

(2001) 02 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 636 Of 1999

Sardar Saran Singh and others

APPELLANT

Vs

State of J&K and Others

RESPONDENT

Date of Decision : 27-02-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Jammu and Kashmir Health and Medical (SSR) Rules, 1994 — Rule 16

Citation : (2001) KashLJ 296

Hon'ble Judges : R.C.Gandhi, J

Bench : Single Bench

Advocate : M.I.Qadiri, M.Aijaz, Advocates appearing for the Parties

Judgement

1. Petitioners seek issuance of writ of Certiorari to quash Government Order No. 144H and FW of 1999 dated 15.3.1999 and further direction to

regularise their promotions and to give them consequential benefits including salary and seniority.

2. Petitioners while working as Class IV employees were promoted by the Chief Medical Officer, Anantnag, Respondent No. 4 vide different

orders dated 24.1.1998 to the post of paraMedical Assistant, Basic Health Worker, Junior Health Inspector and multipurpose worker. Against

the resultant vacancies cause vacant to the promotions of the petitioners, the respondent no. 4, made appointment of Class IV employees also. The

respondents having found these promotions and appointments made by the respondent no. 4 in violation of the rules and the procedure prescribed

vide impugned Government Order cancelled the appointments.

3. The impugned order has been challenged by the petitioners on the ground that the petitioners have been promoted against promotional posts in

accordance with the procedure and the law. Rules contained in SRO 20 of 1992 cannot be made applicable to the case of the petitioners as the

proposed draft rules made a provision for promotion of the petitioners, class IV employees, to the promotional posts, against which petitioners

have been promoted. The Department Promotion Committee was never convened to assess the suitability of the petitioners as directed by the

court. Before passing the order of cancellation of the promotions of the petitioners, principles of natural justice have not been followed.

4. Respondents have filed objections stating therein that the respondents no. 4 has promoted the Nursing Orderlies/ Class IV employees to the

posts of Basic Health Worker, Health Inspectors, Junior Health Inspectors, Multipurpose workers without competence, jurisdiction and in breach

of the rules. The promotions are made to the next higher post strictly on the basis of seniority which has been maintained by the Department at

Divisional level. The respondent no. 4 was not competent to promote the petitioners unless they are recommended by the Departmental Promotion

Committee after considering their suitability under rules. The petitioners had earlier filed SWP No. 599/1998 which was disposed of on 2881998

directing the respondents to convene DPC for considering the cases of the petitioners and pass appropriate orders on the recommendations of the

DPC. Pursuant to the directions of the court, DPC was convened on 24111998 and after considering cases of the petitioners, they have not been

found eligible to seek consideration being not the source for promotional posts. There is no provision in the rules for promotion, to the post of

Basic Health Worker, Para Medical Assistants and Junior Health Inspector of Class IV Employees. The promotion orders made by the

respondent no. 4 were found in violation of the recruitment rules known as Jammu and Kashmir Health and Medical (Subordinate) Service

Recruitment Rules of 1992 (hereinafter to be called as the Rules) notified under SRO 20 of 1992. The Administrative Department considered the

promotions/ appointments made by respondent no. 4 and having come to the conclusion that the promotions and appointments to Class IV posts

made by the respondent no. 4 being against the statutory rules and abuse of the power, cancelled the promotions of the petitioners vide the

impugned government order. The petitioners have been reverted to their original Class IV posts and are not working against the promotional posts.

The direct recruits against the resultant vacancies which fell vacant due to the promotion of the petitioners have also been ousted. The provisions of SRO 20 of 1992 have not been amended though a proposal has been mooted and is under consideration.

5. Heard learned counsel for the parties, perused the pleadings and other evidence on record.

6. The plea of learned counsel for the petitioner that the respondents have not convened the DPC as directed by the court in SWP No. 569 of

1998 has no substance. The respondents have specifically stated in the objections that the DPC was convened on 24/11/1998. The case of the petitioners were considered by the DPC and have been rejected.

7. The plea of the learned counsel for the petitioner that promotions of the petitioners have been made in accordance with law is also misplaced.

Promotion to the higher posts are required to be made in accordance with the procedure prescribed by rules known as Jammu and Kashmir

Health and Medical (Subordinate) Service Recruitment Rules of 1994. Rule 16 thereof envisages that the promotion to the next higher post shall

be made on the recommendations of the DPC. Respondent No. 4 has made the promotions without the recommendations of the DPC which is in

breach of the statutory rules and this is an abuse of the power. Promotions to the post of Basic Health Worker have been made of the Nursing

Orderlies and other Class IV employees. The source for promotion to the post of Basic Health Worker under the Rules is only Field Workers

And Arabic Teacher. No Arabic teacher or Field Worker has been promoted to the post of Basic Health Worker.

8. ParaMedical Assistant post is available for promotion only to Multipurpose workers with five years experience. This has also not been complied

with posts of multipurpose workers is to be filled up 100% by direct recruitment and is not available to Class IV employees, such as petitioners for

promotion. The post of Junior Health Instructor is to be filled up from amongst the Basic Health workers. This has also not been complied. The

promotions, therefore, of the petitioners are quite in violation of the rules and illegal exercise of power rather an abuse of the power by the

appointing authority. The respondents after considering the promotions of the petitioners have rightly cancelled the promotions as the petitioners

were not eligible to seek promotion to the posts against which they have been promoted and such promotions cannot be allowed to stand being made in violation of the statutory provisions of the rules governing the service. Therefore, the order of respondents cancelling the promotions of the petitioners cannot be faulted.

9. The next plea of the learned counsel for the petitioners is that the provisions of SRO 20 of 1992 are not applicable to the cases of the petitioners and therefore the respondents action in cancelling the promotions is illegal. This argument has been advanced on the basis that the respondents have proposed amendment to the rules for making provisions of promotion to the Class IV employees against these posts. Respondents have also admitted that the proposal has been mooted which is under consideration. The proposed amendment to the rules is no substitute to the existing statutory rules unless the statutory rules are amended the proposed amendment has no significance and cannot be made applicable as a substitute to the rules. This plea of learned counsel is misconceived, therefore rejected.

10. Lastly learned counsel has submitted that the principles of natural justice have not been followed by the respondents as the petitioners have acquired a right to hold the promotional posts and should not have been condemned unheard. The promotion order could not have been cancelled without providing opportunity of being heard.

11. It has been observed in the preceding paragraph that the promotions of the petitioners being illegal, are unsustainable. Illegal order of promotion does not create any enforceable right in the petitioners. The principles of natural justice are not required to be observed as a formality.

Even if an opportunity could have been granted to the petitioners, they were not in a position to improve their case to make out that their

promotions are in accordance with law and justified. Where the petitioner cannot improve the case even despite an opportunity of being heard is

granted to him, the principles of natural justice need not be observed as a measure of formality. The Apex Court while dealing with such a

proposition has held in Rita Mishra vs. Director, Primary Education, Bihar and Others, AIR 1988 Pat. 26, the Full Bench of the High Court has

held that :

Undoubtedly, the burden must lie on the petitioners and it is they who have to

establish their claim on the basis of a valid appointment and not for the respondent state to prove the negative. The claim of a full dress industry after associating the petitioners in a writ of mandamus is plainly ill founded and does not lie in the mouth of the petitioners. On principle and even on the basis of precedent on which reliance was placed by the petitioners too, it is wholly settled that where the very original appointment to the service is invalid or forged or fraudulent to then in the eye of law there is no appointment at all and declaration by the State that the alleged appointment is non est does not attract any principle of natural justice. It is unnecessary to elaborate this on principles because it is covered by the observation of the Full Bench in the aforementioned case of Bijoy Kumar Bharti (1983 Lab 1C 1984). Therein S. Sarwar Ali, Acting C.J. observed :

... No one has right to be appointed irregularly. His position is that of a person who has no right to the post. There is no stigma attached in the removal do not think, therefore, that in such a situation there anything unfair in taking the decision without hearing the person likely to be affected".

In his concurring judgment, N.P. Singh J. observed :

... It cannot be disputed that whenever the service of a person appointed on temporary basis is terminated saying that the appointment in question had been made in an irregular or illegal manner, it does not amount to any stigma or penalty. In my view such orders cannot be held to be invalid because before passing such orders opportunity to show cause was not given to the person concerned". Even at the cost of repetition, particular reference is called for afresh to the case of Diwakar Prasad Yadav vs. State of Bihar, (1986 Pat LJR 873) (supra) wherein B.P. Sinha, J. speaking for the Division Bench held as follows :

To sum up I find and hold that the petitioners of these writ applications have not been validly appointed. They cannot challenge the impugned orders on the ground of alleged violation of principles of natural justice. I also hold that they are not entitled to any direction for payment of arrears of their salary for the period they claim to have worked".

It would be manifest from the authoritative findings of the Full Bench and the Division Bench that even in case of termination of services, the rules of natural justice are not attracted where the original appointment itself is void abinitio. Now once that is so, no question of any rules of natural

justice arises merely in the case of refusal of salary in an identical context"".

12. Petitioners have been promoted in an arbitrary manner, in violation of the rules. Their appointments are illegal, therefore, they were not entitled

to be heard before cancellation of the promotion orders as observed by the Constitutional Bench of the Apex Court in *Managing Director ECIL*

vs. B. Karunakar, AIR 1994 SC 10/4, holding that:

The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to

vindicate his just right. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether infect, prejudice

has been caused to the employees or not on account of denial to him of the report has to be considered on the facts and circumstances of each

case...

13. No other point has been urged.

14. For the foregoing reasons, petitioners are not found entitled to the relief prayed for. Writ petition is accordingly dismissed.