

(1998) 07 J&K CK 0029

In the Jammu And Kashmir High Court

Case No : S. Writ Petition Nos. 965 of 1990, S.W.P. No. 321 of 1991

Suraj Parkash Sharma, Harinder Singh Jamwal

APPELLANT

Vs

State of Jammu and Kashmir, Union of India

RESPONDENT

Date of Decision : 29-07-1998

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 24
Constitution of India, 1950 — Article 14, 16, 226

Citation : (1999) 1 SCT 684

Hon'ble Judges : O.P.Sharma, J

Bench : Single Bench

Advocate : A. Kapoor, M.K. Bhardwaj, Advocates appearing for the Parties

Judgement

O.P. Sharma, J.—Both these petitions involve common questions of law and facts and, therefore, can be decided by a common judgment

because what arises for determination is, whether the period of ad hoc appointment counts for seniority when under the Recruitment Rules

appointment to the post can be made only on the basis of selection made by the Public Service Commission after holding competitive examination

?

2. The facts emerging from the pleadings are that both the petitioners were appointed as Forest Conservators of Forest on 4.1.1978 by

respondent No. 2 on the recommendation of Public Service Commission. It is also not disputed that respondent No. 4 (in SWP No. 965/1990

and No. 8 in SWP No. 321/1991) did not figure in the select list published by the Public Service Commission on 11.3.1978. It is thus clear that

the 4th respondent was not regularly appointed on the post at the time the petitioners were appointed. He was thus junior to them. It appears that

his service was regularised much after March, 1978. However, by order dated 10.10.1990' his ad hoc appointment from 10.9.1977 to 31.7.1978

was regularised for purposes of seniority. This order reads as under :

The ad hoc appointment of Shri Aijaz Ahmed Bhat, DFO Bandipur as ACF from 10.9.1977 to 31.7.1978 is hereby regularised for purpose of

his seniority. The officer shall not, however, be paid any arrears that may occur to him on account of regularisation of ad hoc appointment.

3. The petitioners challenged the order on the ground that regularisation of the period of ad hoc appointment is not only contrary to law, but also

against the principles of natural justice. This order even otherwise was against the earlier decision of the Department conveyed to respondent No.

4 vide letter No. Fst/Est90/69II dated 2.1.1984 issued by the 2nd respondent, which is extracted below :

Your representation against tentative seniority list in respect of position given to Pir Bashir Ahmad and officers shown at Serial No. 35, 37, 39,

40, 41 and 42 and your claim for placing at serial No. 28 in seniority list, having been considered under rules, has been found without force, and

hence rejected.

As regards your second claim against the seniority position of Shri Mohd. Shafiq Khan shown in the tentative seniority list, it is to inform you that

the period of ad hoc service of Shri Mohd. Shafiq Khan will not be counted under rules, for purposes of determining his seniority.

Your claim for treating the ad hoc period towards seniority is not also sustainable under rules.

So the relief prayed by the petitioners is that the order dated 10.10.1990 be quashed and their seniority restored.

4. In the counter filed on behalf of the official respondents, the impugned order is justified on the ground that after considering his representation,

the Government regularised the period of his ad hoc appointment for the purpose of seniority.

5. Mr. Bhardwaj, appearing for the petitioner, argued that the order of regularisation is without jurisdiction because when the appointments to the

post under the rules have to be made by direct recruitment on the basis of result of competitive examination, seniority can be determined only

under rule 24 of the Civil Services (Classification control and Appeal) Rules,

1956. As per the rule, merit secured by the candidate in the competitive examination determines his seniority and not the date of appointment. Since the petitioners were appointed in January, 1978 on the basis of selection made by the Public Service Commission, regularisation of ad hoc service of a person who was not appointed in accordance with the Recruitment rules, is against the law.

6. Mr. Kapoor, learned Additional Advocate General, however, submitted that the Government have inherent powers to relax the rules and, therefore, order of regularisation does not suffer from any infirmity.

7. The only question involved for consideration is whether the Government has the powers to regularise ad hoc appointment so as to give benefit of seniority against those who had been appointed in accordance with the Recruitment rules ?

Respondent No. 4, it is admitted, does not figure in the select list dated 11.3.1978 issued by the Public Service Commission. He was, however, appointed on ad hoc basis by order dated 10.9.1978, which reads as under :

Sanction is accorded to :

1. the extension in the period of ad hoc appointments of S/Shri A.R. Latoo and Ejaz Ahmad as Assistant Conservator of Forests (Rs. 475850)

from 10th March, 1978 for a further period of six months or till their selection is made by the Public Service Commission whichever be

earlier.....

The order even if extended, was coterminus with the appointments made on the basis of the select list of the Public Service Commission, unless he

was also selected which admittedly is not the case.

8. However, the official respondents have ignored not only the recruitment rules, but the law also that he could not be appointed unless he was

selected by the Public Service Commission firstly extending his ad hoc appointment and then regularising it while ignoring those who had been duly

selected. His appointment was thus in violation of Articles 14 and 16 of the Constitution and de hors, the Recruitment rules, as laid down in J&K

Public Service Commission v. Narinder Mohan, A.I.R. 1994 SC 1808 : 1994(1) S.C.T. 626 , holding that wherever rules prescribe direct

recruitment to the service, ad hoc employee should be replaced as expeditiously

as possible by direct recruit. A little leeway to make ad hoc appointment due to emergent exigencies does not clothe the executive Government with power to relax the recruitment or to regularise such appointment nor to claim such appointment to be regular or in accordance with rules. Back door ad hoc appointments at the behest of power source or otherwise and recruitment, according to rules, is mutually antagonistic and strange bed partners. They cannot coexist in the same sheath. The former is negation of fairplay. The latter are the products of order and regularity. Every eligible person not necessary be fit to be appointed to a post or office under the State, selection according to rules by a properly constituted Commission (reference is to Public Service Commission) and fitment for appointment assures fairness in selection and exhibits arbitrariness in appointment.

9. Since Public Service Commission did make selection in 1978 on the basis of which appointments were made on 4.1.1978, continuance of respondent No. 4 (Ejaz Ahmad) was illegal and so also his regularisation. However, the question involved is no longer res integra in view of the law laid down in *S.K. Saha v. Prem Prakash Agarwal*, A.I.R. 1994 SC 745 : 1994(1) S.C.T. 609 , holding that :

From time to time, this court has considered, as to what is the relevant date for fixing inter se seniority of entrants in the same cadre, either by the same process or by different process of recruitment. Ultimately, the matter was examined by a Constitution Bench. In the case of *Direct Recruit*

Class II Engineering Officers' Association v. State of Maharashtra, (1990) 2 SCC 715 : A.I.R. 1990 SC 1607, it was said that once the

appointment is made to a post according to rules, the seniority of the person so appointed is to be counted from the date of his appointment and

not with regard to the date of his confirmation. It was also said that the corollary of the above rules is, that where the initial appointment is only ad

hoc and not according to rules and made as a stopgap arrangement, the officiation in such post cannot be taken into account for considering the

seniority. The same view has been reiterated in the case of *State of West Bengal v. Aghore Nath Dey*, (1993) 3 SCC 371 : 1993(2) SCT 734

(SC) .

After referring to the facts of the case, their Lordships held that :

.....The High Court has rightly held that while appointing him on the basis of the recommendation of the Commission, the date of appointment

could not have been ante dated and made to be effective w.e.f. 4.1.1957. This court has repeatedly struck down and decried any attempt on the

part of the appointing authority to give a notional seniority from a retrospective date, especially, when this process affects the seniority of those

who have already entered into the service. In the present case the respondent No. 1 had been appointed as Assistant Director of Industries on

18.2.1959 on basis on an advertisement made in the year 1958 and on the recommendation of the Commission. His seniority in the service could

not have been affected by the State Government, by giving notional date of appointment of the appellant w.e.f. 4.1.1955.

This is the last word on the point at issue and applies to the facts of the case on all fours, because the petitioner was appointed as Assistant

Conservator of Forests on ad hoc basis for a period of six months on 10.9.1977. Even though he was not selected by the Public Service

Commission, he, it appears, was appointed in relaxation of rules and subsequently the period of ad hoc appointment from 10.9.1977 to 31.7.1978

is sought to be regularised for the purpose of seniority to the detriment of the petitioners who admittedly are senior to him as they having been

appointed in accordance with the recruitment rules are entitled to seniority under rule 24 of the Civil Services (Classification, Control and Appeal)

Rules, 1956. Since the respondent (Ejaz Ahmad) was not appointed according to the rules, but in relaxation thereof, which was not possible, he

cannot be made senior to those appointed according to rules. Therefore, the order impugned, being illegal and void ab initio is liable to be quashed.

10. In view of the above, these petitions are allowed and the Government order dated 10.10.1990, impugned in the petition, is quashed. There will

be no order as to costs.