

(2019) 12 J&K CK 0028

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2218, 2397 Of 2018

Rameez Raja

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 12-12-2019

Acts Referred:

Constitution Of India, 1950 — Article 226
Code Of Civil Procedure, 1908 — Order 2 Rule 2
National Institutes Of Technology, Science Education And Research Act, 2007 —
Section 26(3), 26(4)

Citation : (2019) 12 J&K CK 0028

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Hilal Noorani, T. M. Shamsi, Jahangir Iqbal Ganai, Humaira Shafi

Final Decision : Disposed Of

Judgement

Sanjeev Kumar, J

1) Vide Advertisement Notice No.NIT/Faculty-Recruitment/2018/02(F) dated 19th January, 2018, National Institute of Technology, Hazratbal Srinagar, respondent No.2 herein, invited applications, inter-alia, for the positions of Assistant Professor (Contract) in various disciplines including the discipline of Mathematics. The following eligibility qualification was prescribed for new entrants:

"All new entrants shall have Ph.D in specializations mentioned and shall have first class in preceding degrees. (The applicable degrees at B. Tech level/M.Sc. level are given in Annexure-3(b)."

2) In Clause 24 of the Advertisement Notification, the term "first division" was clearly defined in the following manner:

"24. For new entrants first division will mean a CGPA of 6.5 on a scale of 10 or 60% aggregate in degree."

3) The petitioner, claiming to be eligible in all respects in terms of the Advertisement Notification and the Statutory Rules governing the selection, submitted his candidature for consideration against the post of Assistant Professor Mathematics. With the grievance that he despite being eligible was not enlisted in the provisional list of eligible candidates issued by respondent No.2 vide notification No.NIT/PD/18/3356 dated 07.09.2018, the petitioner approached this Court by way of SWP No.2218/2018 without throwing specific challenge to clause 24 which was ultimately pressed into service by the respondents to declare the petitioner ineligible. The petitioner sought a direction in the nature of Mandamus to the respondents to allow him to participate in the process of interview. This Court vide its interim order dated 18.09.2018, passed in the aforesaid writ petition, permitted the petitioner to appear in the interview for the post of Assistant Professor (Contract) in the discipline of Mathematics at his own risk and responsibility.

4) The writ petition aforesaid is contested by respondents, primarily, on the ground that the petitioner having obtained 59.72% marks in B.Sc. does not fulfil the eligibility requirement as laid down in the Advertisement Notification.

5) While the aforesaid writ petition is pending adjudication, the petitioner files another writ petition i.e. SWP No.2397/2018, perhaps after becoming wiser from the reply filed by the respondents in opposition to his first writ petition. This time, the petitioner lays specific challenge to Clause 24 of the Advertisement Notification which has been pressed into service by the respondents to declare the petitioner ineligible to participate in the selection process in question.

6) During the pendency of these two petitions filed by the petitioner, the petitioner came to be interviewed by respondent No.2 and on the basis of his performance, he has been placed in the select list at serial No.2 of the open merit category but his selection has been kept subject to outcome of the writ petition filed by him.

7) The subsequent writ petition (SWP No.2397/2018) is also opposed by the respondents on the same grounds as had been taken in opposition to first petition. Additionally, the respondents have taken a specific plea that the challenge made by the petitioner to Clause 24 of the Advertisement Notification in subsequent writ petition is barred by the principle of constructive res judicata enshrined in Order 2 Rule 2 of the Code of Civil Procedure. It is submitted that in the first available opportunity, the petitioner did not throw challenge to Clause 24 when he filed the first writ petition and rather participated in the selection process being well aware of what is contained in Clause 24 of the Advertisement Notification.

8) Per contra, it is contended on behalf of the petitioner that the broad principle of res judicata envisaged in Order 2 Rule 2 of the Code of Civil Procedure does not apply with all its rigour to the proceedings under Article 226 of the Constitution of India. It is submitted that the jurisdiction vested in High Court

under Article 226 of the Constitution of India is an extraordinary equitable jurisdiction and is not fettered by the technicalities. Clause 24 of the Advertisement Notification has been challenged by the petitioner, primarily, on the ground that the same is in violation of the Statutory Rules governing the selection of faculty in NITs.

9) Having heard learned counsel for the parties and perused the record, I am of the view that, primarily, three questions that beg determination in these petitions are:

(1) Whether the petitioner is eligible to be appointed as an Assistant Professor (Contract) in NIT, Srinagar?

(2) Whether Clause 24 of the Advertisement Notification is in violation of the Statute?

(3) Whether the subsequent writ petition filed by the petitioner, in so far as it pertains to laying challenge to Clause 24 of the Advertisement Notification, is hit by the principle of constructive res judicata as envisaged in Order 2 Rule 2 of the Code of Civil Procedure?

10) With a view to address the aforesaid questions, which have arisen for determination in these petitions, it would be necessary to first advert to the Advertisement Notification in question. As noted hereinabove, the eligibility qualification for the post in question, as laid down in the Advertisement Notification, is that all new entrants shall possess Ph.D in specialization concerned and should have also "first class in preceding degrees i.e. at graduation and post-graduation level." The new entrants would mean those who are not already in service of NIT and have applied for the post from the open market. Apart from possessing the qualification of Ph.D in the concerned subject, a candidate is also required to have obtained "first class" at the graduation and post-graduation level. The term "first class" is not defined anywhere, either in the notification or elsewhere. Clause 24, however, defines "first division" to mean CGPA of 6.5 on a scale of 10 or 60% aggregate in a degree.

11) From conjoint reading of Clause 24 with the eligibility prescribed for the post, it becomes abundantly clear that the term "first class" and "first division" have been used to connote one and the same thing and, therefore, no distinction can be made between the two as is sought to be done by the learned Senior Counsel appearing for respondent No.2 and 3.

12) Admittedly, the petitioner is Ph. D in Mathematics and has first division with more than 60% marks in aggregate at the post-graduate level. The petitioner is also a first division holder in B. Sc. but his total percentage is 59.72. It is here the respondents are finding fault with the eligibility of the petitioner. It is claimed by the respondents that the petitioner having not obtained 60% marks in B. Sc. cannot be said to have done graduation in first class/first division for the purposes of selection in question.

13) National Institute of Technology, Srinagar (J&K), is an institute of national importance and is created under National Institute of Technology, Science Education and Research Act, 2007 (hereinafter Act of 2007). The Central Government, acting in exercise of its powers conferred by sub-section

(3) and sub-section (4) of section 26 of the Act of 2007, has framed the Statutes governing the administration and recruitment of faculty of various NITs created under the Act. The First Statutes of the National Institutes of Technology have undergone several amendments from time to time. Relevant for our purpose is the amendment to the First Statutes effected by the Central Government vide S.O. 947(E) dated 21st July, 2017. Schedule 'E' of the Statutes lays down qualification and other terms and conditions of appointment of academic staff. So far as the post of Assistant Professor is concerned, the essential qualification prescribed is Ph. D in the relevant or equivalent discipline. Note 2 appended with the Schedule 'E' makes it further clear that all new entrants for the faculty posts should have Ph.D in the relevant or equivalent discipline and must also possess first class in the preceding degrees. The term "first class" however, has not been defined in the Statutes. So far as Kashmir University is concerned, it has, in its Statutes, clearly provided the manner in which first, second and third divisions are to be assessed. For facility of reference, Clause 29 of the University Statute, which is relevant in the context of controversy, is reproduced hereunder:

"29. In the case of successful candidates, the classification of the divisions shall be assessed on the basis of combined marks secured in the First, Second and Third year examinations as under: -

- i. Those who obtain 60% or more of the aggregate number of marks shall be placed in the first division.
- ii. Those who obtain 50% marks or more but less than 60% shall be placed on the 2nd division.
- iii. Those who obtain below 50% marks shall be placed on 3rd division.

A deficiency of five marks shall be condoned for purposes of placing a candidate in the first and second division."

14) From a plain reading of Clause 29 of the University Statute, a candidate who obtains 60% or more of the aggregate number of marks is entitled to be placed in the first division and a deficiency of five marks is allowed to be condoned for the purposes of placing a candidate in the first and second division. In other words, if a candidate is five marks short of getting 60% marks in the examination, he would be placed in the first division with condonation as aforesaid. It is by this Statute, the petitioner having obtained 59.72% marks was placed in first division by the Kashmir University in B.Sc. At this juncture it would also be relevant to take notice of a communication dated 16th April, 2019, issued by Ministry of Human Resources Development, Department of Higher Education, Government of India, to the Directors of all the National Institutes of Technology

(NITs) and Director, IEST, Shibpur. The communication aforesaid from the Ministry was necessitated due to certain doubts expressed by the administration of various NITs with regard to certain anomalies in the Statutes. One of the issues for clarification flagged by the Ministry was with regard to import and meaning of the term "first class" as used in the Statutes. The Oversight Committee constituted by the Government of India to look into the anomalies, in its comments on the issue of "first class", suggested that "first class" would be as specified by the respective University/Institution and if not specifically mentioned by the University/Institution, then 60% marks or 6.5 CGPA. The Ministry decided to continue with the same while agreeing to the clarification on "first class" degree given by Oversight Committee. For facility of reference, relevant extract of the clarification issued by the Ministry in terms of the communication dated 16th April, 2019, is reproduced hereunder:

S.No.

Clarifications sought by NITs /Faculties of NITs

Comments of the Oversight Committee (OSC)

Decision

5.

Clarification on First Class

As specified by the respective University / Institution. If not specifically mentioned by the University / Institution, then 60% marks or 6.5 CGPA.

New entrants are as defined in MHRD letter No.33-9/2011-TS, III, dated 31st January 2018. Faculty members appointed in regular pay scale through duly prescribed selection processes will be considered as existing faculty in subsequent selection in the respective Institute.

The Ministry vide letter dated 31.01.2018 clarified that "the new entrant means a candidate who is not existing faculty of concerned NIT.

Therefore, existing faculty will not be considered as new entrants."

It has been decided to continue with the same while agreeing to the clarification on first class degree.

15) Although the clarification from the Ministry has come after commencement of the selection process in question, yet the same would be applicable to the instant selection for the reason that the clarification of any provision dates back to the date of existence of that provision. The clarification, as is well understood, does not add or subtract anything from the provision but only asserts the position as it existed ab initio for the purposes of removal of doubts entertained genuinely or otherwise. By that analogy, I am of the considered view that all clarifications are retrospective in operation. Understood the eligibility qualification in this perspective, it is crystal clear that the term "first class" or "first division" would

mean the term as specified by the respective University/Institution and it is only in absence of such specification by the University/Institution, NITs would insist for having 60% marks or 6.5 CGPA to claim "first division" at the graduate and post-graduate level. In the instant case, indisputably, the University of Kashmir, wherefrom the petitioner has obtained the qualification of B.Sc., has provided for condonation of five marks and awarding first division to a candidate at the graduate level in terms of clause 29 of the Statute referred to hereinabove. That being the position, the prescription in Clause 24 of the Advertisement Notification would be applicable only to such cases where the concerned University/Institution does not specifically provide for what first division/first class would mean. Clause 24 of the Advertisement Notification, in my opinion, needs to be read down to mean that it is only where the University or the Institution, from where the candidate has got his degree, does not specifically provide for first division/first class, first class would mean CGPA of 6.5 on a scale of 10 or 60% aggregate in a degree. Reading thus, would bring Clause 24 of the Advertisement Notification in consonance with the Statutes of the NITs as clarified by the Ministry of Human Resources Development, Department of Higher Education, Government of India, in its communication dated 16th April, 2019.

16) Having held thus, I am of the considered view that the petitioner fulfils the eligibility requirement for the post in question and, therefore, being in the select list on the basis of his merit, cannot be denied appointment. This also answers question No.2.

17) Regarding question No.3, it may be pointed out that the jurisdiction vested in this Court in terms of Article 226 of the Constitution of India is an extraordinary and equitable jurisdiction and there could be no fetters put on its exercise, more so when it is required to undo injustice. Ordinarily, when a petition is filed, petitioner is expected to claim all the reliefs available to him on the basis of cause of action pleaded by him and in case he abandons any of the reliefs available to him, he can be estopped from claiming such relief in the subsequent pleadings on the principle of constructive res judicata. It is, precisely, this principle which is envisaged in Order 2 Rule 2 of the Code of Civil Procedure but, as stated above, the jurisdiction Article 226 of the Constitution of India is extraordinary and wide enough to reach injustice wherever it is found and no fetters can be put on its exercise by any provision of the Code of Civil Procedure.

18) In the given facts and circumstances of the case where the petitioner, despite being eligible, has been denied appointment, I am of the view that such technicalities of law cannot be allowed to have their play to thwart the course of justice. It is worth-while to note that the petitioner, who participated in the selection process on the intervention of this Court, has made it to the select list on the basis of his merit. Denying him the appointment after holding him eligible on the technical plea of the respondents based on Order 2 Rule 2 of the Code of Civil Procedure would be a sheer travesty of justice.

19) For the reasons stated above, I find merit in this petition and the same is,

accordingly, allowed. The respondents are directed to issue order of appointment in favour of the petitioner within a period of four weeks from the date certified copy of this order is served upon the respondents. Appointment of the petitioner shall be retrospective with effect from the date the person selected along with him in the open merit has been appointed. The petitioner shall be entitled to all consequential benefits minus monetary benefits.

20) Disposed of as above.