

(2014) 12 J&K CK 0019

In the Jammu And Kashmir High Court

Case No : LPASW No. 31 Of 2006 and CMA No. 34 Of 2006

Shafi and Others

APPELLANT

Vs

State of JandK and Others

RESPONDENT

Date of Decision : 04-12-2014

Acts Referred:

Citation : (2015) 1 JKJ 232

Hon'ble Judges : M.M. Kumar, CJ;Tashi Rabstan, J

Bench : Division Bench

Advocate : B.B. Kotwal, Advocate, for the Appellant; Ravinder Sharma, A.A.G., Surinder Kour, Senior Advocate and Rajiv Gorka, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Kumar, C.J.â?"This letters patent appeal under Clause XII of the Letters Patent is directed against judgment and order dated 08.02.2006

rendered by the learned Writ Court, holding that the appointments of the petitioner-respondent Nos. 5 to 8 were against the fundamental principles

laid down in Articles 14 and 16(1) of the Constitution of India and Rule 5 of the Jammu & Kashmir Civil Services (Classification, Control and

Appeal) Rules, 1956 (for brevity, J&K Civil Services Rules). The aforesaid conclusion has been reached on the basis of facts that for filling up the

posts of Junior Assistants by way of direct recruitment, no requisition was sent to Subordinate Services Selection Board nor any advertisement

inviting applications from eligible candidates was issued by the Government or the Board. It has thus, been held that the procedure for selection

and appointment aimed at appointing the best available human resource has been scarified in preference to the recommendations made by various

influential persons. The view of the learned Writ Court is discernible from the following paras of the judgment, which are set out below in extenso:-

Articles 14 & 16 of the Constitution guarantee equality of opportunity to all in matters of public employment and appointments. Fundamental rule

for making appointments emerging therefrom is that whenever a public post is to be filled up, it shall be filled up by making selection amongst all the

eligible persons who are desirous of seeking appointments and competing for the same. Equal opportunity to all such persons, who desire to

compete for the post, can only be provided by issuing an advertisement for inviting applications. The law recognizes the some exceptions to the

aforesaid rule by permitting appointments on compassionate grounds or temporary appointments made in an emergency situation. Therefore, to

meet these constitutional requirements, the State makes the provision for issuing advertisement and inviting applications from eligible candidates for

making the appointments on a public post in the Recruitment Rules. As already stated, in the Recruitment Rules governing the posts on which

private respondents have been appointed, the mode and manner of selection is that the selection is made by the Service Selection Board after

advertising the vacancies of the posts for inviting applications. The procedure prescribed by the rules has not been followed in the case in hand.

The appointments, however, have been made in relaxation of the Recruitment Rules. Can the Recruitment rules be relaxed validly by the

Government, the contention of Mr. Kotwal, learned counsel for private respondents, is that in terms of Rule 5 of J&K Civil Services

(Classification, Control & Appeal) Rules, 1956, the Government is vested with the power to relax the rules. Rule 5-reads as follows:

Any of these rules made under them, may for reasons to be recorded in writing, be relaxed by the Government in individual cases if Government is

satisfied that a strict application of the rule would cause hardship to the individual concerned or confer undue benefit on him.

The Writ Court also rejected the submissions made by the learned counsel for the private respondents that their appointment was temporary in

nature and the same could be made by the Government in accordance with the rule 14 of J&K Civil Services Rules by holding that the rule

empowered the Government to make temporary appointments in public interest in an emergency for a period of three months on each occasion but

not more than nine months in toto with prior permission of the Chief Minister. The temporary appointment cannot in any manner be treated as appointment under the Civil Services Rules. It was further held that the initial appointment of the private respondents was void and it could not be regularized despite the stipulation made in this behalf in the appointment order(s) because it was only an irregular action, which could be regularized and not an action which flagrantly violates the rules. The learned Writ Court placed reliance on the views expressed by Hon'ble the Supreme Court in the case of Ashwani Kumar and Others Vs. State of Bihar and Others, . The appointments of the private respondents were regarded as backdoor entries, which have been made without following the recruitment rules. The other argument was also rejected, which was to the effect that the petitioner-respondents had no locus standi to challenge the appointments of the appellants as they did not apply for the said post. The Writ Court held that the question of filing application for the posts would have arisen in case the posts were advertised. The stand of the State also did not find favour with the Writ Court when it asserted that the situation prevailing in that area of Gool did not attract the outsiders to come and work on the vacancies which had arisen. According to the Writ Court, such an assumption can be raised by the respondent-State after the posts were advertised. On the basis of the view taken by the Writ Court, the Government order No. 1263-Edu of 2002 dated 16.10.2002 was quashed. The appellants were ousted from the posts to which they were appointed by virtue of the order impugned in the writ petition. The consequential vacancies caused by the appellants were to be filled up by following the recruitment rules.

2. Mr. Kotwal, learned counsel for the appellants has advanced two arguments before us. Firstly, it has been submitted that due to militancy functioning of the educational institutions in Tehsil Mahore, Gool Gulab Garh was adversely affected and therefore no one from outside was willing to join duties in that area. According to the learned counsel, the State Government with an intention to revive the educational institutions, where all the schools were burnt asked for voluntary service in the prevailing circumstances. The matter was examined at length by the State Government and an opinion was formed to appoint such candidates, who could face the militancy threat provided they possess qualification. Hon'ble the Chief

Minister has approved the appointments of the appellants under the rules vide order dated 28.04.2000. Mr. Kotwal has also submitted that under

Rule 14 of the J&K Civil Services Rules such a course is permissible. He has also placed reliance on a judgment of this Court rendered in the case

of Abdul Khaliq Malik Vs. State and Others, and a judgment of Hon'ble the Supreme Court rendered in the case of Jacob M. Puthuparambil and

others Vs. Kerala Water Authority and others, .

3. Mrs. Surinder Kour, learned senior counsel supporting the judgment of the learned Writ Court and the cause of the petitioner-respondents has

vehemently argued that it is a well settled proposition of law that no person can be appointed even on temporary basis without inviting applications

from all eligible candidates. In that regard reliance has been placed by the learned counsel on a recent judgment of Hon'ble the Supreme Court

rendered in the case of State of Bihar Vs. Chandreshwar Pathak, .

4. Having heard the learned counsel and perusing the record with their able assistance, we are of the considered view that the appointments of the

appellants have been made in flagrant violation of the provisions of Articles 14 and 16(1) of the Constitution of India. Law has accorded utmost

importance to issuing advertisement notice. It can be gauged from the fact that the law has not even tolerated to confine the candidates to be drawn

from employment exchanges for appointment to a post under the State. The view of the Supreme Court in the case of Union of India (UOI) and

Others Vs. N. Hargopal and Others, has been overruled in the case of Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N.

Visweshwara Rao and Others, , by holding that it is common knowledge that many a time a candidate is unable to have his name sponsored

through the employment exchange and if choice to select is restricted to only those, who are registered and sponsored by employment exchange

then many deserving candidates would be deprived of their right to be considered for appointment to the post(s) under the State. Accordingly, it

has been held that the requirement of fair play and equality would be served if in addition to the employment exchange applications are also invited

by issuing advertisement in the newspaper having wider circulation and also displaying on the notice board of the concerned department. If the

aforsaid procedure is followed then the requirement of fair play would be sub-

served. The aforesaid view has again been reiterated in the case of Raj Kumar and Others Vs. Shakti Raj and Others, and the recent judgment rendered in the case of Chandreshwar Pathak (supra).

5. In the present case it is a conceded fact that not only the appointments have been made in a clandestine manner but there appears to be political

flavour. The State in its reply has taken the stand that MLA from Gool Constituency Sh. Abdul Wahid Shah had drawn attention of the Education

Minister about vacant posts in the schools in his Constituency. He had raised the matter in the Assembly which led to the reference of the case to

the Director School Education for examination and report. In turn, the Director communicated that a number of posts of Junior/Senior Assistants

and Lab Assistants were lying vacant in the schools of Gool/Arnas. On account of vacancies the work in these institutions had considerably

impaired. It was also reported by the Director that on account of inherent difficulties in the area of Gool/Arnas Constituency on account of peculiar

topographical and geographical conditions, the outsiders generally avoided posting to those areas and adverse security scenario had been

prevailing there. It was, therefore, felt that providing supportive staff on the analogy of Rehbar-e-Taleem could be of definite help. Accordingly,

applications of the local candidates were scrutinized to fill up the vacancies on the analogy of Rehbar-e-Taleem scheme. Therefore, it is evident

that the principles laid down in the recruitment rules were ignored without effecting any amendment by applying principles of Rehbar-e-Taleem

Scheme for filling up the vacancies of Junior Assistant. Such a course was not available to the respondents and it smacks of extraneous

consideration. For the reasons aforementioned, this appeal fails and same is dismissed. Ordinarily we would have saddled the appellants with

heavy costs on account of violation of the constitutional provisions but we refrain from doing so keeping in view the fact that the appellants are low

paid employees and have also lost the job.