

(2019) 07 J&K CK 0024

In the Jammu And Kashmir High Court

Case No : Letters Patent Appeals (LPASW) No. 38 Of 2019, Letter Patent Appeal No. 66 Of 2019, CM No. 01, 2433 Of 2019

SKIMS And Another

APPELLANT

Vs

Tufail Muzaffar

RESPONDENT

Date of Decision : 19-07-2019

Acts Referred:

Citation : (2019) 07 J&K CK 0024

Hon'ble Judges : Gita Mittal CJ; Rashid Ali Dar, J

Bench : Division Bench

Advocate : Shah Aamir, Altaf Haqani

Final Decision : Dismissed

Judgement

â??30., "Physical Medicine &

Rehabilitation", "Professor

Assistant

Professor", "M.D(P.M.R)/M.D.

(Medicine) with Diploma

in PMR/M.S.)Gen.

Surgery)/M.S.

(Orthopedics) with two

years special training in the

Specialty of Physical

Medicine and

Rehabilitation

(Rehabilitation Medicine)

or two years of equivalent

training approved in the

subject in any approved

institution in India.â??

13. Aggrieved by this rejection, the respondent, alone with some other candidates similarly rejected, filed the writ petition being SWP No. 746/2017",,,

challenging the rejection order. By way of this writ petition, the respondent â?"writ petitioner sought the following prayers:",,,

â??a) Writ of Certiorari for quashing the rejection orders issued by the respondent no. 2 vide No. SIMS: 302 07 (XXXVI)/2015 dated February 2017",,,

(Annexure P/4) against the petitioners.,,,

b) Writ of Certiorari for Quashing the administrative order, direction or Instruction for rejecting the candidature of the petitioners for the posts of",,,

Assistant Professors.,,,

c) Writ of Mandamus commanding the Selection Committee for the post of Assistant Professor, Sher-i-Kashmir Institute of Medical Science Soura",,,

Srinagar to summon petitioners application and allow the petitioners to participate in the selection process for the post of Assistant Professors in their,,,

respective disciplines.,,,

d) Writ in nature of Mandamus commanding the respondents to consider the petitioners for the post of Assistant Professors in their respective,,,

disciplines and their after appoint petitioner if they make their grade in the selection process.â??.,,,

14. The appellants entered appearance in the matter, in response to the show cause notice issued by the Court and filed objections. In para 9 of the",,,

objections, so far as the requirement of publications for the post of Assistant Professor is concerned, the appellants have clearly stated that the",,,

â??designated Screening Committee waived of the condition with regard to the publications as 1st or 2nd authorâ??.,,,

15. The respondent/writ petitioner has drawn our attention to the fact that so far as the filling up the post of Assistant Professor was concerned, the",,,

prescribed qualification in accordance with â??Medical Council of India Minimum Qualification For Teachers in Medical Institutions Regulations," ,,,

1988â? (amended upto 2015) also do not provide that the candidate for the post should have publications in an indexed journal as 1st or 2nd author.,,,

These Regulations were further amended up to 13th July, 2016. The Advertisement No. 7 of 2016 was published thereafter on 5th September, 2016. It",,,

has been contended by the respondent that these Regulations so far as the post of Assistant Professor is concerned, still did not require scientific",,,

publications. Such requirement was, on the other hand, specifically mentioned so far as the essential qualifications for appointment to the post of",,,

Professors is concerned. Copy of these Regulations have been placed on record along with the writ petition.,,,

16. It is further explained in the reply/objections while referring to the advertisements from 2015, that there was poor response to the earlier",,,

advertisement notifications. For this reason, the same was abandoned and fresh advertisement issued, each time notifying the candidates who had",,,

applied in response to the earlier advertisement notices that they did not need to apply afresh.,,,

17. We find that the appellants have also not disputed that the respondent was the only candidate for the post of Assistant Professor, Physical",,,

Medicine & Rehabilitation and that the appellants had not been able to find any qualified candidate and not been able to effect the selection for this,,,

post for the period right from the issuance of first advertisement on 5th July, 2015.",,,

18. On 24th of December, 2018, the writ petition was pressed only on behalf of the private respondent. The learned Single Judge considered the",,,

admission on the part of the appellants that the requirement of publications stood waived by the selection committee, and this being the only ground for",,,

rejection of the respondentâ??s candidature. In view thereof, in the impugned order dated 24th December, 2018, the learned Single Judge held that a",,,

prima facie case for grant of interim relief stood made out.,,,

The direction was consequently issued calling upon the appellants to process the case of the respondent for appointment and appoint him against the,,,

post applied. It was directed that this appointment would be subject to the outcome of the main petition.,,,

19. This appeal before us is pressed by Shah Aamir, learned AAG, who has submitted that the rejection of the respondentâ??s candidature by the",,,

appellants was not only for the reason that he did not have the requisite number of publications but the appellants had given other reasons for his,,,
ineligibility.,,,

20. Our attention is drawn by Mr. Aamir to the objection taken by the appellants in their reply to the effect that "petitioners were not found eligible,,,

for the post on account of lacking certain eligibility criteria by the Screening Committee constituted by the Government for screening of applications,,,

received for the faculty posts advertised while screening their application forms.",,,

We have closely scrutinized the rejection letter of February, 2017 and the reply affidavit/objections filed by the appellants before the learned Single",,,

Judge. We find that apart from the above bald assertion, the appellants have not pointed out a single objection to the eligibility of the respondent for",,,

appointment to the post in question.,,,

21. Mr. Shah Aamir, learned Additional Advocate General has drawn our attention to the grounds taken by the appellants in the present appeal. We",,,

see that after dealing with the matter of publications, the appellants have contended that "upon further assessment of eligibility of the respondent",,,

he was found possessing only two years, ten months and twenty five days (2 years-10 months & 25 days) post DNB experience as against the",,,

requisite three years teaching experience and being short of one month and five days teaching experience, he was declared ineligible."",,,

22. It is trite that an order assailed in a court, has to be tested on the reasons and grounds laid therein. So far as the order of rejection dated February,",,

2017 is concerned, the rejection of the respondent's candidature therein is categorical. It has been clearly stated therein that the respondent was",,,

not found eligible for the post only on account of his lacking the requisite number of publications (in indexed journal as 1st or 2nd author). No other,,,

reason or ground is mentioned.,,,

23. On this important aspect, we may advert to the celebrated pronouncement of the Supreme Court reported a 1978 (1) SCC 405, Mohinder Singh",,,

Gill and Another v. The Chief Election Commissioner, New Delhi and others wherein the well settled principle was reiterated in para 8 of the",,,

judgment which reads as follows:,,,

"8. The second equally relevant matter is that when a statutory functionary

makes an order based on certain grounds, its validity must be judged by",,,
the reasons so mentioned and cannot be supplemented by fresh reasons in the
shape of affidavit or otherwise. Otherwise, an order bad in the",,,
beginning may, by the time it comes to court on account of a challenge, get
validated by additional grounds later brought out. We may here draw",,,
attention to the observations of Bose J. in Gordhandas Bhanji:,,,
Public orders, publicly made, in exercise of a statutory authority cannot be
construed in the light of explanations subsequently given by the officer",,,
making the order of what he meant, or of what was in his mind, or what he
intended to, do. Public orders made by public authorities are meant to have",,,
public effect and are intended to effect the actings and conduct of those to whom
they are addressed and must be construed objectively with,,,
reference to the language used in the order itself,,,
Orders are not like old wine becoming better as they grow older.â??,,,
(Emphasis by us),,,

24. The appellants therefore have to be confined to the reasons mentioned in the
rejection letter of the respondent and cannot be permitted to,,,
supplement the same, either by way of their reply/objections to the writ petition
or by way of the grounds of appeal placed before us.",,,

25. Even if the respondent could be permitted to support the rejection by
additional reasons stated in the reply, we find that apart from the vague",,,
averment that the respondent lacked certain eligibility criteria, nothing else is
stated. It is in the first appeal before us that for the first time, the",,,
appellants have taken the plea that the respondent was ineligible as his
experience is deficient by one month and five days.,,,

26. Mr. Haqani has drawn our attention to few material facts. We have extracted
certain pertinent dates from the Advertisement Notice dated 5th,,,
September, 2016. The appellants had notified 25th September, 2016 as the last
date for submission of applications. As against this, so far as the",,,
requirement of experience is concerned, it was stated that the candidate must
have acquired the same by 30th June, 2016, i.e., almost two months",,,
before the last date for submission of the applications.,,,

27. So far as the respondent is concerned, as on 30th June, 2016, the
respondent had admittedly acquired two years ten months and 25 days of",,,

experience. The respondent has acquired the three years required experience as on 4th August, 2016 which was way before the last date for",,,

submission of applications. As on 25th September, 2016, when he submitted his application form, the respondent had three years one month twenty",,,

five days of experience.,,,

28. It is also to be noted that the respondent was subjected to an interview which was held on 20th November, 2017. By this date, the respondent has",,,

notched up experience of four years three months and fifteen days. When the result of the selection was announced in October, 2018, the respondent",,,

has more than five years experience.,,,

Mr. Haqani has pointed out that on 24th December, 2018 when the impugned order was passed by the learned Single Judge, the respondent had five",,,

years four months experience, which was way beyond the required experience of three years.",,,

29. In this background, it has to be held that the objection being propounded by the appellants in the appeal, even if it could be permitted to be raised in",,,

these proceedings, is really a hyper technicality and deserves to be noted only for the sake of rejection.",,,

30. In any case, such objection was not the reason or basis of rejection of the respondent's candidature. No such reason was conveyed to the",,,

respondent to enable him to assail the same.,,,

31. It is now necessary to deal with the principal ground of challenge to the impugned order passed by the learned Single Judge. It has been",,,

vehemently submitted by Mr. Shah Aamir, learned Additional Advocate General that it is legally impermissible for a court to grant as interim relief",,,

what could be the final relief which could be granted at the stage of final adjudication in the writ petition.,,,

32. We are called upon to consider as to whether this is really an absolute prohibition upon a court? Mr. Haqani on the other side has vehemently",,,

contended that it is not so.,,,

33. In support of his submission, Mr. Haqani has placed before us a pronouncement of the Supreme Court reported at 2004 (4) SCC 697, Deoraj v.",,,

State of Maharashtra & Ors., wherein it has been held as follows:",,,

11. The Courts and Tribunals seized of the proceedings within their jurisdiction take a reasonable time in disposing of the same. This is on account",,,

of fair procedure requirement which involves delay intervening between the previous and the next procedural steps leading towards preparation of,,,

case for hearing. Then, the Courts are also over burdened and their hands are full. As the conclusion of hearing on merits is likely to take some time",,,

the parties press for interim relief being granted in the interregnum. An order of interim relief may or may not be a reasoned one but the factors of,,,

prima facie case, irreparable injury and balance of convenience do work at the back of the mind of the one who passes an order of interim nature.",,,

Ordinarily, the Court is inclined to maintain status quo as obtaining on the date of the commencement of the proceedings. However, there are a few",,,

cases which call for the Court's leaning not in favour of maintaining the status quo and still lesser in percentage are the cases when an order,,,

tantamounting to a mandamus is required to be issued even at an interim stage. There are matters of significance and of moment posing themselves as,,,

moment of truth. Such cases do cause dilemma and put the wits of any Judge to test.,,,

12. Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases,,,

where withholding of an interim relief would tantamount to dismissal of main petition itself; for, by the time the main matter comes up for hearing there",,,

would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong,,,

prima facie case ____ of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury",,,

forcefully tilting the balance of case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting,,,

the final relief itself. Of course, such would be rare and exceptional cases. The Court would grant such an interim relief only if satisfied that",,,

withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the",,,

hearing, and at the end the Court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling",,,

circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also",,,

have to be seen and the Court may put the parties on such terms as may be prudent.â??,,,

(Emphasis by us),,,

34. In the present case, we are concerned with the appointment to the post of Assistant Professor, in the medical specialty, Physical Medicine &" ,,,

Rehabilitation. The appellants are unable to refute before us that there was no candidate other than the respondent who possessed the essential ,,,

academic qualifications. As a result of their inability to find a specialist in this discipline, this post of Assistant Professor in Physical Medicine and" ,,,

Rehabilitation has remained vacant right from 2015 and continues to be vacant even on date. ,,,

35. The candidature of the respondent was rejected by the appellants as back as on February, 2017. The challenge thereto has remained pending" ,,,

before the learned Single Judge since 26th April, 2017 when the writ petition was filed. The interim order has been passed only on 24th December," ,,,

2018, almost two years after the rejection. Adjudication of the writ petition is going to take reasonable time." ,,,

36. It cannot be denied that as a result of lack of professor in the discipline, medical students in the State would have been deprived of the benefit of" ,,,

the skill, essential knowledge and experience in the subject." ,,,

37. SKIMS is an important medical facility which caters to patients from all over the State of Jammu and Kashmir. The specialty of Physical ,,,

Medicine and Rehabilitation is an important branch of medicine. As a consequence of the inability of the appellants to place a doctor in position, patient" ,,,

care in this discipline must also be suffering. It, therefore, cannot be denied that keeping the appointment to the post pending is detrimental to public" ,,,

interest. ,,,

38. In the present case, there was only one ground on which candidature of the respondent was rejected. In the reply which was filed before the" ,,,

learned Single Judge, the appellants have admitted that the reason for which the respondent's candidature was rejected actually stood waived of" ,,,

by the Selection Committee. In view thereof, rejection of the respondent was clearly mis-conceived. In our view, in fact, the writ court would have" ,,,

been justified in disposing of the writ petition itself on 24th December, 2018, in the light of this stand of respondents in their objections." ,,,

39. The above admission of the appellants also completely tilts the balance of the

case in favour of the respondent. In this factual background, on",,,
consideration on the public interest in terms of the need for a doctor in the
discipline to cater to thousands of patients visiting the appellant institute as,,,
well as the interest of the students who have been deprived of qualified faculty in
the discipline, it also has to be held that a very strong prima facie",,,
case was made out justifying the grant of interim order passed by the learned
Single Judge.,,,

40. We are supported in the view which we have taken by yet another
pronouncement of the Supreme Court placed by Mr. Haqani before us. In the,,,
judgment reported at 1997 (7) All India Services Law Journal 278, District
Registrar Palghat and ors v. M.B.Koyyakutty and ors., In the facts of the",,,
case, the Supreme Court has held as follows:",,,

â??30. The last point for consideration is, whether it was proper for the High
Court to issue a positive direction requiring the â??appellant to promote",,,

the respondent to the Upper Division and there after to determine his rank in the
case of Upper Division Clerks. Ordinarily, the court does not issue a",,,

direction in such positive terms; but the peculiar feature of this case is that it has
not been disputed that Koyakutty respondent satisfies the two-fold,,,

criterion for promotion laid down in the statutory rule 28(b) (ii). Indeed, the
District Registrar Palghat, who was impleaded as respondent 3 in the writ",,,

petition expressly admitted in paragraph 8 of his counter-affidavit filed before the
High Court, that the seniority of service is the basis of promotion",,,

from the ranks of Lower Division Clerks to the rank of Upper Division Clerks
provided they are fully qualified by passing the departmental tests for,,,

the purposeâ?. It was never the case of the Registrar that Koyakutty was not
otherwise for promotion. Indeed even in the grounds of appeal to this,,,

Court, incorporated in the Special Leave Petition, it is not alleged that Koyakutty
did not satisfy the criterion of seniority-cum-fitness prescribed by",,,

Rule 28 (b) (ii). This position taken by the appellant, through-out, was that this
rule should be deemed to have been â??supplementâ? by the impugned",,,

Government Notification. It is not correct that the impugned Notification merely
â??supplementsâ? or fills up a gap in the statutory rules. It tends to,,,

superad or superimpose by an Executive fiat on the statutory rules something
inconsistent with the same. Since the axistence of both the criteria viz.,,,

seniority and fitness for promotion to the Upper Division prescribed, by the

statutory rule 28 (b) (ii), in the case of Koyakutty was not disputed, the",,,
High Court was justified in issuing the direction, it did.â???",,,

41. For all these reasons, the order dated 24th December, 2018 was completely
merited and cannot be faulted on any legally tenable grounds.",,,

42. We, therefore, find no merit in this appeal which is hereby dismissed.",,,