

HIGH COURT OF JAMMU AND KASHMIR AT
JAMMU

LPASW No.160/2011
CMP No.188/2011

Date of order:14.06.2012

Veena Kumari	Vs.	State of J&K & ors.
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Coram:

Hon’ble Mr. Justice Virender Singh, Judge.
Hon’ble Mr. Justice Hasnain Massodi, Judge.

Appearing counsel:

For the Appellant(s)	:	Mrs. Shivani Jalali Pandita, Advocate.
For the Respondent(s)	:	Mrs. S. Hakim, Dy.A.G for R- 1 to 5.
		Mr. Ashok Sharma, Advocate for R- 6.

1)	Whether to be reported in Press, Journal/Media	:	Yes.
2)	Whether to be reported in Digest/Journal	:	Yes.

Per Virender Singh-J:

1. The instant Letters Patent Appeal is directed against the judgment of the learned Single Judge dated 08.06.2011 passed in SWP No.937/2009, whereby upholding the appointment of private respondent No.6 (for short writ petitioner) as Rehbar-e-Taleem teacher for Upgraded Middle School, Panjah, Teshil Kalakote, District Rajouri as legal, directed the official respondents to consider the case of the appellant also, for the post of Rehbar-e-Taleem teacher against any available vacancy in the said school

under *Sarv Siksha Abhiyan (SSA) Scheme*.

2. By way of interim order, confirmation of the writ petition as General Line Teacher was put to hold. However, it has been brought to the notice of the Court by Mr. Sharma, learned counsel for respondent No.6, that he already stands confirmed/regularized that too before this appeal was considered.
3. Keeping in view the peculiar facts and circumstances of the case on hand, in which the appellant was denied consideration for engagement as Rehbar-e-Taleem teacher and the fact that the writ petitioner was continuing as Rehbar-e-Taleem teacher on the advertised post, against which the appellant had staked her claim, direction was given to the State to consider the case of appellant's adjustment against available vacancy of General Line Teacher. This attempt was made so that both the candidates could be adjusted. However, State feels handicapped in considering the case of the appellant for her adjustment as General Line Teacher for non-availability of the post. Therefore, the present appeal calls for its disposal on merits.
4. Flash back of the facts needs to be noticed.
5. The litigation of this case started as late as year 2004,

when the appellant filed first writ petition bearing SWP No.1865/2004, projecting her grievance that she despite appearing at serial No.2 in the panel prepared by the official respondents for the post of Rehbar-e-Taleem Teaching Guide for village Panjah, Tehsil Kalakote and the writ petitioner at serial No.3, the official respondents approved his candidature for the aforesaid appointment, whereas against the name of the appellant her candidature was shown as '**cancelled**'.

6. The case set up by the appellant was that she being on better merit position vis-a-vis the writ petitioner, he could not steal march over her. Vide interim order dated 16.11.2004 (annexure-D), the writ Court directed that one vacancy of Rehbar-e-Taleem Teaching Guide for aforesaid village shall remain unfilled. In fact, the advertisement was with regard to two vacancies and there was no dispute with regard to the candidate figuring at serial No.1, being more meritorious than the appellant and the writ petitioner.
7. What needs to be noticed is that the writ petitioner already came to be appointed by Zonal Education Officer, Kalakote vide order No.ZEO/KK/773-78 dated 01.11.2004. Record of the writ petition bearing SWP No.1865/2004 is also attached with the instant appeal. This writ petition was

ultimately dismissed on 08.09.2006 as withdrawn, with liberty to file fresh one.

8. What is averred in the aforesaid writ petition is that the appellant obtained 789 marks in B.A. Final, whereas writ petitioner had obtained 777 marks in B.A. Final. Despite that being the merit position, her selection was cancelled without any plausible cause. The other ground taken was that certain vested interests had prevailed in cancelling the selection of the appellant for certain extraneous consideration.

9. *Per contra*, the stand of the official respondents for canceling the name of the appellant was that on the last date fixed for receipt of the application form, she was not possessing the graduation degree, therefore, could not be considered more meritorious than the writ petitioner and her candidature was rightly indicated in the panel of selection as '**cancelled**'.

10. The appellant, after withdrawing the aforesaid writ petition (SWP No.1865/2004) on 08.09.2006, filed another writ petition bearing SWP No.2194/2006 seeking direction in her favour on the ground that although she had not passed graduation on the last date of submission of application form but submitted her marks sheet of graduation, in which she

was shown as '**failed**' in '**English subject**'. The said result was declared on 03.07.2004 in which she was shown as re-appear in 'English Paper' for B.A. Final year examination. Since she was not satisfied with the result, she applied for re-evaluation in the 'English Subject', the result thereof was declared on 20.08.2004 in which she was shown to have passed the said 'subject'.

11. The case set up by the appellant was that as per the advertisement notification dated 29.06.2004, the application forms to be submitted within 15 days from the date of advertisement and within this stipulated period of 15 days, she had annexed her marks sheet dated 03.07.2004, in which she was shown as re-appear in 'English Paper', which was subsequently submitted before the Zonal Education Officer, Kalakote-respondent No.5 on 24.08.2004, much before finalization of panel and for this reason, on the basis of marks obtained by her in B.A.Part-III examination, she was shown to be figuring at serial No.2 and the writ petitioner at serial No.6. The penal was approved by the Director, School Education, Muthi-respondent No.3 on 09.09.2004 and prior to this, the objections were invited but no candidate had objected to the candidature within the prescribed period. It was thereafter on 24.09.2004, one

Reeta Devi had raised objection to the candidature of the appellant on the ground that she was not qualified and for this reason, the appointment order was not issued in favour of the appellant and in stead, appointment order was issued in favour of the writ petitioner. This constrained the appellant to file earlier writ petition No.1865/2004. It was further pleaded that thereafter Director, School Education, Muthi-respondent No.3, by virtue of his order No.DSEJ/RET/16973-75 dtd 23.11.2005, directed the Chief Education Officer, Rajouri-respondent No.4 to direct Zonal Education Officer, Kalakote-respondent No.5 for issuance of show cause notice to the writ petitioner with regard to terminating of his services having low in merit, as compared to the appellant, and falling at serial No.3 in the panel prepared by Zonal Education Officer, Kalakote(respondent No.5). Ultimately, the Chief Education Officer, Rajouri directed the Zonal Education Officer, Kalakote vide order No.CEOR/13495 dated 24.11.2005 to issue appointment order in favour of the appellant. Pursuant thereto an order No.ZEO/K/RET/3206-10 dated 28.11.2005 came to be passed in favour of the appellant, appointing her as Rehbar-e-Taleem Teacher in Middle School, Panjah. The appellant also reported her joining.

However, on 09.12.2005, another order came to be passed by respondent No.5-Zonal Education Officer, Kalakote, vide which her appointment was cancelled, in pursuance to the directions of the Director, School Education, Muthi-respondent No.3 on the ground that he wanted to re-examine her case once again. Since no consideration was accorded to the case of the appellant for a considerable period, she filed writ petition bearing SWP No.2194/2006 seeking direction in the nature of writ of mandamus commanding Director, School Education, Muthi, to decide the case of the appellant pending consideration for appointment as Rehbar-e-Taleem Teacher in Middle School, Panjah. The aforesaid writ was ultimately disposed of by the learned Single Judge vide order dated 03.04.2008 with a direction to the Director, School Education, Jammu to grant consideration for her engagement/appointment as Rehbar-e-Taleem teacher in Middle School, Panjah and pass appropriate orders.

12. It is worth noticing that the writ petitioner was not arrayed as party respondent in aforesaid SWP No.2194/2006.

13. It is how Zonal Education Officer, Kalakote, issued an order bearing No.ZEO/KK/1389-91 dated 28.05.2009 appointing appellant as Rehbar-e-Taleem teacher for the aforesaid

school, which was questioned by the writ petitioner vide SWP No.937/2009, which has now been disposed of vide impugned judgment.

14. Heard Mrs. Shivani, learned counsel appearing for the appellant, Mrs. Hakim, learned Dy.A.G. appearing for respondent Nos.1 to 5 and Mr. Ashok Sharma, learned counsel appearing for private respondent No.6.

15. Reiterating the pleas taken in the memo of appeal, Mrs. Shivani vehemently contends that the view taken by the writ Court upholding the appointment of the writ petitioner as legal is not sustainable in the eye of law. She submitted that it is settled position of law that re-evaluation involves rectification of any error also, which can be corrected later, as such, the rectification would relate back to the date of error. In the case on hand, the rectification was carried out before the preparation of the panel and, therefore, there was no illegality committed by Zonal Education Officer, Kalakote in taking into account the academic qualification of the appellant after the last date of submission of application form. Admittedly before the preparation of the panel, the appellant had passed the subject (English paper) in which she was shown as reappear.

16. Mrs. Shivani would further contend that even otherwise the

candidate should not suffer on the lapse of the University in not properly evaluating the merit of the candidate and in the case on hand as has happened in this case. On the request of the appellant for re-evaluation, she was ultimately declared as '**Pass**'. It was, in fact, an error in the mark sheet, which was subsequently corrected and, therefore, it would relate back to the date of error. She further submitted that in the present case, admittedly the appellant, as per advertisement notice dated 29.06.2004, had submitted her application form, within the stipulated period of 15 days' time from the date of advertisement notice, with which she had annexed her mark sheet also, in which she was shown as re-appear in English paper. The appellant, thus, obtained 789 marks in B.A.final vis-a-vis the writ petitioner, who obtained 777 marks in B.A.final and that being the fact position, the appellant was stealing march over the petitioner.

17. Learned counsel then submits that the callous treatment meted out the appellant is writ large, that despite she being engaged as R-e-T Teacher not once but twice the writ petitioner has been allowed to sit on the post of the appellant, thereby depriving the appellant of her legitimate right, which had accrued to her at the time of initial

appointment.

18. On the strength of the aforesaid submissions, learned counsel submits that the respondents may be directed to accord consideration to the case of the appellant treating her to be appointed as R-e-T teacher for Upgraded Middle School, Panjah, Teshil Kalakot, District Rajouri, right from the initial date of appointment so as to reap all the consequential benefits including her engagement/regularization as General Line Teacher by setting aside the impugned judgment.

19. *Per Contra*, Mr. Ashok Sharma, learned counsel appearing for the writ petitioner (private respondent No.6) submits that the appellant has twisted the facts at every stage, as suitable to her. He submits that in the first writ petition bearing SWP No.1865/2004 filed by her, the grounds taken was that despite her name reflected in the list of candidates as R-e-T teacher in newly Upgraded Primary School to Middle School, her candidature was shown as '**cancelled**' without any intimation to her and the post was offered to the writ petitioner. In the said writ petition, the relief sought for, was of cancellation of the said list. Learned counsel further submits that in the said petition, a specific objection was taken by the official respondents that the last

date for submission of the application form for two posts, advertised for the said school, was 15.07.2004 and that the appellant qualified her graduation on 20.08.2004, as such, her qualification on the last date of submission of the application form was 10+2 only. It was further the case of the official respondents that at the time of framing of the panel her qualification was wrongly taken as graduation, which admittedly she acquired after the last date of submission of the application form and, therefore, it was cancelled. A specific direction was issued to the appellant to produce her mark list/graduation degree to show that she possessed the requisite qualification on the relevant date, for which she sought time and ultimately, did not comply with the said order. Not only that, the appellant chose not to appear to prosecute the said writ petition, which came to be dismissed on 18.05.2006 but on laying formal application, it was restored on 03.09.2006, on which date the appellant prayed for withdrawal of the same with liberty to file fresh one.

20. Learned counsel would further submit that before the said writ petition came to be dismissed as withdrawn, the writ petitioner was already engaged as R-e-T teacher vide order dated 28.11.2005, which order was not questioned by the

appellant by impleading the writ petitioner as party respondent, rather chosen to seek direction to Director, School Education Muthi, Jammu to decide the case of the appellant pending consideration for appointment as Rehbar-e-Taleem Teacher. Learned counsel fairly submits that no doubt after the writ petitioner was appointed as R-e-T Teacher vide order dated 28.11.2005, a show cause notice was issued to him as to why his services be not terminated. It is only after the aforesaid writ petition bearing SWP No.2194/2006 was disposed of by the writ Court on 03.04.2008 for according consideration to the case of the appellant, an order bearing No.ZEO/KK/1389-91 dated 28.05.2009 cancelling the appointment of the private respondent and appointing the appellant came to be passed, which became the subject matter of the challenge in SWP No.937/2009, which now stands disposed of vide impugned judgment upholding the appointment of the writ petitioner as legal. Learned counsel thus submits that the appellant, in fact, has no case at all to seek indulgence of this Court for declaring the appointment of the writ petitioner as illegal, whereas her adjustment/engagement as R-e-T Teacher is within the domain of the State only.

21. Mrs. Hakim, learned Dy.A.G appearing for the official

respondents, fairly states that the stand taken by the official respondents in the response filed in the main writ petition, virtually supports the case of the appellant. She submits that in terms of the directions passed by this Court, the case of the appellant vis-a-vis writ petitioner was re-examined and before that, a show cause notice was issued to him for terminating his services, to which he responded and ultimately, an order of engagement was cancelled. Mrs. Hakim then submits that no doubt the appellant was initially engaged as R-e-T Teacher but her appointment was cancelled on the ground that she was not B.A. Final (Graduation) at the time of submission of her application but on re-evaluation of her result, she was shown as pass for the subject and this all happened before the select panel was prepared. Considering all these facts, the case of the appellant was ultimately considered to be on more meritorious position, as compared to the writ petitioner.

22.No doubt, the present case has witnessed long 8 years of litigation, as the ball kept on rolling for all these years. But the short controversy involved in this case is, whether the appellant, who had not acquired qualification of graduation on the last date of receipt of application form as she was

shown as re-appear in one of the subjects for which she had applied for re-evaluation, which was carried out and the formal declaration was made after the cut-of-date of the receipt of the application but before the preparation of the panel, the qualification acquired would relate back to the date when her result of B.A.Final was declared.

23. This issue is no longer *res-integra* and set at rest in LPASW No.199/2006 in case titled Jammu and Kashmir Services Selection Board & anr. vs. Sarita Sharma & ors decided on 21.11.2006 upholding the judgment of learned Single Judge in SWP No.370/2002 wherein the petitioner therein had applied for the post of teacher pursuant to the advertisement notice dated 09.03.1999. At the time of submitting the formal application, the petitioner had also completed B. Ed. course, result thereof was also declared on 08.03.1999 wherein she was shown as re-appear in one of the papers, for which she had also applied for re-evaluation. The result of re-evaluation came to be declared on 18.05.1999 and she was considered for selection without taking into consideration the qualification acquired by her on the ground that on the cut-of-date for making application, she had been shown as re-appear and her higher qualification of B.Ed. was not taken into

consideration for determining the merit position.

24. In the said writ petition, the respondent-Board had taken the stand that the petitioner had not acquired B.Ed. examination on the cut-of-date and therefore, her merit position was 40.20 points whereas the last selected candidate had secured 46.45 points.

25. Learned Single Judge, on the admitted position on facts, observed that may be formal declaration was made after the cut-of-date but the re-evaluation is the only rectification of an error, which was rectified subsequently to the cut-of-date but the rectification dates' back to the date of error. In the said case, the rectification was carried out before selection process was completed. In view of the said fact position, respondent-Board was directed to re-determine the merit position of the petitioner therein for the post of Teacher, pursuant to the advertisement notification dated 09.03.1999, by taking into consideration the B.Ed. qualification of the petitioner with a further direction that if the petitioner was able to secure sufficient points on re-determination of merit of the candidates, she would be recommended by the respondent-Board for appointment.

26. Aggrieved of the judgment of learned Single Judge rendered in the aforesaid writ petition (SWP No.370/2002), Jammu

and Kashmir Services Selection Board preferred an appeal bearing LPASW No.199/2006. The Division Bench of this Court while dismissing the appeal of the Board and upholding the view of the learned Single Judge observed:

“Even otherwise, we feel that the writ petitioner should not have suffered for the lapse of the University in not properly evaluating her merit when she was declared erroneously in “re-appear” category. We, therefore, do not find any merit in this appeal of the appellants. The appellants were, thus, required to accord consideration to the writ petitioner’s B. Ed. qualification and give her prescribed weightage before re-determining her merit and in case, she made the grade and fell within the selected panel zone, to recommend her name for appointment to the post of teacher in District Cadre Doda.”

27. The State has virtually accepted the claim of the appellant.

28. In our considered view, right from the very outset, the case of the appellant has not been considered in its right perspective. Admittedly, before the selection panel was prepared, the appellant had submitted the result declared by the University after re-evaluation in which she was shown as pass. The official respondents appreciated it with a different yardstick, considering that she had acquired B.A. qualification after the cut-of-date and therefore, determined her merit position on the basis of matriculation qualification only. This was the basis of showing her lower in

merit to the writ petitioner. Had her B.A. qualification been considered at the initial stage itself, she was stealing march over the writ petitioner, being more meritorious, as such, entitled to the engagement as R-e-T teacher. Therefore, in the present case, the very start is faulty for which the appellant has been dragged to the litigation at different stages.

29. Even in the impugned judgment, the learned writ Court has not disturbed the appointment of the appellant observing that on re-evaluation of her graduation qualification, which would relate to the date when her result of B.A. Part-III was declared and on the basis of that she had better merit position than the writ petitioner. However, the view taken by the learned Single Judge that the appointment of the writ petitioner *per se* can not be said to be illegal, in our considered view, is not correct. No doubt he remained in service as R-e-T teacher for about seven year, but that fact by itself cannot be a ground to extend a concession to him to sit on the post which should have been given to the appellant being more meritorious. In no way, there can be any compromise with the merit position. What weighed with the learned Single Judge was, in fact, the length of stay of the writ petitioner as R-e-T teacher, as such maintaining

his position, directed the official respondents to consider the case of the appellant for R-e-T teacher against any available vacancy. We also, at one stage, during the pendency of the instant appeal, directed the State Government to consider the appellant's adjustment against available vacancy of General Line Teacher as against the vacancy of R-e-T teacher but no such adjustment could be made. Be that as it may, it would not change the complexion of the case, once we hold that the appellant was stealing march over the writ petitioner at the initial stage of appointment itself.

30. In the backdrop of the facts on record, which constrained the appellant to knock at the door of this Court at different stages, the stand taken by the State, the issue involved in the case and following the view already taken by the Division Bench of this Court in *Sarita Sharma's case (Supra)*, we are of the considered view that the initial selection of writ petitioner (private respondent No.6) as R-e-T teacher for Upgraded Middle School, Panjab, Tehsil Kalakote is unwarranted being illegal, as such, cannot stand the test of judicial scrutiny. Resultantly, his services as R-e-T teacher for the aforesaid school has rightly been cancelled vide order No.ZEO/KK/1389-91 dated

28.05.2009 and we uphold the same. View taken by the learned Single Judge is, thus, disturbed.

31. We are conscious of the fact that showing ouster to the writ petitioner at this stage when he has already served as R-e-T teacher for long seven years and might have become General Line Teacher by efflux of time under the Scheme would fall back upon him very heavily, but there cannot be any compromise on merit. After all he has consumed the post of the appellant for this period and has been monetarily benefitted also. The only concession, we feel, can be extended to him, is that in the event of any available vacancy of Rehbar-e-Taleem teacher, to which he is otherwise eligible for applying, the age-bar can be relaxed in his case being an exceptional case. We direct accordingly.

32. We are appreciating the present case yet from another angle. The direction passed by the learned Single Judge to the official respondents to consider the case of the appellant for the post of Rehbar-e-Taleem teacher against any available vacancy in Upgraded Middle School, Panjah, in our considered view, is also not sustainable in the eye of law. Assuming for the sake of arguments, even if any vacancy is available, it can not be filled without affording

opportunity to the other eligible candidates aspiring for this vacancy. Therefore, even if any vacancy is available, the appellant cannot be held entitled to it. It appears that the learned Writ Court made an attempt to keep an equitable balance by not disturbing the position of the writ petitioner on one hand and directing the official respondents to adjust the appellant on any available vacancy as Rehbar-e-Taleem teacher on the other hand. But, in our considered view, this approach is also not legally correct.

33. What emerges from the aforesaid discussion is that though the appellant was entitled to be appointed as R-e-T Teacher, pursuant to the advertisement notice dated 29.06.2004 bearing No.DSEJ/RET/4811-17 issued by Director, School Education, Muthi, Jammu, yet in her place writ petitioner (private respondent No.6) came to be appointed in violation of principles of law. Therefore, we cannot sustain the view of learned Writ Court that the case of the appellant should be considered for any available vacancy and the writ petitioner be allowed to continue to hold the post, for which he has been appointed simply for the reason that he has been there on this position for the last more than seven years. Ends would not justify the means.

34. We, thus, set aside the impugned judgment of learned Single Judge and allow the appeal. The appellant shall be deemed to have been appointed from the date writ petitioner (private respondent No.6) came to be appointed as Rehbar-e-Taleem Teacher for Upgraded Middle School, Panjah, Teshil Kalakote, District Rajouri, albeit without monetary benefits for retrospective period. However, her case shall be considered for all the consequential benefits including regularization in terms of the ***Sarv Siksha Abhiyan Scheme*** and other relevant rules governing the field. To say so, we are fortified in our view by a latest decision of Hon'ble Supreme Court in ***SLA Civil Nos.9415-9416/2008*** decided on 02.05.2011 arising from State of J&K only in case titled ***Kuldeep Raj Vs. State of J&K and ors.*** relating to a case of R-e-T teacher only, Photostat copy thereof is already on record.

35. Since the appellant is fighting for her legitimate due in this Court since 2004 when she filed her first petition bearing SWP No.1865/2004 and ultimately, has been able to get substantial relief, to which, in fact, she was entitled, way back in year 2004 itself, the age-bar in terms of Article-37 of Civil Services Rules applicable to the appointment of R-e-T teacher, will not stand as an impediment in her way for

appointing her for the post of R-e-T teacher. Let this exercise be completed within one month only from the date copy of judgment is provided to the official respondents.

36. The net result is that the instant Letters Patent Appeal is allowed in the aforesaid terms.

(Hasnain Massodi)
Judge

(Virender Singh)
Judge

Jammu
14.06.2012
Ram Murti

The judgment is pronounced by me in terms of Rule 138 (4) of the Jammu and Kashmir High Court Rules, 1999.

Jammu
14-06-2012

(Virender Singh)
Judge