

(2006) 02 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : SWP No's. 33, 391, 735 and 2225 of 2003 and 1122 of 2005

Vivek Gupta and Others

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 16-02-2006

Acts Referred:

Jammu and Kashmir Educational (Subordinate Service) Recruitment Rules, 1992 — Rule 13
Constitution of India, 1950 — Article 14, 16
Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 — Rule 14, 14(1), 22, 5

Citation : (2006) 2 JKJ 425 : (2007) 2 SLJ 345

Hon'ble Judges : Y.P. Nargotra, J

Bench : Single Bench

Advocate : Sudershan Sharma, Nitin Bhasin and Surinder Kour, for the Appellant; Neeru Goswami, Dy. A.G. and B.B. Kotwal, for the Respondent

Final Decision : Allowed

Judgement

Y.P. Nargotra, J.—By this common order I propose to dispose of SWP Nos. 2225/2003, 33/2003, 735/2003, 391/2003 and 1122/2005,

as common question of law and facts are involved in all the writ petitions.

2. Petitioners through these writ petitions are questioning the legality of Government Order No. 1263-Edu of 2002 dated 16.10.2002, whereby the

private respondents have been appointed as Junior Assistants against the existing vacancies in the Education Department. The recruitment to the

post of Junior Assistant in the Education Department is governed by the J&K Educational (Subordinate Service) Recruitment Rules. Under these

Rules, the qualification prescribed for the post of Junior Assistant is matriculation or its equivalent qualification from any recognized University or

Board of Examination with knowledge of typing having not less than 30 words speed per minute, and source of recruitment has been provided to

be 100% by direct recruitment. While out of 100%, 25% of the vacancies have been reserved for the employees classified in Schedule II of J&K

Civil Services Regulations, who have passed matriculation examination and have a speed of not less than 25 words per minute in typing. The mode

for making selection for appointment is governed by J&K Subordinate Service Recruitment Rules, 1992. Under these Rules, the Service Selection

Board, constituted under the Rules is enjoined with the duty of selection and recruitment. Non-gazetted posts available against existing vacancies

are required to be referred by the Administrative Department to the Service Selection Board and in terms of Rule 13, the Board is required to

make selection after inviting applications through advertisement and issue select list in the order of merit after conducting such tests or examinations,

as may be prescribed, and if not prescribed, as it may consider necessary.

3. Admittedly, in the present case, the appointments of private respondents as Junior Assistants have been made by the Government without

referring the vacancies to the Service Selection Board. No advertisement for inviting applications from the eligible candidates has been issued by

the Government or the Board. The procedure, thus, prescribed for making selection and appointment to the post of Junior Assistant as prescribed

by the Recruitment Rules has not been followed. The appointments of private respondents, however, have been made in relaxation of the rules.

The Government order under challenge reads as follows:

Government Order No. 1263-Edu of 2002

Dated 16.10.2002

Sanction is accorded in relaxation of rules, to the engagement of the below mentioned persons against the vacant posts as Jr. Assistants in the

Schools/Offices shown against each:

S/Shri

1. Shah Din Malik S/o Mohd Din In the office of ZEO, Gool.

Malik R/o Budhan, Tehsil

Mahore, Distt. Udhampur.

2. Mohd Nasurallah Wani S/o H.S.S., Gool.

Abdul Majeed Wani R/o Good,

Distt. Udhampur.

3. Mohd. Sadiq S/o Gh. Mohd Shah G.H.S., Gool.

R/o Gool, Tehsil Mahore, Distt.

Udhampur.

4. Mohd. Shafi S/o Hasham R/o High School Ind.

Dhedah, Tehsil Mahore, Distt.

Udhampur.

The newly engaged persons will be paid:

(i) An amount of Rs. 1200/- per month for the first 2 years; and

(ii) Rs. 1500/- per month thereafter for next three years.

The newly engaged persons will be considered for regularization after completion of successful tenure of 5 years.

By order of the Government of Jammu and Kashmir.

4. The case of petitioners is that the appointment of private respondents without advertising the posts is in violation of the rules and, therefore,

legally not sustainable. Learned Counsel appearing for petitioners submit that the appointments of private respondents are backdoor appointments.

The Government was not competent to relax the rules and make the appointments without inviting applications from all eligible candidates. Because

of non-issuance of the advertisement for inviting applications, the right of petitioners guaranteed to them under Articles 14 & 16 of the Constitution

for competing for their appointments has been infringed. The order impugned, as such, is illegal and deserves to be quashed.

5. The respondent-State has filed its stance in SWP Nos. 735/03 and 391/2003, which at the request of learned Counsel for respondent-State is

taken to be the stance in other connected writ petitions also. The stand of the

State, i.e., respondents 1 to 4 is that MLA from Gool Constituency, namely, Ab. Wahid Shah had drawn the attention of Education Minister about the vacant posts in the schools of his Constituency and had also raised the matter in the Legislative Assembly, on which the case was referred to Director School Education for examination and report. The Director School Education, Jammu communicated that a number of posts of Junior/Senior Assistants and Lab Assistants were lying vacant in the schools of Gool/Arnas and also in other offices of the Education Department, due to which the work in these institutions was considerably impaired. It is also stated that the Director School Education mentioned that due to inherent difficulties in Gool/Arnas Constituency in term of peculiar topographical and geographical conditions, the outsiders generally avoid posting to that area; further the problem gets compounded due to adverse security scenario prevailing in the area, which results into the posts remaining vacant. Therefore, in order to improve the work of these institutions/offices, it was felt that providing supportive staff on the analogy of Rehbar-e-Taleem could be of definite help to a reasonable extent. It has further been stated that applications of the local candidates were scrutinized to fill up the void on the analogy of Rehbar-e-Taleem Scheme, whereafter the private respondents were finally appointed against the posts on a consolidated monthly salary of Rs. 1200/-each. Their appointment order envisaged that after the period of two years they will be paid Rs. 1500/- per month so as to be regularized after completion of successful period of five years. It has been admitted by the respondent-State that the post of Junior Assistant is a direct recruitment post and the same is required to be filled up by J&K Service Selection Recruitment Board. According to the respondents, the petitioners cannot claim appointment on the analogy of private respondents, as the concept of equality under Article 14 of the Constitution is a positive concept.

6. The stand of private respondents as disclosed in SWP No. 391/03 is that their appointments have been made under legal and statutory provisions and due process of law in terms of Rehbar-e-Taleem Scheme sponsored by the Government in order to make the Government institutions functional. It has also been submitted that the petitioners never applied for their consideration for appointment nor they were eligible

having any superior merit over them. They also submitted that the State Government has the power to relax the rules in emergent cases like the present one, as war like situation was prevailing in Gool Gulabgarh area due to militancy and in these circumstances the rules have been relaxed by the Government and appointments made.

7. I have heard learned Counsel for the parties and perused the record.

Articles 14 & 16 of the Constitution guarantee equality of opportunity to all in matters of public employment and appointments. Fundamental rule for making appointments emerging therefrom is that whenever a public post is to be filled up, it shall be filled up by making selection amongst all the eligible persons who are desirous of seeking appointments and competing for the same. Equal opportunity to all such persons, who desire to compete for the post, can only be provided by issuing an advertisement for inviting applications. The law recognizes the some exceptions to the aforesaid rule by permitting appointments on compassionate grounds or temporary appointments made in an emergency situation. Therefore, to meet these constitutional requirements, the State makes the provision for issuing advertisement and inviting applications from eligible candidates for making the appointments on a public post in the Recruitment Rules.

8. As already stated, in the Recruitment Rules governing the posts on which private respondents have been appointed, the mode and manner of selection is that the selection is made by the Service Selection Board after advertising the vacancies of the posts for inviting applications. The procedure prescribed by the rules has not been followed in the case in hand. The appointments, however, have been made in relaxation of the Recruitment Rules. Can the Recruitment Rules be relaxed validly by the Government, the contention of Mr. Kotwal, learned Counsel for private respondents, is that in terms of Rule 5 of J&K Civil Services (Classification, Control & Appeal) Rules, 1956, the Government is vested with the power to relax the rules. Rule 5 reads as follows:

Any of these rules made under them, may for reasons to be recorded in writing, be relaxed by the Government in individual cases if Government is satisfied that a strict application of the rule would cause hardship to the individual concerned or confer undue benefit on him.

9. On the strength of Rule 5 (supra), a contention was raised before the

Supreme Court in Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, . Their Lordships in the light of Rules examined the scope of relaxation and observed as follows:

Some relaxation rules permit relaxation of conditions of service and some permit relaxation of rules. Some permit relaxation in any particular case

and some permit relaxation in favour of a person or class of persons. In J.C. Yadav and others Vs. State of Haryana and others, , a three Judge

Bench while dealing with Rule 22 of the relevant rules which permitted relaxation, in case of hardship, in ""any particular case"", held that the above

words did not mean a particular person but meant ""pertaining to an event, situation or circumstances"". The power could therefore be exercised

even in favour of a group.

10. Their Lordships after noticing the two earlier decisions in G.S. Lamba and Others Vs. Union of India (UOI) and Others, and Narender

Chadha and Others Vs. Union of India and Others, , in which power of relaxation of Recruitment Rules was recognized, considered the decision

rendered in The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, and observed but as we

shall presently show, the recent trend of cases in this Court is entirely different. Their Lordships then observed:

Recent trend of cases: Recruitment rules cannot be relaxed. The decisions of this Court have recently been requiring strict conformity with the

recruitment rules for both direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental rules of

recruitment. In Keshav Chandra Joshi and others etc. Vs. Union of India and others, the Rule permitted relaxation of conditions of service and it

was held by the three Judge Bench that the rule did not permit relaxation of recruitment rules. The words 'may consult the PSC' were, it was

observed, to be read as 'shall consult PSC' and the rule was treated mandatory. In Syed Khalid Rizvi v. Union of India 1993 Suppl (3) SCC 575 ,

decided by a three Judge Bench a similar strict principle was laid down. The relevant Rule - Rule 3 of the Residuary Rules (see p. 603) (para 33)

in that case did permit relaxation of ""rules"". Even so, this Court refused to imply relaxation of recruitment rule and observed:

the condition precedent, therefore, is that there should be appointment to the

service in accordance with rules and by operation of the rule, undue hardship has been caused,....It is already held that conditions of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed.

11. Therefore, the Government could not have relaxed the fundamental Recruitment Rules for making appointments of private respondents, as the rule requiring issuance of advertisement for calling applications from all eligible persons being fundamental in character.

12. Mr. Kotwal, learned Counsel for private respondents, next contended that appointment of private respondents was temporary in nature, which could legally be made by the Government in the situation where due to militancy no other person was willing to serve on the places where the vacancies had occurred. He argued that since the initial appointment of private respondents being in accordance with Rule 14 of CCA Rules, it cannot be treated to de-hors the rules. Rule 14 reads as under:

Temporary appointment: - (1) 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 in a post borne, on the cadre of service, class or category and the making of an appointment to such vacancy in accordance with these rules would involve undue delay, excessive expenditure or administrative inconvenience, the appointing authority may appoint a person otherwise than in accordance with these rules temporarily with the prior approval of the Chief Minister in Coordination until a person is appointed in accordance with these rules but such temporary appointment shall in no case exceed three months on each occasion and not more than nine months in all.

(2) A person appointed under Sub-rule (1) shall be replaced as soon as possible by a member of the service of a candidate qualified and considered fit to hold the post under these rules.

(3) A person appointed under Sub-rule (1) shall not be regarded as a probationer in such service, class or category or be entitled by reason only of such appointment to any preferential claim to future appointment to such service, class or category.

13. Rule 14 thus empowers the Government to make temporary appointments in public interest in an emergency for a period of three months,

which can be extended only upto a period not more than nine months in all. After the expiry of period of nine months, the temporary appointment

becomes un-extendable. The temporary appointment cannot in any manner be treated to be an appointment under the Recruitment Rules, which

provide the mode and manner for making appointments to the post of Junior Assistant in the Education Department. The initial appointment of

private respondents being in violation of the Recruitment Rules is void and cannot be regularized despite the stipulation made in this behalf in the

appointment order, for the reason that only an irregular action can be regularized and not an action which is void-ab-initio. In *Ashwani Kumar and*

Others Vs. State of Bihar and Others, , a three Judge Bench of the Supreme Court held as follows:

Question of regularisation in any service including any Government service may arise in two contingencies. Firstly, if on any available clear

vacancies which are of a long duration appointments are made on ad hoc basis or daily wage basis by a competent authority and are continued

from time to time and if it is found that the concerned incumbents have continued to be employed for a long period of time with or without any

artificial breaks, and their services are otherwise required by the institution which employ them, a time may come in the service career of such

employees who are continued on ad hoc basis for a given substantial length of time to regularise them so that the concerned employees can give

their best by being assured security of tenure. But this would require one pre-condition that the initial entry of such an employee must be made

against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the

question of regularisation may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from

some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due

procedure for such recruitment. A need may then arise in the light of the exigency of administrative requirement for waiving such irregularity in the

initial appointment by competent authority and the irregular initial appointment may be regularised and security of tenure may be made available to

the concerned incumbent. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established

rules and regulations governing such recruitment. In any case back door entries for filling up such vacancies have got to be strictly avoided.

However, there would never arise any occasion for regularising the appointment of an employee whose initial entry itself is tainted and is in total

breach of the requisite procedure of recruitment and especially when there is no vacancy on which such an initial entry of the candidate could ever

be effected. Such an entry of an employee would remain tainted from the very beginning and no question of regularising such an illegal entrant

would ever survive for consideration, however competent the recruiting agency may be.

14. The appointments of private respondents made by the Government are nothing but back door appointments, which have been made without

following the Recruitment Rules and without putting the same to open competition. The same, therefore, cannot be regularized. Assuming that

private respondents were appointed by the Government temporarily, even then in terms of Rule 14 of CCA Rules they have no right to continue

after the expiry of period of nine months. The appointments of private respondents cannot also be treated to be appointments under the Rehbar-e-

Taleem Scheme, as the said Scheme does not envisage appointments on the post of Junior Assistant and that too without inviting applications.

15. The next contention of learned Counsel for private respondents that the petitioners in the writ petitions have no locus to challenge the

appointment of private respondents as they had not applied for the said posts, is not tenable. Had the posts been advertised, the question of

petitioners applying for the same would have arisen. On the same principle the plea of respondent-State that in the peculiar circumstances and the

situation prevailing in that area the outsiders from the places where the vacancies had arisen were not willing to serve, is also untenable. It could not

be assumed so by the respondent-State without the posts having been advertised. It would have been altogether a different matter if the posts had

been advertised in accordance with Recruitment Rules and no candidate except the private respondents had applied. Looked from any angle, the

appointments of private respondents through impugned order on the post of Junior Assistants in the Education Department cannot be legally

sustained.

16. For the aforesaid reasons, the writ petitions of petitioners are allowed and Government Order No. 1263-Edu of 2002 dated 16.10.2002 is

quashed. Consequently, the private respondents shall stand ousted from the posts on which they have been appointed by virtue of impugned order

and the vacancies arisen therefrom, if are to be filled, shall be filled up by following the Recruitment Rules.

17. The writ petitions disposed of in the terms indicated above.