

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

LPASW No. 179/2010
CMA Nos. 231/2010, 45/2013 & 11/2012.

Date of Decision:

22.05.2013

State of J&K and anr. Vs. Ravi Kant Sharma and ors.

Coram:

Hon’ble Mr. Justice Mohammad Yaqoob Mir, Judge.
Hon’ble Mr. Justice Dhiraj Singh Thakur, Judge.

Appearing Counsel:

For the Appellant(s) : Mr. M.I.Qadri, Advocate General.
For the Respondent(s) : M/s. Ajay Sharma and P.N. Bhat, Advocates.

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| i) | Whether approved for reporting in Press /Media | : | |
| ii) | Whether to be reported in Digest/journal | : | Yes. |

Per Yaqoob -J:

- Judgment dated 21st October, 2010 passed in Review Petition No. 01/2006 by the learned Single Judge is impugned in this Letters Patent Appeal.
- This case has its chequered history. Precise factual matrix is required to be noticed for appropriate appreciation of the controversy involved.
- 529 posts of Accounts Assistants were referred by appellant No. 2, Director General Accounts and Treasuries (Finance) to the Jammu and Kashmir Services Selection Board, hereinafter referred to as “SSB”. The posts were advertised vide Advertisement Notice No. SSRB-10 of 1991 dated 26.11.1991 with the following break-up:-

<u>Category:</u>	<u>No. of posts.</u>
Open Merit	426
Scheduled Caste	43

Scheduled Tribe	44
Handicapped	16

470 candidates were selected with the following break-up:-

<u>Category:</u>	<u>No. of posts.</u>
Open Merit	426
Scheduled Caste	43
Scheduled Tribe	01

Out of 44 posts advertised for Scheduled Tribe category only 01 candidate was available, who was selected, thus 43 posts of the said category remained unfilled, as such were carried forward. The selection of 16 candidates under Handicapped category were initially kept in abeyance but finally selected. Thus 486 candidates were selected.

4. Two writ petitions SWP Nos. 1602/1995 and 606/1996 captioned *Javed Ahmad Wadoo and ors v. State of J&K and ors* and *Fareeda Bano v. State of J&K and ors* filed against the selection were decided on 22nd November, 1997.
5. It surfaced that out of selected 426 candidates under Open Merit category, 44 did not joined. The SSB had stated during the writ proceedings that they have constituted a Committee to consider the writ petitioners for selection against the left out vacancies. 31 candidates, in pursuance to the directions dated 12.11.1997 issued while disposing of SWP Nos. 1602/1995 and 606/1996,

were considered, found eligible and appointed as against the said available 44 vacancies.

6. At Jammu wing of the High Court, one more writ petition, SWP No. 934/1995 titled Ravi Kant Sharma and ors v. State of J&K and ors, was filed which was also disposed of in the manner SWP Nos. 1602/1995 and 606/1996 were disposed of. In compliance thereto, claims of all the writ petitioners of writ petition, SWP No. 934/1995 were considered as against the left out 13 out of 44 vacancies. 13 candidates were appointed. Since the total number of petitioners who had filed the writ petition at Jammu were 38, therefore, the writ petitioners, who could not get the appointment in view of the non-availability of the vacancies, filed contempt petition projecting therein that the directions issued vide judgment dated 2.4.1998 have not been complied with.
7. On 27th March, 2000, a detailed order was passed in a batch of Contempt Petitions bearing COA (SW) Nos. 78/99,50/99,148/99,68/99,188/99,33-D/98,46/200, 18-D/99, 88/99 and 133/99. The SSB was directed to finalize the selection against the left out vacancies and forward recommendations within six weeks. Said order dated 27th March, 2000 was challenged by the SSB by medium of

LPA Nos. 51 to 59 of 2000 which were disposed of vide order dated 24.07.2000 whereunder order dated 27th March, 2000 to the extent of the observations made *viz-a-viz* filling up of 60 vacancies was set aside.

8. Vide order dated 25th July, 2000 passed by the learned Single Judge, order dated 2.4.1998 passed in SWP No. 934/1995 was recalled. Finally, said writ petition along with contempt petition was disposed of on 23rd November, 2000 with the following observations and directions:-

“In view of what has been said above, it is held that the process and the manner adopted by the J&K Service Selection Board is totally in contravention of Articles 14 & 16 of the Constitution. This is in contravention because the writ petitioners were considered, whereas the candidates who may have higher merit were not considered at all.

In view of the above, it is held that the process adopted by the Selection Board is not in consonance with the principles contained in Articles 14 & 16 of the Constitution of India. The Board would accordingly examine the merit, which was there at the time of initial selection and fill the posts accordingly. The exercise would be completed within a period of one month from the date a copy of this judgment is furnished by the petitioners to the Board. In case, this is not done, the petitioners in this writ petition and the other writ petitions which came to be decided and regarding which contempt petitions are pending would be entitled to appointment and requisite appointment letters would be issued to them. Whatever is said in this order shall apply to the petitioners of writ petitions referred to in the earlier order passed in this petition.

The contempt petitions which are pending and the writ petitions out of which these have arisen are being disposed of accordingly.

However, contempt notice would issue to the present Secretary of the Board for 12.12.2000. He would indicate as to which information, i.e., contained in the order passed in writ petition No. 1602/95 is correct or the information now given is correct. He would also indicate as to under what circumstances wrong information was given. He shall indicate as to how many vacancies are still lying vacant at present.”

9. The said judgment dated 23.11.2000 was challenged by the State by medium of two separate appeals bearing LPA Nos. 14 and 18 of 2001 which were dismissed by the Division Bench on 12.04.2001. Special Leave Petition filed against the said judgment by the SSB before the Hon’ble Apex Court was dismissed on 25.11.2002,
10. After dismissal of the Special Leave Petition by the Hon’ble Apex Court, two contempt petitions were filed before the learned Single Judge. Said petitions were disposed of vide detailed order dated 06.09.2004. The respondents-writ petitioners filed Special Leave Petition before the Hon’ble Apex Court as against the said order dated 06.09.2004 but the same was withdrawn as they wanted to file review petition before the High Court. Special Leave Petition was dismissed as withdrawn on 22.11.2004.

11. Confronted with the challenge to the maintainability of the review of the order dated 6.9.2004 passed in Contempt, COA(SW) No. 1-C/03 and connected matters in SWP No. 934/1995, learned Single Judge has treated the review petition as petition for implementation of the judgment dated 23rd November, 2000 rendered in SWP No. 934/1995. Same position is recorded in order dated 21st October, 2010.
12. Whether review can lie against an order passed in Contempt Petition is settled by the Division Bench of this Court in case of *J&K Service Selection Board v. Mohinder Paul and ors*, reported in 2002 (2) SLJ 598, wherein it has been held that:

“....There is no provision to file an application asking for review of a judgment and order passed in contempt petition under the Contempt of Court Act. Power of review can be exercised only when conferred by law....”

In the said judgment it is also settled that:

“That an appeal against the order recording punishment, passed in contempt petition under Contempt of Court Act, is permissible not otherwise”

13. In case order impugned would dispose of the review petition seeking review of the order passed in Contempt, appeal cannot lie because it is only when in contempt proceedings

punishment is imposed only then under Section 19 of the said Act, appeal can lie. In this view, we are fortified by the judgment rendered by the Hon'ble Apex Court in case *Midnapore Peoples' Co-op. Bank Ltd. & Ors. V. Chunilal Nanda & ors*, reported as AIR 2006 SC 2190. It appears that in view of the said legal position, the review petition has been treated as petition for implementation of the judgment dated 23.11.2000.

14. Now the question which arises for consideration is as to whether the two directions issued vide judgment dated 23.11.2000 have been considered while deciding COA (SW) No. 1-C/03 dated 6.9.2004 because in the order impugned, learned Single Judge has observed that the 2nd direction, i.e., to appoint the petitioners has not been dealt with in the order dated 6.9.2004. It shall be quite relevant to quote the said observation:-

“.....it clearly emerges that the 2nd direction in order dated 23.11.2010 to appoint the petitioners has not been dealt with by this Court in its order dated 06.09.2004 and remained unimplemented even as on date. The contempt proceedings could not have been dropped on the ground that the contemnor was unable to implement the judgment, moreso, on account of non-availability of the record. This in my opinion would not render that the contempt proceedings stood

concluded. The order of the court is required to be implemented in its letter and spirit.”

15. The two directions as issued vide judgment dated 23.11.2000, are as under:-

“1. The Board would accordingly examine the merit, which was there at the time of initial selection and fill the posts accordingly. This exercise would be completed within a period of one month from the date a copy of this judgment is furnished by the petitioners to the Board.

2. In case, this is not done, the petitioners in this writ petition and the other writ petitions which came to be decided and regarding which contempt petitions are pending would be entitled to appointment and requisite appoint- ment letters would be issued to them. Whatever is said in this order shall apply to the petitioners of writ petitions referred to in the earlier order passed in this petition.”

- 16.** The SLP filed against the said judgment dated 23.11.200 has been assailed by medium of Special Leave to Appeal before the Hon’ble Apex Court which has been dismissed vide order dated 25.11.2002. When the said directions were not implemented, contempt petition, COA(SW) No. 1-C/03 in SWP No. 934/95 was filed which was disposed of vide judgment dated 6.9.2004. Both the two directions have specifically been dealt with in the said judgment.

17. While dealing with direction No. 1, it has been observed as under:-

“.....apparently the first direction was to the Service Selection Board being the recommending authority and the second direction was to the State being the appointing authority. The State of J&K as well as the Service Selection Board filed Letters Patent Appeals, which came to be dismissed on 12.4.2001. The Special Leave Petition came to be dismissed by the Supreme Court on 25.11.2002. During the period the Letters Patent Appeals remained pending and the SLP came to be dismissed by the Supreme Court, the period of one month, within which the Service Selection Board was directed to examine the merit of the candidates at the time of initial selection had expired. Otherwise too, the stand taken by the Service Selection Board is that the record being old is not traceable and, therefore, it is not possible to prepare the select list as per the merit of the candidates at the time of initial selection....”

Then further it has been observed:

“....There is no material on record from which it can conclusively be said that the respondents willfully and deliberately or contemptuously had not carried out the directions of the Court in preparing the merit list as per the initial selection.....”

While dealing with the 2nd direction, it has been observed as under:-

“.....The Second direction was to the State Government that in case the select list is not prepared or published, the writ petitioners in SWP Nos. 1602/95, 606/96, 934/95 and

other connected writ petitions would be appointed. In this regard the stand of Mr. M. A. Lala, presently Director General, Accounts & Treasuries, is that as per the recruitment rules he could make appointments only after the names had been recommended of the suitable candidates by the Service Selection Board being the selecting authority. In my view he is right in contending so because the names of writ petitioners have not been recommended by the Service Selection Board and in absence of such recommendations, the Director, Accounts and Treasuries is not empowered to appoint them. Moreover, there has to be posts against which the appointments could be made. All the 529 vacancies advertised in the year 1991 stand filled up pursuant to the recommendations of Service Selection Board and, therefore, the Director General, Accounts and Treasuries cannot be made responsible for not complying with the direction of this Court passed in SWP No. 934/95 dated 23.11.2000. It may be true that some of the writ petitioners may have found place in the merit list and in the process may have suffered, but the respondents can be punished for contempt only if this Court finds that there is willful disobedience on their part....."

Finally, it has been held that:

".....In the facts and circumstances of this case, I am unable to hold so and, therefore, the rule issued against the respondents deserves to be discharged. Accordingly, it is so ordered."

For destroying the records of selection, Chief Secretary has been directed to refer the matter to the Vigilance Commissioner to hold an inquiry.

18. The observations of the learned Single Judge, as quoted above, that 2nd direction in order dated 23.11.2000 has not been dealt with, is not correct in view of the clear position of that having been dealt with as referred to hereinabove. By making such observations, the matter has been reopened which was otherwise closed in terms of the said judgment dated 6.9.2004.

19. Another observation in the order impugned is that when the first part of the judgment is not complied with, for avoiding the implementation of the 2nd direction that there are no vacancies against which the petitioners could be appointed.

Learned Single Judge has observed that:

“.....According to the statements of the respondents, 59 vacancies could not be filled up due to non-availability of the candidates from handicapped and scheduled tribe categories. Admitted position was that 59 vacancies were available against which the petitioners were required to be appointed. Remaining 44 vacancies have been filled up by the selection committee constituted in the year 1998.”

20. It is to be made clear that in total 529 posts were advertised which include 44 posts reserved for Scheduled Tribe, out of which only one candidate was available. Therefore, remaining 43 posts were not required to be filled up and not filled up because these posts were carried forward and re-

advertised for the said category in accordance with applicable rules. So in any case, these 43 posts could not be offered to the writ petitioners. 16 posts were for Handicapped category to whom initially the appointment was not offered but subsequently, on clarification those posts were offered to the said category. 44 candidates who had not joined from amongst the open merit category were offered to the candidates, i.e., the writ petitioners of SWP Nos. 1602/1995, 606/1996 filed in Srinagar Wing and to the writ petitioners of writ petition No. 934/1995 filed in Jammu Wing of the High Court. The respondents remaining (writ petitioners) could not be offered appointment in view of non-availability of posts out of the advertised posts for open merit category, as detailed above in para 5 of the order. The appointment of writ petitioners as against said 44 posts has not been quashed. It needs to be emphasized that the handicap of ascertaining, as to whether the writ petitioners so appointed against said 44 vacancies were appointed in order of merit or as to whether the respondents (writ petitioners) were superior in merit as compared to appointed writ petitioners, is due to non-availability of the selection record

that is why appointment of other 44 writ petitioners has not been interfered with. It is in the same background directions has been issued vide judgment dated 6.9.2004 passed in contempt petition whereunder Chief Secretary has been asked to refer the matter of destruction of record of selection of 1991 to the Vigilance Organization for fixing the responsibility for action.

21. What would emerge is that no posts remained vacant against which the writ petitioners could be appointed. As a result thereof, direction No. 2 in effect had become unworkable as has rightly been pointed out by the learned Advocate General, in support whereof, relied on the judgment rendered by the Hon'ble Apex Court in case *State of Orissa v. Dr. Shivashanker Lal Bajoria and another* reported in AIR 1995 SC 334. Para 5 of the judgment is advantageous to be quoted:

“5. Hence, in the absence of a declaration that the appointment of Dr. Satpathy as on February 3, 1983 was illegal and when the High Court had specifically declined to go into that question, there is no vacant post existing for consideration of the claim of Dr. Bajoria as per the directions given by the High Court. This situation makes the order of the High Court unworkable. Accordingly, no need arises to consider the argument

made in support of the order under appeal.”

- 22.** In the judgment dated 6.9.2004, vacancy position has specifically been taken note of by observing that:

“.....All the 529 vacancies advertised in the year 1991 stand filled up pursuant to the recommendations of Service Selection Board and, therefore, the Director General, Accounts and Treasuries cannot be made responsible for not complying with the direction of this Court.....”

23. The observations made in the impugned judgment dated 21.10.2010 runs contrary to what has been opined in judgment dated 6.9.2004. In the impugned judgment, learned Single Judge in the background of the observations made therein which are factually incorrect, has issued directions to respondent No. 3 therein to appoint the petitioners as against the posts of Accounts Assistants in terms of judgment dated 23.11.2000 and in default, has directed respondent No. 3 to remain personally present before the Court. In the judgment dated 6.9.2004, position has been elucidated and the implementation of the directions issued vide judgment dated 23.11.2000 have been dealt with, it has been concluded that the respondents could not

implement the same, so the rule issued against them has been discharged. Once again, on the same basis, to frame rule against them is unwarranted. Petitioners had availed the remedy against the order dated 6.9.2004 by filing Special Leave to Appeal before the Hon'ble Apex Court which they have withdrawn.

24. Judgment dated 6.9.2004 has attained finality, therefore, order impugned which runs contrary and in effect amounts to re-opening of the matter is impermissible under law. Judgment impugned being unsustainable, as such, is set aside. Review petition treated as petition for implementation of the judgment dated 23.11.2000 shall stand dismissed. Accordingly, appeal succeeds.

(Dhiraj Singh Thakur)
Mir)
Judge

(Mohammad Yaqoob
Judge

Jammu:
 22.05.2013
 Tilak, Secy.