

**IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

...

CSA No. 30/2018

1. Director SKIMS Soura, Srinagar
2. Joint Director SKIMS, Soura, Srinagar
3. Administrative Officer, SKIMS Soura Srinagar.
- 4.

...Petitioner(s)

Through: Mr. Furqan Yaqoob, GA.

VERSUS

Mohammad Asif Dar
S/o Mohammad Maqbool Dar
R/o Soura, Srinagar.

...Respondent(s)

Through: Mr. M.I.Dar, Advocate.

CORAM:

HON'BLE MR JUSTICE RAHUL BHARTI, JUDGE

ORDER

1. The respondent-Mohammad Asif Dar filed a civil suit on 05.04.2011 against the three appellants herein thereby seeking a decree of declaration with mandatory injunction to the following effect:-

“a)Decree, order or direction including one in the nature of declaration declaring the decision of advertising the vacant post of Technician (lab Group) informed by virtue of letter bearing no.SIMS/RTI-11/2011-1900 dt:6/3/2011 issued by the defendant institute as null, void and non-est in law.

b)A decree order or direction including one in the nature of declaration declaring an order regarding validity lost beyond 02/10/2008 of waiting list of the candidates for the post of technicians (Lab. Group) conveyed letter no.SIMS: 302/Rep/2009-1696, dt:9/7/2009 as non-est in laws and null and void. vide bearing illegal.

c)A decree, order or direction including one in the nature of mandatory injunction commanding upon the defendants to appoint the plaintiff on regular basis against the vacant post of technician (Lab Group) as being entitled as per legal position and make formal order regarding same.

d)A decree, order or direction including one in the nature of mandatory injunction commanding upon the defendants to forebear from advertising the vacant post of Technician (lab.Group).

e) Any other order, relief or direction which this hon'ble court deems fit and proper in the circumstances of the case may be pleased to pass in favour of the plaintiff and against the defendants.”

2. The case set up by the respondent-Mohammad Asif Dar

in his suit was that at the relevant point of time he \was a Diploma Holder as Laboratory Assistant being a pass out from the J&K State Medical Faculty of the year 2002 on

which qualification basis he had applied in response to an advertisement notice No. **01 of 2006 dated 31.05.2006** for selection to advertised posts of Technician (Lab. Group) in the Sher-i-Kashmir Institute of Medical Sciences ('SKIMS' in short), Soura, Srinagar.

3. The respondent-Mohammad Asif Dar pleaded to have participated in the written test driven selection process followed by viva-voce held in the year 2007 and thereby coming to figure in a purported Wait List as candidate No.8.
4. It was pleaded in the civil suit that by virtue of **Government Order No.46-SKIMS of 2007 dated 16.10.2007**, appointment of four diploma holder candidates as Technician (Lab.Group) came to be sanctioned but some of the appointees did not join within one month from date of said **Order No. 46 of 2007** so Wait List came to be operated.
5. It came to be stated by the respondent-Mohammad Asif Dar that a Government Order No. **70-SKIMS of 2008 dated 30.08.2008** was issued thereby operating wait list

and appointing five more candidates to the posts which had remained unfilled due to non joining of original appointees.

6. The respondent-Mohammad Asif Dar reckoned a cause of action for him to file suit when due to non-joining of one of the four Wait List selected candidates namely Shah Fasal purportedly meant to be otherwise appointed in terms of Govt. Order No. **70-SKIMS of 2008 dated 30.08.2008** did not join and, thus, opened a window for the respondent-Mohammad Asif Dar to get a call for appointment but since the same call did not mature, as such, the respondent No.1 submitted representation to the authorities, in turn to be apprised by virtue of a communication of the Administrative Officer G-1(Policy) vide endorsement No. **SKIMS 302/REP/2009-1696 dated 09.07.2009**, thereby communicating purported decision of the Authorities concerned that the wait list being valid only for one year had lost its validity beyond **02.10.2008**.

7. It came to be further pleaded that despite repeated applications made by him for seeking his appointment, no out-come in terms of response worth name coming forth from SKIMS's authorities afforded a cause of action for him to come forward with the civil suit.
8. The suit was instituted before the court of learned 1st Additional Munsiff Srinagar, wherein the appellants appeared and filed their written statement stating therein that two (2) vacancies of Technician (Lab Group) in OM(Diploma Quota) were filled in terms of Government Order **No.46 of SKIMS of 2007 dated 16.10.2007** from the merit list approved by the Chairman Governing Body SKIMS (Chief Minister of State of J&K) and the Waiting list thereto was valid for a period of one year w.e.f **02.10.2007** lasting upto 02.10.2008.
9. It came to be divulged in the written statement that in the meanwhile five (5) vacancies of Technician (Lab Group) Diploma Quota in OM had become available which came to be filled up in terms of **Order No.70-SKIMS of 2008**

dated 30.08.2008 by operating the Wait List within its validity lasting up to **01.10.2008**.

10. One of five wait list candidates namely Fasal Shah who was supposed to join up to 29.09.2008 failed to report for his joining but before the operation of wait list in terms of next selectee who was the respondent-Mohammad Asif Dar could be considered, the validity of the wait list was reckoned to have expired and the respondent -Mohammad Asif Dar who was figuring at serial number 8 in the Wait List could not be considered for appointment against unfilled post of Technician (Lab. Group).

11. In the preliminary objections raised in the written statement the dismissal of suit was sought for want of notice under section 80 of the J&K Code of Civil Procedure Svt.1977.

12. The respondent-Mohammad Asif Dar was denied to have had any cause of action to sue against the appellants.

13. The institution of the suit had taken place on file **No.22/N on 05.08.2011** which came to be disposed of by

virtue of a judgment and decree dated **30.11.2015** after the appellants absented and were proceeded ex-parte in the matter.

14. Six issues came to be framed in the civil suit which are reproduced hereunder:-

1) Whether the defendants were obliged to appoint plaintiff against the vacant post which had fallen vacant due to non-joining of one of the selectees? (OPP)

2) Whether the plaintiff has applied before the expiry of waiting list? (OPD)

3) Whether the selection list was published by defendants for information of General Public viz with plaintiff? (OPD)

4- Whether the plaintiff has submitted reminders to the defendants so as to keep the waiting list in tact? (OPD)

5- Whether the defendants have intentionally slept over the matter to jeopardize the rights of plaintiff? (OPD)

6-Relief.

15. The appellants, while in the state of ex-parte, chose only to cross examine the witnesses produced by the respondent-Mohammad Asif Dar in support of his case.

16. The trial court of learned 1st Additional Munsiff, Srinagar came up with the finding that the selection list

was not published by the appellants for the information of General Public and, as such, the date on which the expiry of the wait list was to take place was not to be reckoned w.e.f. **16.10.2007** of the issuance of **Government Order No.46-SKIMS of 2007** and also not prior to said date when the Selection Committee had convened its meeting and finalized the selection on **02.10.2007**.

17. The trial court came to identify the factual point involved in the suit being the date upto which the selection list and wait list were to stay valid from the date of its publication for being made public and not being the date when the competent authority approved it. In this regard the trial court came to rely upon a judgment passed by this Court as cited in the judgment.

18. The court of learned 1st Additional Munsiff, Srinagar came to decree the suit to the following effect:-

“In view of the above reasoning this court comes to the conclusion that the claim of the plaintiff for his appointment as Lab Technician arose during the validity of said select list/waiting list. Therefore duty was cast upon the competent authority to fill up the vacancies from the waiting list if any vacancy had remained unfilled during the validity of such select list/waiting list. Office to prepare a

decree sheet accordingly. Suit is disposed off accordingly without any order as to costs.”

19. Against said judgment and decree dated **30.11.2015**, the appellants preferred a civil first appeal **No.25/2016** on **19.02.2016** before the court of learned 4th Additional District Judge Srinagar, which appeal came to be allowed on a technical aspect that issue-wise finding based upon discussion and appreciation of evidence was not returned by the trial court and, thereby holding that the judgment and decree dated **30.11.2015** passed by the court of learned 1st Additional Munsiff, Srinagar was not sound in law which came to be set aside by remanding the matter back to the trial court of 1st Additional Munsiff, Srinagar for deciding the suit in accordance with law and return its finding keeping in view the discussion as made by the appellate court in its judgment dated **27.09.2016**.
20. Thus, the trial court of learned 1st Additional Munsiff, Srinagar, in remand proceedings, came up with a judgment and decree dated **15.04.2017** arriving at the same very conclusion and determination as was done in

its first judgment dated **30.11.2015** but purportedly undertaking issue-wise discussion.

21. The court of learned 1st Additional Munsiff Srinagar came to hold in the judgment so passed in the suit as under:

“...As such the suit of the plaintiff is decreed and a decree of declaration is passed in favour of the plaintiff and against the defendants whereby the decision of advertising the vacant post of Technician Lab Group) informed by virtue of letter bearing No. SIMS/RTI-II/2011-1900 dated 6-03-2011 issued by defendant institute is declared as null, void and non-est in the eyes of law.

A decree of declaration whereby the order regarding validity lost beyond 2-10-2008 of waiting list of the candidates for the post of Technicians (Lab Group) conveyed vide letter bearing No. SIMS 302/Rep/2009-1696 dated 9-07-2009 is declared as illegal, non-est, null and void.

A decree of mandatory injunction is passed in favour of the plaintiff and against the defendants whereby the defendants are directed to appoint the plaintiff against vacant post of technician (lab Group).”

22. The decree proceeding upon said judgment which came to be passed in favour of the respondent-Mohammad Asif Dar by the court of learned 1st Additional Munsiff, Srinagar is reproduced hereunder:

“A decree of declaration is passed in favour of the plaintiff and against the defendants whereby the decision of advertising the vacant post of Technician (Lab Group) informed by virtue of letter bearing No.SIMS/RTI-II/2011-1900 dated 6.03.2011 issued by defendant institute is declared as null, void and nonest in the eyes of law.

A decree of declaration whereby the order regarding validity lost beyond 2-10-2008 of waiting list of the candidates for the post of Technicians (Lab Group) conveyed vide letter bearing No. SIMS 302/Rep/2009-1696 dated 9-07-2009 is declared as illegal, nonest, null and void.

A decree of mandatory injunction is passed in favour of the plaintiff and against the defendants whereby the defendants are directed to appoint the plaintiff against vacant post of technician (lab Group).”

23. Against the second round judgment and decree dated **15.04.2017**, the appellants again preferred a civil first appeal on file **No.16/Appeal on 20.06.2017** before the court of learned 1st Additional District Judge, Srinagar, which came to suffer dismissal in terms of judgment dated **13.06.2018** which has now come to be assailed in the present civil second appeal under section 100 of J&K Code of Civil Procedure Svt. 1977 by the appellants.

24. The appellate court of learned 1st Additional District Judge, Srinagar generated the following point for determination in civil first appeal which is reproduced hereinafter:

“Whether the learned trial court has passed the impugned judgment and decree erroneously without appreciating the material and are not sustainable under law.”

25. The learned appellate court came to generate a factual finding as to whether the Wait List was valid for one year only and lost its validity beyond 02.10.2008 so as not to remain operable.

26. The appellate court also came to return a concurrent finding of factual import that the commencement and operation of the Wait List was to take place from the date of issuance of appointment order dated **16.10.2007** by virtue of which first round of appointees were first directed to join the post within a period of one month and by reference to said date of 16.10.2007 the Waiting List was held to expire on **16.10.2008**. So during the course of said period , when 2nd round appointees came to be

appointed by virtue of Order No. 70-SKIMS of 30.08.2008, so the respondent-Mohammad Asif Dar figuring at serial number 8 was held to be having a live claim in view of the fact that appointment of five candidates purported from Wait List had taken place on the basis of an order dated **30.08.2008** but one of them namely Shah Faisal not joining, as such, the post meant for his joining was to fall for the benefit and claim of the respondent-Mohammad Asif Dar as being next available wait list candidate. By that reference, the Wait List was held to be live and the respondent-Mohammad Asif Dar was having a recurring vested claim for his appointment.

27. When this court scans two judgments of the courts below, both of concurring nature, holding the Wait List was first to put to operation and exhaustion, as such, the respondent-Mohammad Asif Dar was in due line of consideration with non-joining of one of the five candidates namely Shah Fasal drawn from the wait list, the respondent-Mohammad Asif Dar had become entitled to be called for appointment which upon denial to him led

him to file the civil suit with a cause of action and succeed therein by earning concurrent judgements from the courts below.

28. Therefore, this court does not agree with the proposed substantial questions of law to be held as being involved. All proposed substantial questions of law are nothing but superficial in impression and intent, therefore, cannot count to puncture two judgments of the courts below. The appellants ought to have contested the suit with tooth and nail and not by contesting the suit from sidelines.

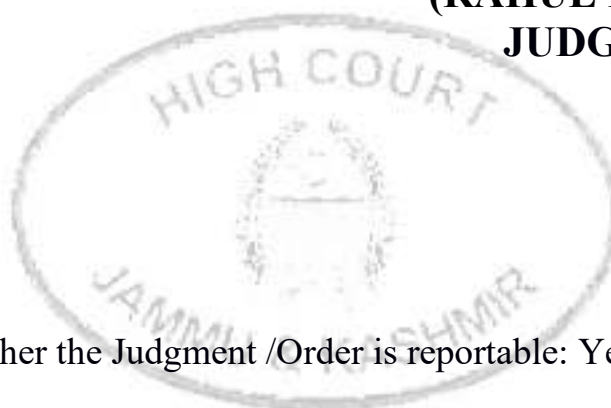
29. However, before dismissing this civil second appeal on account of non-involvement of questions of law, this Court would like to register an observation that the trial court judgment and decree has given a mandatory injunction for the appointment of the respondent-Mohammad Asif Dar to the post of Technician (Lab Group). A mandatory injunction decree by its tone and tenor is prospective in nature without admitting any retrospective effect in favour of the respondent-Mohammad Asif Dar in terms of his appointment taking

place and would thus continue to be so upon the appointment of respondent-Mohammad Asif Dar to take effect without any retrospective service benefit and effect accruing to him provided the post which had fallen vacant due to non joining of Shah Faisal is still available and vacant.

30. Disposed of in terms of the above.

(RAHUL BHARTI)
JUDGE

SRINAGAR
12.08.2025
Muzammil. Q



Whether the Judgment /Order is reportable: Yes / No