

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU
Present: The Hon'ble Mr Justice Virender Singh-Judge.
The Hon'ble Mr Justice Hasnain Massodi-Judge
LPA SW No.157/2011, CMA No.185/2011

*Urgent.
Pl. dismiss with file
AS
11/04/12*



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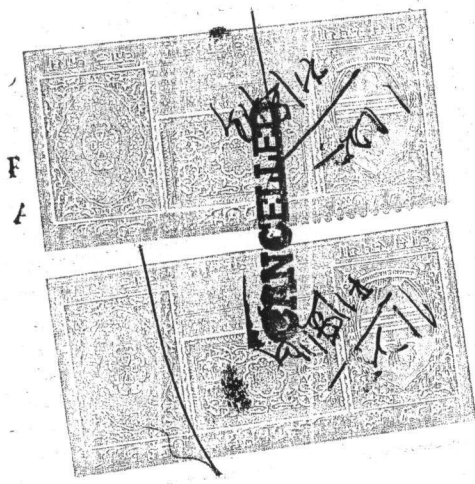
Dr. Koushal Kumar Khajuria; aged: 33 years
S/o Sh. Romesh Chander
R/o Village Pahariwala P.O. **Pallanwala** (Khour)
Tehsil Akhnour District Jammu
At Present: House No:517/5, Opposite Ever Green Public School
Lower Roop Nagar, Jammu

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Appellant

Versus

1. State of Jammu and Kashmir
through
Commissioner-cum-Secretary to Government
Department of Health and Medical Education
Jammu and Kashmir Government
Civil Secretariat, Srinagar
2. J&K Public Service Commission
through its Secretary
Opposite Polo Ground
Srinagar
3. Dr. Vikas Mahajan
S/o Sh. Sansar Chand Gupta
R/o 115 Sector No:4 Trikuta Nagar
Jammu



Respondents

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[Signature]
**Asstt. Registrar
High Court of J&K
JAMMU,**

*497
20.02.2014*

LPA SW No.157/2011
✓CMA no.185/2011

Date of order: 17.2.2014

Appearing counsel:

For the appellant(s): Mr. S.K.Shukla, Advocate
For the respondent(s): Ms. Neeru Goswami, Dy.AG for Respondent no.1
Mr. D.C.Raina, Sr. Advocate with
Mr. F.A. Natnoo, Adv for Respondent no.2
Mr. P.N. Raina, Sr. Advocate with
Mr. W.S. Nargal and Mr. J.A. Hamal, Advocates for resp.3

- | | | | |
|----|---|---|------------------------|
| 1. | Whether to be reported in Press/Journal/Media | : | Yes/No/Optional |
| 2. | Whether to be reported in Digest/Journal | : | Yes/No |

Per Massodi, J.

1. Jammu and Kashmir Public Service Commission (hereinafter referred to as "Commission") issued Advertisement notice, being No.09/PSC of 2010 dated 26th August 2010, inviting applications from eligible candidates, amongst others, for four posts of Lecturers, Pediatrics, in Government Medical College, Jammu, with the following breakup:

"Open Merit:	02
Residents of Backward Area:	01
S.T.:	01
Total	<u>04</u>

2. Dr. Koushal Kumar Khajuria – appellant herein, finding himself eligible for the advertised post in Open

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Merit Category, responded to advertisement notice. He, however, was aggrieved that Commission unmindful of J&K Reservation Act, 2004 (for short "Act of 2004") and Rules made thereunder, omitted to earmark one of the four posts for ALC Category. Appellant hailed from Actual Line of Control and intended to participate in the selection process under the said Category. He however did not take any chances, decided to apply under Open Merit Category notwithstanding disregard shown by Commission to the mandate of Act of 2004 and Rules made thereunder. He nonetheless decided to call in question Advertisement Notice on the ground that it violated mandate of Act of 2004, and accordingly filed writ petition, being SWP No.2313/2010.

3. Appellant's case was that respondent Commission had not advertised a single vacancy under ALC Category since 20th June 1994, when J&K Reservation Act, 1994 came into force. He insisted that as many as 14 posts of Lecturers in Paediatrics were advertised by Commission from time to time till 26th August 2010 i.e. date of the Advertisement Notice in question and four more posts were being advertised vide aforesaid Advertisement Notice making total number of posts of Lecturers, Paediatrics, advertised 18 and that one of the four posts advertised was, therefore, to be set apart for ALC Category. It was

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pleaded that Lecturer in Paediatrics like other disciplines, was a State Cadre post in terms of J&K Medical Education (Gazetted) Service Recruitment Rules, 1979, and for the purposes of Act of 2004 and Rules made thereunder, faculty in Government Medical College, Srinagar, and Government Medical College, Jammu, formed one cadre and share of different categories was to be worked out accordingly. Appellant labeled Government Order No.123-HME of 2006 dated 3rd March 2006, whereby cadre was bifurcated, as violative of J&K Medical Education (Gazetted) Service Recruitment Rules, 1979. Appellant on the strength of averments made in the petition, sought quashment of Advertisement Notice No.09/PSC of 2010 dated 26th August 2010 as also Government Order No.123-HME of 2006 dated 3rd March 2006 and a writ of Mandamus, commanding respondents to earmark one of the four advertised posts of Lecturers in Paediatrics for ALC Category and consider his candidature under said Category.

4. Respondents resisted writ petition on the grounds that in terms of Government Order No.123-HME of 2006 dated 3rd March 2006, Lecturers Cadre in various disciplines in two Government Medical Colleges of the State stood bifurcated and share of the Reserved Categories as also Open Merit Category was to be worked

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out on the basis of cadre strength in respective Government Medical Colleges. It was pleaded that seniority and roster of Lecturers in different disciplines was maintained separately for Government Medical College, Srinagar, and Government Medical College, Jammu and 10th post would go to ALC Category in Government Medical College, Jammu, only after nine posts were filled up from other categories in terms of Act of 2004 and Rules made thereunder.

5. Respondents pleaded that as only four posts of Lecturers in Paediatrics were advertised in Government Medical College, Jammu, prior to the Advertisement Notice in question, the total number of posts of Lecturers, Paediatrics, advertised including four posts advertised vide aforesaid advertisement notice, came to 08 and a post under ALC Category was only to be advertised after 9th post was advertised and filled up. The claim made by appellant, therefore, was said to be premature and without merit. Respondents maintained that the Advertisement Notice in question did not offend Act of 2004 and Rules made thereunder, and therefore, did not call for any interference. Appellant was said to have participated in Open Merit Category and not made grade while one Dr. Vikas Mahajan, impleaded as party respondent vide order dated 28.02.2011, was found to be

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meritorious, deserve to be selected against one of the advertised posts under Open Merit Category.

6. Writ Court did not find any merit in respondents' plea that Government Order No.123-HME of 2006 dated 3rd March 2006, bifurcated the cadre and that government order was to be read as amendment to J&K Medical education (Gazetted) Service Recruitment Rules 1979. It held that any decision to bifurcate the cadre would necessitate amendment to Recruitment Rules and in absence of such amendment, impugned government order, could not have the consequences suggested by respondents. Writ court further held that 10th post out of advertised posts of Lecturer, Paediatrics, with effect from 28th June 1994 i.e. the date when J&K Reservation Act 1994, came into force, was required to be set apart for ALC Category. It was, however, held that as appellant admittedly was not eligible on the date 10th post of Lecturer, Paediatrics, was advertised in 2008, he was not to have any grievance regarding failure on part of respondents to advertise 10th post under ALC Category in the year 2008.

7. Learned Single Judge upholding appellant's claim, however, did not grant any relief to appellant, pointing out that as selection process was concluded, the post to be earmarked for ALC Category would require re-

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advertisement and fresh selection process. The writ Court observing that respondent no.3 had been meritorious and entitled to selection, directed respondents to advertise next Lecturer Paediatrics post under ALC Category.

8. Appellant through medium of Letters Patent Appeal on hand, throws challenge to Writ Court judgment dated 29th July 2011. Appellant's case is that writ court, after recording agreement with almost all the grounds urged in writ petition, ought not to have declined relief sought in writ petition and to have allowed respondents to go ahead with a course admittedly not permissible under J&K Medical Education (Gazetted) Service Recruitment Rules 1979 and J&K Reservation Act, 2004 and Rules made thereunder.

9. We have gone through Writ Court judgment, memo of appeal and writ record. We have heard learned counsel for parties at length.

10. The case put forth by the appellant before the Writ Court was that the respondent - Commission in violation of the mandate of Jammu and Kashmir Reservation Rules, 1994 and thereafter Jammu and Kashmir Reservation Act, 2004 and Rules made thereunder, failed to offer 10th Lecturer Paediatric post to a candidate from Actual Line of Control (ALC) Category. The case set up was that the Actual Line of Control (ALC) was recognised

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as one of the reserved categories under Socially Educationally Backward Classes and 3% of the available vacancies for direct recruitment were required to be filled up by the residents of areas adjoining Line of Control; that in terms of Roster for direct recruitment prescribed under Rule 5 of J&K Reservation Rules, 2005, 10th vacancy in each service, class, category and grade in service was to be filled up by eligible candidate from ALC Category in accordance with Rules. It was pleaded that, as many as, 14 vacancies of Lecturers Paediatrics borne on Jammu and Kashmir Medical Education (Gazetted) Service Recruitment Rules, 1979 were advertised from 28th June, 1994 – the date J&K Reservation Rules, 1994 came into force, till 26th August, 2010 i.e the date of impugned Advertisement Notification, without a single post advertised for ALC Category. The respondent – Commission was said to have repeated its disregard for the mandate of J&K Reservation Act, 2004 and Rules made thereunder by not earmarking one of the four vacancies advertised vide impugned Advertisement Notification for ALC Category. The appellant anticipating that his claim may be opposed on the ground that as in wake of Government Order No. 123-HME of 2006 dated 03.03.2006, seniority of members of J&K Medical Education (Gazetted) Service was being maintained

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separately for Medical Government Colleges, Jammu and Government Medical College, Srinagar, the number of Lecturer Paediatric filled up in two colleges when taken separately was yet to reach the requisite number i.e. 10 as would require offering one post in Government Medical College, Jammu to a candidate of ALC Category, assailed the aforesaid Government Order as violative of J&K Medical Education (Gazetted) Service Recruitment Rules, 1979. The averments made in the petition were controverted by the respondents and as anticipated by the appellant, his claim resisted on the ground that the Government Order No. 123-HME of 2006 dated 03.03.2006, had the effect of bifurcating the service. Learned Single Judge alive to the nature of controversy raised following questions for determination:-

- “1. Whether the roster position will operate as against the vacancies, which have accrued from the year 1996, when the J&K Reservation Rules, 1994 came into force OR will operate from the date the J&K Reservation Rules of 2005 came into force?
2. Whether the roster was required to be maintained from the year 2006; College wise separately afresh in pursuance to the Government Order No. 123-HME of 2006 dated 03rd of March' 2006?

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3. Whether the State cadre of Lecturer could be bifurcated College wise.

4. Whether 10th vacancy has been advertised for the category A.L.C, if no, what is its effect?

11. The Writ Court taking an overview of J&K Reservation Rules, 1994 and J&K Reservation Act, 2004 with focus on Section 24 of the Act, held that the Roster for Lecturer Paediatric is to be maintained from the date, J&K Reservation Rules, 1994 came into force. The Court further held that Government Order No. 123-HME of 2006 dated 03.03.2006 did not bifurcate the cadre – a course, according to the Writ Court, otherwise, impermissible J&K Medical Education (Gazetted) Service Recruitment Rules, 1979 unless amended and at the most the Order had the effect of maintaining seniority at the college level i.e. Government Medical College, Jammu and Government Medical College, Srinagar. The Writ Court made it clear that, in the event, Government proposed to take a policy decision to bifurcate J&K Medical Education (Gazetted) Service Recruitment Rules, 1979, it could not press into service, the Government Order but was required to amend J&K Medical Education (Gazetted) Service Recruitment Rules, 1979.

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12. The appellant's plea that none of 14 Lecturers Paediatrics posts advertised from 1994 till 2008, was set apart for ALC Category, was accepted by the learned Single Judge, opining that the prescribed procedure was not followed to fill up posts from Open Merit Category. The Court pointed out that only, in case, the 10th vacancy was advertised for ALC Category, it failed to evoke any response, or a meritorious candidate was not found and the vacancy was carried forward as required under Rules, but still remained unfilled that the vacancy could have been filled up from an Open Merit Category candidate.

13. The Writ Court after accepting all the grounds set out in the petition, to question the Advertisement Notice and the selection process to the extent of second candidate in Open Merit Category – respondent no. 3, still left the appellant without any relief on the ground that advertisement of 10th Lecturer Paediatric vacancy in Open Merit Category instead of ALC Category, had gone without challenge, selection process pursuant to the Advertisement Notification impugned in the petition, was complete and the respondent no. 3 stood selected against the second vacancy in the Open Merit Category. The next vacancy of Lecturer Paediatric was, however, directed to be advertised for ALC Category, with liberty to

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the appellant and other eligible candidates to participate in the selection process.

14. The finding returned by the Writ Court on all the issues raised in the writ petition has not been questioned by the respondents. It is admitted that J&K Medical Education (Gazetted) Service is a single cadre and Government Order No. 123-HME of 2006 dated 03.03.2006 does not bifurcate the cadre. It is also admitted that 10th vacancy was advertised together with three other vacancies, though not for ALC Category candidate and one Dr. Tariq Ahmad Bukhari selected under RBA Category was given 10th slot in the 100 points Roster maintained in terms of Jammu and Kashmir Reservation Act, 2004 and Rules made thereunder.

15. The omission on part of the respondents to advertise 10th Lecturer Paediatric vacancy for ALC Category would not absolve them of their statutory duty to rectify the mistake and set right the grievance of ALC Category candidates. The respondents observed mandate of J&K Reservation Act, 2004 and the Rules made thereunder in complete breach by advertising 4 vacancies vide Advertisement Notification No. 14-PSC of 2009 dated 17.07.2009 again in violation of J&K Reservation Act, 2004 and the Rules made thereunder. The appellant approached the Writ Court right in time i.e. when the

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impugned Advertisement Notification was issued and selection process had yet to start, with his grievance that the respondents oblivious to mandate of J&K Reservation Act, 2004 and Rules made thereunder had omitted to earmark one of the advertised vacancies for ALC Category. Failure on part of the respondents to advertise 10th Lecturer Paediatrics vacancy for ALC Category, or omission on part of an eligible candidate at the relevant time to question such failure, would not entitle the respondents to ignore the mandate of J&K Reservation Act, 2004 and Rules made thereunder in future, with impunity. Once the Writ Court found merit in the appellant's case on the strength of averments made, and rejected all the ground urged in opposition to the writ petition, it was not open to the Writ Court to deprive the appellant of the fruits of litigation and instead allow respondent no. 3 to continue against the position, not meant for and due to an Open Merit Category candidate. Failure on part of the respondents to advertise 10th Lecturer Paediatrics vacancy in the year 2008 for ALC Category cannot be taken to have resulted in automatic conversion of ALC Category vacancy into Open Merit Category vacancy. Even in case, such a vacancy was advertised and not filled up because of no response or non-availability of eligible and meritorious candidate, the

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vacancy would not go to the Open Merit Category but was required to be carried forward and re-advertised and reverted to the Open Merit Category, if the advertisement did not result in selection of an ALC Category candidate. The respondents as held by the Writ Court neither advertised 10th vacancy under ALC Category nor adhered to mandate of J&K Reservation Rules, 2004.

16. The only course open to the Writ Court, in face of its clear finding recorded in favour of the appellant, was to set aside the Advertisement Notification to the extent it advertised second Lecturer Paediatrics vacancy under Open Merit Category, set aside selection of respondent no. 3, allow the respondents to finalise selection to the extent of three of four advertised vacancies i.e. one vacancy under Open Merit Category, one under RBA Category and one vacancy under Scheduled Tribe Category and direct them to advertise the fourth vacancy under Actual Line of Control Category.

17. The Writ Court instead allowed itself to be influenced by finalization of selection process, undertaken by the respondent – Commission ignoring the challenge thrown to it by the appellant at its threshold and selection made from a category to which the vacancy was not due under J&K Reservation Act, 2004 and Rules made thereunder. In the process, a premium was put on

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non-adherence to the Rules and respondent no. 3 rewarded with an appointment not due to him because of non-availability of vacancy to the category under which he applied.

18. The reservation as pointed out at the outset, is not in the nature of doles or alms distributed out of pity. It is a measure to set right the disadvantage and disempowerment suffered by a section of the society not because the members thereof suffer from deficiency in ability or intellect but because they have been pushed to the bottom of the barrel for historical or geographical reasons. It is a plan to provide level play field to downtrodden, marginalized and unattended sections of society – a tool to realize the Constitutional mandate of justice to all, in all its manifestations. The respondents are under statutory obligation to give flesh and blood to the Reservations Act and Rules by ensuring that the rules do not remain paper rights but are followed without fail. The Courts as an arm of constitutional revolution are equally duty bound to ensure that the statutory obligations are followed without breach and whatever is due to socially and educationally backward sections of the society is not usurped by those outside the category.

19. For the reasons discussed, we find merit in the Letters Patent Appeal on hand. The appeal is,

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accordingly, allowed. Selection of respondent no. 3 in Open Merit Category against a vacancy required under Rules to be advertised for ALC Category is set aside. The respondents are directed to advertise the second vacancy advertised under Advertisement Notification No. 09/PSC of 2010 dated 26.08.2010 for Open Merit Category, for ALC Category and finalize the selection process as far as possible by or before 31.03.2014.

20. Allowed.

Sd/-
Honble
(Hasnain Massodi)
Judge

Sd/-
Honble
(Virender Singh)
Judge

Jammu
17.2.2014
Parshant

This judgment is pronounced by me under Rule 138 (4) of the Jammu and Kashmir High Court Rules, 1999.

Sd/-
Honble
(Virender Singh)
Judge

Jammu
17-02-2014

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