
(2009) 04 J&K CK 0035
In the Jammu And Kashmir High Court

Shyam Singh (Dr.)

APPELLANT

Vs

J. and K. Public Service Commission

RESPONDENT

Date of Decision : 27-04-2009

Acts Referred:

Jammu and Kashmir State Medical Council Act, 1998 — Section 15

Citation : (2009) 2 JKJ 514

Hon'ble Judges : Muzaffar Hassain Attar, J

Bench : Single Bench

Judgement

Muzaffar Hassain Attar, J.—Mr. R.A. Jan, Learned Counsel for impleaded party (respondent No. 4) has raised objection about the

maintainability of this petition and seeks its disposal by holding it to be premature. Learned Counsel for parties were heard on the issue of

maintainability of this writ petition which is being answered in this order.

2. For the purpose of disposal of issue of maintainability of this petition some facts pleaded by the parties require to be noticed. Petitioner filed a writ petition before this Court in which he has sought following reliefs.

1. That by issuance of a writ of certiorari the criteria applied by the respondent No. 1, for the process of selection for filling up the post of lecturer

Cardiothoracic Surgery may be quashed.

2. Any by issuance of a writ of mandamus the respondents be directed. to follow the criteria for filling up the said post in strict compliance to

Medical Council of India Act and J & K State Medical Council Act and in consequence to same allow only such candidates to compete the

process of selection who have M.Ch Degree which is recognized by the Medical Council of India and have M. Ch degree registered in State

Medical Register under J & K State Medical Council Act. The respondents be restrained from allowing the respondent No. 3 and other similarly

situated candidates to compete the process of selection because of their ineligibility.

3. A writ of Mandamus be also issued whereby the respondents 1 and 2 be directed to take a decision on the said issue in light of legal position

above explained.

Case set up in the writ petition is that a post of lecturer in Cardiothoracic Surgery was referred by the Government to Public Service Commission

for making the selection to the said post. Public Service Commission, accordingly, issued notification No. 02-PSC of 2007 dated 06th of March,

2007 in which above referred post was also advertised. The required qualification as also experience was mentioned in the advertisement

notification. Earlier the said post was advertised by Public Service Commission vide notification No. 3-PSC of 2006 dated 20th of February,

2006 under RBA category. The petitioner approached this Court seeking reliefs reproduced herein above. This writ petition was taken up for

consideration on 26th of April, 2007 notice was issued to Mr. Azha-ul-Amin, AAG standing Counsel for Public Service Commission. It was

directed that subject to objections of other side, the selection process may continue, however, till next date the list of selected candidates may not

be formally issued.

3. During the pendency of writ petition one Dr. Ishtiyag Ahmad Mir filed an application seeking impleadment as party respondent. Application was

allowed by this Court vide order dated 18th of October, 2008 doctor was impleaded as respondent and figures at serial No. 4 in the array of

respondents. The writ petition was admitted to hearing on 18th of October, 2008. Mr. Azhar-ul-Amin, AAG made a statement that objections

already filed be treated as counter. Mr. A.M. Magray, AAG appearing for State respondents made a statement that objections filed by respondent

No. 1 be treated as counter on his behalf as well. This Court in terms of said order directed for listing of this case for final disposal in the admission

column. In the meanwhile, objections were also filed by Mr. R.A. Jan on behalf of respondent No. 4.

4. The matter was heard in part on 22nd of December, 2008. On that date Mr.

Azhar-ul-Amin, Learned standing Counsel for Public Service

Commission submitted at Bar that he has information that a decision has been taken by the Public Service Commission about the eligibility of

candidates seeking consideration for being selected to the post of lecturer in Cardiothoracic and Vascular Surgery. Learned Counsel was directed

to make available information about the decision of Public Service Commission to the Court. On 29th of December, 2008, when this matter came

up before this Court Mr. Azhar-ul-Amin, Learned Counsel appearing on behalf of Public Service Commission stated at Bar that he has received

information from Public Service Commission about issue of eligibility and decision taken thereon through Fax. Learned Counsel was directed to

place on record the said information by filing an affidavit.

5. The matter came up for consideration of the Court on 09 of February, 2009 and Mr. R.A. Jan, Learned Counsel for respondent No. 4 raised

preliminary objections about the maintainability of writ petition. The matter was heard in part about the issue raised by Mr. R.A. Jan.

Supplementary affidavit was filed by Secretary, Public Service Commission on 16th of January, 2009 in which besides given other information, it

was stated at paragraphs 4 and 5 as under:

That the eligibility of other two candidates was challenged by the petitioner Sham Singh, therefore, matter was re-examined by the Commission

and it was found that Dr. Arvind Kohli has acquired M. Ch Degree from JIMPER Pondichery University and the other candidate namely Dr.

Ishtiyah Ahmad has acquired his M. Ch from SKIMS and both the degree are not recognized by the Medical Council of India. That confronted

with the situation legal opinion was sought in the light of judgment delivered by the Hon'ble High Court in the case titled Khalid Mohi-ud-din v.

SKIMS. On the basis of the legal opinion and the judgment of the Hon'ble High Court of J & K the following decision was taken by the

Commission:

The opinion of the Standing Counsel Mr. Azhar-ul-Amin Advocate, in the context of the judgment of Hon'ble High Court titled Dr. Khalid Mohi-

ud-din v. SKIMS and Sheri Kashmir Institute of Medical Science (Grant of Degrees), Act 1983 was discussed. It was felt that in view of the legal

position which occupied the field, the Commission held that the degrees including

CVTS awarded by SKIMS will continue to be honored for

selection/appointment within the State. However, the degrees, awarded by any other Institute, including JIPMER Pondichery University shall be

recognized only if approved by the MCI cannot be admitted for selection/appointment within the State.

6. Respondent No. 1 (Public Service Commission) by taking a decision, thus declared respondent No. 3 to be ineligible and respondent No. 4

was held to be eligible in view of the opinion given by standing Counsel.

7. When this matter came before this Court on 04th of March, 2009, Mr. Azhar-ul-Amin, was directed to make available copy of the order

related to the decision of Public Service Commission declaring respondent No. 3 as ineligible and respondent No. 4 as eligible. On 12th of March,

2009, the copy of the order was made available by Mr. Azhar-ul-Amin and at the request of Learned Counsel for parties' case was adjourned.

8. Petitioner filed CMP No. 917/2009 wherein he prayed that he be allowed to amend the writ petition and to challenge the decision of Public

Service Commission declaring respondent No. 4 to be eligible. This CMP came up for consideration of the Court on 2nd of April, 2009. Notice

was issued, which was accepted by M/s Azhar-ul-Amin and R.A. Jan. Learned Counsel submitted that they have no objection in allowing the

application and taking amended writ petition on record. Application was, accordingly, allowed and amended writ petition was ordered to be taken

on record. Learned Counsel for respondents were given opportunity to file reply/counter.

9. The case was listed before the Court on 20th of April, 2009. Learned Counsel appearing for respondents submitted that objections filed in

opposition to unamended writ petition, be treated as counter affidavit in the amended writ petition. Orders were, accordingly, passed. Reliefs

sought for in the amended writ petition are reproduced as under:

a. While holding that a candidate seeking appointment in medical teaching line should necessarily have the requisite qualification in the

specialty/super specialty concerned which qualification is duly recognized by the Medical Council of India under MCI Act of 1956 read with

Regulation 1998, respondents 3 and 4 being not qualified hence not eligible could not have been considered by the respondent No. 1 for the post

of lecturer in CVTS for Medical College Jammu in terms of notification No. 2-PSC dated 6.03.2007.

b. That while the candidature of the respondent No. 3 has been rightly rejected by respondent No. 1 the candidature of the respondent No. 4 also

had to be rejected accordingly which has been wrongly entertained by declaring him eligible while ignoring the judgment of the Learned single

Judge date 12.06.2003 given in case of Dr. Rohul Jabeen SLJ 2003 Vol. 2 Page 341 and the Hon'ble Supreme Court in this behalf hence the

impugned decision in this behalf dated 18.02.2008 is illegal and unsustainable which deserves to be set aside accordingly by issuing writ of

certiorari.

c. That the respondents 3 and 4 besides having not requisite degrees recognized were not eligible to be considered in view of Section 15 of the J

& K State Medical Council Act of 1998 also because their qualification were not registered as required under the State Act and by accepting their

applications the respondent No. 1 has committed gross illegality in this behalf hence both the respondents 3 and 4 on this account also be declared

as ineligible.

d. That in view of above mentioned facts and circumstances petitioner being the sole eligible and qualified candidate having requisite M. Ch

qualification duly from recognized institute as well as all the qualifications duly entered in the State Medical Register as warranted under the J & K

Medical Council Act of 1998, by issuance of writ of Mandamus respondent No. 1 be directed to recommend the name of the petitioner to the

respondent No. 2 for appointment against the post of lecturer in Medical College Jammu in Cardiothoracic Surgery which post was advertised

vide notification No. 2-PSC of 2007 dated 6.03.2007 by the respondent No. 1.

10. Learned Counsels made a joint request for hearing the arguments on the maintainability of the writ petition.

11. Mr. R.A. Jan, Learned Counsel for respondent No. 4 submitted that the selection process having not culminated in issuance of appointment

order, petitioner is precluded from challenging the eligibility of respondent No. 4. Learned Counsel while further projecting his case submitted that

Public Service Commission has only to make recommendation and it is for the appointing authority to accept or reject the recommendations so

made. Learned Counsel in this backdrop stated that writ petition is premature. Learned Counsel placed reliance on case titled A. Chinnappa Vs.

V. Venkatamuni and others, , case titled Mrs. Kunda S. Kadam Vs. Dr. K.K. Soman and Others, and case titled Raj Kumar and Others Vs.

Shakti Raj and Others, .

12. Responding to the preliminary objection raised by Mr. R.A. Jan about the maintainability of the writ petition, Learned Counsel for petitioner

Mr. B.A. Bashir, submitted that writ petition is maintainable. He submitted that in case he would not have filed the writ petition in the present form,

he would be precluded from challenging the appointment orders, if same were issued in favour of respondent No. 4, on the ground that he has

acquiesced in the selection process. Learned Counsel has relied upon judgment reported in (1995) 3 SCC 522 and Dhananjay Malik and Others

Vs. State of Uttaranchal and Others, to substantiate his arguments.

13. Heard Learned Counsel for parties. Considered the matter.

The preliminary objection raised by Mr. R.A. Jan, Learned Counsel for respondent No. 4 at the first blush appears to be affecting the continuation

of the writ petition, but on close scrutiny of the matter the objections raised has to fail for the following reasons:

a. In the unamended writ petition, petitioner prayed for issuance of writ of Certiorari for quashing the criterion applied by respondent No. 1 for

process of selection for filling up of the post of lecturer and had further prayed for issuance of writ of Mandamus to direct respondents to follow

the criteria for filling up of the post in strict compliance to Medical Council of India Act and J & K State Medical Council Act. Further direction

was sought to restrain the official respondents from allowing the respondent No. 3 and others similar situated candidates to compete in the process

of selection because of their ineligibility. It was further prayed that respondents 1 and 2 be directed to take a decision on the said issue in the light

of legal position. Respondents 1 and 2 are duty bound to carry out their affairs in accordance with law. Seeking a direction against the said

respondents to ask them to adhere to the mandate of law and take a decision about the issue of eligibility raised in the fact situation of this case

cannot be held to be a premature exercise not countenanced by law. It could not be further said that writ petition for seeking such reliefs was

premature. It is in view of reliefs sought for in the said writ petition that decision has been taken by the respondent No. 1 declaring respondent No.

3 to be ineligible and respondent no4 to be eligible. The unamended writ petition thus could not be held to be premature. In the amended writ

petition besides seeking other reliefs, petitioner has challenged the decision of the respondent No. 1 declaring respondent No. 4 to be eligible. This

decision of respondent No. 1 affects the legal and constitutional rights of the petitioner. The decision of respondent No. 1 which is challenged in the

amended writ petition has the effect of consideration being accorded for being selected and appointed to the post of lecturer to an ineligible

candidate as per petitioner. The right of consideration as guaranteed under Article 14 and 16 of Constitution of India is constitutional right which is

available to only eligible candidates who seek consideration for being selected and appointed to a particular post. An ineligible candidate cannot be

said to have any right in law to seek consideration for being selected and appointed to a post. The decision having taken by respondent No. 1, if

unchallenged, would certainly affect the legal and constitutional rights of the petitioner and might even preclude him from challenging the same when

the appointment to the post would be made.

b. The judgment in the case of Mrs. S. Kadam and Ors. on which strong reliance has been placed by Mr. R.A. Jan is not applicable to the facts of

this case. In that case as it appears from paragraphs 2 and 3 of the judgment no decision was taken by the selecting authority declaring the

candidate to be eligible. The issue was joined by respondents 1 and 2 about the statutory qualification of the selected candidate. Hon'ble Supreme

Court ruled that the recommendation of the selection committee has to be considered by the Municipal Corporation and it was open to the

Municipal Corporation to accept or not to accept the recommendation. Thereafter, it was still open to the Government to confirm or not to confirm

the appointment made by the Corporation. In the present case, a decision is taken by respondent No. 1 about the eligibility of the respondent No.

4 declaring him to be eligible, this was not fact situation in the above referred case. The said judgment is distinguishable on yet another ground viz.,

it appears that issue about clubbing an ineligible candidate with eligible candidate was not raised in the case. It sounds unreasonable to make an

eligible candidate who has constitutional right to seek consideration for selection/ appointment for a post available to him under Article 14 and 16 of

Constitution to compete with an ineligible candidate. Even on this ground writ petition is held maintainable. The judgment in the case of Dr.

Sarana's proceeds on the premise that an aggrieved person has other remedies by way of representation and by filing application for reference,

available to him. The facts of this case are different from the above said case as such the law laid down therein cannot be applied to the facts of this

case. The other judgment in the case of Mr. Raj Kumar referred to by Mr. R.A. Jan was cited only to explain to Learned Counsel for petitioner

the petitioner will not be precluded from challenging the final decision of the appointing authority despite having participated in the selection process

as he raised objections at all stages about the eligibility of other competing candidates. This judgment does not help the Learned Counsel for

respondent No. 4.

c. The process of selection once initiated takes lot of time and in some (Cases even years together to fructify in issuance of appointment orders.

The writ petition filed lake sometime in deciding the matters and resultantly the selection made, though in some cases even appointment of ineligible

candidates remain intact for years together, which has the potential of causing miscarriage of justice in some of the cases.

14. This petition, for the above stated reasons, is held to be maintainable. Registry is directed to list this petition in the next regular cause list in

terms of order dated 18th of October, 2008. Matter may not be treated as part heard.