

CASE NO.:
Appeal (civil) 3734 of 2002

PETITIONER:
Inder Parkash Gupta

RESPONDENT:
State of Jammu & Kashmir & Ors.

DATE OF JUDGMENT: 20/04/2004

BENCH:
CJI, S.B.Sinha & S.H. Kapadia.

JUDGMENT:
J U D G M E N T

With CA Nos.3735/2002, 3736/2002,
3737/2002, 3738/2002 and 3739/2002

S.B. SINHA, J :

INTRODUCTION:

These six appeals involving common questions of law and fact were taken up for hearing and are being disposed of by this common judgment.

BACKGROUND FACTS:

Under the Health Ministry of the State of Jammu and Kashmir there are two different departments, medical health and medical education. The employees working in those departments are borne on separate cadres. The Respondents 3 to 10 before the High Court were appointed as ad hoc lecturers in medicine in the medical education department by the State of Jammu and Kashmir. No recommendation of the Jammu and Kashmir Public Service Commission was obtained therefor. The said ad hoc appointments were set aside by this court in Jammu and Kashmir Public Service Commission Vs. Dr.Narender Mohan & Ors. reported in 1994 (2) SCC 630 wherein the State was directed to refer the vacancies to the Commission and make appointments in terms of the recommendations made by it in that behalf. Pursuant thereto and in furtherance thereof, an advertisement was issued by the Commission for some posts of Lecturers on or about 8.3.1994 in the Health and Medical education department. The educational qualification prescribed therefor was "M.D.(Medical/general medical) MCRF, FRCP. Speciality Board of Internal Medical (USA) or an equivalent qualification in the subject with experience as Registrar/Tutor/Demonstrator/Tutor or Senior Resident for a period of two years in the discipline of Medicine, in a teaching medical institution recognised by the Medical Council of India. The notification issued by the Public Service Commission further stipulated that the candidates who possessed any experience in the

line, any distinction in sports/games, NCC activities should furnish certificate, along with the application, to that effect.

It is not in dispute that the appointment in the posts of Lecturers was governed by a statutory rule called Jammu & Kashmir Medical (Gazetted) Service Recruitment Rules, 1979 (for short, 1979 Rules; Rule 8 whereof reads thus:-

"8. Method of recruitment: While making selections.-

(1) to the posts in the teaching wing of the service, the Commission/ Department Promotion Committee shall have regard to the following, namely,-

- (a) Academic qualifications of the candidates;
- (b) Teaching experience;
- (c) Research experience; and
- (d) Previous record of work, if any."

The Public Service Commission, however, framed a rule in the year 1980, known as Jammu & Kashmir Public Service Commission (Business & Procedure) Rules, 1980 (for short, 1980 Rules) although there did not exist any provision therefor. Rule 51 of 1980 Rules is as under:-

"Rule 51. The assessment at an interview shall be based on the following principles:-

A. Performance of the candidate in the viva voce test

...100 Marks

B. Academic Merit \026

(i) Percentage of marks obtained in the basic (i.e., minimum qualification prescribed for the post

...25 Marks

(ii) Higher qualification than the basic (minimum) prescribed for the post such as Diploma or Degree in the concerned Speciality/Superspeciality/ Subject/Discipline-

(a)Diploma\026 2 Marks]subject to

(b)Degree - 5 Marks]a maximum of
]5 marks

C. Experience acquired by the candidate in the concerned Speciality/

Superspeciality/Subject/Discipline

(i) exceeding 1 year
but not 2 years ...2 marks

(ii) for excess
2 years - for every full year
1 mark subject to a
total of 5 marks
including those under
(i)

D. Sports/Game :
Distinction in sports/games (i.e.,
representing a University, State or
Region in any Sports/Games.

...3 Marks

E. Distinction in NCC activities (i.e.,
having held the rank of Junior Under
Officer or Senior under officer or
having passed the top grade
certificate examination of NCC).

...2 Marks

Total A to E ...140 Marks"

The Commission interviewed the candidates in
terms of Rule 51 aforementioned.

Upon taking the vice voce test and
considering the materials on records, the public
Service Commission made recommendations pursuant
to or in furtherance whereof, the Respondent Nos.3
to 10 were appointed by the State.

Writ Petitions before the High Court:

Questioning the validity of the Rule 51 of
1980 and consequently the selection and
appointment of the Respondents No.3 to 10, a writ
petition was filed by Shri Inder Parkash Gupta,
inter alia, contending therein that the
Respondents No.3, 6 & 9 were not eligible to be
considered for appointment to the said posts as
they did not possess requisite experience of two
years as Registrar/Tutor. It was further alleged
that the Respondent No.10 at that time was
overage. Further contention of the writ
petitioner was that his research work, experience
and publications had not been taken into
consideration by the Commission. In particular,
his higher qualification of D.M. had not been
given due weightage.

It was also urged that keeping in view the
decision of this Court in J & K Public Service
Commission V. Dr. Narender Mohan [1994 (2) SCC
630] wherein the appointments of Respondent Nos. 3
and 10 as ad hoc Lecturers have been quashed, the
purported experience gained by them in the said

capacity could not have been taken into consideration by the Commission. The selection made by the Commission was said to be arbitrary and illegal as the criteria laid down in Rule 51 of 1980 Rules had been applied to assess the merit and suitability of the candidates ignoring Rule 8 of 1979 Rules whereby and wherein eligibility criterion and method of recruitment were laid down.

A further contention was raised by the said writ petitioner to the effect that 100 marks earmarked for viva voce test in Rule 51 is unreasonable and excessive.

The State of Jammu & Kashmir did not file any counter affidavit but Public Service Commission did. The private respondents also filed their counter affidavits.

The writ petition having regard to the importance of the questions involved was referred to a Full Bench for its decision. The Full Bench by its judgment dated 30.7.1999 passed in SWP No.211 of 1994, for all intent and purport accepted the major contentions raised on behalf of the writ petitioner/appellant holding:-

"1. The Commission has the competence and jurisdiction to frame rules for conducting its business such as Rules 1980;

2. Rule 51 of Rules 1980 should be re-framed by the Commission in accordance with the observations made in the course of this judgment.

3. The selection of selected candidates made by the Commission is not disturbed subject to the relief granted to the petitioner;

4. The petitioner shall be treated to have been selected and placed in the select panel above respondents 3 and 9 who in turn shall be the selected candidates in the select panel after respondent no.4 and the petitioner. The petitioner shall further be entitled to all consequential service benefits."

The writ petitioner, Inder Parkash Gupta has filed an appeal thereagainst which has been marked as C.A.No.3734/2002 and the State has filed an appeal which has been marked as 3736/2002.

One Dr. Vinay Rampal who was not a party in the writ petition has filed an appeal which has been marked as C.A.No.3735 of 2002 against the

judgment.

An order of Jammu & Kashmir High Court passed by a learned single Judge dated 5.5.1997 in a batch of writ petitions which were disposed of following the Full Bench decision of this Court is the subject matter of other three appeals. A further contention was raised in the said writ petitions to the effect that even assuming Rule 51 of 1980 Rules to be valid, as it prescribed certain marks to be allotted, the same should be allotted to the superspeciality post which the concerned person had been holding and not his experience in any other capacity. The said appeals are marked as Civil Appeal Nos.3737/2002, 3738/2002 and 3739/2002.

It is not in dispute that the Public Service Commission proposed a select list of 16 candidates for appointment. Dr. Inder Parkash Gupta's name appeared at Sl.No.13 therein. The private respondents whose names appeared at Sl.No.3 to 10 of the select list were appointed. Two posts were kept in abeyance as the matter regarding reservation was pending before the State Government.

It, however, stands admitted that during the pendency these appeals the proceedings the State of Jammu & Kashmir issued a notification dated 22.5.2002 whereby and whereunder the appellant herein Inder Parkash Gupta was given promotion in terms of the judgment of the High Court but the same had been applied prospectively and without giving any monetary and seniority benefits to Shri Gupta.

High Court Judgment:

The High Court having regard to the pleadings of the parties and submissions made before it formulated the following questions:-

"1. Whether the Commission has the competence and jurisdiction to frame the Jammu and Kashmir Public Service Commission (Conduct of business and Procedure) Rules, 1980?

2. Whether the selection made applying criteria prescribed under Rule 51 of the Rules (supra), has the effect of ignoring Rule 8 of the Jammu & Kashmir Medical (Gazetted) Service Recruitment Rules, 1979, which prescribes the statutory method of recruitment to the posts in teaching wing?

3. Whether the experience as ad hoc lecturer can be counted as experience gained as Registrar/Tutor, Demonstrator/Tutor or Senior Resident/Tutor to meet the requirement of statutory eligibility condition to seek consideration for

selection and appointment as lecturer?

4. Whether 100 marks earmarked for viva voce test and 40 marks for record as per the criteria contained in rule 51 (supra), are excessive and capable of turning the merit into demerit in view of the judgments of the Supreme Court and thus Rule 51 needs re-consideration?

5. Whether the selection of respondents 6 to 10 and particularly of respondents 3, 6, 9 & 10 is bad being not in accordance with the statutory method of selection and is also the result of arbitrary selection?"

As regard question No.1, it was answered in the negative stating that although no such power is expressly conferred upon the Commission but proceeded to hold that the Commission had the competence and jurisdiction to frame such regulatory procedural rules for conduct of its own business and this power is impliedly granted by the enactment. As regard question No.2, the High Court was of the opinion that Rule 8 of 1979 Rules prevailed over Rule 51 of 1980 Rules holding that no additional qualification can be attached or added to the prescribed eligibility qualification or method of selection by the Commission holding:-

"Thus, the Commission has not properly followed and applied the method of selection relating to the service, while making selection, prescribed under rule 8 of Rules 1979."

As regard the eligibility of the Respondents 3, 6 & 9, the High Court noticed that the said respondents did not possess requisite experience observing that the Commission did not specifically explain as to how these Respondents were said to have possessed two years experience as Registrar, Demonstrator or a Senior Resident. It was held:-

"Respondent No.3 Dr.Jaipal Singh, is having experience as Registrar only of 22 months whereas Respondent No.9 Dr.Jatinder Singh is having experience of 20 months 27 days which is less than two years."

As regard the question No.4, the High Court answered the same in the affirmative relying on various decisions of this Court. It was held that in Engineering Service there is no such rule providing statutory method of selection as is found in Rule 8 of 1979 Rules holding:-

"Rule 51 providing 100 marks for viva voce against 40 for record, makes a departure and is apparently contrary to

the law laid down by the Supreme Court and necessitates re-consideration of Rule 51 for the added reason that there is no consensus of judicial opinion rendered in Abdul Wahid Zargar's case vis-à-vis the judgments of the Supreme Court that marks for viva voce test could exceed the marks assigned for record/academic merit, where the selection is made on the basis of interview alone. There is another reason also that Rule 51 has not taken care of Rule 8 of Service Rules 1979, consequence whereof is that the statutory method of selection has not been comprehensively followed and adopted in the rule. For these reasons Rule 51 is required to be recast."

While answering question No.5, the High Court noticed that no marks had been assigned for the research experience, publications or previous record of work, which could not be ignored as there was a statutory obligation upon the Commission to make selection according to the statutory rules governing the service and further noticing that the Respondent Nos.4, 5 & 7 (namely, Masood Tanvir Bhat, Samia Rashid and Parvez Ahmed Shah) could not secure any mark out of the 15 marks as they did not possess the requisite research experience etc. and were not found entitled thereto but despite the same had been selected as higher marks were allotted to them in the viva voce test. It was held:-

"It is established from the record that the selection has been based upon 15 marks for record (as 25 marks could not be utilised) and 100 marks for interview. The claim of the respondent-Commission that 40 marks have been taken into consideration for record while applying Rule 51, is not forthcoming from the record maintained by the Commission.

The Petitioner is admittedly possessed of the higher qualification and record of research experience, publications etc. in comparison to the other selected candidates. Respondents 3 and 9 are not having any such record. The petitioner has been assigned minimum marks in the viva voce which has down-graded him in the merit list of the candidates supplied to the court even though he is D.M. The Commission has turned the merit of the petitioner into de-merit by giving minimum marks..."

Despite such findings, the High Court refused to set aside the entire selection on the premise that the same had been made long ago and one of the respondents had been promoted and proceeded to dispose of the writ petition with the directions as noticed hereinbefore.

Submissions:

Mr.Ranjit Kumar, learned counsel appearing on behalf of the appellant would submit that Rule 51 of 1980 Rules framed by the Public Service Commission is not statutory in nature. He would urge that keeping in view the advertisement issued, the Commission was bound to scrupulously comply with the requirements as regard qualification etc. and should have strictly applied Rule 8 of 1979 Rules which is admittedly statutory in nature. The Learned Counsel would further contend that as the Commission had no jurisdiction to frame such rules, the same should have been declared ultra vires by the High Court. Mr.Ranjit Kumar would urge that Section 133 of the Jammu and Kashmir Constitution which is in pari materia with Article 320 of Constitution of India clearly provides that only in certain situations the Governor can frame regulations as a result whereof the necessity to consult the Commission may be done away with. The Rules framed by the Public Service Commission does not also satisfy the test laid down in the proviso appended to Section 133 of the State Constitution or for that matter Article 320 of the Constitution of India and in any event the same having not been laid before the Legislature as is mandatorily required under sub-section (4) thereof, the selection held pursuant to or in furtherance of Rule 51 of 1980 Rules must be held to be wholly illegal and without jurisdiction.

The Learned Counsel Kumar would argue that having regard to the findings arrived at by the High Court, the writ petition could not have been disposed of in the manner as was sought to be done inasmuch as some of the private respondents admittedly did not have the requisite qualification or experience to be appointed. Merit of the appellant, it was contended, having admittedly been turned into demerit as was found by the High Court, relief by way of solace given to the appellant by placing him respondent No.6 & 9 must be held to be insufficient and he, in any event, deserved to be placed above some other respondents in view of the fact that he had not been assigned 5 marks for higher qualification. In any view of the matter, awarding of 100 marks in viva voce examination out of the total 115 marks (as no marks have been awarded for academic merit) was bad in law.

The learned counsel would further submit that as some of the respondents did not have two years' experience and as admittedly Respondents No.3 to 5 did not have any higher qualification, there was no reason as to why the entire selection was not set aside. Lapse of time in selection of the candidates may not itself be sufficient ground to uphold his selection, the learned counsel would urge, having regard to the seniority of the petitioner and further having regard to the fact that all the private parties being in the service

of the State, they could only be reverted back to their parent departments and would not be out of job.

Mr. Anis Suhrawardy, learned counsel appearing on behalf of the State of Jammu and Kashmir, on the other hand, would submit that keeping in view the fact that appellant Inder Parkash Gupta had already been promoted and furthermore in view of the subsequent event this Court should not interfere in the matter.

No submission was made on behalf of any other parties to the appeals.

Analysis:

Section 133 of the Jammu & Kashmir Medical (Gazetted) Service Recruitment Rules, 1979 admittedly were issued under Section 124 of the Jammu and Kashmir Constitution which is in pari materia with Article 309 of the Constitution of India. The said rules are statutory in nature. Public Service Commission is a body created under the Constitution. Each State constitutes its own Public Service Commission to meet the Constitutional requirement for the purpose of discharging its duties under the Constitution. Appointment to service in a State must be in consonance with the constitutional provisions and in conformity with the autonomy and freedom of executive action. Section 133 of the Constitution imposes duty upon the State to conduct examination for appointment to the services of the State. The Public Service Commission is also required to be consulted on the matters enumerated under Section 133. While going through the selection process the Commission, however, must scrupulously follow the statutory rules operating in the field. It may be that for certain purposes, for example, for the purpose of short-listing, it can lay down its own procedure. The Commission, however, must lay down the procedure strictly in consonance with the statutory rules. It can not take any action which per se would be violative of the statutory rules or makes the same inoperative for all intent and purport. Even for the purpose of short-listing, the Commission cannot fix any kind of cut off marks. [See State of Punjab & Ors. vs. Manjit Singh and Ors. [2003 (11) SCC 559].

Rule 8 mandates that while selecting the teaching wing of the service, the Commission must have regard to the academic qualification of the candidate, teaching experience, research experience and previous record of work, if any.

Rule 8 does not speak of any viva voce test. It, however, appears that so far as academic qualification is concerned, the same had been laid in the advertisement and the requirement of M.D. (Medical/General Medical), MCRF, FRCP, Speciality Board of Internal Medicine (USA) or an equivalent qualification of the subject. So far as the teaching experience is concerned, two years experience as Registrar/Tutor/Demonstrator/Tutor

or a Senior Resident in the discipline of medicine in a recognised teaching medical institution recognised by the Medical Council of India was specified.

So far as the teaching experience is concerned, the Commission awarded marks to those who had even less than two years experience. One mark was to be awarded for every full year of experience subject to a total of 5 marks. Sports/Games distinction in NCC activities had also been taken into consideration which were not the criterion prescribed under the 1979 Rules. There is nothing to show that any mark was awarded in relation to the previous record of work, if any.

In its judgment, the High Court did notice that in awarding marks for minimum qualification prescribed for the post, the Commission did not award any mark at all to some respondents. It, therefore, for all intent and purport had considered the candidatures of the candidates only on the basis of 110 marks. If the marks awarded for sports/games and NCC activities are excluded as they are beyond the purview of Rule 8; and as it fixed 100 marks for viva voce test, a clear case of breach of the Statutory Rules had been made out. While the appellant had been given minimum marks in the viva voce test, the other respondents who even did not fulfill the requisite criterion were awarded higher marks.

The High Court, in our opinion, was correct in holding that Rule 51 providing for 100 marks for viva voce test against 40 for other criteria is contrary to law laid down by this Court. [See Union of India and Anr. Vs. N.Chandrasekharan & Ors. [AIR 1998 SCC 795], Indian Airlines Corporation Vs. Capt. K.C.Shukla & Ors. [1993 (1) SCC 17], Anzar Ahmad Vs. State of Bihar and Ors. [1994 (1) SCC 150] and Satpal and Ors. Vs. State of Haryana and Ors. [1995 Suppl. (1) SCC 206]

It is true that for allocation of marks for viva voce test, no hard and fast rule of universal application which would meet the requirements of all cases can be laid down. However, when allocation of such mark is made with an intention which is capable of being abused or misused in its exercise, it is liable to be struck down as ultra vires Article 14 of the Constitution of India.

[See Jasvinder Singh & Ors. Vs. State of J & K and Ors.[2003 (2) SCC 132], Vijay Syal and Anr. Vs. State of Punjab and Ors. [2003 (9) SCC\026401].

It is also trite that when there is requirement of consultation, in absence of any statutory procedure, the competent authority may follow its own procedure subject to the conditions that the same is not hit by Article 14 of the Constitution of India.

[See Chairman & MD, BPL Ltd. Vs. S.P.Gururaja and Ors. [2003 (8) SCC 567]

We would proceed on the assumption that the Commission was entitled to not only ask the candidates to appear before it for the purpose of verification of records, certificates of the candidates and other documents as regards qualification, experience etc. but could also take viva voce test. But marks allotted therefor should indisputably be within a reasonable limit. Having regard to Rule 8 of 1979 Rules higher marks for viva voce test could not have been allotted as has rightly been observed by the High Court. The Rules must, therefore, be suitably recast.

The High Court assigned sufficient and cogent reasons in support of its conclusions which have been noticed by us hereinbefore. We agree with the said reasonings.

The only question which survives for consideration is what would be the meaning of the 'post' contained in Rule 51 (b)?

In our opinion, a higher qualification than the basic (minimum) prescribed for the post would evidently mean the department of superspeciality for which the appointment was made and not any other superspeciality.

Conclusions:

Having held so, the question which remains to be determined is as to what relief should be granted to appellant herein.

While issuing the Notification dated 22.5.2002 the State evidently did not fully comply with the judgment of the High Court. The appellant in view of the judgment of the High Court was not only entitled to be placed in the select panel above Respondent Nos.3 and 9 but also should have been given all consequential service benefits which would include monetary benefits, seniority etc.

In ordinary course we would have allowed the appeal but we cannot lose sight of the fact that the selections had been made in the year 1994. A valuable period of 10 years has elapsed. The private respondents have been working in their posts for the last 10 years. It is trite that with a view to do complete justice between the parties, this Court in a given case may not exercise its jurisdiction under Article 136 of the Constitution of India.

[See Chandra Singh and Ors. Vs. State of Rajasthan and Anr. [2003 (6) SCC 545], M.P.Vidyut Karamchari Sangh Vs. M.P. Electricity Board [JT

2004 (3) SC 423] and State of Punjab & Ors. Vs. Savinderjit Kaur [JT 2004 (3) SC 470]

We are, therefore, of the opinion that the interest of justice would be subserved if the State is directed to fully comply with the directions of the High Court by giving all benefits to the appellant herein including monetary benefits and seniority by placing him in the select list above Respondents 3 and 9. We further direct that if any respondent has been promoted to the higher post in the meantime the same would be subject to our aforementioned direction. Necessary order in this behalf must be passed by the State.

These appeals are disposed of accordingly. The cost of the appellant herein shall be borne by the State of Jammu and Kashmir quantified at 10,000; we hope and trust that the State of Jammu and Kashmir as also Jammu and Kashmir Public Service Commission shall make all endeavours to see confidence in the Statutory Bodies restored, and they would henceforth comply with legal requirements strictly and scrupulously.