S. No.

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

WP(C) No. 1855/2022 CM No. 4594/2022.

Reserved on:02.07.2024.
Pronounced on:26.07.2024.

Dr. Afaq Ahmad Khan …Petitioner
Aged about 48 years
S/o Bashir Ahmad Khan
R/o Green Colony, Ellahi Bagh,
J&K, Srinagar.

Through: Mr. Salih Pirzada, Advocate.

Vs.

1. Union Territory of J&K through ...Respondents
   Chief Secretary,
   Jammu and Kashmir Government,
   Civil Secretariat, J&K Jammu/Srinagar.
2. Commissioner/Secretary to Government
   Health and Medical Education Department,
   Civil Secretariat, J&K Jammu/Srinagar.
3. Sher-i-Kashmir Institute of Medical Sciences
   Through its Director/Ex-Officio Secretary to Government, Soura, Srinagar.

Through: Mr. D. C. Raina, Advocate General, with
Mr. Mubeen Wani, Dy.AG and
Mr. Furqan Yaqoob, GA.

CORAM:

HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE

JUDGEMENT

1. Before proceeding to advert to the issues involved in the instant petition, it is pertinent to mention here that the petition in hand came to be heard and dismissed at the admission stage on 29.08.2022 against which order of dismissal, the petitioner herein preferred Letters Patent Appeal being LPA 154/2022 wherein on 30.08.2022 the Division Bench stayed the operation of the said order of dismissal dated 29.08.2022 and directed respondent 3 herein to allow the appellant petitioner herein to participate in the process of selection and conduct his interview for the post in question at his own risk and

responsibility with a direction not to declare the result till further orders, whereafter vide order dated 31.10.2023 the Division Bench passed another order permitting the appellant petitioner herein to apply for the post of Associate Professor in the Department of Clinical Hematology providing further therein the said order that in the event of failure of the petitioner herein to succeed in the same, it would not adversely affect the case setup by him. Thereafter on 09.05.2024 the Division Bench finally disposed of the LPA and while allowing the same requested the writ court to consider the matter afresh considering the observations made in the said order of disposal and pass fresh orders. It is significant to mention here that during the pendency of the said LPA, the petitioner herein came to be interviewed in terms of order dated 30.08.2022 by the respondents and came to be declared as qualified which fact came to be recorded by the Division Bench in its order dated 07.03.2023.

2. The petitioner herein in the instant petition has called in question notification issued by respondent Institute vide No.SIMS 302 07(XXXVIII/2022-2690-99 dated 25.08.2022 by virtue of which the petitioner herein was declared ineligible for promotion to the post of Associate Professor in Clinical Hematology due to lack of requisite service as per the Assessment Merit Promotion Scheme (for short the AMPS) by 5 months and 8 days besides being short of 2 Indexed Publications.

3. The case setup by the petitioner herein is that the Respondent-Institute issued an advertisement notice no. 04 of 2015 dated 10.07.2015 for appointment to the post of Assistant Professor in various disciplines and the petitioner herein being eligible for appointment as Assistant Professor in the discipline of Clinical Hematology applied in response to the said notification whereafter facing the process of selection, in the year 2017, the respondent Institute issued the appointment order in favour of the petitioner on 27.11.2019 whereas, the appointment orders in favour of the other selected candidates in other disciplines who had participated in the said selection process pursuant to the notice dated 10.07.2015 were issued in the Month of October 2018. The delay in issuance of order of appointment of the petitioner,

according to him occurred due to miscalculation of marks awarded to him by the selection body in the selection process, whereafter the petitioner claims to have filed a representation before the respondent Institute seeking retrospective effect to his appointment w.e.f. the date of appointment order in favour of the selected candidates of other disciplines were issued and claims that upon taking cognizance of said representation, the respondent Institute recommended the case of the petitioner to the competent authority for grant of notional effect to his appointment retrospectively with a view to protect the seniority of the petitioner for the purposes of promotion to the post of Associate Professor, Additional Professor and Professor in terms of AMPS, wherein combined *inter se* seniority is acted upon.

The grievance projected by the petitioner thus is that had the respondent Institute reckoned his services/appointment w.e.f. 03.10.2018, i.e., from the date of appointment of the other selected doctors was reckoned for the purpose of promotion, he would have been eligible for promotion to the post of Associate Professor in the discipline of Clinical Hematology. Insofar as the issue of short fall of Indexed publications is concerned, the petitioner herein claims to have addressed the same.

4. The petitioner has questioned the impugned notice 25.08.2022 primarily on the ground that due to unreasonable delay in the issuance of appointment order in his favour, by the respondents Institute, the petitioner cannot be made to suffer a perpetual loss of his seniority and, as such, cannot be deprived of his seniority viz-a-viz those selected candidates who faced selection process with him in terms of the advertisement notice dated 10.07.2015 and were appointed without any delay by the respondent Institute while placing reliance on the judgment passed by this court in case titled as *"Mir Ab. Wahid v. State of J&K and others passed in SWP No. 1935/2014 decided on 05.10.2016.*

5. Even though the respondents had filed objections to the matter when the same was being heard by the Division Bench in the LPA supra, the respondents yet, again filed additional objections to the petition in hand in terms of order dated 21.05.2024 before this Court.

6. In the said two sets of objections, one filed before the Division Bench and the another before this Court, the respondents have raised a preliminary objection to the maintainability of the petition in view of Section 28 of the Administrative Tribunals Act, 1985 inasmuch as that the petitioner herein having accepted his appointment on 27.11.2019 without raising any alarm or challenging the same, therefore, the petitioner is estopped from seeking retrospective effect to his appointment besides the petition being hit by delay and laches.

On merits, the respondents in the objections have averred that after the release of initial recommendations of the Apical Selection Committee made pursuant to the process of selection undertaken in terms of the advertisement notice dated 10.07.2015, complaints were received regarding the marks awarded by the said Selection Committee which resulted into issuance of Order No. 64-SKIMS of 2018 dated 28.07.2018 for constitution of a Committee for scrutinizing the selection list of all the candidates of all the disciplines including that of the petitioner which Committee noted that the tabulation of marks obtained by the petitioner herein was not correct, therefore, revised the recommendations/tabulation of marks in favour of the petitioner herein on 17.08.2019 followed by the issuance of the order of appointment of the petitioner dated 27.11.2019.

It is being further stated in the objections by the respondents that seniority being an incidence of service, the petitioner will acquire seniority only from the date of his initial appointment in terms of Rule 24 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 which has translated into a settled law by various judgements of the Apex Court and this court.

It has been further averred in the objections by the respondents that appointment of the petitioner herein cannot be antedated to a date when he was not even borne in the cadre and, as such, the reliefs prayed by the petitioner herein if granted would unsettle the settled things which is not permissible, more so, in view of the fact that selectees/appointees who may get effected by grant of the relief prayed by the petitioner herein are not impleaded as party in the petition as the said selectees/appointees would get prejudiced and

condemned unheard, therefore, warrant the dismissal of the petition in limine.

It is further stated in the objections that since the appointment of the petitioner cannot be antedated and that his service is to be counted from the date of his actual appointment, declaring him ineligible for promotion under AMPS due to lack of eligibility was valid.

It is lastly stated in the objections by the respondents that the case of the petitioner herein was also considered by the Government and consultation in this regard held with the Department of Law, Justice and Parliamentary Affairs whereupon the claim of the petitioner herein was rejected vide letter dated 28.09.2022 which rejection though brought to the knowledge of the petitioner has not been assailed by him in the instant petition and furthermore vide Order No. 956 (PER) of 2022 dated 06.10.2022, final seniority list in the case had been also issued which the petitioner has not chosen to challenge.

Heard counsel for the parties and perused the record.

7. At the outset, it is deemed appropriate to address to the preliminary objection raised by counsel for the respondents in the first instance being that the petition is not maintainable in view of exclusion of jurisdiction of this Court under Section 28 of the Administrative Tribunal Act, 1985 which reads as under: -

> ***28. Exclusion of jurisdiction of courts except the Supreme Court under article 136 of the Constitution.****—On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, [no court except—*
>
> *(a) the Supreme Court; or*
>
> *(b) any Industrial Tribunal, Labour Court or other authority under the Industrial Disputes Act, 1947 or any other corresponding law for the time being in force,*
>
> *shall have,] or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters.*

In regard to aforesaid provision of law the Apex Court in case titled **L. Chandra Kumar v. Union of India** reported in **(1997) 3 SCC 261**, has declared Clause 2(d) of Article 323-A and Clause 3(d) of Article 323-B of the Constitution of India as unconstitutional to the extent that the same excluded the jurisdiction of the High Courts under Articles 226 and 227 and of the Supreme Court under Article 32 of the Constitution; consequently, Section 28 of the Administrative Tribunals Act was declared unconstitutional as were the 'exclusion of jurisdiction' clauses in all other legislation enacted under Articles 323-A and 323-B and it was held that the jurisdiction conferred upon the High Courts under Articles 226 and 227 and upon the Supreme Court under Article 32 of the Constitution form a part of the basic structure of the Constitution.

Besides above, Section 28 starts with the expression "On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or Post or Service Matters concerning members of any service or persons appointed to any Service or Post", meaning thereby that the matters in which the Tribunal constituted under the Act of 1985 had the jurisdiction, jurisdiction of the High Court stood excluded.

8. A further reference to Section 14 of the Act of 1985 would also be relevant hereunder in regard to the above which reads as under: -

> ***14. Jurisdiction, powers and authority of the Central Administrative Tribunal.—****(1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts except the Supreme Court in relation to—*
>
> *(a) recruitment, and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian;*
>
> *(b) all service matters concerning—*
>
> *(i) a member of any All-India Service; or*
>
> *(ii) a person [not being a member of an All-India Service or a person referred to in clause(c)] appointed to any civil service of the Union or any civil post under the Union; or*
>
> *(iii) a civilian [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any defence services or a post connected with defence,*

and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation [or society] owned or controlled by the Government;

(c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation [or society] or other body, at the disposal of the Central Government for such appointment.

(2) *The Central Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of sub-section (3) to local or other authorities within the territory of India or under the control of the Government of India and to corporations [or societies] owned or controlled by Government, not being a local or other authority or corporation [or society] controlled or owned by a State Government:*

Provided that if the Central Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this sub-section in respect of different classes of, or different categories under any class of, local or other authorities or corporations [or societies].

(3) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall also exercise, on and from the date with effect from which the provisions of this sub-section apply to any local or other authority or corporation [or society], all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court) in relation to—

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation [or society]; and

(b) all service matters concerning a person [other than a person referred to in clause (a) or clause (b) of sub-section (1)] appointed to any service or post in connection with the affairs of such local or other authority or corporation [or society] and pertaining to the service of such person in connection with such affairs.

Since the respondent Institute is yet, to be brought under the jurisdiction of the Tribunal, it is manifest that this court has jurisdiction to entertain a service matter arising out of the service in the respondent Institute.

9. Regarding the objection qua the application of doctrine of estoppel and the plea of delay and laches raised by respondents against the petitioner herein are concerned, the said objections as well are not applicable having regard to the facts and circumstances of the case, in that, the order of appointment of the petitioner herein did not contend any stipulation as to from which date the said appointment had to be given effect to, more so, in presence of the positive case setup by the petitioner herein that he raised an issue in this regard with the

respondent Institute which had indisputably taken up the matter with the Administrative Department.

In this view of the matter, a reference to the judgement of the Apex Court passed in case titled as **"C. Jayachandran V. State of Kerala"** reported in **AIR 2020 SC 3846** would be profitable wherein at para 41 following has been held: -

> ***41****. The Office Memorandum of Government of Kerala dated 22nd December, 2010 and later notification of the State Government appointing the appellant is that of setting aside of selection of three candidates and appointing the appellant by assigning Sl. No. 41 and Sl. No. 42 to Badharudeen. It is in tune with the merit while preparing the select list. Therefore, such merit could not be disturbed only for the reason that the appellant has not disputed it for 1 year and 2 months after his appointment. Admittedly, a seniority list was circulated in the year 2009 before the appointment of the appellant, thereafter, no seniority list was circulated. The appellant has already submitted representation claiming seniority which representation was accepted on 19th October, 2017. An employee has no control over the employer to decide the representation or to finalise the seniority as per his wish. The High Court has taken long time to decide the seniority claim. That fact will not disentitle the appellant to claim seniority from the date the other candidates in the same selection process were appointed. The fact that some of the officers have been given selection grade will not debar the appellant to claim notional date of appointment as the appellant has asserted his right successfully before the Division Bench in an earlier round and reiterated such right by way of a representation. The delay in deciding the representation by the High Court cannot defeat the rights of the appellant to claim seniority from the date the other candidates selected in pursuance of the same selection process.*

Even otherwise also as per the own showing of the respondent Institute the matter was under active consideration of the Government in consultation with the Department of Law Justice and Parliamentary Affairs, which did not agree with the claim of the petitioner herein and decision in this regard is stated to have been conveyed to the petitioner later on 28.09.2022 (i.e. after the filing of the petition which admittedly has been filed in the month of August, 2022), as such, under said circumstances the petition cannot be said to be not maintainable on the aforesaid grounds.

10. Having turned down the preliminary objections qua the maintainability of the petition, the next question which arises for consideration of this Court is as to whether the petitioner herein is entitled to get his service reckoned from the date other selectees having faced the same selection process with the petitioner herein were appointed though in support of the said claim, the counsel for the

petitioner herein referred to various provisions of the ASM Schemes and canvassed as to the way the combined seniority for the purposes of the promotion under the said Scheme is to be formulated, yet, this Court is of the considered opinion that the petitioner herein is entitled to the said benefits having his services reckoned from the date the other selectees were appointed on the basis of judgement passed by the Apex Court in the case of **C. Jayachandran** supra wherein at paras 37, 38, 39 and 40 following has been held: -

> *"**37**. In Sanjay Dhar, a three Judge Bench of this Court held as under:*
>
> > *"16. For the foregoing reasons the appeal is allowed. The judgment under appeal is set aside. It is directed that the appellant shall be deemed to have been appointed along with other appointees under the appointment order dated 6-3-1995 and assigned a place of seniority consistently with his placement in the order of merit in the select list prepared by J&K PSC and later forwarded to the Law Department…"*
>
> ***38**. In Lakshmana Rao Yadavalli, this Court held as under:*
>
> > *"13. For the reasons recorded in Lakshmana Rao Yadavalli v. State of A.P. [Set out in paras 1 to 13, above.] , the present appeals are allowed and it is directed that the High Court as well as the respondent State will do the needful for giving appointment to the appellant with retrospective effect i.e. from the date on which she ought to have been appointed, however, she shall not be paid salary for the period during which she has not worked as a District and Sessions Judge. We are sure that the respondents will do the needful for the appointment of the appellant at an early date."*
>
> ***39**. In view of the above, the appellant having been participated in the same selection process and in view of the direction of the Division Bench of the High Court, was rightly placed by the High Court by giving him revised select list placing him at Sl. No. 41 by pushing Badharudeen from general category candidate to OBC category candidate at Sl. No. 42.*
>
> ***40**. The appellant was wrongfully excluded from the process of appointment on account of an illegal and arbitrary grant of moderation of marks. The Government in its Order dated 22nd December, 2010 cancelled the appointment of three District and Sessions Judges who were granted benefit of moderation. Badharudeen was earlier assigned general category seat but since the appellant was higher in merit, Badharudeen was pushed down and adjusted against OBC category seat at Sl. No. 42. Badharudeen has not challenged his pushing down at Sl. No. 42 either before the learned Single Bench of the High Court or before the Division Bench of the High Court or even before this Court. Therefore, as respondent, he cannot be permitted to dispute the grant of seniority to the appellant at Sl. No. 41. The judgment referred to by learned counsel is not helpful to the arguments raised as the appellant therein sought seniority as direct recruit from the time when the vacancies occurred. To raise such an argument, reliance was placed upon judgment of this Court reported in Union of India & Ors. v. N.R. Parmar &*

Ors.[9], wherein this Court held that a person is disentitled to claim seniority from the date he was not borne in the service. The said finding is in the context of the claim of the appellant to claim seniority from the date of availability of the vacancies; whereas in the present case, the appellant is claiming seniority from the date the other candidates in the same selection process were appointed but the appellant is excluded on account of an illegal act of the High Court of the moderation of marks. Therefore, the said judgment is not of any help to the arguments raised."

Thus, what emerges from above is that it is well established principle in service jurisprudence that an individual cannot be made to suffer due to insufficiencies or laches on the part of the administrative authorities as the principle of fairness dictates that a candidate who has successfully cleared the selection process and whose appointment has been held solely due to the administrative laches should not be placed at a disadvantage compared to his peers. Thus, a direct recruit whose appointment is held for no fault on his part, but due to the laches on the part of the department cannot be denied retrospective effect to his appointment from the date on which other candidates having faced the same selection process and such direct recruit cannot also be denied consideration for promotion merely because he does not have a requisite length of service for promotion by computing the same from the date of joining, when his appointment was required to be reckoned from the date other candidates in the same selection process were appointed.

11. For what has been observed, considered and analyzed hereinabove, the only inescapable conclusion that could be drawn is that the instant petition deserves to be allowed. Accordingly, petition is allowed and is disposed of with the following directions: -

(i). The petitioner shall be deemed to have been appointed as Assistant Professor in the discipline of Clinical Hematology with effect from 03.10.2018, i.e., the date on which the other candidates/selectees having faced the same selection process with the petitioner were appointed.

(ii). The appointment of the petitioner with effect from 03.10.2018 till he actually joined the services pursuant to the order dated 27.11.2019 shall be **notional** not entitling

the petitioner to any monetary benefits. The petitioner, however, shall be entitled to all other service benefits as also consequential consideration for promotion to the next higher post by reckoning his service from 03.10.2018.

(iii). Respondents shall re-fix the seniority of the petitioner in view of above and in the process of such re-fixation the affected person/s, if any, be provided an opportunity to present his/their claim/s.

(iv).The impugned notice vide No. SIMS302 07(XXXVIII/2022-2690-99 dated 25.08.2022 to the extent it declares the petitioner as ineligible for want of requisite service is quashed.

(v) Respondents shall consider the appointment and regularization of the petitioner as Associate Professor, if the petitioner otherwise fulfills the criteria in terms of the AMPS minus the length of the service as determined above.

12. Disposed of.

(JAVED IQBAL WANI)
JUDGE

SRINAGAR
26.07.2024
Ishaq

Whether the order is speaking? Yes/No
Whether approved for reporting ? Yes/No