

(2)

HIGH COURT OF JAMMU & KASHMIR
AT SRINAGAR

SWP No.1458/2012
CMP No.2408/2012

Date of Decision: 30.07.2013

Naseer Ahmad Lone & ors

Vs.

State of J&K & ors.

Coram:-

Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge

Appearing counsel:-

For the Petitioner(s): Mr. Z. A. Shah, Sr. Adv. with Mr. Asif.
For the Respondent(s): Mr. J. A. Kawoosa, Sr. AAG(for R1)
Mr. Azhar-ul-Amin (for R2)

- i) Whether to be reported
in Digest/Journal: ✓
YES/NO
- ii) Whether to be reported
in Press/Media: ✓
YES/NO/OPTIONAL

1. Respondent-Public Service Commission
(hereinafter for short PSC) vide notification
No.PSC/Exm-09/46 dated 30th December, 2008, invited
applications from the permanent residents of J&K State
for filling up 398 vacancies with the following break-up:

S. No.	Service	OM	RBA	SC	ST	LAC	OSC	PHC Horizontal Reservation	Total
1.	Junior Scale of J&K Administrative Service	119	42	17	21	07	04	06	210
2.	J&K Police (G) Service	48	17	06	08	03	02	-	84
3.	J&K Accounts (G) Service	56	21	08	11	04	02	02	104
	Total	225	80	31	40	14	08	08	398

(23)

2. The proviso to the eligibility conditions was to the effect that the candidates who have appeared in any examination for Bachelors Degree from any recognized University, the passing of which would render them eligible to appear in the examination but the results of their examination has not been declared, shall be allowed to appear in the preliminary examination but after qualifying the preliminary examination, they shall be required to produce the proof of passing of examination with the application for main examination failing which such candidates shall not be admitted to the main examination.

3. Some of the candidates who had claimed to have appeared in the degree examination but results were not declared, on the strength of above referred Proviso appeared in the preliminary examination and qualified for taking Competitive Combined Main Examination subject to production of the degree certificate. It had emerged that the candidates falling in such group had appeared in the degree examination subsequent to cut off date, they filed various writ petitions and on the strength of directions from the

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Court they were permitted to take the Combined Competitive(Main) Examination. Out of them six candidates had made the grade.

4. The PSC on conclusion of the selection process recommended 392 candidates to the Government for appointment on the basis of merit-cum-preference, both in open merit and reserved category, who were appointed vide Govt. order No.434-GAD of 2011 dated 08.04.2011 against the posts in Junior Scale KAS, J&K Police (Gazetted) Service and J&K Accounts(Gazetted) Service.

5. Six posts were kept pending awaiting results of the writ petitions. All the writ petitions so filed were dismissed, as a consequence thereof six candidates (petitioners), next in order of merit were recommended for appointment. The said recommendation has been turned down and as a result thereof, Govt. order No.734-GAD of 2012 dated 09.07.2012 was issued. Aggrieved thereof, instant writ petition has been filed.

6. Learned counsel would contend that the petitioners being next in order of merit would have been recommended for appointment along 392

candidates who have been appointed but for the pendency of the writ petitions and the directions of the Court. No fault or anything adverse is attributable to the petitioners which would disentitle them from getting appointed. A right has accrued to them which cannot be snatched, therefore, impugned Govt. order dated 09.07.2012 is totally against law.

7. In the order impugned position as projected has not been disputed but it has been mentioned that as against the dismissal of writ petitions, LPA is pending. Now LPA(SW) captioned Sourabh Sharma & ors Vs. State of J&K & ors has already been dismissed on 24.5.2013, therefore, on such count right to appointment of the petitioners could not be declined.

8. In the impugned order it has been further mentioned projected that the recommendations made by PSC in favour of the petitioners involve re-allotment of services in respect of four officers who had already undergone training in their respective branches, numerous difficulties will arise in re-allocating the candidates from one service to another, there will be delay in completion of their training schedule and consequent delay to their period of probation. In the

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same background also, it has been decided not to accept the recommendations of the PSC and to carry out the vacancies having remained unfilled to the future examination as the Combined Competitive Examinations are held annually.

9. Learned counsel for the petitioners rightly contended that re-allocation of the candidates from one service to another service, in view of they having completed training course, is not a valid ground for refusal of appointment, worst that can happen is that the petitioners can be adjusted against those six vacancies as had remained to be recommended vis-a-vis respective services and the petitioners are ready to abide by the same. Supporting the submission, learned counsel placed reliance on the judgment reported in **(2010) 7 SCC 678**.

10. Mr. Kawoosa, learned Senior AAG, appearing for respondent No.1, would project that mere selection does not confer any right of appointment. The recommendation of PSC is not binding, it is for the Government to take a decision, therefore, no enforceable right has accrued to the petitioners, as such, writ petition is not maintainable. In support of



this submission, he has placed reliance on the judgments reported in **(2008) 7 SCC 110, AIR 2009 SC 1994** and **(2001) 6 SCC 380**.

11. Learned counsel appearing for respondent No.2 submits that PSC had to make recommendations in order of merit which has been done, therefore, nothing more is required to be done by the PSC.

12. It is true that selection per se does not confer right of appointment but every case has to be adjudged in the background of its own facts. In a single process 398 candidates have been selected and out of whom 392 have been recommended and appointed, recommendation of six candidates has been with-held in view pendency of writ petitions filed by the candidates whose eligibility was in dispute. Those writ petitions have been dismissed, LPA taken has also been dismissed and it is in the same background recommendation has been made by the PSC. Such recommendation does not suffer from the vice of any arbitrariness, slackness, indolence or any fault attributable to the petitioners. Will it not be a discrimination to deny appointment to the petitioners when they were similarly circumstanced with 392



candidates who have been recommended and appointed. It will be a travesty of justice to deny appointment to the petitioners. In the given facts, petitioners have a vested right to claim appointment. Such type of selection and recommendation, which is free from any type of favouritism or fraud, creates a right which is enforceable.

13. It is true that the recommendations of the PSC is not binding but it is also equally true that the selection and recommendation cannot be turned down in an arbitrary manner. Discretion is with the Government but such discretion is not untrammelled and unfettered. Exercise of discretion must stand the test of reasonability. If the discretion exercised suffers from arbitrariness and unreasonableness, such type of discretion, if exercised, has to be set at naught.

14. The judgments as referred to and relied upon by Mr. Kawoosa, learned Sr. AAG, have been rendered in the backdrop of the facts and features of those cases which are not identical to the features of present case.

15. In the judgment relied upon by Mr. Kawoosa captioned **Subha B.Nair and others Vs. State of Kerala**



and others, reported in (2008) 7 SCC 210, the Cooperative Bank had made requisition for 214 vacancies but Registrar, Cooperative Societies approved 208 vacancies, ultimately only 201 were filled up. It was held that the *bona fide* decision of the Registrar to grant approval for 208 vacancies, keeping in view the Bank's weak financial position, was unassailable. In the same background it has been held:

"8. A decision on the part of an employer whether to fill up the existing vacancies or not is within its domain. On this limited ground in the absence of discrimination or arbitrariness, a writ court ordinarily would not interfere in such matters. This has been so held by this Court in *Deepa Keyes v. Kerala SEB*, observing that the rank list having expired and the validity having not been extended, no relief could be granted to the appellants therein."

16. Next Mr. J. A. Kawoosa, learned Sr. AAG, relied on the judgment *All India SC & ST Employees Association and another vs. A. Arthur Jeen and others*, reported in (2001) 6 SCC 380. Para 10 of the judgment is relevant to be quoted:

"10. Merely because the names of the candidates were included in the panel, indicating their provisional selection, they did not acquire any indefeasible right for appointment even against the existing vacancies and the State is under no legal duty to fill up all or any of the vacancies as laid down by the Constitution Bench of this Court, after referring to earlier cases in *Shankarsan Dash Vs.*

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Union of India. Para 7 of the said judgment reads thus(SCC pp.50-51) :-

"7.It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana vs. Subhash Chander Marwaha*, *Neelima Shangla vs. State of Haryana* or *Jatendra Kumar vs. State of Punjab*."

The said judgment advances the cause of the petitioners for the reasons as stated hereinabove.

17. Next learned Sr. AAG relied on the judgment captioned *S. S. Balu & anr v. State of Kerala & Ors* (AIR 209 SC 1994). Following portion from para 16 is relevant to be quoted:

"The State as an employer has a right to fill up all the posts or not to fill them up. Unless discrimination is made in regard to the filling up of the vacancies or an arbitrariness is

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committed, the concerned candidate will have no legal right for obtaining a writ of or in the nature of mandamus."

18. In the facts of the present case as detailed hereinabove, to deny appointment to the six candidates (petitioners) for no fault of their when their counter parts have already been appointed and the appointment of the petitioners remained pending in view of litigation at the behest of ineligible candidates, therefore, to deny them the right of appointment shall be discriminatory.

19. The law as referred to and relied upon by Mr. Kawoosa, learned Sr. AAG, is of no help to him because those judgments have been rendered in the backdrop of the facts and features of those cases which are not identical to the features of the present case.

20. Mr. Shah, learned counsel for the petitioners, has rightly placed reliance on the judgment captioned **East Coast Railway and another vs. Mahadev Appa Rao and others**, reported in **(2010) 7 SCC 678**, which is quite applicable to the present case. Para 14 is relevant to be quoted:

"It is evident from the above that while no candidate acquires an indefeasible right to a post merely because he has appeared in the examination or even found a place in the select list, yet the State does not enjoy an

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unqualified prerogative to refuse an appointment in an arbitrary fashion or to disregard the merit of the candidates as reflected by the merit list prepared at the end of the selection process. The validity of the States decision not to make an appointment is thus a matter which is not beyond judicial review before a competent writ court. If any such decision is indeed found to be arbitrary, appropriate directions can be issued in the matter

21. Impugned Government order No.734-GAD of 2012 dated 09.07.2012 is illogical and has an effect of defeating the ends of justice. It is to be realized that the petitioners have undergone cumbersome process while competing for the posts and by burning their midnight oil had made the grade so had to figure amongst the selected 398 candidates. Their hard work and merit cannot be permitted to be rewarded by denying them the right of appointment when their counter parts similarly circumstanced 392 candidates have been appointed.

22. Viewed thus, impugned Govt. Order No.734-GAD of 2011 dated 09.07.2012 is quashed, as a necessary corollary, the respondent No.1 is directed to consider the recommendation as made by the Public Service Commission in favour of the petitioners, which is required, to be accepted so as to advance the object of Article 14 and 16 of the Constitution of India. In the

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process the petitioners shall be open to be adjusted against those six vacancies which had remained to be filled up out of 398 vacancies in view of pendency of the writ petitions, irrespective of the allocation of services, to which they shall be entitled to. The allocation shall not stand as a stumbling block so as to deprive the petitioners of their legitimate right to appointment. The appointment of the petitioners shall be notional for service purposes with effect from the date their counter parts 392 candidates have been appointed.

23. The aforesaid exercise be undertaken and completed within a period of six weeks from today.

* **24.** Disposed of as above along with connected CMP.



Sgr
30/07/13

sd Honble Mr. Justice
Mohammed Yagoub M.D.

Application No. 7494
 Date of Opp. for the copy 2/9/13
 Date of which copy was ready for delivery 4/9/13
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 Joint Registrar
 High Court of J&K, Srinagar

Dated 4th Day of Sept 2013
AUTHORISED UNDER SECTION 76 OF EVIDENCE ACT
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(1) 88

IN THE HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

SM/1458/2012

In the matter of:



1. Naseer Ahmad Lone, age 25 years,
S/O Kh. Muhammad Shafi Lone,
R/O Shamsipora, Anantnag, District Anantnag.
2. Muneeb Umar, age 28 years,
S/O Kh. Ghulam Rasool Sheikh,
R/O Kishtwar, District Kishtwar.
At present Rajbagh, Srinagar
3. Ms. Farah Anjum, age 34 years,
S/O Kh. Muhammad Amin Anjum,
R/O 49 D/C Gandhi Nagar Jammu.
At present Rajbagh, Srinagar.
4. Satyan Shri Gupta, age 29 years,
S/O Sh. Ravi Kumar
R/O H. No: 5, Gali Arya Samaj,
Ward No: 9, Udhampur.
At present Rajbagh, Srinagar.
5. M. Ershad ul Haq Khan Manhas, age 25 years,
S/O Bashir Ahmad Khan Manhas,
R/O Zawoora Bdrhama, District Shopian.
6. Altaf Hussain Shah, age 43 years,
S/O Muneer Hussain Shah
R/O Gursai District Poonch.
At present Rajbagh, Srinagar



.. Petitioners

Versus

1. State of Jammu and Kashmir,
Through Commissioner/Secretary to Government,
General Administration Department,
Civil Secretariat, Srinagar.

Munad Advocate Central Srinagar

Advocate
[Signature]
at

CERTIFIED COPY

Joint Registrar
High Court of J&K, Srinagar

Dated 4th Day of sep 2012
AUTHORISED UNDER SECTION 76
OF EVIDENCE ACT

[Signature]

2. J&K State Public Service Commission,
Through its Secretary,
Polo Ground, Srinagar.

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Respondents

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High Court of J&K, Srinagar

Dated 4th Day of Sep 2001
AUTHORISED UNDER SECTION 1706
OF EVIDENCE ACT