
(2014) 08 J&K CK 0042

In the Jammu And Kashmir High Court

Case No : SWP No. 1390J Of 2009, IA(C) Nos. 3713, 664 Of 2013 and 4371 Of 2012

Surinder Mohan and Others

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 07-08-2014

Acts Referred:

Citation : (2015) 1 JKJ 567

Hon'ble Judges : Janak Raj Kotwal, J.

Bench : Single Bench

Advocate : Tasaduq H. Khawaja, Advocate, for the Appellant; Shuja-ul-Haq, G.A., for the Respondent

Final Decision : Dismissed

Judgement

Janak Raj Kotwal, J.â?"In this writ petition under Article 226 of the Constitution of India read with section 103 of the Constitution of Jammu and

Kashmir, petitioners, who are Drug Inspectors in Drug and Food Control Organization of the State, have assailed Government Order No. 39-

HME of 2008 dated 11.01.2008 alleging that by the issue of this order, the Drug Inspectors have been denied the promotional avenues. Besides,

petitioners have assailed order No. DFO/Estt./01 of 2008 dated 04.04.2008, whereby respondent No. 4 has been promoted as Instrument

Technician and Government Order No. 395-HME of 2008 dated 25.04.2008, whereby the respondent No. 4 has been promoted as Incharge

Assistant, Drug Controller. Heard. I have perused the record.

2. Facts, which have not been disputed or are indisputable are these:

2.1 State of Jammu and Kashmir has constituted the Drugs and Food Control, Organization (for short the Organization) in order to implement the

provisions of the Drugs and Cosmetics Act, 1940, which has been enacted to regulate the import, manufacture, distribution and sale of drugs and

cosmetics. The Organization does not have its recruitment rules for the posts on Non Gazetted cadres. Up to the year 1987, the Organization was

a part of the Health Department of the State and posts of Senior Drug Inspectors and Junior Drug Inspectors alone were created by the

Government to implement the provisions of the Act and Director of Health Services was made ex-officio Controller of Drugs. The posts of Junior

Drug Inspector and Senior Drug Inspector were mentioned in the schedule to the Recruitment Rules of the Health Department. The Organization

came to be segregated from the Health Department in the year 1987. However, rules for recruitment and appointment to Non Gazette cadres of

the Organization were not framed even after segregation and till the issue of impugned Order No. 39-HME in the year 2008, the creation of posts

and method of recruitment to the Non Gazetted cadres were governed by administrative instructions. In the meantime various posts inter alia

mentioned below were created in the Organization:

Petitioners were appointed as Drug Inspectors in the year 1994.

2.2. It may be pointed out that the posts of Drug Inspector and Sr. Lab Technician were in the same pay scale and in that they were equivalent

posts. Likewise posts of Senior Drug Inspector and Instrument Technician were equivalent being in the same grade. The post of Senior Scientific

Officer was higher in scale.

2.3. Petitioners' contention, which has been admitted by official respondents in para (iv) of their reply to the grounds taken up by the petitioners, is

that prior to the Government Order No. 39-HME a Drug Inspector, besides being promoted as Senior Drug Inspector, could have been

promoted as Instrument Technician and after that as Senior Scientific Officer. Petitioners have quoted two instances where Drug Inspector had

been promoted, firstly, as Instrument Technicians and thereafter as Senior Scientific Officer.

2.4 As the Organization does not have its own rules for recruitment to the Non Gazetted cadres, the Government, Health and Medical Education,

Department, have formulated rules namely, the Jammu and Kashmir Drugs and Food Control Organization (Subordinate) Service Recruitment

Rules, 2007 and have send them to ARI Department for clearance. Meanwhile, the Government issued the impugned Government Order No. 39-

HME of 2008 dated 11.01.2008 providing that till the finalization of the Recruitment Rules, the method of recruitment to the posts shall be

governed by the Draft Recruitment Rules. This order is annexed with schedule-I and schedule-II. Schedule-I gives description of the posts, their

pay scale and sanctioned strength whereas schedule-II provides for qualification and method of recruitment to the said posts. Schedule-I, insofar

as relevant for the matter on hand is reproduced as:

2.5. In context of schedule-II, it suffice to say that the post for Senior Scientific Officer can be filled up by promotion only from amongst the

Instrument Technicians and the post of Instrument Technician can be filled up by promotion from amongst the Senior Lab Technicians. Say

otherwise, a Senior Lab Technician (figuring at serial No. 3 of schedule-I) has avenue of promotion to the post of Instrument Technician (figuring at

serial No. 2 of schedule-I) and further to the post of Senior Scientific Officer (figuring at serial No. 1 of schedule-I). As against this, a combined

reading of schedule-I and schedule-II would show that a Drug Inspector, whose post prior to the impugned Government Order was and even after

the said order is equivalent in pay scale to the post of Senior Lab Technician, has no promotional avenue in the Non Gazetted cadres as the same

does not figure in the feeding cadre of any other post mentioned in schedule-I. This fact situation as contended by petitioners in their grounds (ii),

(iii) and (iv) is not disputed by the official respondents and it has rather been admitted in reply to ground (iv) that by issuance of the impugned order

Drug Inspectors have been denied the promotions for all the times.

2.6 Contextually, undisputed ground of the petitioners and the official respondents is that recruitment to the Gazetted cadres of the Organization is

governed by the Jammu and Kashmir Drugs and Food Control (Gazetted) Service Rules, 1997 notified vide Notification SRO-56 dated

03.02.1997 (for short the 1997 rules). Petitioners' contention is that the lowest post in the Gazetted cadre is that of Assistant Controller

Drugs/Assistant Drugs Analyst. This however, is not wholly correct because perusal of schedule-I and schedule-II to the 1997 Rules would show

that the post of Assistant Controller Drugs/Assistant Drugs Analyst falls in

category (a) of class III which is followed by the posts of Assistant

Controller (PFA) and Public Analyst. The lowest post in Gazetted service is that of Public Analyst.

2.7. Petitioners' contention further is that 20 per cent of the posts of Assistant Controller Drugs/Assistant Drugs Analyst are filled by direct

recruitment, 20 per cent by promotion of Senior Scientific Officers and 60 per cent by promotion of Instrument Technician/Senior Drug

Inspectors. Contextually, it is contended that the post of Senior Drug Inspector has been abolished vide Government Order No. 604 HME of

2007 dated 10.09.2007. Grievance of the petitioners, therefore, is that even to the Gazetted cadres a Drug Inspector has no chance of promotion.

Grievance of the petitioners though indisputable as at the time of the filing of this writ petition for the reason that post of Drug Inspector does not

figure in the feeding cadre of any post either on the Gazetted cadres or on the Non Gazetted cadres, the position, however, has changed with

amendment to 1997 Rules effected vide SRO Notification 417 dated 24.09.2013 as pointed out by way of supplementary affidavit of the official

respondents. By SRO 417, the feeding cadre for the Gazetted post of Assistant Controller Drugs/Assistant Drugs Analyst has been amended and

would be:

(i) 20% by directed recruitment

(ii) 80% by promotion from amongst Senior Scientific Officers and Drug Inspector, Instrument Technicians of Drugs and Food (Subordinate)

Service subject to fulfillment of statutory qualification laid down in the Drugs and Cosmetics Rules, 1945 in following ratio:

i) Senior Scientific Officer 20%

ii) Drug Inspector/Instrument Technician 60%.

Amendment vide SRO No. 417 seems to have been necessitated due to abolition of the posts of Senior Drug Inspectors vide Government Order

No. 604-HME of 2007 dated 10.09.2007.

2.8. The comparative scenario as prior to the impugned order No. 39-HME and after that, thus, is that whereas prior to the said order a Drug

Inspector had avenue of first promotion to the post of Senior Drug Inspector as well as to the equivalent post of Instrument Technician and next

promotion to the post of Senior Scientific Officer, both in the Non Gazetted cadres but pursuant thereto a Drug Inspector does not have

Promotional avenue to any post in the Non Gazetted cadres. However, under the 1997 Rules read with SRO 417 of 2013, a Drug Inspector does

have promotional avenue to the post of Assistant Controller Drugs/Assistant Drugs Analyst in the Gazetted cadre as he has been included in the

feeding cadre of the said post with at least 30 per cent share. On the other hand, a Senior Lab Technician, whose post was and is equivalent to the

post of Drug Inspector, has first promotional avenue to the post of Instrument Technician and second to the post of Senior Scientific Officer in

Non Gazetted cadres and further to the post of Assistant Controller Drugs/Assistant Drug Analyst in the Gazetted service. There lies the grievance

of the petitioners and cause of action to file this writ petition seeking:

Certiorari quashing Government Order No. 39-HME of 2008 dated 11.01.2008 to the extent it excludes Drug Inspectors from promotion to the

post of Instrument Technician;

Mandamus commanding the respondents to make a combined seniority list of Senior Laboratory Technicians and Drug Inspectors strictly in

accordance with the date of their appointment to their respective posts and date of acquiring the qualification prescribed for the post of Instrument

Technician i.e. Graduate in Pharmacy and further directing the respondents 1 and 3 to make promotions to the post of Instrument Technician from

the said combined seniority list;

Certiorari quashing Order No. DFO/Estt./01 of 2008 dated 04.04.2008, whereby respondent No. 4 has been promoted as Instrument Technician

w.e.f. 09.12.2003.

Certiorari quashing Government Order No. 395-HME of 2008 dated 25.04.2008, whereby respondent No. 4 has been promoted as Incharge

Assistant Drug Controller over and above the head of the petitioners.

Mandamus commanding the respondents 1 and 2 not to confirm the respondent No. 5 against the post of Instrument Technician.

Mandamus commanding the respondents 1 and 2 to consider the petitioners for promotion to the posts of Instrument Technicians available in

Jammu and Srinagar respectively.

3. I may restate before proceeding ahead that the petitioners had filed this writ petition at a time when with the issue of the impugned Government

Order 39-HME dated 11.1.2008 bringing into operation the Draft Recruitment Rules, the Drug Inspectors were rendered with no promotional

avenue in the Organization, may it be Non Gazetted or Gazetted cadres. However, with the issue of SRO 417 dated 24.9.2013, their promotional

avenue to the post of Assistant Controller Drugs/Assistant Drugs Analyst in the Gazetted cadre has been opened.

4. The main plank of petitioners' case is that earlier than the impugned order No. 39-HME, Drug Inspectors and the Sr. Lab Technicians were

equally entitled to promotion to the post of Instrument Technician and further to the post of Senior Scientific Officer in the Non Gazetted cadres

but with the issue of the said order the Drug Inspectors have been totally deprived of promotional avenue in the Non Gazetted cadres.

5. Mr. Tasaduq H. Khawaja, learned counsel appearing for petitioners, submitted that depriving of promotional avenue to the Drug Inspectors as

compared to similarly placed Senior Lab Technicians of the same Department violates their fundamental right of equality enshrined under Article 14

of the Constitution and fundamental right of equal opportunity in the matters of public employment enshrined under Article 16. The impugned

Government Order therefore, is not discriminatory only but arbitrary, irrational and unreasonable as well. When confronted with SRO 417 of 213

whereby the Drug Inspectors have been included in the feeding cadre of Assistant Controller Drugs/Assistant Drug Analyst in the Gazetted cadre,

Mr. Khawaja sought to point out in reference to schedules-I and II of the Draft Rules that sanctioned strength of the Drug Inspectors in the

Organization is 88 as against sanctioned strength of five Senior Lab Technicians, two Instrument Technicians and two Senior Scientific Officers. He

argued that vast majority of the officials entering the Organization at the entry level of Drug Inspectors have been deprived of the meager

promotional avenue in the Non Gazetted cadres, which they had had prior to issue of the impugned Government Order and the avenue opened by

SRO 417 is too meager for a cadre strength of 88. Mr. Khawaja submitted further that the Drug Inspectors, firstly, were earlier deprived of

promotional avenue with the abolition of the seven posts of Senior Drug Inspectors with corresponding increase in the posts of Assistant Controller

Drugs vide Government Order No. 604 of 2007 (supra) and have further been deprived with the issue of impugned Government Order No. 39-

HME and 30 per cent quota in promotion to the post of Assistant Controller Drugs/Assistant Drug Analyst is too meager given the cadre strength

of 88. Mr. Kawaja concluded by saying that promotion is normal incidence of public service and in the interest of administration, to boost

performance in the public service and for the welfare of its employees Government is obliged to provide proper promotional avenues in the public

service and not to render its employees to stagnate. Mr. Khawaja referred to Dr. Ms. O.Z. Hussain Vs. Union of India and others, .

6. Per contra, Mr. G.A. Lone, learned counsel for the private respondents and Mr. Shuja-ul-Haq, learned Government Advocate, submitted that

nature of jobs of a Drug Inspector on one hand and that of Senior Lab Technician or Instrument Technician on the other are totally different. Post

of Drug Inspector and that of Senior Lab Technician though equal in pay scale belong to two different classes and have different requisite

qualification. Parity cannot be claimed on the basis of similarity of pay grade of the two posts. Learned Counsel would say vehemently that to lay

down the cadre strength of a service and qualification and method of recruitment/promotion falls within the rule making power of the Government

and is beyond the purview of the power of judicial review of this Court. Mr. Lone relied upon V.K. Sood Vs. Secretary, Civil Aviation and others,

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7. As I have indicated above also, it is admitted ground of both the sides that prior to issue of the impugned Government order No. 39-HME there

had been instances when, besides the Senior Lab Technicians, some Drug Inspectors had also first been promoted as Instrument Technician and

further as Senior Scientific Officer. But that was a time when the Organization did not have recruitment rules for its Non Gazetted service, neither

there was regular cadre nor hierarchy of posts. In absence of the rules, the creation of posts and method of recruitment/promotion to the non

Gazetted posts was governed by Government Instructions and some promotions might have been made as per the requirement for manning the

Organization. That apart, it is stated neither by the petitioners nor by the respondents whether such promotions were stray individual instances or

were granted in accordance with some Government order/instruction. In this backdrop, petitioners cannot claim continuation of the practice prevailing in pre impugned order era. Plea of the petitioners that the impugned Government order has deprived the Drug Inspectors of their right of promotion to the post of Lab Technician and further to the post of Senior Scientific Officer does not have any substance for the reason that it is not possible to assume that such right ever was there or, to say the least, was available under some Government order or instruction and the petitioners cannot claim the same as a legal right.

8. It needs to be stated that whenever a new Government service (or Organization) is constituted, it is for and within the rule making power of the Government to make rules to provide the cadres and hierarchy of posts for the said service, to lay down the qualification of the persons to man the posts in various cadres and method for their recruitment. Qualification, and method of recruitment/promotions, whatsoever, adopted at a time when a service is newly created and its Recruitment Rules are not yet framed cannot be expected to be continued even after framing of the rules because such a course would defeat the purpose of framing the Recruitment Rules.

9. The other contention that has been urged for and on behalf of the petitioners is that depriving the Drug Inspectors of any promotion in non

Gazetted cadres is arbitrary and causes unreasonable discrimination between them and the similarly placed Senior Lab Assistants.

10. On the point of fact, undisputedly, under the draft Recruitment Rules formulated by the Government, which pending their finalization have been

brought into operation vide the impugned Government Order No. 39-HME, the Drug Inspectors have no promotional avenue in the Non Gazetted

cadres and in that the petitioners allege discrimination as compared to the Senior Lab Assistants in the same pay grade. What has been urged on

behalf of the petitioners ex facie does not have much substance because similarity of pay grade of two posts cannot be the criterion for equal right

of promotion to a post in the higher grade. Qualification and criteria for appointment to a post, by promotion or by direct recruitment, depends

upon the requirement of that post. It would be for the Government to prescribe the qualification for recruitment to a particular post on the cadre of

a service depending upon the job requirement and provide the feeding cadre for appointment by promotion accordingly. No member of the service

either has a right to or can claim inclusion in the feeding cadre of a particular post. In *S.S. Moghe and Others Vs. Union of India (UOI)* and

Others, , A three-Judge Bench of the Supreme Court in para 29 of the reporting has held that 'when a new service is proposed to be constituted

by the Government, it is fully within the competence of the Government to decide as a matter of policy the source from which the personnel

required for manning the service are to be drawn.

11. In *P.U. Joshi and Ors. v. Accountant General. Ahmedabad and Ors.* (2004) 2 SCC 623, Supreme Court while dealing with the power and

competence of the Government to constitute a new service has held:

10. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications

and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy is within

the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it

is not for the statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of

promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change

the rules relating to a service and alter or amend and vary by addition/subtraction the qualifications, eligibility criteria and other conditions of service

including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate

rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking

further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of services, as may be

required from time to time by abolishing the existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to

claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for

ensuring or safeguarding rights or benefits already earned, acquired or accrued

at a particular point of time, a government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service.

12. To support the allegation of discrimination with Drug Inspectors as compared to the Senior Lab Technicians, petitioners were required to

make out a strong case of similarity in qualification for recruitment to the two posts as provided under the proposed rules and similarity in the

nature of their jobs. This however, has not been done as the petitioners have built edifice on the basis of the practice as it prevailed prior to the

impugned Government Order, that is, prior to the proposed Recruitment Rules. It has been argued on behalf of the respondents that post of Drug

Inspector and that of Senior Lab Technician belong to two different classes, have different requisite qualification and nature of job requirement of

the two is totally different. Sufficient material has not been produced by or on behalf of the petitioners to compare and show similarity of the job

requirement of the two posts. What I, however, can see in the proposed Recruitment Rules is that the post of Senior Lab Technician has been

provided for the 'Drug Laboratory Unit', whereas, the post of Drug Inspector has been provided for the 'Executive Unit'. The two posts have same

grade but eligibility qualification provided for them is not exactly the same. I therefore, do not find substance in petitioners' contention that both the

posts are of similar nature and have same job requirement even though there is similarity in their pay grade.

13. I, however, find substance in the petitioners' contention that due to the impugned Government Order/Draft Recruitment Rules, the vast majority

of Drug Inspectors have been rendered with no promotional avenue in the Non Gazetted cadres and meager promotional avenue in the Gazetted

Cadres. As stated above, as per the draft Recruitment Rules, there are 88 posts of Drug Inspectors, as compared to five posts of Senior Lab

Technician and two posts of Instrument Technician. Posts of Senior Lab Technician and Drug Inspectors are in same pay grade but fall in different

classes. The five Senior Lab Technicians have first promotional avenue to the post of Instrument Technician and second to the post of Senior

Scientific Officer in the Non Gazetted cadres. They stand dual chance of promotion to the post of Assistant Controller Drugs/Assistant Drugs

Analyst in the Gazetted cadre. One, through 20 per cent quota for Senior Scientific Officers and the other through 30 per cent quota of Instrument

Technicians. As against this, 88 Drug Inspectors have just 30 per cent quota in promotion to the post of Assistant Controller Drugs/Assistant

Drugs Analyst and that is all.

14. In *O.Z. Hussain (supra)* Supreme Court has reiterated that 'provision for promotion increases efficiency of the public service while stagnation

reduces efficiency and makes the service ineffective. Promotion is thus a normal incidence of service'. However, while maintaining the importance

of promotional avenues in public service, the service rules formulated by the Government in exercise of its rule making power cannot be impeached

on the ground of absence of promotional avenues for a particular class or category. In taking this view I may draw support from and quote the

statement of law made by Their Lordships of Supreme Court in para 6 of the reporting of the judgment in *V.K. Sood's case (supra)*:

6. Thus it would be clear that, in the exercise of the rule making power, the President or authorized person is entitled to prescribe method of

recruitment, qualifications both educational as well as technical for appointment or conditions of service to an office or a post under the State. The

rules thus having been made in exercise of the power under proviso to Art. 309 of the Constitution, being statutory cannot be impeached on the

ground that the authorities have prescribed tailor made qualifications to suit the stated individuals whose names have been mentioned in the appeal.

Suffice to state that it is settled law that no motives can be attributed to the Legislature in making the law. The rules prescribed qualifications for

eligibility and the suitability of the appellant would be tested by the Union Public Service Commission.

15. No case for quashing the impugned Government Order No. 39-HME and directing official respondents to prepare a combined seniority list of

Drug Inspectors and Senior Lab Technician is made out. Nonetheless, it would be for the Government to see that no segment of its personnel in a

service is rendered to stagnation on a post by not creating appropriate promotional avenues for them. As elaborated above, cadre strength of 88

Drug Inspectors have no promotional avenue in Non Gazetted service and just 30 per cent share against 04 posts of Assistant Controller

Drug/Assistant Drug Analyst in the Gazetted Cadre. The promotional avenue for Drug Inspectors is too meager to imagine and stagnation in the cadre is writ large. Situation is worrying and State Government must look into the same.

16. Petitioners, besides seeking quashing of the impugned Government Order No. 39-HME (supra) have also sought the quashing of the promotion of respondent No. 4, firstly as Instrument Technician with effect from 09.12.2003 and secondly, as Incharge Assistant Drug Controller.

They have also sought mandamus directing the respondents 1 and 2 not to confirm the respondent No. 5 against the post of Instrument Technician.

17. It is seen that the impugned promotion of respondent No. 4, firstly, from Senior Lab Technician to Instrument Technician vide order dated

07.04.2008 and secondly, from Instrument Technician to Assistant Controller Drugs on Incharge basis have been made after issue of the impugned

Government Order No. 39-HME of 2008 dated 11.01.2008, whereby the draft rules for Non-gazetted service were brought into operation. As

the Drug Inspectors do not figure in the feeding cadre of Instrument Technicians so petitioner's challenge to respondent No. 4's promotion as

Instrument Technician and upwards thereafter cannot be entertained. Likewise, no case for assailing respondent No. 5's adjustment as Instrument

Technician for back in the year 2003, that is, six years prior to filing of this writ petition, is made out. For all what has been said and discussed

above, this writ petition is dismissed. It is, however, left open to the petitioners to make a representation to the Government, which, if made, may

be considered by the Government in light of the observations made in this judgment.