

(1972) 09 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : Writ Petition No. 54 of 1971

Syed Mohd.Yousuf Qureshi	Vs	APPELLANT
State of Jammu & Kashmir and another		RESPONDENT

Date of Decision : 08-09-1972

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 25
Constitution of India, 1950 — Article 14, 16

Citation : (1972) KashLJ 433

Hon'ble Judges : Mufti Baha-Ud-Din Farooqi, J

Bench : Single Bench

Advocate : S.T.Hussain, K.N.Raina, A.D.Singh, Advocates appearing for the Parties

Judgement

(1) This is a writ petition under section 103 of the Constitution of Jammu and Kashmir.

(2) The facts are these. The petitioner was employed as a clerk in the Education Department in the year 1942 and was promoted as Head Asstt.

substantively on 22/7/1968. Respondent No. 2 was likewise promoted as Head Asstt. substantively on 23/2/1962. By Govt. order No. 70 of 1969

dated 21/4/1969 the said respondent was promoted as officiating Superintendent in the office of the Joint Director Women Education. The said

order reads as under :

Government of Jammu and Kashmir, Civil Sectt. Education Department.

Subject : Promotion of Shri Abdul Rehman Head Assistant as Superintendent.

Reference : General Department's No. CE(EST) 104/61 dated 16/16.

Government Order No. 70 of 1969 dated 21/4/1969.

Sanction is accorded to the transfer of Shri Abdul Rehman, Head Assistant of Education, Department to the Office of the Joint Director Women's

Education as officiating superintendent in the scale of Rs 215450 against the post vacated by Shri S A. Jalali Superintendent of the office adjusted

against P. A's post sanctioned for joint Director.

By order of the Government J&K.

Sd/ Tirath Ram Secretary to Government"

(3) Aggrieved by this order the petitioner who according to him, was senior to respondent No. 2 filed a writ petition in this court which came up

for hearing before Mr. Anant Singh J. At the hearing before him it was contended on behalf of the State that the appointment of respondent No. 2

as Superintendent was merely in an officiating capacity and as such the question of the supersession of the petitioner did not arise. The plea found

favour with the learned Judge who, therefore, by his order dated 26101970 dismissed the petition observing.

Learned counsel, Mr. Anil Dev Singh appearing for the State has drawn my attention to the appointment letter Annexure 'A*' according to which

the appointment of Respondent No. 2 as the superintendent is merely on an officiating basis against the post vacated by Shri S. A. Jalali, the

permanent superintendent who has been appointed as the personal Assistant to the Joint Director and it is urged that the question of supersession

of the petitioner at the present stage does not arise.

Since the appointment of Respondent No. 2 is merely on an officiating basis the question of supersession of the petitioner does not arise. If,

however, the appointment of Respondent No. 2 is to be continued on an officiating basis for a considerable longer period the case of the petitioner

should also be considered as it shall be considered when the question of permanent appointment to this post will arise. With this observation the

petition is dismissed without costs.

(4) Even after this order, the petitioner alleges, the Government did not consider his case and instead allowed the respondent No. 2 to continue

indefinitely on the post of the Superintendent held by him The respondent State, on the other hand, alleges that meanwhile J&K Civil Services

(Decentralization of and Recruitment to nongazetted cadre) Rules. 1969 came into force and when the case was examined it was found that, in

accordance with these rules, the petitioner, belonging as he was to the Divisional Cadre, court not claim promotion to the post of Superintendent

like the one held by respondent No. 2 in the State Cadre. This is what is denied by the petitioner! who says, that no Departmental Promotion

Committee was even constituted as required under rules to consider his case along with that of respondent No. 2. The petitioner has therefore

again come up with this writ and challenged the order as being violative of the rules and the constitution.

(5) There is no dispute that the petitioner was confirmed as a Head Assistant in the scale of 140250 much earlier than the respondent No. 2. In

fact this is also clear from the copy of the order of the Director of Education forming annexure 'B' to the petition. Accordingly under Rule 24 of the

J&K Civil Service (Classification, Control and Appeal) Rules the petitioner ranked senior to respondent No. 2 There can be no doubt, therefore,

that the petitioner was superseded by the impugned order. The question that naturally arises is whether the supersession is justifiable under law.

(6) At the material time the promotions were admittedly governed by Rule 25 of the J&K Civil Services (Classification, Control and Appeal) Rules

1956. That rule reads.

25. Promotions (I) All promotions shall be made by the appointing authority.

(2) Promotions to a service or class or to a selection category or grade in such service or class shall be made on grounds of merit and ability and

shall be subject to the passing of any tests that Government may prescribe in this behalf, seniority being considered only where the merit and ability

are approximately equal.

(3) All other promotions shall be made in accordance with seniority and subject to any tests or special qualifications prescribed by Government

unless,

(a) The promotion of a member has been withheld as a penalty or

(b) A member is given special promotion for conspicuous merit and ability.

(4) Where it is necessary in the public interest owing to an emergency which has arisen and could not have been foreseen, to fill immediately a

vacancy by promotion from a lower category and where promotion in accordance with these rules would involve undue delay or expenditure or

cause administrative inconvenience, the appointing authority may promote a person otherwise than in accordance with these rules temporarily until

a person is promoted in accordance with the rules, but such temporary promotion shall in no case exceed three months on each occasion.

(5) A person promoted under subrule (4) shall not be entitled by reason only of such promotion to any preferential claim to future promotion.

(6) The ambit and scope of clauses 2 and 3 fell for consideration before a Full Bench of this court in Lal Chand Vs. Director N. E. S. (AIR 1970

J&K 57) and it was held that the meritcum seniority rule on provided in clause 2 would apply to all the promotions except to a promotion from one

grade to another in the same category which would be governed by the rule of seniority contained in clause 3. Alongside the court also held that

the promotion order made under rule 25 (2) should be a speaking order. Dwelling further on this latter aspect in a subsequent decision reported as

1971 J&K LR 181 the Full Bench explained the position thus:

The full Bench in the present case was of opinion that in view of the explicit language of Rule 25 (2) it was incumbent on the appointing authority

to give reasons and record the grounds for making promotion when a senior employee had been superseded. In this connection the Full Bench

made the following observations '

The words 'Shall be made on the ground of merit and ability' clearly postulate that the order of the appointing authority must shown ex facie that the

considerations mentioned in the rule were present in the mind of the appointing authority at the time of making promotions and the word, 'ground'

implies that these considerations should be stated in the order so that anybody reading the order may know that action has been taken under rule

25(2) of the Rules.

x x x x

Where the order of promotion specifies the grounds mentioned in rule 25 (2), there can be no confusion on this account and the order of

promotion being a speaking order would apprise the Government servant of the actual situation.

And then again as under :

"The reason that impelled us for holding that the language of Rule 25 (2) implies that reasons for bypassing a senior employee , must be given by

the appointing authority was that the appointing authority must apply its mind to the promotion of a Government servant in a given case and the record must show that the authority had actually applied its mind. Promotions are matters of moment and cannot be treated as a casual or routine affair. The words 'on the ground of merit and ability' appearing in rule 25 (2) clearly enjoin on the appointing authority a fair and objective application of its mind at the time of making promotions. Even if the appointing authority does not record reasons in the order, it will be a sufficient compliance with the rule if the contemporaneous and anterior record on the basis of which the order of promotion is passed by the appointing authority clearly shows that reasons have been given for promotion and that the appointing authority has applied its mind by proceeding on the basis of such record which contains the grounds for promotion. We, therefore, clarify our Full Bench decision in Lal Chand Pargal's case (Supra) accordingly.

(8) The promotion in the instant case was clearly not in the same category. Accordingly Rule 25 (2) became applicable. Involving, as it did, the supersession of the petitioner, the impugned order should have been a speaking order or else it should have been shown by a contemporaneous or anterior record that the appointing authority had applied its mind to the matter and given reasons for the promotion of respondent No. 2 over the petitioner, as required by the decisions noted above. The case however falls short of both these requirements. The impugned order is not a speaking order nor also has any contemporaneous or anterior record been produced to explain the reasons for the supersession of the petitioner.

The irresistible conclusion is that the impugned order is violative of Rule 25(2) of the J&K Civil Services (Classification, Control and Appeal)

Rules 1956. In that view it is violative of Articles 14 and 16 of the Constitution as well, being discriminatory.

(9) The learned counsel for the respondent tried to justify the order on the ground that the promotion made there under was purely on an officiating basis. Subrule (2) or subrule (3) of Rule 25 does not however make any exception in regard to officiating promotions. These apply with equal force to all the promotions, be they officiating or substantive. The only exception is that provided in subrule (4). In terms thereof an officiating promotion

may be made without regard to subrule (2) or subrule (3), as the case may be for a period not exceeding three months at one time provided the public interest so demands owing to an emergency which could not be foreseen and strict adherence to subrule (2) or subrule (3), as the case may be, would involve undue delay or expenditure or cause administrative inconvenience. Putting it differently an officiating promotion may be ordered for a period not exceeding three months without consideration of senioritycummerit or seniority, as the case may be, only if the case fulfils the requirements of subrule (4) and not otherwise. It is not in the case of every officiating promotion, therefore, as the learned counsel for the respondent put it, that a supersession can be justified. That can be so only if the case satisfies the requirements of subrule (4). Moreover there is no presumption that an officiating promotion fulfils the requirements of subrule (4) unless the order of promotion expressly so provides or at least the contemporaneous record so reflects. In the absence of either circumstance the order cannot be upheld as one under subrule (4). In the instant case the impugned order does not xfacie satisfy the requirements of subrule (4) nor also has any contemporaneous record been produced to prove that fact. The order cannot therefore be construed as one falling under Subrule (4) justifying the petitioners supersession.

(10) In the view I have taken it is not necessary to consider the Jammu and Kashmir Civil Services (Decentralization of and Recruitment the nongazetted cadre) Rules 1969 which were promulgated on 21/10/69 months after the impugned order was made on 21/4/1969 Such consideration could become relevant only if the impugned order was one falling under subrule (4) of the J&K Civil Services (Classification, Control and Appeal) rules 1956. I will however assume that it was so. In that context the question that arises is whether regular promotion to the post was governed by J&K Civil Services (Decentralization of and Recruitment to nongazetted cadres) Rules 1969 or by the J&K Civil Services (Classification, Control and Appeal) Rules, 1956.

(11) There is nothing in the J&K Civil Services (Decentralization of and Recruitment to nongazetted cadre) Rules 1969 to indicate that the said rules would apply to the regularisation of ad hoc promotions made earlier under subrule (4) of J&K Civil Services (Classification, Control and

Appeal) Rules. On the other hand rule 15 thereof provided as under:

"35 Rules to be of over riding nature. (1) These rules shall have effect notwithstanding anything inconsistent contained in any other rules for the time being in force relating to recruitment and promotion, to any nongazetted service.

(2) Subject to the provisions of subrule (1) all matters not expressly provided for under these rules, shall be regulated by the rules and orders

applicable to the services in general

(12) Subrule (2) of this rule makes it amply clear that the regularisation of such adhoc promotions shall continue to be governed by the earlier rules.

The contention to the contrary made by the counsel for the respondents cannot, therefore, be accepted as correct. If the respondent State has

while acting on the mistaken notion of law implied in that contention, considered the case of the petitioner under these rules and rejected it on the

ground that he was not eligible, as stated in the return filed by it, that it is as good as if the case was not considered at all. The matter was

appropriately governed by Rule 25 (2) of the J&K Civil Services (Classification, Control and Appeal) Rules 1956. Under the said Rule both the

petitioner and respondent No. 2 were eligible for consideration and if the petitioners case has been thrown out on the ground that he is not eligible,

it constitutes an infringement of equality of opportunity for employment enshrined in Article 16 of Constitution.

(13) Towards the end the learned counsel for the respondent argued that, on the principles of resjudicata, the impugned order could not be

challenged by the petitioner on the ground that it was violative of rule (25 (2) of the J&K Civil Services (Classification, Control and Appeal) Rules

1956 in that the plea though raised in the earlier petition was impliedly rejected by this Court. Assuming that it is so, it is equally true about the plea

based on the J&K Civil Services (Decentralization of and Recruitment to non gazetted cadres) Rules, 1969 raised by the respondent now in that

the said rules came into force on 21/10/1969 while the earlier writ petition was decided on 20/10/1970, when therefore, the plea based on these rules

was available to the respondent which not having been raised by them would be barred on the same principles of resjudicata. The legal position

emerging from the application of this principle would therefore be that the J&K Civil Services (Decentralization of and Recruitment to nongazetted

cadre) Rules could be no defence to the claim for regular promotion made by the petitioner which should have been considered under Rule 25 (2)

of the J&K Civil Services (Classification, Control and Appeal) Rules, 1956 This is what has not been done. Instead the respondent No. 2 has

been allowed to continue on the post of Superintendent in violation of that rule.

(14) Viewed from any angle, therefore, the impugned order cannot be upheld and must be set aside with a view to enabling the respondentState to

consider the question of promotion in its proper perspective This would naturally cause a great hardship to respondent No 2 who has been holding

the post of Superintendent for over three year new, but this is where the Government and not the court can help him. The Government can avoid

hardship to him if it feels inclined so to do by accommodating the petitioner on an equivalent post from the date the impugned order was made.

They may not perhaps be able to do so unless a provision is made in that behalf in the final order. I therefore propose to so frame the final order

that this course is left open to the Government.

(15) In the result I accept this writ petition set aside impugned order and direct that the petitioner be considered for promotion to the post covered

by the order along with respondent No. 2 in accordance with Rule 25 (2) of the J&K Civil Services (Classification, Control and Appeal) Rules

1956. I further direct that the aforesaid order shall not be effective if, within a period of fifteen ,days from today, the respondentState promotes the

petitioner on an equivalent post retrospectively from the date the impugned order was made. In the former case the petitioner shall be entitled to his

cos.? in this petition but not so in the latter case.