

(2004) 07 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : SWP No's. 343 and 382 of 2004

Nazir Ahmad Wani and Mushtaq Ahmad Khateeb	APPELLANT
Vs	
State and Others	RESPONDENT

Date of Decision : 06-07-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 — Rule 85
Jammu and Kashmir Drugs and Food Control (Gazetted) Service Recruitment Rules, 1997 — Rule 5

Citation : (2005) 1 JKJ 71

Hon'ble Judges : Nisar Ahmad Kakru, J

Bench : Single Bench

Advocate : G.A. Lone, in SWP No. 343/2004 and M.Y. Bhat, in SWP No. 382/2004, for the Appellant; G.A. Lone, in SWP No. 382/2004, A.M. Magray, AAG for the Respondents 1 and 2 in SWP No. 343/2004 and 1 to 3 in SWP No. 382/2004 and M.Y. Bhat, for the Respondents 3 to 5 in SWP No. 343/2004, for the Respondent

Judgement

Nisar Ahmad Kakru, J.—The Writ petitions have been finally heard in terms of order dated 03.04.2004 which reads:

Mala fides alleged against the Minister are sought to be proved on the basis of averments urged in SWP No. 382/2004 contending inter alia

failure of the Minister to address to the representation of Shri Mushtaq Ahmad Khateeb, Assistant Drug Analyst, the other that the assignment of

charge is de hors the rules. In view of nature of the allegations the Minister concerned who happens to be respondent in the writ petition filed by

Shri Mushtaq Ahmad Khateeb was directed to file his affidavit in terms of order dated 29.03.2004 which reads :

SWP 382/2004 questions the assignment of charge mainly on the basis of ineligibility of one Mr. Nazir Ahmad Wani, respondent in SWP

382/2004 and petitioner in SWP 343/2004. The order is inter alia alleged to have emanated from mala fides attributed to the Minister, respondent

No. 2. The averment is vehemently resisted by Mr. Magray Learned AAG on the ground of insufficiency of material. Needless to say that absence

of rebuttal is bound to constitute mala fides but there is a difficulty for them which is traceable to their stance admitting the ineligibility of the

petitioner Nazir Ahmad Wani yet the Minister has accorded approval. Another aspect which calls for an answer from the Minister is his failure to

address to the representation of Mr. Mushtaq Ahmad Khateeb, forming page 33 of the departmental file. Whether these facts do contribute

towards establishment of the mala fides can only be appreciated after the Minister files his personal affidavit Mr. Magray AAG is accordingly

directed to file the affidavit on behalf of the Minister before next date.

List on 03.04.2004 in terms of order dated 17.03.2004.

The affidavit is filed but the aspects identified in the order have not been responded to. Mr. Magray learned AAG does not want to file any

further/better affidavit. Writ petitions are admitted to hearing. Pleadings filed in opposition to the petitions having been adopted as counter by

learned counsel for the parties, there remains no impediment to take up the main writ petitions for final disposal along with CMPs. List after one

week.

2. It transpires that the post of Deputy Controller Drugs has become vacant due to adjustment of the incumbent of the above said office as

Controller Drugs Food Organization, consequently, the writ petitioner in SWP 343/2004 namely Shri Nazir Ahmad Wani, Assistant Controller

Drugs, Kashmir came to be assigned the charge of the post of Deputy Controller Drugs Kashmir in addition to his own duties vide Government

Order No. 123 HME of 2004 dated 12.02.2004 which reads:

Without prejudice seniority of others and pending claim of others, Sh. R. L. Dass Dy. Controller Drugs and Food Organization Jammu is hereby

adjusted as incharge Controller Drugs and Food Organization J&K in his own pay and grade pending clearance by DPC/PSC.

However this order is subject to out come of any writ petition pending in the

Hon'ble High Court.

Assistant Drug Controller, Kashmir will look after the working of Dy. Controller Drugs and Food Organization Kashmir in addition to his own duties.

By order of Government of Jammu & Kashmir.

3. Whether expression 'look after' amounts to assignment of charge, no deliberation is called for, in view of stance of the official respondents who in unambiguous terms call the assignment as a stop gap arrangement. This arrangement aroused criticism and resentment from Assistant Controllers and to stall the reconsideration of the assignment on the part of the Government Shri Nazir Ahmad Wani lost no time to invoke the extra ordinary writ jurisdiction of this Court seeking following relief.

a) A writ, order or direction in the nature of Mandamus commanding the respondents not to interfere with the working and functioning of the petitioner as Incharge Deputy Controller Drugs and Food Organization, Kashmir with further direction to pay charge allowance to the petitioner as admissible under rules.

4. The impugned order of assignment of charge has also become subject matter of SWP No. 382/2004 filed by Shri Mushtaq Ahmad Khateeb,

Assistant Drug Analyst seeking indulgence of the Court to quash the same. In essence fate of both the writ petitions centers around the legality or

otherwise of the assignment of charge that is why both are taken up together for final disposal. The order being in favour of the petitioner Shri

Nazir Ahmad Wani shall be referred as beneficiary, Shri Mushtaq Ahmad Khateeb having challenged the order in a separate writ petition, shall be

referred as aggrieved person and the order of assignment sought to be questioned as impugned order.

5. In SWP No. 343/2004 filed by beneficiary of the order main thrust is laid on the ineligibility of the aggrieved person to hold the post of

Inspector because of alleged financial interest through his daughter and brother in sale of medicine. These averments have been refuted by

aggrieved person supported by an affidavit. Since reliance is placed on sub section (3) of Section 21 of The Drugs and Cosmetics Act, 1940, it

will be appropriate to reproduce it as also sub clauses (i), (ii) of clause (e) Section 3 which give the definition of Inspectors.

21. Inspectors;-

(3) No person who has financial interest in the import, manufacture or sale of drugs or cosmetics shall be appointed to be an Inspector under this

Section.

The sub section makes reference to the Inspector which is defined in definition clause which may be extracted:

Section 3(e) 'Inspector' means:-

(i) in relation to Ayurvedic, Siddha or Unani drug, an Inspector appointed by the Central Government or a State Government u/s 33G ; and

(ii) in relation to any other drug or cosmetic, an Inspector appointed by the Central Government or a State Government u/s 21 ;

6. From a plain reading of the aforementioned provisions it is clear that the posts of Inspector and Assistant Drug Controller/Assistant Drug

Analyst are not synonymous and the latter cannot be brought within the purview of Inspector. It has also to be borne in mind that appointment as

Inspector made in favour of the aggrieved person was not questioned at any point of time by anybody much less by beneficiary. That too when

position has altogether changed due to the present status of the aggrieved person who holds the post of Assistant Drug Analyst Substantively. It is

too late in the day to advance a grievance on such appointment, for, he remains no more positioned on the post of Inspector. More so, examining

the contention in the light of mandate of the preamble of the Act the challenge appears irrelevant because the Drugs and Cosmetics Act/Rules aim

at regulating import, manufacture, distribution of sale of drugs and Cosmetics and not the services of employees of the Drugs and Food Control

Organization which would be dealt with but a bit later

7. Reference to the Act and Rules aforementioned in my opinion has been made without any relevance simply to involve the Court in an

adjudication to stretch the beneficiary's continuation on a higher post, notwithstanding the fact that the question that arises for consideration is

whether petitioner has any right of continuation on the basis of an order of assignment of charge. Let me make it very clear that I am not inclined to

deliberate whether the aggrieved person is entitled to hold the higher post because that aspect is required to be examined by the competent

authority. Needless to say that for relief of continuation it is the beneficiary-

petitioner who has to establish his eligibility prescribed by rules and his contention that the aggrieved person has no right to man the post cannot create any right whatsoever in former's favour for his continuation. It goes without saying that for grant of writ the beneficiary has to establish a legal right showing further that the respondents have a legal duty to enforce such right. Does he fulfill these two conditions needs to be understood in the light of the rules governing the field. To begin with it will be appropriate to refer to the stand of the State reflected in Para 2 of the objections which reads:

That the petitioner has no right to claim continuation as incharge Deputy Drug Controller Drug and Food Control Organization Kashmir, as he is not eligible to be otherwise promoted against the post, therefore, on this ground writ petition deserve to be dismissed.

8. Whether stand of the State has statutory sanction reference to the rules governing the services of the parties called the Jammu and Kashmir

Drugs and Food Control (Gazetted) Service Recruitment Rules, 1997 (for short Service Rules 1997) becomes imperative and rule 5 may be

noticed:

5. Qualification and method of recruitment: - (1) No person shall be eligible for appointment or promotion to any post in any class category or

grade in the service unless he/she possesses the qualification as laid down in the schedule 'II' and fulfils other requirements of recruitment as

provided in the rules and orders for the time being in force.

9. Perusal of the rule makes it manifestly clear that unless a gazetted officer fulfils the requirements as laid down in Schedule II, he cannot claim

appointment to the post. What is the requirement for the post of Deputy Controller Drugs and Food Organization relevant entry of Schedule II

may be extracted:

I.

II. Deputy Controller, Drugs (i) 75% by promotion from Class III

and Food/Drug Analyst. Category (a) with at least five years experience as such.

(ii) 25% by promotion from Class III

category (c) with at least five years
experience as such and possessing
the qualifications as prescribed in
respect of Assistant Controller,
Drugs and Food.

10. The schedule is unambiguous to the effect that both Class III category (a) i.e. Assistant Controller Drugs/Assistant Drugs Analyst and category

(c) Class III i.e. Assistant Controller PFA require an experience of five years in the respective categories to attain eligibility for promotion to the

post of Deputy Controller Drugs and Food/Drug Analyst. Admittedly, the beneficiary lacks the requisite experience, therefore, ineligible for the

post of Deputy Controller Drugs and Food. Being quite evident that the beneficiary lacks the requisite experience of five years which is a condition

specified by the statute itself upon which power can be exercised, his adjustment on the post of Deputy Controller Drug is violative of the statute,

therefore, discretionary power under Article 226 cannot be exercised to protect such an illegal appointment.

11. As regards objections raised in the reply filed by the beneficiary of the impugned order in opposition to the writ petition based on the strength

of provisions of the Drugs and Cosmetics Act and Rules thereto contending that the aggrieved person lacks qualification need to be appreciated in

the light of the fact that in the writ petition filed by beneficiary continuation is sought on the basis of order assigning the charge to him, conversely,

the aggrieved person seeks quashing of the said order and the rival contentions need to be considered in terms of the prevalent Service Rules,

1997 of which validity is not under challenge, obviously, the argument is beyond the scope of the writ petitions.

12. Another important facet of the matter is that the mode of appointment be it by direct recruitment or by promotion, Service Rules 1997 rule the

field. It is by dint of the said rules that the beneficiary has entered the service of Drugs and Food Control Organization. These rules have to govern

the services of the employees of the organization unless same are amended or quashed by legislation or Court as the case may be. Till then the

provisions of the Drugs and Cosmetics Act and Rules thereto cannot be read into the Service Rules 1997. Thus argument fails.

13. It brings me to the contention that eligibility prescribed by Service Rules 1997 is a requirement for substantive promotion only. To appreciate

the argument apposite it is to reproduce the relevant portion on of the Government instruction (a) to Regulation 85 of the Jammu and Kashmir Civil

Service Regulations:

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...

14. The instruction knows no ambiguity in making reference to the appointment of a Government servant to a higher post in his own pay and grade.

The instruction deprecates such appointments in absence of clearance by the Departmental Promotion Committee. Reference to the formalities

essentially includes scanning the eligibility of a Government servant on the touchstone of the Service Rules. Thus it is obligatory upon the competent

authority to ensure that the person upon whom assignment of the charge of a higher post is contemplated does fulfill the requirement of the post. It

has to be so because assignment has the effect of giving charge of a public office, therefore, the pre-requisite conditions of eligibility laid by the

rules have to be fulfilled. The proposition of law in my opinion is countenanced by clause of equal opportunity enshrined in Article 16 of the

Constitution. Regard being had to the Constitutional mandate adjustment made by pick and choose against any office under the State denying the

right of consideration to the eligible persons even if it is a stop gap arrangement amounts to violation of Article 16 of the Constitution.

15. The argument that eligibility is to be seen in respect of substantive promotions only stands already answered in the negative by the Division

Bench of this Court in J&K State Forest Corporation and Anr. v. Naresh Kumar Gupta and Ors., LPA(SW) 133/96 decided on 02.09.1997 in

the following words:

There is no doubt that even for ad hoc promotions, persons so promoted must have the basic eligibility, because if it is held that for ad hoc

promotions, eligibility is not needed, it can create a chaos and sometimes even an expert like a Doctor can be appointed on ad hoc basis without

having the basic medical degree, therefore, the rule which permits the Corporation to make the ad hoc promotions does not give them a right to promote persons on adhoc basis who lack the basic qualifications of eligibility.

16. Now coming to the challenge thrown to the impugned order on the ground of mala fides, the contention needs to be appreciated in the light of

settled legal position that an inference of mala fides is deducible from the attending circumstances, obviously, omission to consider the aggrieved

person and other eligible persons, non consideration of representation assigning the charge to an ineligible person as averred by the State

categorically (see relevant para of objections reproduced in para 3 of this judgment) are the relevant circumstances which have been allowed by

the State to go unexplained. Not only that, the perusal of the record also establishes that the beneficiary of the impugned order was considered for

assignment of the charge to the exclusion of eligible officers falling in the feeding cadre, thus violating their right of consideration guaranteed to them

by the equality clause of the Constitution and such set of facts leads to the conclusion that the impugned order is bereft of element of public interest

and emanates from mala fides.

17. One more aspect which needs to be weighed against the beneficiary of the impugned order is that he is not fair in his pleadings and unfairness is

evident from the averment made by him in the writ petition supported by an affidavit contending that he was chosen for the assignment of the

charge on comparative merit suggesting that all eligible persons were considered but the official record belies him leading to an inference that a false

affidavit has been sworn in, thus guilty of approaching the Court with unclean hands.

18. In the result SWP No. 343/2004 fails and is dismissed along with CMP, Interim direction is vacated. Law being no more res integra that

administrative orders are required to be made in a manner and in consonance with the rules and the Court is within its power to struck down the

order if the appointment made to public office is violative of constitutional guarantees of the effected persons or same is de hors the rules as is true

of the case on hand, obviously, SWP 382/2004 succeeds and is allowed. The order impugned bearing Government Order No. 123 HME of 2004

dated 12.02.2004 is quashed leaving the Government free to fill up the post on

regular basis strictly in accordance with the rules. However, in case appointment on regular basis is going to take considerable time. In such eventuality, the competent authority shall be free to make the appointment of all eligible person on stop gap arrangement or ad hoc but while making such exercise all those officers who do fulfill the requisite eligibility shall be considered uninfluenced by observations made in this judgment.

19. With a view to rule out probability of failure in my duty to record faithfully all that was urged before me by learned counsel for the parties, I

would like to place on record that Mr. Lone placed reliance on the judgment reported in State of Bihar and others Vs. Sri Akhouri Sachindra Nath

and others, and judgment of learned Single Judge dated 08.04.2000 passed in SWP 2327/2000. The judgments deal with the seniority and

retrospective promotion, whereas controversy to be settled in these writ petitions is as to whether beneficiary of the order possesses requisite

eligibility and whether right to continue does flow to him from the impugned order which aspects are not dealt with by decisions relied upon, thus

not applicable. It was also contended by Mr. Lone that it is the judgment of the Single Bench of this Court which makes the promotion of the

aggrieved person effective from 1994 as also regularization but same was not within the knowledge of beneficiary. How this argument helps the

beneficiary nothing was contended. Otherwise also contention needs to be ignored because this Court is neither sitting in an appeal on the

judgment of the learned Single Judge nor is the order of retrospective promotion under challenge in these writ petitions. On the contrary Mr. Bhat

submitted that M. Pharmacy is a course of two years at a stretch. On this assumption he called the petitioner's claim to have completed it

successfully as a bald assertion and a fraudulent act because the beneficiary has remained away from job for not more than 224 days as

contended. It is also contended that the beneficiary is working against the post of a deputationist, therefore, not a regular appointee because of

absence of a vacant post and does not fall within the consideration zone of the post of Deputy Controller Drugs. It is also submitted that a false

avermment is made by the beneficiary in the writ petition that respondent No. 5 is not willing to serve in the State to make out a case for continuation

Mr. Bhat has also submitted that the order was ante dated to escape the rigor of

the ban imposed by the Election Commission. The submissions so made in my opinion do have no bearing on the issues involved in the writ petitions, I, therefore, choose to refrain from expression of opinion.

Nevertheless, nothing prevents the Government to address to all these issues on administrative side if they deem it appropriate. Record produced

by Mr. Magray is returned to him in the open Court.