
(2006) 05 J&K CK 0024

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2209 of 1999

Nazir Ahmad Ganai

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 26-05-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2006) 3 JKJ 440

Hon'ble Judges : Bashir Ahmed Kirmani, J

Bench : Single Bench

Advocate : H.I.Hussain, B.A.Bashir, A.M.Magray, Advocates appearing for the Parties

Judgement

1. While seeking consideration for appointment to the post of Assistant House Keeper in Directorate of Hospitality and Protocol the petitioner

herein instituted writ petition No. 1041 of 1997 which was disposed of on 3.2.1999 in the following terms:

i. Respondents shall consider the case of the petitioner alongwith other eligible candidates against the post of Assistant House Keeper, as and

when available in the Hospitality and Protocol Directorate in the State.

ii. The appointment to the post of Assistant House Keeper shall be made under the J&K Civil Recruitment Rules, 1992, unless the application of

this recruitment rule is excluded in case of Assistant House Keeper posts under the enabling provisions of Rule 2 of the said rules and in any case

the posts shall be filled up in terms of the applicable statutory rules and orders after the post is advertised for being foiled up.

2. Thereafter vide Government order No. 1399GAD of 1999 dated: 13. 12, 1999, the private respondent was appointed as Assistant House

Keeper in the Hospitality and Protocol Department (hereinafter to be referred to as H&PD) in the pay scale of Rs. 20003400 in relaxation of rules

and apparently without reference of the post for regular selection. Aggrieved thereby petitioner challenged it on the ground that the post against

which private respondent was appointed was a selection post never referred for requisite selection process by appointing authority and as such

private respondents appointment thereupon was quite arbitrary, particularly because the said respondent did not even possess the requisite

technical qualification and was not at all eligible, and accordingly sought quashment of the order.

3. In their reply filed on 24. 7. 2000 respondents pleaded that the post against which private respondent No.3 was appointed was existing in Chief

Ministers Secretariat and did not belong to H&PD which was revealed only after issuance of said appointment order, and that being so at the time

the direction dated: 3.2.1999 was passed in writ petition No. 1040/1997 no post to be filled up in accordance there with was available in H&PD.

They also maintained that issuance of impugned Government order was necessary because Chief Minister's Secretariat was in need of a House

Keeper and the HPD was not in a position to spare any person from existing strength of the service so 3rd respondent was appointed in relaxation

of rules by Government.

4. Before however considering the rival pleas, it would be apt to notice another limb of the matter culminating in a Division Bench order passed in

LPA No. 149 of 2000 filed by petitioner against Single Bench's order dated: 25. 8. 2000, whereby interim direction dated: 31.12.1999 directing

respondents to stay impugned order and put it back on hold, was modified to the extent of allowing private respondent to hold the post. The LPA

Bench also noticed a subsequent administrative order purporting to have been passed on 13.11.2000 and on request allowed her to amend his

petition for incorporating his objection to said subsequent order. Subsequently the petitioner instituted amended writ petition on 9.9.2001, wherein,

while reiterating the grounds already taken, he also set up a challenge against the order of 13.11.2000 purporting to have been issued by

Government under No. GAD (MTG) R&BIV/99/114 whereunder the words ""Hospitality and Protocol Department"" as existing in the original

appointment order of private respondent bearing No. 1399GAD of 1999 were deleted and substituted by the words ""Chief Ministers Secretariat"".

The effect was that the post against which private respondent had been appointed was deemed and declared to have been existing in Chief

Ministers Secretariat and not in H&PD.

5. Grounds of challenge pleaded against said order are that it had simply been done to defeat petitioner's right that accrued to him on the basis of

judgment dated: 3. 2.1999 passed by this Court in SWP No. 1040 of 1997 which provided for his consideration for appointment against the post

etc.: and was only meant to imply that no post was available in H&PD against which petitioner could be considered in compliance of the aforesaid

judgment, and was as such totally illegal particularly for the reason of being designed to hoodwink the order of this Court.

6. In their reply to amended writ petition, respondent/Government in addition to what they had already pleaded against the unamended one, further

stated that the need to issue the challenged corrigendum of November, 2000 to order No. 1399 of 1999 was necessitated because the post

against which respondent No.3 was appointed was found to have been available in Chief Ministers Secretariat and not the H&PD etc. In her

separate counter affidavit private respondent No.3 while reiterating the pleas taken by official respondents also pleaded that the court order of

SWP No. 1014 of 1997 covered available post in H&PD where the post did not exist, so there was no violation of the said court order

particularly because no rules were in vogue governing appointment to the post of Assistant House Keeper in Chief Ministers Secretariat. In his

rejoinder affidavit filed by petitioner earlier, he has further reiterated and explained the pleas taken by him in the main petition.

7. Meanwhile under another Government order No. 883GAD of 2003 dated: 10.7.2003 purported to have been issued in supersession of

Government order No. 1328GAD of 2001 dated: 13. 11. 2001, whereunder 3rd respondent is mentioned to have been transferred to Social

Welfare Department against any post carrying an equivalent pay scale, with an observation that she would retain her lien in the parent department,

the private respondent has been transferred back to H&PD. However, during course of their submissions the counsel for parties have reiterated

the contents of their pleadings with reference to annexures on record.

8. I have heard learned counsel and considered the matter. That respondents were directed to consider petitioner alongwith other eligible

candidates through proper selection process for the post of Assistant House Keeper in H&PD is a matter of record and admitted by all as also

that respondent No.3 was appointed against the post of Assistant House Keeper, in the H&PD, ten months after said judgment which is not

denied by anybody. That 3rd respondent's appointment against post of Assistant House Keeper as aforesaid was made without reference of the

post to proper selection process and in relaxation of rules, is not denied by anybody. Within these three aspects, ordinarily, the position would be

that private respondent's appointment on the post even though purporting to have been sanctioned in relaxation of rules would be bad for the

simple reason of being arbitrary and in contravention of the judgment of this Court dated: 3.2.1999 passed in petitioners aforementioned writ

petition No. 1040 of 1997, and as a matter of fact, the position would be so till issuance of the corrigendum order of November, 2000

whereunder the 3rd respondent's appointment was deemed and declared to have been made in Chief Ministers Secretariat on the ground that no

post of Assistant House Keeper existed in H&PD. Nothing, however, has been brought on record to substantiate the claim that the post against

which 3rd respondent was appointed was not available in H&PD on the relevant dates i.e. February, 1999 and December, 1999. On the contrary

it is only after issuance of court order dated: 31.12.1999 staying private respondent's appointment in H&PD, that respondents discovered the post

to have been available in Chief Ministers Secretariat and not H&PD issued the corrigendum. However while issuing the so called corrigendum the

words ""in relaxation of rules"" as existing in the original order of December were left untouched, implying thereby that even private respondents

deemed appointment in Chief Ministers Secretariat also was made in relaxation of rules. It looks quite absurd when read with respondents

assertion that no rules for appointment to the post of Assistant House Keeper in Chief Ministers Secretariat are in vogue, obviously then the

question would be as to what rules were relaxed for making the appointment. Ordinarily in absence of any statutory rule governing the appointment

in question, the government could have and perhaps should have prescribed a criterion through an appropriate executive order and then thrown the

post to open selection by competition or in case the expediency so demanded fill it up on ad hoc basis, on prescribed criterion, till appointment

against the post could be made on regular basis after proper selection. That too was not done which further deepens the mystery of this

appointment and the subsequent discovery of the non availability of post in the department where appointment was made.

9. In its own terms also the cause projected to justify 3rd respondents appointment in Chief Ministers Secretariat as Assistant House Keeper

under the original order, is that Chief Ministers Secretariat was in need of said official and the H&PD could not spare one. That simply is

unbelievable; both in theory as well as in practice; for the simple reason that the first person chosen for catering by the H&PD is always the Chief

Minister and till date no instance has ever been noticed where H&PD has even inadvertently refused to spare the services of any of its officials for

being placed at disposal of Chief Ministers Secretariat. The cause shown for appointment of respondent No.3 de hors the norms is, therefore, as a

matter of fact as bad as the appointment itself, which suffers from the vice of arbitrariness on the simple ground that a selection post required to be

filled up by reference to regular selection process has been filled up in quite suspicious a manner, depriving other eligibles, particularly the petitioner

of their right to compete and that too in teeth of the Court judgment in his favour; which stands shamelessly fiddled with by mere administrative

gimmicks, that is too visible to be hidden beneath their veil of official expediency.

10. Looking at it objectively, the whole exercise, right from private respondent's initial appointment, to the issuance of corrigendum and the later

orders aforesaid, all developments appear to be the links in the same chain of the surreptitious deal which finally appears to have been aimed at

wrongly appointing 3rd respondent against the post and depriving the petitioner of whatever benefit he could have under the aforesaid Court

judgment, particularly because even while the impression that the post against which 3rd respondent was appointed existed in H&PD, might not

have been correct, the judgment should have been taken note of and complied with. If later the post would be found as not having been available in

H&PD on the relevant date, consequences would automatically follow. As a matter of fact the whole exercise of 3rd respondent's impugned

appointment appears to be nothing but a ploy to subvert the judgment of the Court in SWP No. 1040 of 1997.

11. In result, therefore, the conclusion is that appointment of 3rd respondent is bad not only because of being isolative of judgment of this court

dated: 3.2.1999 passed in petitioners writ petition being SWP No. 1014/97 but also because the post being a selective one should have been

referred to regular selection process; under prescribed criterion.

a. Appointment of 3rd respondent ordered under impugned original appointment being No. 1399GAD of 1999 dated: 13.12.1999 conveyed vide

endorsement No. GAD (MTG) RBIV/99 (114) dated: 13. 11. 2000 is quashed alongwith order No. 1328 GAD of 2001 dated: 13. 11. 2001,

and all subsequent orders based thereupon.

b. In the result and subject to departmental requirement the 3rd respondent would be deemed to be only an ad hoc employee on the post till

31.8.2006. In the intervening period the respondent shall have the post referred to the competent authority for its fulfillment after regular selection

while providing petitioner full opportunity of participating in the process, if required in relaxation of his age;

c. After 31.8.2006 if post is not filled up on regular basis, through selection it shall be deemed to be vacant to be filled up under rules, if any, in any

case after reference to the concerned selection authority;

d. A notice shall be issued to the concerned officers of H&PD responsible for issuing the initial order of appointment of 3rd respondent in violation

of court direction aforesaid for showing cause as to why proceedings for contempt of this Court may not be initiated against them. The said notice

alongwith replies, if any, shall be put up by Registrar Judicial after four weeks alongwith copy of this judgment.

e. The respondents shall be liable to pay the petitioner Rs. 10, 000/ as costs of litigation which shall be recoverable from the officers responsible

for issuing the order of appointment of 3rd respondent dated: 13. 12. 1999.

12. The petition stands accordingly disposed of alongwith all CMPs.