

(2001) 09 J&K CK 0017
In the Jammu And Kashmir High Court
Case No : Letters Patent Appeal No. 86/1998

Tariq Ahmad Ganai

APPELLANT

Vs

State of J&K & others

RESPONDENT

Date of Decision : 18-09-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2002) KashLJ 88 : (2001) SriLJ 385

Hon'ble Judges : R.C.Gandhi, J and S.K.Gupta, J

Bench : Division Bench

Advocate : M.I.Qadiri, M.A.Beigh, Advocates appearing for the Parties

Judgement

1. This Letters Patent Appeal has arisen out of the Judgement dated : 11.03.1998 passed by the Learned Single Judge dismissing SWP. No.

1662/96 wherein the appellant has sought the relief of appointment to the post of Assistant SubInspector of Police on compassionate grounds on

the demise of his father in harness while serving as ASI in the Police Department.

2. A few facts necessary for disposal of the appeal are that the father of the appellant was killed by the militants while in active service working as

ASI. Petitioner applied seeking appointment on compassionate grounds as ASI in terms of provisions of SRO 43 of, 1994. He was appointed as

Head Constable. Being not satisfied he preferred the writ petition seeking direction for his appointment as ASI. In the writ petition he has

mentioned the names of some of the persons who have been appointed by the respondents to the higher posts in terms of SubRule (2) of Rule 3 of

SRO 43 of 1994 whereas he was appointed as Head Constable instead of ASI, thus he has been discriminated viz aviz those who have been

appointed on a higher posts. Respondents in their reply opposed the relief prayed for. Learned Single Judge after hearing the learned counsel for

the parties has rejected the case of the petitioner relaying upon the judgement of the Supreme Court delivered in Umesh Kumar Vs. State of

Haryana reported in 1994(4) SCC 138 wherein the Supreme Court has observed that if the dependent of the deceased employee finds it below

his dignity to accept the post offered, he is free not to do so. The post is not offered to cater to his status but to see the family through the

economic calamity.

3. Aggrieved of the order of the learned Single Judge, the appellant has preferred this Letters Patent Appeals challenging the legality and

correctness of the order.

4. We have heard the learned counsel for the parties and perused the record.

5. The main argument of Mr. Beigh is that the appellant being the son of the ASI should have been appointed as ASI on compassionate ground as

in similar circumstances, the respondents have appointed the dependent of the deceased to higher posts in exercise of the discretion any power in

terms of Subrule (2) of Rule 3 of SRO 43 of 1994. The persons with whom the appellant is seeking party have not been arrayed as party in the

writ petition. His simplicitor case is that of discrimination. To appreciate those arguments of Mr. Beigh, Rule 3 of SRO 43 of 1994 is extracted

below the reads as:

Appointment under these rules (1) Notwithstanding anything contained in any rule or order for the time being in force regulating the procedure for

recruitment in any service or posts under the Government, an eligible family member of a person specified in rule 2 may be appointed against a

vacancy in the lower rank of a nongazetted service having qualification above matriculation or to a class IV Posts if the candidate has read upto

matric;

Provided that the applicant is eligible and qualified or acquires eligibility, the qualification within a period of six months specified in rule 2.

(2) Nothing in subrule (1) shall derogate from the powers of the Government in general administration department to appoint at its discretion a

candidate to a higher post in the nongazetted service if he/she is a family of a deceased government employee or a civilian killed in the militancy

related action.

6. SubRule (2) vest discretionary power with the government under certain circumstances to appoint a candidate to higher post in a nongazetted

service if he/she is a family of the deceased government employee or a civilian killed in militancy related action. Perusal of this provision of the law

indicates that it does not grant any substantive right to the effected person but only vests with the government a discretion for appointment to the

higher post despite the mandate of subrule (1) of Rule 3. The discretion is to be exercised by the government under certain circumstances taking

into consideration various factors. Subrule (2) referred to above does not create any foreseeable right as held in the case of ""Hemant Kumar vs.

State of Rajasthan"" reported in 1998 (2) SIR 90 wherein the petitioner claiming the appointment to the higher post was appointed as LDC and

dealing with the plea that he should have been appointed to the higher post, the court held:

I am of the view that the arguments raised by the counsel for the petitioner are not sustainable. The appointment on compassionate ground cannot

be claimed as a matter of right. However, in the present case, since the petitioner has already been considered and given appointment on the post

of LDC after death of his father on compassionate ground and having accepted the appointment offered to the petitioner way back in the year

1985, it is not open to the petitioner now to claim for higher post and more so after more than 12 years.

7. This view has been reiterated by the Supreme Court in the case ""State of Rajasthan vs. Umro Singh"" reported in 1994 (6) SCC 560 holding

that:

Admittedly the respondent's father died in harness while working as SubInspector CID (Special Branch) on 16.03.1988. The respondent filed an

application on 16.03.1988. The respondent filled an application on 08.04.1988 for his appointment on compassionate ground as subinspector or

LDC according to the availability of vacancy. On a consideration of his plea, he was appointed to the post of LDC by order dated 14.12.1989.

He accepted the appointment as LDC. Therefore, the right to be considered for the appointment on compassionate ground was consummated. No

further consideration on compassionate ground would ever arise. Otherwise, it

would be a case of ""endless compassion"". Eligibility to be appointed as SubInspector of Police is one thing the process of selection is yet another thing. Merely because of the so-called eligibility, the learned Single Judge of the High Court was persuaded to the view that direction be issued under proviso to Rule 5 of the Rules which has no application to the facts of this case

Therefore, once the right has consummated as we indicated earlier, any further or second consideration for a higher post on the ground of compassion would not arise.

8. While dealing with the similar proposition on facts and law in LPA No. 178 No. 178/2000 titled ""Gulzar Ahmad Mir vs. State of J&K and ors

decided on 25.06.2001, the Letters Patent Bench of this court has considered such a plea and observed as under:

The core grievances of the appellant is that he has been unequally treated in as much as the appellant is equally circumstanced with one Mr. Rattan

Lal who has been appointed to the post of ASI of Police on compassionate ground. The equal circumstances of the appellant with Rattan Lal is to

the extent that both the fathers were working as Head Constable at the relevant time. Both the fathers were gun down by the extremist. The father

of the appellant in 1990 and the father of one Rattan Lal in 1994. To that extent the appellant and Rattan Lal are equally circumstanced. However,

from the judgement of the learned Single Judge it clearly appeared that the circumstances weighed in the order of the appropriate authority,

appointing Mr. Rattan Lal to the post of ASI of Police because he possessed the qualification of Post Graduate Degree. At the bar, counsel for the

appellant admitted that the appellant was appointed as constable on 26.04.1990 when he was under matric. It is also clear from the judgement of

the learned Single Judge that one Rattan Lal who has been appointed to the post of ASI of Police in 1994 possessed the qualification of Post

Graduate Degree. It is in these circumstances that the case of the appellant is not equally circumstanced with one Mr. Rattan Lal who had not been

arrayed as a party respondent in the writ proceedings. It must be grasped that the equality clause is applicable to equal circumstances. If unequal is

treated equally it amounts to discrimination in reverse. The fact that one Mr. Rattan Lal possessed post graduation qualification and the appellant is

only undermatic at the time of his appointment would clearly show that there was intelligible differentia between the appellant and one Mr. Rattan

Lal".

9. Herein the appellant has passed only 12th standard whereas the essential eligibility qualification for the post of ASI is Graduation. Thus the

petitioner on this score also is not entitled to the relief prayed for. The case of the appellant is also similar on facts and law and we have no reason

to deviate from or disagree with the finding recorded by the coordinate bench of this court.

10. Mr. Qadri, has also submitted that the appellant has accepted the post with out any protest, and therefore has waived his right to approach the

court for seeking direction for his appointment as ASI. Mr. Beigh has in rebuttal submitted that the case of the appellant was submitted to the

Governor for his appointment as ASI and what happened thereafter is not known. There is substance in the plea of Mr. Qadri that having accepted

the post of Head Constable the appellant has waived his right and cannot turn back to seek the relief prayed for. Waiver of right, has been

explained by the Supreme Court in case "M.P. Sugar Mills vs. State of U.P." reported in AIR 1979 SC 621 holding that:

Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be an

intentional act with knowledge".

11. The appellant has abandoned right by conduct on accepting the appointment and this has waived his right.

12. For the aforesaid reasons we do not find any substance in the appeal which is accordingly dismissed.