

HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

LPA No. 268/2023

Reserved on 08.05.2025
Pronounced on 23.05.2025
e

Dr. Fayaz Ahmad Sofi
S/O Abdul Ahad Sofi
R/O Gulababad, Arampora, Sopore,
Aged

...Appellant(s)

Through:- Mr. G. A. Lone, Advocate.

V/s

1. Dr. Showkat Ali Mufti
S/O Mohd Syed Mufti
R/O Bijbehara, Anantnag,
At present Alochi Bagh (Silk Factory Road) Srinagar.
2. U.T. of J&K through Commissioner-Secretary,
Medical Education Department, J&K Government,
Jammu/Srinagar.
3. Director, Sher-i-Kashmir Institute of Medical Sciences,
Soura, Srinagar.

...Respondent(s)

Through:- Mr. Mohsin Qadri Sr. AAG with
Ms. Maha Majeed, Assisting Counsel For 2&3
Mr. Hakim Suhail Ishtiyag, Advocate For R-1.

**Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE SANJAY PARIHAR, JUDGE**

JUDGMENT

Sanjeev Kumar-J

1. This intra Court appeal arises from an order and judgment dated 13-10-2023 passed by a learned Single Judge of this court ['the Writ Court'] in SWP No. 30/1998 clubbed with SWP No. 15/2004 whereby the Writ Court

has allowed SWP No. 30/1998 and dismissed SWP No. 15/2004 as 'infructuous'.

2. The brief resume of the factual antecedents leading to the filing of this appeal may be necessary.

3. The respondent No.1 Dr. Showkat Ali Mufti, who was possessed of Degree of MBBS and MD in Medicines, and was serving in the State Health Department as an Assistant Surgeon, was appointed as Lecturer, General Medicines, in the Sher-e- Kashmir Institute of Medical Sciences, Srinagar, ['the Institute'] against a leave/migrant vacancy initially for a period of one year vide Government Order No. 15-IMS of 1993 dated 16-08-1993. There was, however, stipulation in the said Government Order that the services rendered by the appointees against migrant/leave vacancies shall be counted for eligibility for higher post subject to certain conditions enumerated in the said Government Order. With regard to the persons appointed in the Departments of General Surgery and General Medicines, there was a further stipulation that the experience gained by them while working against the migrant/leave vacancies shall be treated as teaching experience in their respective disciplines and, that they shall have their seniority maintained as such.

4. In the year 1994, the Government vide its Order bearing Order No. 14-IMS of 1994 dated 13-10-1994 ['the Government order of 1994'] ordered that the appointments of faculty staff made in the Institute against migrant vacancies shall be deemed to be appointments against temporary vacancies. It is in the same order it was provided that the appointment of faculty

members including the respondent No.1 herein shall be deemed to have been made against temporary leave vacancies and that they shall continue till such time they are regularized or the incumbents holding such posts on regular basis join, whichever is earlier. There was further stipulation in the Government Order of 1994 providing that faculty members appointed against temporary leave vacancies in the department shall be regularized on the basis of seniority and/or merit if so defined by the Epic Selection Committee in their cases as soon as the regular post, which such faculty member is holding, becomes available in that department.

5. It seems that while the respondent No.1 was working as Lecturer/Assistant Professor in the Institute against the migrant/leave vacancy, he came to be selected for admission to DM/MCH course in the subject of Pulmonary Medicines at Post Graduate Institute of Education and Research (PGI) Chandigarh. One of the pre-conditions for admission to DM/MCH course was deputation/sponsorship of the candidate from his employer. The respondent No.1 had already been issued a sponsorship certificate in advance i.e. on 26-10-1995. Notwithstanding the issuance of sponsorship certificate by the Director of the Institute dated 26-10-1995, the respondent No.1, who was at the relevant point of time working against a temporary leave vacancy, was not relieved by the Institute to enable him to join the DM/MCH Course at PGI Chandigarh. Feeling aggrieved, the respondent No.1 filed SWP No. 934/1996 before this Court. A learned Single Judge vide interim order dated 29-06-1996 directed the Institute to relieve the respondent No.1 forthwith so as to enable him to join his course

at PGI Chandigarh. A further direction was issued to the respondents to pay to the respondent No.1 dues, as may be admissible under rules. He, instead, pursued some course i.e. MRCP in the United Kingdom. Since the respondent No.1 had left temporary services as Lecturer in the Institute for pursuing Higher Education, first in PGI Chandigarh and then in the United Kingdom, the Director, who was also Ex-Officio Secretary to the Government issued Office Order No. SIMS 840 of 1996 dated 03-12-1996 reverting the respondent No. 1 to his parent Department i.e. Health and Medical Education Department of the Government with effect from the date he had proceeded to PGI Chandigarh for undergoing the DM/MCH course in Pulmonary Medicines. This Order was not put to challenge by the respondent No. 1 immediately after its issuance. The trigger point came only when the respondent Institute issued Advertisement Notification No. 2 dated 13th November, 1997 notifying recruitment process for the Post of Assistant Professor in various specialities including the General Medicines. The respondent No. 1 applied for the Post of Assistant Professor, General Medicines, however in view of the Institute holding him ineligible to apply for the post advertised by the respondent Institute, the respondent No. 1 filed SWP No. 30/1998. In the said Writ Petition, the respondent No. 1 challenged Office Order No. SIMS 840 of 1996 dated 3rd December, 1996 whereby he stood reverted to his parent Department of Health and also sought a direction to the respondent Institute to treat him as an employee of the Institute.

6. He also sought a direction to the respondent- Institute to allow him to participate in the process of selection for the post and consider him for his

appointment as Assistant Professor in General Medicines. In this selection process initiated vide advertised Notification No. 2 of 1997, the appellant herein as well as the respondent No. 1, both participated and neither of the two made the grade. The appellant herein challenged the selection process before this court in SWP No. 1284/ 2001 titled “Dr. Fayaz Ahmed Sofi Vs. State of J&K and Ors” which was disposed of by a learned Single Judge of this Court on 12-06-2003. The judgment is reported as 2003(3)JKJ 154. The learned Single Judge found merit in the Writ Petition and opined that the selection process for the post of Assistant Professor in General Medicines was tainted requiring quashment of the entire selection process. The learned Single Judge, however, stopped short of quashing the selection process, in view of the respondent Institute having made an offer to appoint the appellant on the post of Assistant Professor, which was available due to an incumbent Assistant Professor having abandoned his services. The Court took note of the aforesaid offer and allowed the writ petition without quashing selection process, but issuing direction to the respondent-Institute to appoint the appellant on the post of Assistant Professor in the discipline of General Medicines forthwith. This judgment of the learned Single Judge was called in question in LPA No. 110/2003 by one Dr. Rafi Ahmed Jan. The appeal was partly allowed to the extent of expunging the observations made by the learned Single Judge in the judgment in respect of selection of respondent Nos. 4 to 6, however, the judgment in respect of the appellant herein and his subsequent appointment against the post of Assistant Professor, General Medicines was not disturbed.

7. So far so good, after the appointment of the appellant herein as Assistant Professor vide Government Order No. 971-HME of 2003 dated 14th July 2003, the respondent No. 1, who despite his participation in the selection process under the Court orders had failed to make the grade, started manipulating his regularization with the respondent-Institute. Vide communication No. SIMS 302 07 (XVII)/2001-1195 dated 21.08.2003, the respondent-Institute requested the Government to modify the appointment order of the appellant herein to provide that the appointment of appellant would be against a temporary leave vacancy and consequently issue order of confirmation of respondent No.1 as Assistant professor on regular/temporary basis. Interestingly, the recommendation made by the respondent-Institute were accepted by the Government and vide Government Order No. 1142-HME of 2003 dated 22-08-2003 sanction was accorded to the modification of earlier Government Order dated 14-07-2003. The appellant was ordered to be appointed and adjusted against the temporary vacancy whereas the respondent No.1 was confirmed as Assistant Professor from the date of his appointment as such. It seems that the serious error committed by the Government on the recommendations of the respondent-Institute, whereby the order of appellant was modified in the manner aforementioned, came to the subsequently corrected. The Department of Health and Medical Education vide Government Order No. 1273-HME of 2003 dated 17-12-2003 withdrew the Government Order No. 1142 of 2003 dated 22-08- 2003. It is this order passed by the Government which was called in in question by the respondent No.1 in SWP No. 15/2004.

8. Both the writ petitions, as is evident from the judgment impugned, came to be contested by the official respondents as well as the appellant herein who was arrayed as private respondent No.3 in SWP No. 30/1998, and respondent No.4 in SWP No. 15/2004. Having considered the rival contentions, the writ Court came to the conclusion that the writ petition raised purely three instances for adjudication vis-à-vis the validity of the impugned Orders:

- I. Order No. SIMS 840 of 1996 dated 03-12-1996, relieving the respondent No.1 to his parent Department i.e. H&ME;
- II. Government Order No.1273-HME of 2003 dated 17-12-2003, withdrawing the order of confirmation of the appointment of respondent No.1 with effect from 19-07-2001;and
- III. Order No. SIMS 16 (P) of 2009 dated 17-01-2009 regularising the service of respondent No.1 with effect from 01-02-2007.

9. The writ Court, having adverted to and considered the validity of the aforesaid three orders, came to the conclusion that with the acceptance of appointment as Lecturer/Assistant Professor in General Medicines against the temporary leave vacancy in the respondent-Institute, the respondent No.1 had ceased to be an in-service candidate and, therefore, could not have been reverted to his parent Department. It was also opined by the writ Court that the respondent-Institute having issued a sponsorship certificate in favour of respondent No.1 to enable him to join the MD/MCH Course a PGI, Chandigarh, and promising him payment of emoluments/stipend during the Course, were estopped from turning around and take the plea that respondent No.1 had abandoned the services of the respondent-Institute. The principle of promissory estoppel was pressed into service by the writ Court to fortify its opinion.

10. Be that as it may, in view of the aforesaid opinion arrived at by the writ Court, the writ petition SWP No.30/98 was allowed and impugned Order dated 03-12-1996, reverting the respondent No.1 to his parent Department was quashed. The writ Court also directed respondent-Institute to regularise the services of respondent No.1 with effect from 16-08-1993 in view of availability of post held by Dr. Mohd. Ramzan who had left the vacancy since 30-05-1988. A further direction was issued to the respondent-Institute to reckon the services of respondent No.1 with effect from his initial appointment on 16-08-1993 as qualifying service for the purpose of pension. Some of the directions were even beyond the relief claimed by the respondent No.1 in his writ petition. Having allowed SWP No.30/98 the writ Court declared SWP No. 15/2004 as infructuous but, at the same time, quashed Government Order No..1273-HME of 2003 dated 17-12-2003 impugned in the said writ petition.

11. Having heard learned Counsel for the parties and perused the material on record, we are of the considered opinion that the judgment passed by the writ Court is wholly erroneous and contrary to the settled legal position.

12. There is no dispute with regard to the fact that respondent No.1, who was holding the post of Assistant Surgeon in the Department of Health on substantive basis, came to be engaged as Lecturer/ Assistant Professor in the Department of General Medicines in the respondent-Institute against a migrant/leave vacancy. It needs to be mentioned that in the wake of onslaught of militancy in the year 1990 the members of the minority community staying in the Kashmir valley had to flee to save their lives.

These persons were forced to leave the valley due to worsening law and order situation and they settled in other parts of the country. The Government Employees working in Kashmir Valley were no exception. Due to this mass exodus of the minority community, including the employees of such community, various posts in the Government fell vacant. With a view to run the administration, the local eligible candidates were temporary engaged against these migrant vacancies with a stipulation that they shall be permitted to continue till the return of incumbents of the posts. It is in these circumstances and keeping in view the qualification possessed by respondent No.1 he came to be engaged against one of the migrant vacancies of Lecturers, (which was later designated as Assistant Professor) in the Discipline of General Medicines in the respondent-Institute. He did not resign from his substantive post of Assistant Surgeon in the Department of Health nor had he applied for leave/migrant vacancy through proper channel as is observed by the writ Court in the impugned judgment. It was thus a pure and simple case of abandoning the permanent service of Assistant Surgeon with a view to take up the higher assignment of Lecturer/Assistant Professor in the respondent-Institute, though on a temporary migrant/leave vacancy. It is also not in dispute that when the respondent No.1 was selected to undergo MD/MCH Course at PGI, Chandigarh, in the year 1996, he was working against a temporary migrant vacancy and was not holding any civil post in the respondent-Institute or under the Government. That being the position, the respondent-Institute was under no obligation to sponsor his DM/MCH course or to release him salary/stipend which may be available to

a Government employee deputed for acquiring higher qualification. As a matter of the fact, the Civil Service Regulations, was not applicable him.

13. True it is that at the time of his admission at PGI Chandigarh respondent No.1 had managed a certificate from respondent-Institute but perusal of the said certificate would clearly indicate that this sponsorship certificate was not based on facts but was tailor-made by the then Director to further the interest of the respondent No.1. It is mentioned in the sponsorship certificate that respondent No.1 was a permanent employee of the respondent Institute whereas the fact remains that he was working only against a temporary migrant vacancy having been engaged without any selection process. Respondent No. 1 was a permanent employee of Health Department and could have been sponsored for higher studies only by his employer.

14. Be that as it may, when respondent No.1 was relieved by the Government to undergo the MD/MCH Course at PGI, Chandigarh, that too pursuant to an ad- interim order passed by a Bench of this Court in SWP No. 934/1996, it was clearly mentioned by the Government that the respondent No.1 was undergoing the MD course at PGI, Chandigarh, at his own risk and responsibility. It is also interesting to note that respondent No.1 though got admission in MD/MCH Course at PGI, Chandigarh, but left the same mid-way to do some other Course in the United Kingdom. It was a clear case of respondent No.1 not only abandoning his permanent services as Assistant Surgeon of the Department of health but it was also a case of leaving his temporary service of Lecturer/Assistant Professor in General Medicines in

the respondent-Institute. Ordinarily, the institute should have just struck off his name from the list of temporary Faculty Members working in the Institute against the leave/migrant vacancies. The respondent-Institute, in our opinion, took a lenient view of the matter and instead reverted him to his parent Department of Health. The respondent No.1, should have been thankful to the respondent-Institute for having put him back in the service which he had long abandoned to pursue higher studies though without the permission of his employer i.e. the Department of Health.

15. The representation of the Government contained in Government Order of 1993 and Government Order of 1994 were without any consequences for the respondent No.1. The stipulation in Government Order of 1994, that the Faculty Members appointed against temporary leave vacancies shall, in due course, be regularized on the basis of their merit and seniority against the available regular vacancies of the post, such faculty Member was holding, could be taken benefit of only by those who were continuously in the service of the respondent-Institute and were in position on the date of regular vacancies becoming available in the Department. Such offer of regularization, contained in Government Order of 1994, was, however, subject to the conditions enumerated in the Government Order of 1993, which clearly stipulated that the services rendered by the Faculty Members while working against the temporary leave/migrant vacancies would be counted for eligibility for the higher post, provided the performance of the appointee during temporary period had remained satisfactory; the appointee has to his credit two scientific papers in indexed National/International

Medical Journals as first authors or first co-authors published during the period of temporary appointment; and, that the appointee had remained regular at the Institute campus to be available for duty round the clock. It was categorically provided in the Government Order of 1993, whereby respondent No.1 was engaged, that unauthorised absence would entail termination of his temporary services.

16. We are aware that admission of respondent No.1 in DM Course at PGI, Chandigarh, was after he was formally relieved by the Government, but, his leaving the Course mid-way and joining some other Course in United Kingdom, was undoubtedly without permission of his employer. It was thus a clear case of unauthorised absence even from the temporary service entailing termination of his service.

17. Viewed from any angle, respondent No.1 cannot legitimately claim to be in the continued employment of respondent No.1, notwithstanding his unauthorised absence during the period he was pursuing some Course in United Kingdom. It is in these circumstances we are of the considered opinion that the doctrine of promissory estoppel, as is explained elaborately by the writ Court, was not attracted at all. The respondent-Institute was perfectly within its competence to either terminate the services of respondent No.1 or to revert him to his parent Department i.e. Department of Health where he was serving as Assistant Surgeon prior to his appointment as Lecturer in the respondent-Institute against a migrant vacancy in the year 1993.

18. We also fail to understand as to how the writ Court has granted him certain reliefs, which respondent No.1 has not even prayed for in his writ petition. For facility of reference the prayer clause of SWP No. 30/1998 is set out below:-

“In view of the submissions made hereinabove, it is humbly prayed that by issuing appropriate order, writ or direction:-

- (i) Order No. 840 of 1996 dated 03.12.1996 be quashed;
- (ii) Respondents be directed to treat the petitioner as an employee of Sheri Kashmir Institute of Medical Sciences, Srinagar; and respondent No. 2 be directed to allow the petitioner to participate in the process of selection for the post of Assistant Professor and to consider him for appointment to such post.”

19. It is true that while filing the supplementary pleadings, respondent No.1 has also prayed for regularization of his services with effect from the date the post of Lecturer became available in the Institute but that was not a part of the prayer made in the writ petition.

20. Be that as it may, since we do not find any fault with the order impugned in the Writ Petition No.30/1998 i.e. Order No. SIMS 840 of 1996 dated 03-12-1996, as such, we see no reason or justification to direct the respondent-Institute to regularise the services of respondent No.1 from a particular date, i.e. when the vacancy became available in the respondent-Institute. We, however, cannot lose sight of certain developments that took place during the pendency of the writ petition before the writ Court.

21. The respondent No.1, who had abandoned his services for pursuing the medical Course in United-Kingdom, came to be engaged again as Assistant Professor, General Medicines, against available temporary leave vacancy vide Government Order No. 22-IMS of 2001 dated 09-07-2001 and his services were later regularised against the post of Assistant Professor, General Medicines with effect from 01-02-2007 in terms of Order No. SIMS-16(P) of 2009 dated 17-01-2009. We, therefore, clarify that, notwithstanding, that we have found the impugned judgment rendered in SWP No.30/1998 wholly unsustainable, we do not wish to disturb the regularization of services of respondent No.1 ordered by the respondent-Institute as Assistant Professor, General Medicines, with effect from 01-02-2007.

22. So far as SWP No. 15/2004 is concerned, suffice it to say that the writ Court, having held this writ petition as 'infructuous', could not have issued Certiorari to quash Order No. 1273-HME of 2003 dated 17-12-2003 impugned in the said writ petition. Otherwise also, there should be no doubt that the appointment of appellant herein as Assistant Professor in General Medicines was in pursuance of and in compliance with the judgment passed by a Bench of this Court in SWP No. 1284/ 2001 titled "Dr. Fayaz Ahmed Sofi Vs. State of J&K and Ors, which judgment stood approved by the Division Bench in LPA No.110 of 2003 on 17-04.2009. The issuance of Government Order No. 1142-HME of 2003 dated 22-08-2003 whereby the order of appointment of the appellant herein as Assistant Professor was modified was wholly unwarranted, to say least, completely perverse. The

Order was tailor-made to sub-serve the illegitimate interest of respondent No.1 and the same was rightly withdrawn by the Government by issuance of Government Order No.1273 of 2003 dated 17-12-2003, the order which was subject matter of challenge in SWP No.15/2004.

23. Even on merits we find that there is no legal infirmity or illegality in the Government Order dated 17-12-2003, impugned in SWP No.15/2004, and, therefore, there was no occasion for the writ Court to quash the said order.

24. For the forgoing reasons, we find merit in this appeal and, accordingly, the judgment and order dated on 13-10-2023 is set aside. Resultantly the appointment of the appellant as Assistant Professor in the Department of General Medicines, made in terms of Government Order No.791-HME of 2003 dated 14-07-2003 shall remain intact. The respondent No.1 shall be deemed to have been regularised as Assistant Professor, in General Medicines with effect from 01-02-2007, as envisaged in Office Order No. SIMS 16 (P) of 2009 dated 17-01-2009. The services rendered by respondent No.1 as Assistant Professor, General Medicines, while working in temporary capacity in the respondent-Institute from time to time, shall be reckoned only towards qualifying service for the purposes of pension.

(Sanjay Parihar)
Judge

(Sanjeev Kumar)
Judge

Srinagar.

23 .05.2025

Anil Raina, Addl. Registrar/Secy

Whether the order is speaking : Yes

Whether the order is reportable: Yes