

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

**LPASW No. 187/2016
IA No. 1/2016**

*Reserved on: 03.10.2023
Pronounced on: 26.12.2023*

Saqib Saleem and others

.....Appellants/Petitioners

Through :- Mr. Rahil Raja, Advocate.
Mr. Intikhab H Shah,
Advocate.

v/s

State of J&K and others

.....Respondent(s)

Through :- Mrs. Monika Kohli, Sr. AAG
for R-1 & 2.
Ms. Saliqa Sheikh, Advocate
vice Mr. Raman Sharma, AAG
for R-3.
Mr. Nitin Bhasin, Advocate for
R-15, 17 to 22, 34, 35, 41, 42
& 46.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

(N.KOTISHWAR SINGH-CJ)

01. Heard learned counsel for the appellants.

02. The present appeal has been filed against the order dated 06.12.2016 passed by the learned Single Judge of this Court in *SWP No. 2974/2013, titled "Saqib Saleem and others Vs. State of J&K and*

others". By the said order, the prayer of the petitioners/appellants herein for setting aside the final select list issued by respondent No.2 vide Order No. FC(A) 200 of 2013 dated 08.10.2013, insofar it pertains to inter se seniority of the four appellants-petitioners and respondents No. 4 to 75 and seeking fixation of inter se seniority of the petitioners and respondents No. 4 to 75 by clubbing together the combined merit lists of candidates selected pursuant to advertisement notification dated 26.04.2002, notification dated 14.12.2005 and notification dated 26.05.2008 was rejected.

BRIEF FACTS

03. It is the admitted position that 52 posts of Naib-Tehsildars were advertised vide Notification No.01 of 2002 dated 26.04.2002. However, the recruitment process could not materialize. It was, thus, followed by another advertisement by which 39 posts of Naib-Tehsildars were advertised vide Notification No. 09 of 2005 dated 14.12.2005. In respect of the said advertisement, the selection process also did not commence. Subsequently, another advertisement was issued under Notification No. 04 of 2008 dated 26.05.2008 advertising 20 more posts of Naib-Tehsildars.

04. The present appellant Nos. 1 and 3 had submitted their applications pursuant to advertisement dated 26.05.2008 whereas, the appellant Nos. 2 and 4 applied in terms of advertisement dated 14.12.2005. None of the appellants had applied under the initial

advertisement of 2002. Subsequently, all the advertisements were clubbed together, and a common written test was held and on the basis of the result of the written test, interview/viva-voce was conducted in the ratio of 1:5 as follows:

Written Test	:	120 marks
<u>Viva Voce</u>	:	<u>15 marks</u>
Total	:	135 marks

05. Thereupon, the J&K Service Selection Board published a select list on 08.09.2009 containing three lists, prepared as per the advertisements, firstly, in respect of candidates pursuant to advertisement notice No. 01 of 2002, followed by another list in terms of the advertisement notice No. 09 of 2005 and thereafter, third select list based on the advertisement notice No. 04 of 2008. However, there was no combined merit list of these recommended candidates published. After declaration of the result as mentioned above, the Government of Jammu and Kashmir issued the appointment order on 20.11.2009, appointing 81 persons who were included in the three select lists prepared in terms of the advertisements of 2002, 2005 and 2008. In the said appointment order issued on 20.11.2009, certain conditions were mentioned, including that the seniority of the appointees shall be fixed based on select list recommended by the J&K Service Selection Board, though as mentioned above, no combined merit list was published.

06. Pursuant to the said appointment order, the appellants as well as the private respondents joined their services respectively.

Subsequently, on 05.04.2011 a tentative seniority list of Naib-Tehsildars was issued in which persons who were recommended against the posts notified in the year 2002 were made senior to the persons recommended against the posts advertised in 2005 and they in turn were made senior to these recommended against the posts advertised in 2008. Consequently, the present appellants were shown to be junior to the private respondents. The appellants submitted a representation against the said tentative select list published on 05.04.2011 on the plea that the provision of Rule 24 of the J&K Civil Services (Classification, Control and Appeal) Rules, 1956 was not followed as the aforesaid posts of Naib-Tehsildars were filled up by a common competitive examination in which the appellants had fared better in merit than the private respondents and as such, merit being given primacy in the matter of fixation of the seniority as per the aforesaid Rule 24, the present appellants should be placed higher in seniority than the private respondents.

07. According to the appellants, the authorities issued another tentative seniority list on 12.04.2013. The appellants did not file any fresh objections as the appellants were made to believe that their objections submitted earlier would be considered at the time of finalization of the seniority list. The authorities also did not inform them of the consideration and disposal of the objections filed earlier. The final seniority list was published on 08.10.2013 by placing the appellants as junior to the private respondents as was done in the

tentative seniority lists. Thus, being aggrieved by the same, the appellants filed a writ petition before this Court bearing SWP No.2974/2013 within two months of the publication of the said final seniority list.

08. According to the appellants, they had taken a specific plea before learned Single Judge that though there were three advertisements as mentioned above, issued in the years 2002, 2005 and 2008 for the posts of Naib Tehsildars, all these advertised posts were clubbed together and a common competitive examination was held by way of a written test and interview, in which the present appellants had performed better than the private respondents. However, the authorities segregated the candidates on the basis of the number of posts advertised in the years 2002, 2005 and 2008 and prepared separate lists, though notified in the same common order. According to the appellants, however, even if the authorities had prepared separate lists, at the time of fixation of seniority list, the same has to be done in accordance with the provisions under Rule 24 of the J&K Civil Services (CCA) Rules, 1956 which specifically provides, *inter alia*, that in case of those recruited directly, seniority has to be in accordance with the positions attained by the candidates and assigned to them in order of merit at the time of competitive examination.

09. It has been submitted that in the present case, it is on record that the selection was based on a common examination by the J&K Civil

Services, and that at the time of fixation of seniority, the appellants were to be shown as senior in the final seniority list so prepared.

10. The said writ petition was contested by the respondents contending amongst others that three select lists were prepared as per the different advertisements issued in the years 2002, 2005 and 2008, though these were notified on the same day by the same order and it was also mentioned under Clause (e) of the appointment order dated 20.11.2009 that the seniority will be fixed on the basis of their placement in the selection list recommended by the J & K Service Selection Board. It was also contended that the appointees were placed according to the advertisements in which they had applied and the appellants had accepted the terms of the appointment order on 20.11.2009 without any demur.

11. The respondents further contended that the appellants had quietly accepted the terms specifically mentioned in the appointment order dated 20.11.2009, but raised the objections subsequently in the year 2011 and as such, any such belated objection should be ignored in the light of the decision of in *Rajendra Pratap Singh Yadav v. State of U.P.*, (2011) 7 SCC 743, wherein it was held that,

“45. We deem it appropriate to reiterate that in service jurisprudence there is immense sanctity of a final seniority list. The seniority list once published cannot be disturbed at the behest of a person who chose not to challenge it for four years. The sanctity of the seniority list must be maintained unless there are very compelling reasons to do so in order to do substantial

justice. This is imperative to avoid avoidable litigation and unrest and chaos in the services.”

12. It was further contended that it is not the case that all the appellants had objected to the said tentative list published on 05.04.2011, but it was only the appellant Nos.1 and 3 who had filed objections. Moreover, when the subsequent tentative seniority list was published on 12.04.2013, none of the appellants had raised any objections and thereafter, the authorities finalized the seniority list which was published on 08.10.2013 and they did not object to the same but they preferred to file the petition as mentioned above.

Accordingly, it has been submitted by the respondents that since the appellants joined the service fully knowing the condition that their seniority will be based on basis of the placement in the selection list recommended by the J&K Service Selection Board. Hence, it does not lie in the mouth of the appellants at this stage to challenge the seniority list. It has been contended that the seniority list was prepared in terms of the conditions mentioned in the appointment order of which the appellants were fully aware of.

It has been submitted that now all the parties have been promoted to the higher posts of Tehsildars and as such, at this belated stage, if the final seniority list is interfered with, it will amount to a chaotic situation in the Department as cautioned in ***Rajendra Pratap Singh Yadav*** (supra).

13. Learned Single Judge after hearing the parties disposed of the writ petition by accepting the plea of the respondents and held that the conduct of the appellants in making belated claim disentitled them to any discretionary relief which may be granted by the Court under Article 226 of the Constitution of India read with Section 103 of the Constitution of J&K and once the seniority has been finalized, the sanctity of the seniority list ought not to be disturbed at the behest of persons who had remained silent for a long period of time, and accordingly dismissed their petition.

14. Before us, a similar plea has been taken by the appellants that though the posts advertised in the years 2002, 2005 and 2008 were clubbed together and a recruitment was held on the basis of a common recruitment test, since the appointments were made on the same day based on the same recruitment process, in view of the provisions under Rule 24 of the J&K Civil Services (CCA) Rules, 1956, seniority has to be determined on the basis of the merit in the said competition. On the other hand, it is the plea of the respondents that though a common recruitment took place, yet these selections were made in respect of different years and advertisements namely 2002, 2005 and 2008 and as such, the selection list was prepared on the basis of the three advertisements and published accordingly. According to the respondents, though these select lists were notified on the same day, the fact remains that three select lists were prepared in respect of three different advertisements qua the number of posts advertised.

15. On the other hand, it is the case of the appellants that even if the select list consists of three separate lists prepared advertisement wise, it was based on the same common written test and common interview of all the candidates who have applied in terms of advertisements issued in 2002, 2005 and 2008 and there were no three separate recruitment processes in respect of the said three advertisements warranting preparing three separate lists and hence, there could not have been three separate select lists.

CONSIDERATION BY THE COURT:

16. From the pleadings and submissions advanced, it is clearly noticeable that the controversy relates to inter-se seniority of the direct recruit Naib-Tehsildars.

17. The post of Naib-Tehsildar is included under Schedule II-A to the Jammu and Kashmir Revenue (Subordinate) Service Recruitment Rules, 2009 (hereinafter referred to as the Service Rules) and 45% of the said posts are to be filled up by direct recruitment.

18. Rule 10 of the aforesaid Service Rules, 2009 provides for maintenance of seniority lists, which states that the seniority of the members of the Service shall be regulated under the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956(hereinafter referred to as the CCA Rules) and the Head of Department shall maintain an up to date and final seniority list of the members of the Service.

19. Rule 24 of the aforesaid Rules of 1956 reads as follows:

“24. Seniority. - The seniority of a person who is subject to these rules has reference to the service, class, category or grade with reference to which the question has arisen. Such seniority shall be determined by the date of his first appointment to such service, class, category or grade as the case may be.

Note 1. The rule in this clause will not effect the seniority on the date on which these rules come into force of a member of any service, class, category or grade as fixed in accordance with the rules and orders in force before the date on which these rules come into force.

Interpretation. The words "date of first appointment" occurring in the above rule will mean the date of first substantive appointment, meaning thereby the date of permanent appointment or the date of first appointment on probation on a clear vacancy, confirmation in the latter case being subject to good work and conduct and/or passing of any examination or examinations and / or tests:

Provided that the inter se seniority of two or more persons appointed to the same service, class, category or grade simultaneously will, notwithstanding the fact that they may assume the duties of their appointments on different dates by reason of being posted to different stations, be determined—

(a) in the case of those promoted by their relative seniority in the lower service, class, category or grade;

(b) in the case of those recruited direct except those who do not join their duties when vacancies are offered to them according to the positions attained by and assigned to them in order of merit at the time of competitive examination or on the basis of merit, ability and physical fitness etc., in case no such examination is held for the purpose of making selections;

(c) as between those promoted and recruited direct by the order in which appointments have to be allocated for promotion and direct recruitment as prescribed by the rules.

Note 2. Any substantive appointments or permanent promotions made in any department prior to 15th May, 1953, will not be disturbed if otherwise in order unless

such appointments or promotions are already the subject of any appeal, review or revision or otherwise pending decision.

- (2) A member of a service, class, category or grade, unless he is reduced in seniority as a punishment shall retain seniority in such service or grade as determined by sub-rule (1) notwithstanding any delay in the completion of his probation or his appointment as a member of such service, class, category or grade.
- (3) Where a member of any service, class, category or grade reduced to a lower service, class, category or grade he shall be placed at the top of the latter unless the authority ordering such reduction directs that he shall rank in such lower service, class, category or grade next below any specified member thereof.

20. It is, thus, clear from Rule 24 (1) Proviso (b) of the CCA Rules that in the case of direct recruits, seniority will be determined according to the positions attained by and assigned to them in order of merit at the time of competitive examination.

21. The issue to be decided in the present case is what are the merit positions assigned to the appellants and private respondents, who are all direct recruits, in the competitive examination held in 2009 which will determine the seniority position as per Rule 24 of the CCA Rules.

22. If the select list shown in the appointment order dated 20.11.2009 reflects the true merit position of the appellants and the private respondents in the competitive examination, seniority prepared based on the said merit position does not require interference from this Court as it is in consonance with the aforesaid Rule 24 of the CCA Rules.

23. The problem has arisen in view of the contention of the appellants that the said select list was prepared for different advertisements of 2002, 2005 and not based on the merit position obtained by the candidates in the same open competition.

24. In view of the aforesaid contentions of the respondents, we need to examine the nature of the competition. It is not in dispute that there was a common open competition for all the posts advertised in 2002, 2005 and 2008. As far as holding of a common competition is concerned, there is nothing in the service rules which prohibits the same. However, it is to be noted how the said common test was conducted and whether the recruitment process was made advertisement wise. Even if the recruitment was common, if the recruiting agency had separately tested/assessed the candidates as per the different advertisements, it may be stated that the recruitment was done as per the separate advertisements and as such preparing separate merit lists for each of the advertisements may be permissible.

For this purpose, this Court had requisitioned the records.

25. It is seen from the records that there was a common written test for all the candidates irrespective of the applications pursuant to the different advertisements.

As noticed above, the competition consisted of a written test and viva voce. As regards written test, it goes without saying that written test would reflect their intrinsic merit. In a common competition, even

if the candidates are categorised separately as candidates of 2002 or 2005 or 2008, their performance will remain the same, as they are being assessed for their intrinsic knowledge in the subjects they appear. However, the assessment in the interview, will be qualitatively different from the assessment in the written test. While making assessment by the interviewers in the interview, there is not only a subjective element involved, but also a comparative assessment. The interviewers while interviewing the candidates, and assessing the intrinsic merit of the candidates, adjudge the candidate in the light of the performance of other candidates. Thus, in an interview, while making the assessment of merit of the candidates, there is an element of comparison with other candidates. There is comparative assessment of the candidates, which does not arise in a written test. In the assessment in a written test, it is only of the intrinsic merit of the individual candidates without any comparison with the other candidates. Thus, if interview is held amongst only a particular group or category, viz., only the candidates/applicants under the 2002 advertisement, one can get a glimpse of the comparative merit of the candidates who had applied under advertisement issued in 2002. Similarly, will be the case in respect of those applicants who had applied under the advertisement in 2005.

26. However, the situation will change, if the interview is held across the board in respect of all the candidates who had applied under the advertisements of 2002, 2005, and 2008. It will be then a

comparative merit of all the candidates under these advertisements. In such a situation, the comparative merit of the candidates under different advertisements cannot be segregated and compartmentalised on the basis of year of advertisement. In that event, the order of merit in the three lists contained in the common appointment order dated 20.11.2009 will be disturbed, unless it is found that all the applicants of the year 2002 had done better than the candidates of 2005 and so on and so forth. The respective merit of the candidates is to be seen with reference to the performance of all the candidates which cannot be based on the date of application. Any segregation or classification of candidates on the basis of advertisement will not reflect the correct merit position of the candidates.

27. If the candidates are interviewed batchwise according to the advertisements, their merit can be considered to have been adjudged batchwise according to the advertisement. However, if all the candidates are subjected to the same interview without categorising them separately according to the advertisements, there can be no differential classification of the candidates as they are subjected to the same standard. If the candidates are subjected to the same common competition, both written and interview, any subsequent classification based on the year of advertisement would not be permissible for the purpose of determination of seniority as seniority is to be based on the merit position accorded in the same open competition.

28. From the records, it is seen that though there were three advertisements issued in three different years, yet there was one common written test and one interview process. The interview was not held separately for the three categories of applicants who applied under three different advertisements of 2002, 2005 and 2008, but held for all the candidates irrespective of the year of application.

29. The records show that all the posts notified in three advertisements were clubbed together and so are the different categories of reserved posts. Thus, it is clear that recruitment process was meant for all these posts clubbed together and there was no separate recruitment process for each of the advertisements. From the records, it is seen that in the “Note 1” made by the Chairman of the Services Selection Board in the File, it has been clearly mentioned that the candidates who had applied in response to the advertisement notice No.1 of 2002, dated 26.04.2002 shall additionally be considered against the posts advertised vide advertisement notices dated 14.12.2005 and 26.05.2008 subject to eligibility. Similarly, the candidates who have applied in response to the advertisement notice No. 09 of 2005 dated 14.12.2005 shall additionally be considered against the posts advertised vide advertisement notice dated 25.05.2008 but not against the posts advertised vide advertisement notice dated 26.04.2002. But the candidates who submitted their application forms in response to advertisement notice no. 04 of 2008 dated 26.05.2008 shall be considered against the posts advertised

against the posts advertised vide the said notification only and not against the earlier two notifications.

30. Thus, candidates applying under advertisement issued under 2008 were not considered for appointment against posts advertised in 2002 and 2005. Similarly, candidates applying under advertisement issued in 2005 were not considered against the posts advertised in 2002, though candidates applying in earlier advertisements were be considered against posts subsequently advertised.

31. Consequently, the candidates applying under the earlier advertisements had more opportunity or chances of getting appointment as the number of posts was more. On the other hand, the competition for the candidates applying under later advertisements would be more intense as they had to compete against more candidates but against later number of posts. Thus, though the recruitment process was one and combined, they did not have the similar and equal opportunity. To that extent, it can be said that the said recruitment process was flawed being less favourable to the candidates who had applied later and more favourable to those who had applied earlier.

32. If anyone seeks to justify the same on the ground that the candidates who did not apply in the earlier advertisements might not have been eligible and if eligible choose not to apply, hence, non-consideration of these candidates against earlier posts cannot be

faulted. Further, it could be also claimed that since the candidates who had applied earlier were eligible also for the posts under later advertisements, there is no illegality in considering them against the later advertised posts.

33. In our opinion, the aforesaid contention suffers from a fundamental flaw. It is to be remembered that the posts advertised are meant to be filled up by way of direct recruitment. Under our service jurisprudence, there is no concept of year wise vacancy unlike in the case of posts to be filled up by promotion. In case of direct recruitment, no one has a vested right to claim to be considered against any particular advertised post till the recruitment process is undertaken and completed. If the recruitment process for the advertised posts is not initiated or completed for any reason and if new posts are further advertised, all the persons who would have become eligible by then, will be also entitled to apply for the posts advertised earlier also. In other words, no direct recruitment posts could be kept reserved for a particular group of candidates. It must be made open to all those persons who become eligible when the posts are advertised. Thus, all the candidates who had applied under the advertisement issued in 2008 and were eligible for the posts of Naib Tehsildar would be entitled to be considered for all the posts advertised earlier in 2002 and 2005 as these posts could not have been reserved only for those who had applied in 2002 or 2005 as the case may be.

34. The position is different when it related to appointment by promotion when the concept of year wise vacancy comes into play. Under the promotional scheme, only those who become eligible when the vacancy under the promotion quota arises can be considered and if for any reason the selection for the promotion could not be held, it can be held in a subsequent year, but it will be confined to those candidates who were eligible during that period when the vacancy arose and not those who become eligible after the vacancy had arisen. Thus, the right of eligible candidates for consideration against vacancies occurring in a particular year or period is confined to the posts to be filled up by promotion and not against direct recruitment quota unless, the rules specifically provide or the advertisements make it very clear and the recruitment process conducted accordingly.

35. In the present case, there is no mention in the relevant service rules that vacancies occurring in a particular year against direct recruitment quota has to be filled up from amongst the eligible candidates of that period or advertisement. Further, it was not mentioned in the advertisements that the appointments will be made advertisement wise. It has been also noted that there was only one written test and one interview process. There were no separate written tests and separate interviews for these different categories of candidates as per advertisements issued in 2002, 2005 and 2008. The interview was conducted as if all the posts were advertised together and as per records, all the posts were clubbed together.

36. The inference is inescapable. If the open competition consisting of written test and interview is the same for all these posts advertised in 2002, 2005 and 2008, which is the position in the present case, for the purpose of determining seniority in the post of Naib Tehsildars, the merit position obtained by the candidates in the said common competitive examination must be the basis for determining inter-se seniority amongst them. There cannot be any subsequent compartmentalisation or segregation of the select lists/merit lists for the three advertisements within the meaning Rule 24 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956.

37. Any subsequent segregation based on advertisement though may be permissible for the purpose of ascertaining the number of persons to be appointed against the vacancies occurring in 2002, 2005 and 2008, it cannot have any effect for the purpose of determining seniority as Rule 24 of CCA rules does not contemplate any other method for determining seniority except the merit position assigned to the candidates in the common competition.

38. Accordingly, we hold that the seniority list prepared on the basis of advertisement wise vacancy in terms of the advertisements issued in 2002, 2005 and 2008 is not only impermissible under law but also violative of the provisions of Rule 24 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 for the

purpose of determining seniority and to that extent the impugned seniority list dated 08.10.2013 prepared is not valid and accordingly, the same is quashed and set aside as far as the present appellants and private respondents are concerned, and not for others, as they have not questioned the said final seniority list before us and we do not wish to disturb the position at this stage except for the appellants and the private respondents.

39. In our opinion, the principle for fixing seniority list of direct recruit Naib Tehsildars who were appointed as such on the basis of the common open competition held in 2009 and select list notified on 08.09.2009 is to be based on the positions attained by them and assigned to them in order of merit in the said competition by the selection body.

40. It has been submitted at the Bar that many of the Naib Tehsildars in the meantime have been promoted to the higher posts of Tehsildars.

In the present case there are only four appellants. Accordingly, if any of these four appellants are found to be senior to any of the Tehsildars who are found to be junior to the appellants in the grade of Naib Tehsildars in the light of the principle and observation made above, a review Departmental Promotion Committee/Selection process shall be held for promotion to the post of Tehsildars and if the

appellants are found to be suitable for promotion to the post of Tehsildar, the appellants shall be given promotion to the posts of Tehsildars. We, however, make it clear that those private respondents, who may have been promoted earlier to any of the present appellants as Tehsildars, they shall not be demoted but shall be allowed to remain as Tehsildars by assigning appropriate seniority in the grade of Tehsildar below the appellants as per the recommendation of the Review Departmental Promotion Committee by adjusting against the promotion quota.

41. The aforesaid exercise shall be conducted at the earliest, preferably within a period of one month from today, so that any subsequent promotion to the post of Tehsildar and higher posts is not unduly delayed to avoid any further complications.

42. The appeal is, accordingly, allowed in the aforesaid terms.

(RAJESH SEKHRI)
JUDGE

(N. KOTISWAR SINGH)
CHIEF JUSTICE

JAMMU
26.12.2023
Eva