followed must be consistent with Article 14 and 16 of the Constitution. This was so held in 'J&K Public Service Commission and Ors. Vs. Dr. Narinder Mohan & Ors.'. 1994 (II) SCC 630 which reads as under:

7. Existence of statutory rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is coextensive with legislature power of the State and under Article 162. the State can create civil posts and fill them up according to executive instructions consistent with Article 14 and 16 of the Constitution.

12. While referring to the procedure to be followed in the matter of public employment their lordships further held as under:

The rules or instructions should be in compliance with the requirement of Articles 14 and 16 of the constitution. The procedure prescribed shall be just, fair and reasonable, opportunity shall be given to eligible persons by inviting applications through the public notification and recruitment should be according to the valid procedure and appointment should be of the qualified persons found fit for appointment to a post or an office under the state." While referring to the Rules prescribing direct recruitment to the post, their Lordships held that:

Moreover, when the Rules prescribe direct recruitment, every eligible candidate, is entitled to be considered and recruitment by open

advertisement which is one of the well accepted modes of recruitment. Inviting applications for recruitment to fill in notified vacancies is consistent

with the right to apply for. by qualified and eligible persons and consideration of their claim to an office or post under the state is a guaranteed right

given under Articles 14 and 16 of the constitution.

13. So the expression "" in accordance with Rules and procedure"" occurring in the government order dated 11/11/97 (supra) means just and fair

procedure, since these appointment were made without inviting applications, the procedure was neither just nor fair. The only exception to this rule

is appointment made on compassionate ground and that too after considering the financial condition of the family. This was observed in. *IJ mesh*

Kumar Nag pal Vs. state of Haryana and ors. 1994 (4) SCC 138 which reads as under:

The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is

satisfied, that but for the provision of employment the family will not be able to meet the crisis that a job is to be offered to the eligible member of

the family. The posts in classes III or IV are the lowest posts in nonmanual and manual, categories and hence they alone can be offered on

compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of

employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory.

14. Barring this there is no other exception to the rule that in the matter of public employment application from all eligible candidates have to be

invited by the appointing authority before selection is made. It is an admitted fact that all these appointments have been made by Direct

Recruitment but without inviting applications. One of the arguments advanced was that these appointments should be deemed to have been made

in relaxation of rules. There is, however, a distinction between Rules of Recruitment and conditions of service. This distinction was noticed by their

Lordships in '*Kcshav Chandra Joshi and ors Vs. Union of India and ors*', 1992 Supp (1) SCC 272. wherein it has been laid down that:

33.....

There is a distinction between "rules of recruitment" and "conditions of service". To become a member of the service in a substantive capacity,

appointment by the governor shall be preceded by selection of a direct recruit by the Public Service Commission undergoing training in Forestry

for two years in the college and passing Diploma are conditions precedent. If the contention of the promotees that rules of recruitment are

conditions of service is accepted, it would be open to the Governor to say that "I like the fact of 'A'" and I am satisfied that he is fit to be appointed.

I dispense with one rules of recruitment and probation and appoint 'A' straightway to the service in a substantive capacity as Assistant Conservator of Forest.

15. Since the appellants were admittedly appointed without inviting applications, their appointments were illegal. The orders of appointment are

also illegal being in contravention of the Jammu and Kashmir Reservation Rules, 1994 notified vide SRO 126 dated 28061994 providing for

appointments of Schedule Tribes, Schedule Castes, Backward Classes and others against roster points assigned to each reserved category in case

of direct recruitment. Moreover all these orders were issued on 31031998 and were directed to be kept in abeyance on 014)41998. Since the

order dated 01041998 was stayed by this court, this enabled some appointees to join the post before the order of cancellation was issued. The

question arises whether any right had accrued in favour of the appellants when but for the interim direction of the court they could not have joined

the post on which they were appointed. Such interim direction being subject to the final outcome of the lis, mere joining (the post will not confer any

right which did not exist before the order was passed.

16. This takes us to the question whether the principle of natural justice has been violated. The writ court negated the argument against violation

of principles of natural justice holding that if the order cancelling the appointments is quashed it would amount to restoration of illegal orders.

17. We are of the opinion that this is the correct legal position. The Summit Court in "M.C. Mehtha Vs. Union of India and others" AIR 1999 SC

2583 formulated following questions for determination:

(1) Whether this Court, in exercise of powers under Article 32 (or the High Court,

generally under Article 226) is bound to declare an order of

Government passed in breach of principles of natural justice as void or whether the court can refuse to grant relief on the ground that the facts of

the case do not justify exercise of discretion to interfere or because de facto prejudice has not been shown ?

(2) Whether the Court is not bound under Article 32 (or High Courts under Article 226) to quash an order of Government on ground of breach of

natural justice if such an action will result in the restoration of an earlier order of Government which was also passed in breach of natural justice or

which was otherwise illegal ?"" Relying on its earlier judgment in ""Gadde Venkateswara Rao Vs. Govt. of Andhra Pradesh", 1966 (SC 828, their

Lordships held as under:

The above case is clear authority for the proposition that it is not always necessary for the court to strike down an order merely because the order

has been passed against the petitioner in breach of natural justice. The court can under Article 32 or Article 226 refuse to exercise its direction of

striking down the order if such striking down will result in restoration of another order passed earlier in favour of the petitioner and against the

opposite party, in violation of principles of natural justice or is otherwise not in accordance with law.

18. While rejecting the argument that breach of principle of natural justice is in itself sufficient to grant relief and that no further de facto prejudice be

shown, their Lordships held as under:

21. It is true that in *Ridge Vs. Baldwin*. 1964 AC 40, it has been held that breach of principles of natural justice is in itself sufficient to grant relief

and that no further de facto prejudice need be shown. It is also true that the said principles have been followed by this court in several cases but

we might point out that this court has not laid down any absolute rule. This is clear from the judgment of Chinnappa Reddy. J. in *S.L. Kapoor Vs.*

Jagmohan (1980) 4 SCC 379 (AIR 1981 SC 136). After stating (p. 395) (of SCC): (at p 147 of AIR) that 'principles of natural justice know of

no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed' and that 'nonobservance of

natural justice is itself prejudice to a man and proof of prejudice independently of proof of denial of natural justice is unnecessary'. Chinnappa

Reddy. J. also laid down an important qualification (p. 395) (of SCC): (at p. 147 of AIR) as follows:

As we said earlier, where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible,

the court may not issue its writ to compel the observance of natural justice not because it is not necessary to observe natural justice but because

courts do not issue futile writs." "22. It is, therefore, clear that it on the admitted or indisputable factual position, only one conclusion is possible and

permissible, the court need not issue a writ merely because there is violation of principles of natural justice.

19. We are also of the view that in the given circumstances nonapplication of the principle of natural justice will advance cause of justice and

prevent abuse of power as observed in 'Ashwani Kumar Vs. State of Bihar. AIR 1996 SC 2833 as under:

With the aid of principles of natural justice, the courts preserve rule of law keeping arbitrary action by the executive or the legislature within the

confines of law. Courts have to examine in each case the balance of fairness, whether the violation of the principle of audi alterant partem visits with

irremediable civil consequences and its incursion on administration, if action is invalidated. No set rule or standard of universal application can

possibly be laid for application to all sets of cases. Courts exercise their power of judicial review with circumspection to weigh in balance the

fairness of action. Therefore, though the principles of natural justice are omnipervasive, in given circumstances their nonapplication may also

advance cause of justice to prevent misuse or abuse of power or of the judicial process.

20. Assuming that an order of appointment on civil post which is cancelled before the incumbent submits the joining report creates any right though

it does not. nonapplication of the principles of natural justice in the case has advanced the cause of justice by preventing abuse of executive power.

21. There is however one aspect of the case which requires to be noticed. The writ court while dismissing the petitions directed as under :

i) The respondent authorities would release the salary of the petitioners for the period they have actually worked. The State Government, however,

would be at liberty and as a matter of fact recover the salary so paid to the petitioners from the officer who issued the appointment letters, ii) The

State Government would also examine as to whether other appointments which were similarly made without issuing advertisement notice are good or bad.

22. It is admitted that but for the interim direction of the court, none of the petitioners would have been able to join on the basis of appointment

letters. If that be so as it really is the principle of Acts Curiae Neminem Gravabit is attracted. In ""State of M.P. and others Vs. M.V.

Vyavsaya&CO'. 1997(1)SCC 156,'their Lordships while applying the same doctrine observed as under:

19.....

It is the duty of the court to try to repair the damage to the extent possible. No one should be allowed to suffer on account of the acts(s) of the court.....

23. Applying the ratio to the case, the appellants having derived benefits of salary on the strength of the court orders which has been vacated the recovery lies to be from them. In this view we are fortified by the decision of the Apex Court in 'Krishan Yadav and anr. Vs. State of

Haryana and Ors ', AIR 1994 SC 2166 which reads as under:

22. The effect of setting aside the selection would mean the appointments held by these 96 candidates (including the respondents) will have no

right to go to the office. Normally speaking, we should require them to disgorge the benefit of these ill-gotten gains. That means they will have to

repay the entire salary and perks which they have received from the said office. But, here we show a streak of sympathy. For more than 4 years

they were enjoying the benefit of ""office"". The proper lesson would be learned by them if their appointments are set aside teaching them that

dishonesty could never pay.

24. However, since the appellants were appointed against available vacancies and have discharged the duty of the posts, we think it will not be just

and fair to recover the amount from them. But we are clearly of the view that the amount cannot be recovered from the then Director who made

these illegal appointments. He may be liable to disciplinary action if permissible under law but that is a different matter covered by Article 168A of

the Civil Service Regulations.

25. Similarly, the direction to the State to examine other appointments made by the Director is uncalled for because it amounts to a roving or a fishing inquiry which is not justified. This direction is also withdrawn. In the view we have taken there is no merit in these appeals which are liable to be dismissed. Hence with the modification as above the judgment of the writ court is upheld and the appeals are Dismissed without any order as to costs.