

**HIGH COURT OF JAMMU AND KASHMIR AT
JAMMU**

1. LPASW No. 65/2013, CMA No. 84/2013
2. LPASW No. 71/2013, CMA No. 90/2013
3. LPASW No. 72/2013, CMA No. 91/2013
4. LPASW No. 73/2013, CMA No. 92/2013
5. LPASW No. 74/2013, CMA No. 93/2013
6. LPASW No. 84/2013, CMA No. 104/2013
7. LPASW No. 85/2013, CMA No. 105/2013
8. LPASW No. 86/2013, CMA No. 106/2013
9. LPASW No. 87/2013, CMA No. 107/2013
10. LPASW No. 88/2013, CMA No. 108/2013

Date of Decision: 22.05.2013

Israr Munir and ors.	vs.	State of J&K and ors.
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Israr Munir and ors.	vs.	State of J&K and ors.
Israr Munir and ors.	vs.	State of J&K and ors.
Surjeet Singh and ors.	vs.	Neeraj Rajput and ors.
Inder Paul and anr.	vs.	Sultana Kosser & ors.
Surjeet Singh and ors.	vs.	Renu Raina and ors.
Surjeet Singh and ors.	vs.	Amit Sharma and ors.
Surjeet Singh and ors.	vs.	Indu Sharma and ors.

Coram:
**Hon’ble Mr. Justice Mohammad Yaqoob Mir,
Judge.
Hon’ble Mr. Justice Tashi Rabstan, Judge.**

For the Appellant(s) : M/s. M. A. Goni, A.V.Gupta, Sr. Advocates with
Mr. Ajay Singh Kotwal, Munish Sharma,
Mr. Kazam Bhat & Mr. Rahul Pant, Advocates.

For the Respondent(s) : Mr. D. C. Raina, Sr. Advocate with
Mr. Arun Kumar, Advocate.
Mr. M. K. Bhardwaj, Sr. Advocate with
Mr. Ajay Abrol, Advocate.
Mr. Ravinder Sharma, AAG.
Mr. S. K. Shukla, Advocate.

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

Per Yaqoob –J:

1. Vide Advertisement Notice No. 07 of 2010 dated 12.11.2010; applications were invited from eligible candidates for filling up 295 posts of teachers District Cadre Rajouri. The process culminated in selection of the appellants. Some of the appellants after selection, on completion

of formalities have been appointed. The respondents (writ petitioners) after participating in the process of selection, failed to make the grade, challenged the entire process of selection and appointment by medium of various writ petitions, i.e., SWP Nos. 2140/2012, 2274/2012, 255/2012, 151/2012 and 479/2013. All the said writ petitions have been disposed of at the admission stage by the learned Single Judge vide judgment dated 9.4.2013.

2. In the judgment, it is observed that many issues have been raised yet the Court is considering only one issue leaving the writ petitioners free to raise all other issues at any subsequent point of time if cause arises for the same.
3. The issue dealt with by learned Single Judge is that the District Level Selection Committee has not been constituted in accordance with the Jammu and Kashmir Civil Services Decentralization and Recruitment Rules, 2010 notified vide SRO 375 dated 21.10.2010 (hereinafter for short referred to as "The Rules"), as a result thereof, entire selection

process stands vitiated. Finally, has quashed the selection and consequent some of the appointment as made of the appellants (respondents in all the writ petitions) with the direction to initiate fresh selection process and to conclude the same within a period of eight weeks from the date copy of the order is served upon the respondent Nos. 2 & 3. Dissatisfied with the judgment, batch of Letters Patent Appeals as captioned above, have been filed.

4. Learned counsel for the parties were heard at length, keeping in view the urgency, i.e., the requirement of supplying the vacancies of teachers in the Schools of Rajouri District for imparting education, so that the beneficiaries, i.e., students may not suffer in the pursuit of their education, all the above appeals with the consensus of the counsel for the parties are taken up for final disposal at the admission stage itself.
5. One of learned senior counsel for the appellants, Mr. M. Aslam Goni highlighted that the writ petitions have been allowed without deciding all the issues as were raised. The

composition of the District Level Selection Committee, if at all taken to be defective can give rise to irregularity. In case mala fides /malice is alleged as against the members of the Committee or to the inclusion of member of the Committee other than Chief Education Officer (District head of intending Department), in that eventuality, position can be otherwise.

6. The allegation of mala fides and favouritism as against one of the member of the Committee was required to be determined which would be done only after completion of the pleadings of the parties.
7. Another Senior Advocate for the appellants, Mr. A.V. Gupta, would contend that instead of District Head of intending Department, i.e., Chief Education Officer as a member of the Select Committee, due to non-availability, Mr. Bishember Dass, Principal, Higher Secondary School, Behrote Rajouri was included. Said Bishember Dass was also replaced because he had to function as Returning Officer for Panchayat elections, therefore, in his place, Mrs. Savita Jamwal, Head of Department Economics,

Degree College, Rajouri was included as a member. According to him, it was a necessity so as to make the Committee effective with the object of advancing the process of selection of the teachers. Such inclusion would attract applicability of “Doctrine of Necessity”. Further added that even if the Committee could be termed to be defective even then the position would be taken care of by applying the De facto Doctrine.

8. Next added that inclusion of Chief Education Officer, as a member, is not mandatory. As per Rule 6 (6) of the Rules, it is provided that the District Level Selection Committee shall consists of the members as provided therein. The word ‘shall’ employed is not mandatory but directory in nature, therefore, there was scope for inclusion of any other academicians as a member of the Committee.
9. It was also highlighted that some of the selected candidates were serving in other departments, on selection and appointment; they have resigned from those departments and have joined as teachers. Now, if their

appointment is quashed, they will be subjected to uncertain situation.

10. In opposition, senior counsel for the respondents-writ petitioners, Mr. D. C. Raina would contend that the constitution of the Committee in accordance with Rule 6 (6) of the Rules is a statutory requirement. Inclusion of any other person in place of the District Head of the intending Department is illegal, being against the statute.
11. It is also stated by Mr. Raina that one Mohinder Singh, Principal, DIET, Rajouri, was functioning as Incharge Chief Education Officer but not included in the Select Committee.
12. It is further contended that as against one of the member of the Committee, namely, Mr. Shiraz-ul-Haq Malik (Programme Officer, ICDS, Rajouri), there were specific allegations of favouritism and, more particularly, the allegations that his close relatives were selected. Said member should not have been part of the Selection process. He should have withdrawn from the selection.

13. Another Advocate for private respondents-writ petitioners, Mr. M.K. Bhardwaj projected that the Jammu and Kashmir Civil Services Decentralization and Recruitment Act, 2010 (hereinafter referred to as “The Act”) has been enacted with some background and it is in that background, Rules framed have statutory backing. The Board itself is a creature of statute so was required to do and act in accordance with Rules and in case of any difficulty; Section 14 of the Act and the Rules 24 and 25 of ‘the Rules’ should have been followed.
14. Mr. Shukla appearing for the Services Selection Board would contend that the Chief Education Officer had retired, no one was manning the post. The Board in its wisdom with all bonafides had included firstly Mr. Bishember Dass but when he was noticed to be not available in view of election duties, he was replaced by Mrs. Savita Jamwal, which in itself shows that the Board has acted in a bonafide manner.
15. In support of the rival submissions, learned counsel for the parties relied on various

judgments which shall be applied while dealing with the points raised.

16. 'The Act' has been enacted for providing equal opportunities of employment in the Civil Services in the State keeping in view its complex socio-economical and geographical/topographical/linguistic/security concerns and matters connected therewith and incidental thereto. The said Act provides for constitution of the District, Divisional and State Cadre posts, mode of recruitment and promotions. The Rules stand framed by the Government in exercise of the powers conferred by Section 124 of the Constitution of the Jammu and Kashmir and Section 15 of the Act. Chapter III of the Rules provides for constitution of the Services Selection Board. The Board shall have three tier setup:

- “(i) State Level Selection Committee for making selection to the State Cadre posts;
- (ii) Divisional Level Selection Committee for making selection to the Divisional Cadre posts; and
- (iii) District Level Committee for making selection to the District Cadre posts.”

The formation of the said Committees is envisaged by Sub-Rules 4, 5, and 6 of Rule 6.

17. In the instant case, Sub-rule (6) is relevant to be quoted:-

“6(6). The District Level Selection Committee shall consist of:-

(i)	Chairman or a member of the Board to be nominated by the Chairman.	Convener
(ii)	District head of the intending office/Department (not more than one)	Member
(iii)	One office of, of above, the rank of Deputy Secretary to Government in the General Administration Department.	Member

18. The Board was under statutory obligation to constitute the Committee accordingly but in view of the non-availability of the Chief Education Officer (District Head of the intending Department) who on superannuation, retired on 30th March, 2011. Successor joined on 29th June, 2011. A member in contravention of the rules has been included in the Committee which in the intervening period initiated and concluded the selection process, leaving space for challenge to constitution of the Committee and consequent process of selection.
19. What would emerge from the above is that the Board was confronted with the peculiar situation, i.e., District head of the intending Department was not available. The question

would arise, what the Board could do. The Act and Rules of 2010 do not contain any provision which would empower the Board to include in the Committee a member other than the one prescribed by Rule 6 (6) of the Rules. Then in such a situation, whether the Board was competent to include in the said Select Committee, Mr. Bishembar Dass, Principal, Higher Secondary School, Behrote or Mrs. Savita Jamwal, HOD Economics, Degree College, Rajouri when both of them were not the District Head of the intending Department, the answer has to be no.

20. In such a situation, what the Board was required to do is that it should have communicated to the Education Department to fill up the vacancy of Chief Education Officer otherwise should have sought guidance from the Administrative Department, i.e., General Administration Department. In this connection, it shall be quite relevant to quote Section 14 of 'the Act' as well as Rules 24 and 25 of 'the Rules'.

“Section 14. Removal of difficulties.

If any difficulty arises in giving effect to the provisions of this Act, the Government may by order, do anything

which appears to it necessary for the purpose of removing such difficulty.

Rules 24 & 25:

24. Power to issue instructions

The Government in the General Administration Department may from time to time issue such directives or instructions as may be necessary for the purpose of carrying out the provisions of these rules.

25. Interpretation

If any question arises relating to the interpretation of these rules, the matter shall be referred to the Government in the General Administration Department whose decision thereon shall be final."

21. Plain reading of these provisions would show that the situation which had arisen could be taken care of by the Government in the General Administration Department by issuing necessary directives/instructions so as to carry out the purpose of Rule 6 (6) of the Rules. The Board in itself has no competence to include in the Committee a member other than the District head of the intending Department. This way, the Board has violated the statutory provisions, which in turn renders the Select Committee as incompetent to make selection.
22. Mr. Shukla, learned Advocate appearing for the Board tried to project as he has projected in the objections filed in opposition to the writ

petitions that an academician has been included in place of District head of the intending Department, as is permissible in accordance with the 2nd proviso to Rule 6 (6) of the Rules. Submission is misplaced because the proviso provides that the Chairman, if feels necessary may co-opt an expert /specialist in the concerned discipline with the Committee. The expert/specialist can be co-opted in addition to the Selection Committee, not to the exclusion of any member of the Committee. That apart, the Board has issued two orders bearing Nos. 75-SSB of 2011 dated 08.04.2011 and 77-SSB of 2011 dated 13.04.2011, whereunder firstly Mr. Bishember Dass, Principal was included in the Committee as a member and then Mrs. Savita Jamwal, HOD Economics was included as a Member. The said two orders are clear to the effect that both Bishember Dass or Savita Jamwal were included in the Committee as a member and not as an expert.

23. The applicability of “Doctrine of Necessity” and “*De facto* Doctrine”, as projected by the learned Senior counsel, A.V.Gupta by placing reliance

on the judgments reported in (2011)10 SCC 106 and AIR 1981 SC 1473 is of no help because the “Doctrine of Necessity” could be invoked by the Government in exercise of the powers vested in it by Rules 24 and 25 of the Rules but not by the Board which had no such power. If thereafter in the instructions of the Government issued under Rule 24 of the Rules, there would have been some defect. For curing that defect, *De facto* doctrine could be applied so as to avoid any disturbance to the selection.

24. Contention of learned Senior counsel, Mr. Gupta that the composition of the Committee of the members as envisaged by Rule 6 (6) of the Rules, is not mandatory, i.e., it was not necessary for the Board to include Chief Education Officer as member. There was scope for inclusion of any other member in absence of Chief Education Officer. The contention though attractive but is of no help because the Board has no power as per the provisions of the Act and the Rules to include any other member in place of Head of the intending department. It is the Government in the General Administration

Department which has such powers in view of Rules 24 and 25 of the Rules.

25. The Act and Rules have been enacted in a peculiar background and the inclusion of members specified in Rules is in the same background, that is why, the power for issuing directives/ instructions so as to carry out the purpose of the Act and Rules, vests in the Government in terms of Section 14 of “the Act” and Rules 24 and 25 of “the Rules”.
26. Participation of the private respondents in the selection process without demur and their failure to make the grade whether would debar them from challenging the selection. In the instant case, in the peculiar facts, the answer has to be no. They have not only challenged the constitution of the Committee before whom they had appeared for interview but have also alleged bias, favouritism and also the position of selection of relatives of one of the member namely Mr. Shiraj-ul-Haq Malik.
27. Mr. Goni, learned senior Advocate contended that for proving favouritism and malafide, the parties were to be given chance to complete the

pleadings which would help the effectual adjudication of the issue, both the contentions pales into insignificance because it was not notified to the respondents as to what shall be the constitution of the Committee. Then again when Committee is constituted in violation of the statutory requirement, the question of acquiescence would not arise. From the judgment captioned *Rajasthan Pradesh v. Sardarshahar & Anr*, reported in 2010 (4) Supreme 449, following portion of para 11 is relevant to be quoted:

“.....In *Bharat Singh & Ors Vs. State of Haryana & Ors.*, AIR 1988 SC 2181, this Court has observed as under:-

“In our opinion, when a point, which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or the counter-affidavit, as the case may be, the Court will not entertain the point. There is a distinction between a hearing under the Code of Civil Procedure and a

writ petition or a counter-affidavit. While in a pleading, ie. a plaint or written statement, the facts and not the evidence are required to be pleaded. In a writ petition or in the counter affidavit, not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.”

28. As stated above, the learned Single Judge in the judgment has observed that many issues have been raised; only one is to be considered. Rest of the issues can be raised if required at any subsequent point of time.
29. The issue of selection of close relatives of one of the member of the Selection Committee, Mr. Shiraj-ul-Haq Malik is also required to be dealt with. In the writ petition SWP No. 2140/2012, it has been specifically pleaded that respondent No. 8 (Mr. Shiraj-ul-Haq Malik) being one of the members of the District Selection Committee conducted the Viva Voce of his own kith and kins and awarded them highest points in the viva voce in connivance with other two members of the Committee. The position of kith and kins has been given in detail in the writ

petition in a tabulated form, which is reproduced hereunder:-

S. No.	Name of private respondent	Private respondent No.	Relation with respondent No. 8	Academic Merit points	Points awarded in Viva-voice	Total points
1.	Saleha Jabeen	86	Sister	32.92	18.33	51.25
2.	Anjum Ara	100	Niece (sister's daughter)	25.03	19.67	44.69
3.	Ruksana Imtiyaz	217	Cousin (Maternal Aunt's daughter)	33.64	12.00	45.64
4.	Farzana Imtiyaz	213	Cousin (maternal Aunt's daughter)	30.19	15.67	45.86
5.	Ashima Iqbal	212	Sister-in-law	26.72	19.33	46.05
6.	Gazala Parveen	51	Cousin (Maternal Uncle's daughter)	37.96	14.67	52.63

30. Respondent No. 8, Mr. Shiraj-ul-Haq Malik has filed objections before the writ court wherein he has not specifically denied the position of relationship instead has pleaded that some of his distant relatives may have participated in the process of selection. When the pleadings are clear and the position of the relationship is clear, the member should have withdrawn from the selection process which he has not. Resultantly, the process of selection is vitiated. To support this view, it shall be quite advantageous to rely on the Constitutional Bench judgment of the Hon'ble Apex Court rendered in case *Ashok Kumar Yadav and ors v. State of Haryana and ors and other connected*

cases, reported in (1985) 4 SCC 417. Following portion of para 18 which is relevant to the facts of the present case, is quoted hereunder:-

“18. We must straightway point out that *A.K.Kaipak's* case is a landmark in the development of administrative law and it has contributed in a large measure to the strengthening of the rule of law in this country. We would not like to whittle down in the slightest measure the vital principle laid down in this decision which has nourished the roots of the rule of law and injected justice and fair play into legality. There can not be doubt that if a Selection committee is constituted for the purpose of selecting candidates on merits and one of the members of the Selection Committee is closely related to a candidate appearing for the selection, it would not be enough for such member merely to withdraw from participation in the interview of the candidate related to him but he must withdraw altogether from the entire selection process and ask the authorities to nominate another person in his place on the Selection Committee, because otherwise all the selections made would be vitiated on account of reasonable likelihood of bias affecting the process of selection.....”

31. Learned counsel for the appellants vehemently projected that by composition of the Selection Committee, no prejudice is caused to the private respondents as they have actively participated in the selection process and have been awarded what they deserved in accordance with their merit. Now, after failing to

make the grade, they cannot claim prejudice. Even otherwise, for establishing prejudice, the parties should have been permitted to complete the pleadings and it is only on completion of the respective pleadings, any final opinion could be formed, on such count judgment impugned is liable to be reversed.

32. The selection/appointment, even in absence of prejudice does not survive, because inclusion of the member in place of Chief Education Officer in the Committee by the Board was not permissible by law. So the composition of the Committee was illegal. That apart, the position of one of the member Mr. Shiraj-ul-Haq Malik of having participated in the entire selection process and admittedly having interviewed along with other members his own close relatives, as detailed above, would also vitiate the entire selection process in view of law laid down by the constitutional Bench of the Hon'ble Apex Court, as quoted above.
33. Learned Single Judge has quashed the entire selection process only on the ground of the Committee having been constituted in violation

to the statutory Rule 6(6) of 'the Rules'. However, another important issue as dealt with above also emerged enough for quashing the selection/appointment, i.e., Mr. Shiraj-ul-Haq Malik, member should not have participated in the selection process and should have withdrawn but default thereof has vitiated the entire selection process.

34. It is a matter of concern that one Arshad Waheed, who was working as Lab. Assistant in Government H.S, Ramkote, on getting selected as teacher, has resigned and thereafter joined. Now subjected to an uncertain situation. Again, one more candidate Mrs. Shazia Parveen, who has been working as Banking Associate Code No. 12578 posted at BU Gujjar Desh Charitable Trust, has, also on getting selected and appointed, resigned from the post as she was occupying. Now she too is in an uncertain situation. For advancing the cause of justice, we observe the said two candidates shall move a representation for being taken back into service which we hope and trust will

sympathetically be considered and accepted by the concerned authorities.

35. In some of the appeals filed by the appellants, such as LPASW Nos. 72/2012 and 73/2012, the appellants were not the party to the writ but the quashment of the entire selection/appointments has affected them directly. With the leave of the Court, their appeals also stand entertained. Their contention that they have been condemned unheard, as a result thereof, principles of natural justice have been violated, no more survive for any further consideration because the issues, as dealt with hereinabove and the findings recorded thereon would remain unaltered and now since they have been heard, therefore, to seek fresh hearing of the matter by the learned Single Judge, shall be an empty formality.

36. Respondent Nos. 2 & 3 respectively are directed to constitute the District Level Selection Committee in accordance with Rule 6(6) of "the Rules" and finalize the process of selection and appointment within eight weeks. Copy of the judgment be furnished to learned

Additional Advocate General, Mr. Ravinder Sharma and Mr. S.K. Shukla, Standing counsel for the SSRB so as to ensure compliance within the time fixed.

37. The cumulative effect is that for aforestated position of fact, law and reasons, the judgment impugned is maintained, Appeals shall stand disposed of on afore stated terms.

38. No order as to costs.

**(Tashi Rabstan)
Mir)
Judge**

**(Mohammad Yaqoob
Judge**

Jammu:
22.05.2013
Tilak, Secy.

