

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

SWP No.676/2005
decision:13.06.2014

Date of

Arjumand Hamid

Vs.

JKPSC & ors

Coram:-

***Hon'ble Mr. Justice Mohammad
Yaqoob Mir, Judge***

Appearing counsel:-

For the Petitioner(s):	Mr. P. S. Ahmad.
For the Respondent(s):	Mr. Azhar-ul-Amin (for R1 to R2)
	None for respondent No.3
	Mr. M. A. Qayoom (for R4)
	Mr. I. Sofi (for R5)

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| i) | Whether to be reported
in Digest/Journal: | YES |
| ii) | Whether to be reported
in Press/Media: | OPTIONAL |

1. By medium of this petition petitioner seeks quashment of selection/appointment of respondents No.4 and 5 as Lecturer Grade-II in the Discipline of Secretariat Practice and Office Management and also seeks issuance of Writ of Mandamus so as to command respondents No.1 and 2 to declare the petitioner having been selected to the said post on the basis of preference prescribed, further be directed to recommend the petitioner for appointment and to grant all service benefits.

2. From the perusal of the records what transpires is that this writ petition had been earlier accepted,

the selection and appointment of respondent No.4 was quashed, further the respondent PSC was directed to recommend name of the petitioner as against the said post. The said judgment was assailed by medium of LPA Nos.134/2011 & 161/2011, one filed by respondent No.4 and another by respondent PSC. Vide judgment dated 16.09.2011 rendered in the said LPAs, the judgment has been reversed because respondent No.4 was not heard by the Writ Court, as such, to be decided afresh.

3. Flashback of the factual matrix shall be advantageous for effective determination of the petition:

- i) Respondent Public Service Commission (for short PSC) received requisition for two posts of Lecturers Grade-II in the Discipline of Secretarial Practice & Office Management of Technical Education Department on 11.10.2001 along with Draft Recruitment Rules. Before advertisement could be issued, six more posts in the same Discipline were also referred, so all the posts were to be filled on the basis of Draft Recruitment Rules.

ii) Notification No.34-PSC of 2001 dated 11.12.2001 was issued but in the meanwhile Recruitment Rules, i.e. the Jammu and Kashmir Technical Education (Gazetted) Service Recruitment Rules, 2002(for short Rules of 2002), were notified by the Government vide SRO 328 of 2002 dated 29.08.2002. The qualification prescribed for the post as was notified in terms of Draft Rules was not consistent with the qualification prescribed in the Recruitment Rules notified vide SRO 328, therefore, the PSC decided to re-advertise the posts so as to bring the qualification consistent with the Rules of 2002. Accordingly, the posts were re-advertised vide notification No.05-PSC of 2004 dated 16.03.2004 with a stipulation that the candidates who had applied in response to the notification No.34-PSC of 2001 possessing the requisite qualification as prescribed in the notification No.05-PSC need not to apply afresh.

iii) Respondents 1 and 2, in their reply, have stated that 166 applications were received out of

which only 42 candidates including the petitioner were found eligible. The interview was conducted on 23rd and 25th April, 2005 at Srinagar and Jammu respectively.

- iv) Petitioner, respondent No.4 and 5, admittedly, belong to RBA category. As against the two posts of RBA category, respondents No.4 and 5 were found suitable and recommended for appointment, so were appointed.

4. The qualification prescribed for the post of Lecturer Grade-II (non-engineering) as per Entry 5B of Schedule-II-A to the Rules of 2002 is as under:

- (i) Bachelor's degree with 55% marks in appropriate branch/discipline or equivalent from a recognized Institution/University.
- (ii) Bachelor's degree in Arts/ Science/ Commerce with first class diploma in the relevant discipline from a recognized Institution/University.
- (iii) Diploma holders' first class in appropriate branch/discipline from recognized Institution.

Preference shall be given to the candidates from category (i). In case no candidate from this category is available then preference shall be given to the candidate from category (ii). In case no candidate is available from this category also then candidates from category (iii) shall be taken.

5. In the advertisement notice, the aforesaid qualification has been prescribed. Breakup of the posts as notified therein is as follows:

Open	=04
RBA	=02
SC	=01
ST	=01
Total	=08

6. In this petition, controversy is vis-a-vis two posts under category RBA. The case as projected by the petitioner is that she possessed the qualification prescribed, as noticed in para 4, at serial No.(ii) whereas respondent No.4 possessed the qualification as prescribed at serial No.(iii). The preference clause would provide that when candidates are available from clause (i) they are to be preferred to the exclusion of clauses (ii) and (iii). In case of non-availability from clause (i), the candidates from clause (ii) have preference to the exclusion of clause (iii).

7. Admittedly, in the present case no candidate from RBA category possessed the qualification No.(i). It is also admitted position that the petitioner and respondent No.5 possessed the qualification No.(ii) whereas respondent No.4 possessed qualification No. (iii). Therefore, according to petitioner, in presence of

her possessing qualification No.(ii), the respondent No.4 was to be excluded to her inclusion on the basis of the preference.

8. The respondents No.1 and 2 in their reply have specifically projected that the respondents No.4 and 5 were selected in order of merit. The merit of the petitioner was inferior to them. The assessment was made by the Expert Selection Body in accordance with the terms of recasted Rule 51 of the Jammu & Kashmir Public Service Commission(Business and Procedure) Rules, 1980. It is further stated that the question of preference is permissible only when merit is equal not otherwise.

9. The position of qualification of the petitioner, respondent No.4 and 5, as it was up to cut off date of receipt of the applications i.e. up to 15.04.2004, is shown as under:

	Qualificatio n	Year
Petitioner	B.A in Arts 3-year 1 st Class Diploma	Dec. 2003-Jan. 2004
Responde nt 4	10+2 3-year 1 st Class Diploma	2001 2003
Responde nt 5	B. A in Arts 2-year 1 st	2002 2001

	Class Diploma	
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10. The position as emerge is that the qualification of the petitioner, respondent No.4 and 5, as it was, up to the cut off date for receipt of application, is clear. It is also clear that the minimum qualification prescribed for the post is in three categories, i.e.:

- (i) Bachelor's degree with 55% marks in appropriate branch/discipline or equivalent from a recognized Institution/University.
- (ii) Bachelor's degree in Arts/ Science/ Commerce with first class diploma in the relevant discipline from a recognized Institution/University.
- (iii) Diploma holders first class in appropriate branch/discipline from recognized Institution.

The petitioner and the respondent No.5 belong to category (ii) whereas respondent No.4 falls within category (iii). Admittedly, none among them fall within category (i). Now the question is as to whether on the basis of preference clause, in view of availability of the candidates from category (ii), the candidates from category (iii) were altogether to be ignored.

11. A cursory look at the preference clause, as quoted above in para 4, would suggest that in case of non-availability of the candidate from category (i), candidates from category (ii) are to be taken and in

case of non-availability from category (ii), candidates from category (iii) are to be taken but same shall be illogical because minimum qualification is prescribed, all the candidates belonging to all the three categories have a equal right to compete and all are to be considered, as has been done. Their merit position is clear, as noticed above, i.e. in merit they are not equal, therefore, there is no question of preference. The preference is available only when merit is equal. The preference clause in the schedule has been couched in a language which has given rise to controversies. Three categories of qualifications as prescribed are minimum qualifications cannot be to the exclusion of one another. The marks have been awarded to the petitioner, respondent No.4 and 5 for minimum qualification on the basis of percentage of marks obtained by these three candidates in the diploma course. In case of petitioner it is 67.57, in case of respondent No.4 it is 72.87 and in case of respondent No.5 it is 72.75. They have been respectively, on pro-rata basis, out of 30 marks awarded 20.27, 21.86 and 19.76 marks. It was the only way to work out the marks for minimum qualification of three competing candidates. Same

yardstick has been applied to all the candidates in Open Merit as well as other categories.

12. In terms of explanation II of Rule 51 of J&K Public Service Commission (Business and Procedure) Rules, 1980, recasted in the year 2004, preference is permissible only on obtaining equal marks in the interview. Same method has been applied, based on which petitioner has got excluded. The said explanation-II reads as under:

“ii) Where a candidate with the minimum prescribed qualification and a candidate with preferential qualification prescribed in addition to the minimum prescribed qualification, compete for the same selection and obtain equal marks in the interview, the candidate with preferential qualification shall have an edge over the other candidates in view of the preference attached to such preferential qualification.

13. The preference clause has to be interpreted so as to advance its object. Once three categories of qualifications are prescribed as minimum qualification, candidates from all the three categories on the basis of assessment of merit, if found to be equal, only then preference is permissible. In this connection, para 17 of the judgment rendered by the Hon’ble Apex Court in the case **State of U.P. & anr. v. Om Prakash & ors (AIR 2006 SC 3080)**:

“This Court has consistently held that when selection is made on the basis of merit assessed through the competitive examination and interview, preference to additional qualification would mean other things being qualitatively and quantitatively equal, those having additional qualification would be preferred. It does not mean en bloc preference irrespective of inter se merit and suitability.

14. Following portion from 19 of the said judgment is also relevant to be quoted:

“A mere rule of preference meant to give weightage to the additional qualification cannot be enforced as a rule of reservation or rule of complete precedence. Such a construction would not only undermine the scheme of selection envisaged through the Public Service Commission, on the basis of merit performance but also would work great hardship and injustice to those who possess the required minimum educational qualification with which they are entitled to compete with those possessing additional qualification too, and demonstrate their priority merit-wise and their suitability for the post. It is not to be viewed as a preferential right conferred even for taking up their claims for consideration. On the other hand, the preference envisaged has to be given only when the claims of all candidates who are eligible are taken for consideration and when anyone or more of them are found equally positioned by using the additional qualification as a tilting factor, in their favour vis-a-vis others in the matter of actual selection.

15. Para 20 is also relevant to be quoted:

“In the instant case, the requisite academic qualification for the post of homeopathy as prescribed in the advertisement was a recognized degree in Homeopathy or a recognized diploma in Homeopathy. A proviso has been added that preference will be given to degree holders. This would mean that a recognized diploma in homeopathy prescribed in the advertisement is also a required minimum

educational qualification with which they are entitled to compete with those candidates possessing the degree. The word 'preference' would mean that when the claims of all the candidates who are eligible and who possess the requisite educational qualification prescribed in the advertisement are taken for consideration and when one or more of them are found equally positioned, then only the additional qualification may be taken as a tilting factor, in favour of candidates vis-a-vis others in the merit list prepared by the Commission. But preference does not mean en bloc preference irrespective of inter se merit and suitability.

16. Perusal of the records as produced by learned counsel for respondents No.1 and 2, Mr. Amin, in a sealed envelope would reveal that for allocating 30 marks for minimum qualification, it is the percentage obtained by all the competing candidates in diploma in relevant subject which has been taken as minimum qualification based on which 30 marks have been allotted on pro-rata basis. The percentage of marks secured by the petitioner, respondent No.4 and 5 and marks awarded to them out of 30 on pro-rata basis is as under:

Name of the candidate	Percentage awarded for MOP/ SPOM Diploma	Out of 30 marks awarded on pro-rate basis	Marks in viva(out of 50 marks)	Total
Petitioner	67.57	20.27	25	45.27
Respondent No.4	72.87	21.86	30	51.86
Respondent No.5	65.89	19.76	28	47.76

The merit allocated or the merit allotted by the interview Committee is not open to question. The allocation of marks out of 100 in accordance with Rule 51 of the J&K Public Service Commission (Business and Procedure) Rules, 1980, as has been recasted vide notification of 2004, is also clear. Keeping in view merit of the candidates not be equal, the preference clause will not operate.

17. Petitioner next projected that the respondent No.4 acquired the qualification of Graduation in the year 2005 i.e. subsequent to the cut off date which qualification is not to be reckoned. Such contention is meaningless because respondent No.4 had clearly applied on the strength of Diploma certificate. She has clearly pleaded that she was 10+2 and was diploma holder, which is a required qualification. Admittedly, she has acquired Bachelors degree after cut off date but that, admittedly, is not reckonable. She had applied only on the strength of Diploma Certificate, which is permissible. This contention of the petitioner shall, accordingly, stand repelled.

18. In accordance with Rule 51 of J&K Public Service Commission (Business and Procedure) Rules, 1980,

recasted in the year 2004, marks have been allocated in the following manner:

Minimum qualification	=30 marks
Higher qualification	=05 marks
Experience	=05 marks
Sports	=03 marks
NCC	=02 marks
Special attributes	=05 marks
Viva	=50 marks
Total	=100 marks

For minimum qualification, on pro-rata basis, petitioner has been allocated 20.27, respondent No.4=21.88 and respondent No.5=19.76 points. For viva marks awarded to the petitioner, respondent No.4 and respondent No.5 are as under:

Petitioner	=25 marks
Respondent No.4	=30 marks
Respondent No.5	=28 marks

So in order of merit, among four RBA candidates, respondent No.4 figured at serial No.1 with 51.86 points, respondent No.5 at serial No.2 with 47.76 points, petitioner at serial No.3 with 45.27 points and another candidate who is not the party at serial No.4 with 44.88 points. Based on such selection, the respondents No.4 and 5, on the recommendations of respondent PSC, have been appointed in the year 2005. Respondent No.4 vide Govt. Order No.152/Edu(Tech) of 2010 dated 29.10.2010 has been

shown to have successfully completed two years probationary period with effect 06.09.2005.

19. The another point for consideration is as to whether order of appointment of respondent No.4 can be set aside when the said order has not been specifically challenged. At the time petition was filed only selection was finalized, it is during the pendency of petition appointment order has been issued. Although in the petition quashment of selection and appointment has been sought but appointment order at the time of presentation of petition was not in existence, therefore, when the appointment order was issued and then another order was also issued providing that the respondent No.4 has completed probation period successfully, both the two orders were required to be challenged and the petition was required to be amended. Same has not been done. In this context learned counsel for respondent No.4 placed reliance on the judgment rendered in **Surinder Singh v. Central Government and others (AIR 1986 SC 2166)**. In para 9 of the judgment it has been held as under:

“.....Normally whenever an order of Government or some authority is impugned before the High Court under Article 226 of the Constitution, the copy of the order must be produced before it. In the absence of the impugned order it could not be possible to

ascertain the reasons which may have impelled the authority to pass the order. It is, therefore, improper to quash the order which is not produced before the High Court in a proceeding under Article 226 of the Constitution.....”

20. Coordinate Bench of this Court in the case of **Mehraj-ud-din Dar v. State & Ors** reported in **2010 (2) J.K.J. 557(HC)**, has held that an order having the effect of upsetting the selection without same having been challenged would be violative of Article 14 and no writ can be issued infringing Constitutional guarantees as contained in Article 14. Para 10 of the said judgment reads as under:

“10.The selection/appointment of the selected/ appointed candidates having not been challenged by amending the writ petition, the writ petition is rendered infructuous.”

21. Learned counsel for respondent No.4 further rightly contended that it would be unjust now to upset the appointment of respondent No.4 who has been appointed in the year 2005 and vide Govt. Order No.152/Edu(Tech) of 2010 dated 29.10.2010 has been declared to have completed the period of probation successfully. In support of this contention relied on the judgment rendered by the Hon’ble Apex Court in the case “**The Secretary, Andhra Pradesh Public Service Commission v. Y. V. V. R. Srinivasulu**

and others” (AIR 2003 SC 3961). Para 11 is relevant

to be quoted:

“Whenever, a selection is to be made on the basis of merit performance involving competition, and possession of any additional qualification or factor is also envisaged to accord preference, it cannot be for the purpose of putting them as a whole lot ahead of others, dehors their intrinsic worth or proven inter se merit and suitability, duly assessed by the competent authority. Preference, in the context of all such competitive scheme of selection would only mean that other things being qualitatively and quantitatively equal, those with the additional qualification have to be preferred. There is no question of eliminating all others preventing thereby even an effective and comparative consideration on merits, by according en bloc precedence in favour of those in possession of additional qualification irrespective of the respective merits and demerits of all candidates to be considered. If it is to be viewed the way the High Court and Tribunal have chosen to, it would amount to first exhausting in the matter of selection all those, dehors their inter se merit performance, only those in possession of additional qualification and take only thereafter separately those with ordinary degree and who does not possess the additional qualification. Assuming for consideration without even accepting the same to be right or correct view to be taken, at least among the class or category of those possessing the additional qualification, inter se merit performance should be the decisive factor for actual selection for appointment and relief could not have been granted to respondents for the mere asking only on the basis of the interpretation of the provision to some one who came to Court, ignoring the fact that those before the Court at any rate in spite of the view taken do not come up to the level of selection consideration in the context of numerous others with higher ranks of merit performance, in addition to they being also in possession of the additional qualification, as those before the Court. That apart, the

old rule relating to the post of ACTO, which has become obsolete having been superseded, or even the advertisement if it has stated on the basis of the obsolete rule, that preference will be given first to candidates who possess a degree in Commerce and degree in Law, secondly to those who possess a degree in Commerce and thirdly to those who possess a degree in law, cannot either support the claim of the respondents Nos. 1 to 3 nor in any manner lend credence to the interpretation placed by the High Court and the Tribunal. The word 'first' has to be construed in the context of even giving preference only in the order and manner indicated therein, inter se among more than one holding such different class of degrees in addition and not to be interpreted vis-a-vis others who do not possess such additional qualification, to completely exclude them, en bloc.

Applying the law to the facts of the case in hand, the contention is of prevailing force, as such, prevails.

22. The judgments relied upon by learned counsel for the petitioner reported in **Narinder Singh v. State & ors.**, reported in **2012(4) JKJ 660(HC)** and **Dr. Arun Kumar Agarwal v. The State of Bihar and others (AIR 1991 SC 1514)**, with respects, are of no help to him because those are altogether on different facts and position of the qualification.

23. Respondent No.4 in her reply has projected that the petitioner is in-eligible as she is shown to have obtained Bachelors degree in the year 2003-04 and is also shown to have appeared from Govt. Polytechnic

College in Modern Office Practice Course held in Sessions 2003. She could not obtain three years degree course certificate from University of Kashmir and also three years Diploma from Govt. Polytechnic College for Women's, Srinagar, during one and the same period.

24. Position so projected has been specifically refuted by the petitioner by stating that, in fact, the petitioner was admitted for pursuing the graduation in Govt. Degree College for Women, Anantnag in the year 2000-2001 but she was discharge from the rolls of the said College on 13.05.2000. Certificate supporting this position has been issued by Government College for Women, Anantnag. Same is further supported by the information supplied by the Assistant Registrar Registration, University of Kashmir vide No.F(Verification Particulars) dated 20.06.2011, wherein it is clearly shown that the petitioner was registered as a regular student in the year 2000 but had not appeared in the examination. Then it is further qualified that the petitioner has appeared in the examination of B.A. 1st year, 2nd year and 3rd year respectively in the years 2001, 2002 and 2003 as a

private candidate. It being so, the contention of respondent No.4 that the petitioner's qualification is not reckonable because the petitioner could not pursue two courses i.e. B.A. and Diploma in two different colleges within same period pales into insignificance.

25. The respondent No.5, in her reply, has stated that the petitioner was not eligible at all because she does not possess the requisite qualification i.e. Diploma in the Discipline of Secretariat Practice and Office Management, instead she possesses Diploma in Modern Office Practice which is not a prescribed qualification whereas respondent No.5 possessed the prescribed qualification, i.e., Diploma in the Discipline of Secretarial Practice and Office Management.

26. This position has been clarified by the counsel for the petitioner that MOP and SPOM diploma is one and the same as the petitioner when joined for diploma for the first year, she is shown to have secured marks in SPOM and in the second year marks in MOP and SPOM are shown in the diploma certificate issued. Perhaps nomenclature of diploma

has been changed, therefore, MOP and SPOM, as it was, is same.

27. For the stated reasons, fact and law petition is found to be devoid of merit, as such, dismissed.

28. The record of final selection as produced by learned Counsel, Mr. Amin, is returned to him in the open court.

(Mohammad Yaqoob Mir)
Judge

Srinagar
13.06.2014
"Mohammad Altaf"