

HIGH COURT OF JAMMU & KASHMIR
AT SRINAGAR

SWP No.542/2006

Date of Order:31.08.2015

Bashir Ahmad Mir

Vs.

State of J&K & ors.

Coram:

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

Appearing Counsel:

For the petitioner(s)/Appellant(s): Mr. M. A. Qayoom.

For the respondent(s): Mr. S. A. Naik, AAG-for R1 to R4.

Mr. G. A. Lone-for R5.

Mr. R. A. Khan- for R6

1. Instant writ petition was earlier dismissed vide detailed judgment dated 11.09.2009. Same was challenged by medium of LPA No.243/2009 which has been allowed vide judgment dated 23.03.2011. Matter has been remitted back for consideration in the light of observations made therein.

2. For appreciating the matter in its right perspective and for its effectual adjudication, the background of the case shall be advantageous to be given in detail as follows:

- I) For filling up two posts of ReTs under Sarva Shiksha Abiyan available in EGS Centre, Mir Mohalla of village Hanroo, an advertisement notice has been issued by the respondent No.4 on 9th April, 2005. Five candidates had applied. Respondent No.4 in the list of candidates has recorded names of three candidates with all details i.e. Mst. Saleema Bano-respondent

No.5, Mst. Shayista Mir-respondent No.6 and one Amanullah Mir. A note has been recorded to the following effect:

“Two more candidates, namely, Bashir Ahmad Mir S/o Gh. Mohd. Mir R/o Hanroo and Manzoor Ahmad Wani S/o Habibullah Wani R/o Hanroo have also applied for the post of ReTs but the former case is over-aged and his D. O. B is 28.10.68 and the second case has withdrawn his application on production of affidavit.”

II) Thereafter panel of two candidates i.e. respondents No.5 and 6 in order of merit has been prepared for engagement by respondent No.4 which has been submitted to respondent No.3 vide letter No.ZEOD/Estt/918 dated 30.07.2005.

III) Petitioner who had applied noticing the aforesaid development filed a suit before the Court of Sub Judge, Sopore on 04.08.2005. In para 4 and 5 of the memo of writ petition, petitioner has averred that in order of merit he figured at serial No.1 but apprehending mischief of dropping from the panel, filed suit before the Court of Sub Judge, Sopore and had prayed a restraint order so that position of panel wherein he figures at serial No.1 is not changed and no one else is appointed as ReT in PS Mir Mohalla Hanroo. The Court of Sub Judge, Sopore had granted an interim order on 19.08.2005 wherein respondent No.4-Zonal Education Officer was directed to maintain

status quo vis-à-vis status of the petitioner in the process of selection but it is during pendency of the suit when written statement was filed it was made known that the respondents No.5 and 6 have been appointed vide orders dated 26.08.2005. In the meantime, one more development i.e. Government issued order No.971-GAD/2005 dated 5th August, 2005, in pursuance whereof maximum age limit for applying for any post has been raised in case of general category candidates from 35 to 37 years with a further stipulation that the same shall apply to the posts advertised by the Selecting Agencies w.e.f. 01.01.2005 against which the selection process has not been completed till the issuance of the order and the selection shall only be finalized after affording such candidates an opportunity to apply if they are otherwise eligible as per the relevant Recruitment Rules. Picking the thread therefrom what the petitioner has done is that he has left the suit proceedings there and filed the instant petition.

IV) While disposing of writ petition vide detailed judgment dated 11.09.2009, it was concluded that the selection process vis-à-vis two posts of ReTs was not concluded, therefore, said Govt. order would apply, however, respondent-authorities have not followed the procedure as was prescribed in the said Govt. 971-GAD of

2005 dated 05.08.2005, perhaps that may have not reached to them before completion of selection/engagement process. In the judgment it has been concluded that a candidate is to be selected/appointed when he is considered along with all other eligible candidates for such selection/ appointment. The prayer of the petitioner so as to command the respondent-authorities to appoint him is not the mandate of Govt. order, if such prayer is accepted, that shall be violative of rights of all other similarly circumstanced persons so shall be a violation of constitutional guarantees available to such candidates under Article 14 and 16 of the Constitution. If such order is issued by the Court, same will give birth to illegal and unconstitutional orders. On such basis, writ petition has been dismissed.

- v) In the judgment passed in LPA No.243/2009, it has been noticed that the learned Single Judge has returned two material findings in favour of the appellant, firstly that the process of selection was not complete by the time Government order No.971-GAD of 2005 dated 05.08.2005 came into force and secondly that the appellant's candidature has not been considered. Learned Division Bench has opined that they find sufficient reasons have been recorded by the learned Single Judge while arriving at the conclusion that the process of selection was still going on when the said Govt.

order came into force. It has been further observed as under:

“The contention of the respondent Nos.5 & 6 that the process of selection was over by the time Government order came into force, has not been accepted by the learned Single Judge and we find rightly so.”

VI) Learned Division Bench has observed that in view of the findings, the appellant got a right of consideration and should have been considered for appointment along with respondent Nos.5 & 6. With the issuance of Government order dated 05.08.2005, there was no reason to reject his candidature on the basis of age bar. Finally, it has been concluded as under:

“In the circumstances, we find the judgment impugned in the present appeal cannot stand in so far as the dismissal of the writ petition is concerned. We allow the present appeal with a request to the learned Single Judge to re-consider the matter in light of the observations made above.”

3. The first contention of the learned counsel for the petitioner is that the petitioner in response to the advertisement notice had applied. Advertisement notice, admittedly, was issued on 09.04.2005. Age of the candidate as on 01.01.2005 was required to be 35 years but since the selection process was not complete on the date when Govt. order No.971-

GAD/2005 dated 05.08.2005 was issued, therefore, position of the age was to be governed vis-à-vis petitioner in terms of said Govt. order, more so the finding recorded in the judgment dated 11.09.2009 to the effect that on the date of issue of said Govt. order, selection process had not been complete has not been disturbed by the learned Division Bench while disposing of LPA 243/2009.

4. In opposition, learned counsel for respondents highlighted that Govt. order No.971-GAD/2005 has been issued but Article 37 of J&K Civil Service Regulations was not amended. Until same is amended, the age as raised pursuant to said Govt. order would not take effect. Meeting this situation, learned counsel for the petitioner would submit that Civil Service regulations do not govern terms of the recruitment. In this connection referred to Regulation No.1-A. Submission is correct. Regulation No.1-A provides that the Regulation do not deal otherwise than indirectly and incidentally with matters relating to recruitment, promotion, official duties, discipline or the like. In fact, it is Rule 17 of Civil Services, Classification and Appeal Rules which prescribes qualification including

minimum and maximum age for recruitment and it is stated that the said Rule has been amended.

5. The finding recorded in the judgment dated 11.09.2009 has been confirmed by the Division Bench while disposing of LPA No.243/2005 vide judgment dated 23.03.2011. The only position which has to be re-considered is that as to whether the petitioner could be considered for appointment along with respondents No.5 and 6. Same is not permissible in view of clear stipulations as contained in Govt. order No.971-GAD/2005, which for facility of reference is reproduced here-under:

**“Government Order No.971-GAD of 2005
Dated: 05.08.2005**

It is hereby ordered that the following maximum age limit shall w.e.f 01.01.2005 apply in respect of posts falling under direct recruitment to Govt. service in all i.e. Subordinate and Gazetted Service other than those filled through combined competitive examination shall continue to be governed by SRO 38 of 2005.

(i)General Category Candidate: 37 years

(ii)Physically challenged: 39 years.

(iii)Members of SC/ST: 40 years

(iv)Candidates already in Government service/Ex-serviceman: 40 years

It is further ordered that the above dispensation shall apply to the posts advertised by the Selecting Agencies w.e.f 01.01.2005 against which the selection process has not been completed till the issuance of this order and the selection shall only be finalized after affording such candidates an

opportunity to apply if they are otherwise eligible as per the relevant Recruitment Rules.

The recruitment for the posts which have been advertised before 01.01.2005 shall be governed by the age applicable at the relevant point of time.

The Finance Department shall make necessary amendment in the Jammu and Kashmir Civil Services Regulations as well.

By order of the Government of Jammu and Kashmir.

**Sd:-
(Leena Padha)
Under Secretary to
Government
General Administration
Department”**

The language employed in the order clearly suggests that in case selection process has not been completed on the date of issue of the order then the selection has to be finalized after affording such candidates an opportunity to apply if they are otherwise eligible as per relevant Recruitment Rules, that would mean that a fresh notice was to be issued so as to enable all eligible candidates who in view of having crossed the age of 35 years had not applied, to compete. That has not been done nor same shall be apposite at this time to do because respondents No.5 and 6 have been appointed on 26.08.2005, by now they have completed ten years of service, to throw them out at this stage would be against equities and would be so harsh as the respondents No.5 and 6,

being women, by such course would be subjected to an awkward situation on both social and other fronts, more particularly by now they shall not be eligible to compete anywhere for any government job, therefore, equities tilt in their favour.

6. Learned counsel for the petitioner would submit that equities favour a person who is free from blame, furthermore, equities do not favour the fraud. Fraud is fraud, cannot be protected under the guise of equities. According to him, there was a calculated attempt made by respondent No.4-Zonal Education Officer for accommodating respondents No.5 and 6. The contention raised is not supported by the records. The fact of the matter is that in normal course when any recruitment drive is initiated, the minimum and maximum age limit is taken into consideration. Respondent No.4-Zonal Education Officer while preparing the list of candidates has been fair enough to state that the petitioner has also applied but he is not included in the list of candidates who have applied because he had crossed the age of 35 years as on 01.01.2005. He has specifically recorded that the date of birth of the petitioner is 28.10.1968. In the suit it

was averred that petitioner figured at serial No.1 amongst all applicants who had applied and then it is prayed therein that his position at serial No.1 shall not be disturbed and it is in the same background learned Sub Judge had granted an interim relief to the effect "Respondent 4 to maintain status quo vis-à-vis status of the petitioner in the process of selection to the engagement of teachers". What was the position and status of the petitioner as per list is that his candidature was not accepted as he was over aged. Only three candidates were included in the list in order of merit which includes respondents No.5 and 6, therefore, petitioner was not figuring at serial No.1. Such averment as was made in the suit and thereafter referred to in para 4 and 5 of the memo of writ petition is totally without any basis. The process of selection as was finalized had culminated in the issue of appointment order dated 26.08.2005 in favour of respondents No.5 and 6 which by any means was neither prohibited nor in violation of order of status quo as was granted by the Court of Sub Judge, Sopore.

7. Learned counsel for the petitioner further submitted that the appointment order was in

contravention to the order of status quo as was granted by the Court of Sub Judge, Sopore and thereafter their continuation was also in contravention to the interim direction passed by the Division Bench on 28.05.2010, wherein it was ordered that till the matter is considered and till result of the LPA, the appointment of respondents No.5 and 6 shall remain in abeyance. So far contention regarding contravention of status quo order issued by the Court of Sub Judge, Sopore, is concerned, same is made clear hereinabove. There was no contravention. The contention regarding appointment of respondents No.5 and 6 being in contravention of interim order dated 28.05.2010 no more survives because while disposing of LPA finally vide judgment dated 23.03.2011, the position/status of respondents No.5 and 6 was not disturbed so they rightly continued.

8. The respondent No.4 in the normal course while preparing the list of candidates who had applied noticing that the petitioner has crossed the age limit has not included his name in the list which cannot be found fault with nor can be said to be tainted with any *mala fide*. Therefore, the process of selection and

appointment of respondents No.5 and 6 is not, in any manner, product of fraud or any favouritism which would negate the tilt of equities in their favour.

9. Learned counsel for the petitioner again contended that as per ReT scheme no age is prescribed. Govt. order No.396-Edu of 2000 dated 28.04.2000 provides that sanction has been accorded to the launching of scheme of Rehbar-e-Taleem. In the eligibility criteria as prescribed, it has been recorded that the candidate shall as far as possible fulfill the age qualification as prescribed by the State Government. Interpreting "as far as possible" learned counsel would submit that there is no strict bar for observing the age qualification prescribed by the Government which position according to him is supported by the last part of said Govt. order No.396-Edu of 2000 which provides that satisfactory completion of five years as Rehbar-e-Taleem on honorarium basis, the candidate shall be eligible for appointment as General Line Teacher in the Education Department. It further provides that at the time of consideration for formal appointment in the Government, if a teacher is found not to fulfill age

qualification, then his/her employment would be on contractual basis for future.

10. Conjoint reading of various paras of Govt. order No.396-Edu of 2000 may provide a scope for even considering the candidates who may not have the age qualification but such interpretation would lead to disastrous results. However, it is made clear that same can be made use of in a situation where no candidate is available but for advancing the object of Rehbar-e-Taleem scheme, a candidate irrespective of age qualification could be considered but the eligibility i.e. “the candidate shall as far as possible fulfill the age qualification as prescribed by the State Government” has to be interpreted purposively. After all such candidates after five years of satisfactory performance and satisfaction of other requirements have a right to become General Line Teachers. When it is so, how a candidate lacking age qualification can be selected when candidates having all requisite qualifications are available.

11. Learned counsel for the respondents submits that the petitioner had filed suit, without withdrawing the same has filed the writ petition, whether that writ

petition can be maintained although suit subsequently has been dismissed for want of prosecution on 29.11.2007. The petitioner had wrongly averred in the plaint that he figures at serial No.1 in the list which position is not correct as his candidature was never considered on merits nor he was enlisted because of having crossed the age limit, can't the position of the petitioner be said to be blameworthy.

12. Though the position of institution of the suit by the petitioner before the Court of Sub Judge, Sopore has been taken note of and dealt with in the judgment dated 11.09.20098, therefore, same position is not open to question but the false averments in the suit and then its reference in the memo of writ petition that the petitioner figured at serial No.1 has to be taken note of for grant or otherwise of the equitable relief.

13. While confronted with the position of tilt of equities in favour of respondents No.5 and 6 who have been working as ReTs for last ten years and the position of they being women, learned counsel for the petitioner would submit that the respondent No.4- Zonal Education Officer has breached the trust, he has favoured respondents No.5 and 6 by misuse of his

official position, therefore, their selection/appointment is liable to be set aside. In support of this submission, placed reliance on the judgment rendered by Hon'ble Apex Court in the case of **Krishan Yadav v. State of Haryana** reported in **1994(4) SCC 165**. Para 16, 17 and 20 of the judgment are relevant to be quoted:

“16. The above extracts unmistakably establish the “misdeeds” of the Board.

17. Having regard to all the above, the irresistible conclusion is “fraud has reached its crescendo”. Deeds as foul as these are inconceivable much less could be perpetrated. We are reminded of the words of Shakespeare:

“Thus much of this, will make Black, white; foul, fair; wrong, right; Base, noble; Ha, you gods: why this?”

20. It is highly regrettable that the holders of public offices both big and small have forgotten that the offices entrusted to them are sacred trust. Such offices are meant for use and not abuse. From a Minister to a menial everyone has been dishonest to gain undue advantages. The whole examination and the interview have turned out to be farcical exhibiting base character of those who have been responsible for this sordid episode. It shocks our conscience to come across such a systematic fraud. It is somewhat surprising the High Court should have taken, the path of least resistance stating in view of the destruction of records it was helpless. It should have helped itself. Law is not that powerless.”

It is clear that in the reported judgment “misdeed” of the Board were established and it was concluded that in the background of facts of the case, fraud has reached its crescendo, deeds as foul as

these are inconceivable much less could be perpetrated. While coming to the case in hand, no question of misdeeds and fraud is discernible. In the background of the facts and circumstances as noticed in the earlier part of the judgment, it is clear that respondent No.4-Zonal Education Officer in good faith had not included the petitioner's name in the list of candidates who had applied because at the time he had applied he had crossed the age limit of 35 years as on 01.01.2005 i.e. the year of advertisement notice. Thereafter in order of merit, list of three candidates was prepared wherein respondents No.5 and 6 figured at serial No.1 and 2 on the basis of their merit and eligibility. They were recommended for engagement, same had been approved by the respondent No.3 based on which appointment order dated 26.08.2005 was issued. There is no specific allegation as against respondent No.4 or any other authority made in the writ petition which would persuade the Court that the respondent authorities in any manner have showered any favour or undue benefit upon respondents No.5 and 6. Neither fraud nor any misdoing is attributable to the respondents No.5 and 6, which otherwise could

be an obstacle for tilting balance of equities in their favour.

14. No doubt, petitioner at the 10+2 level had secured 276 marks out of 600 whereas respondent No.5 had secured 261 marks out of 600 and respondent No.6 secured 238 marks out of 600 but petitioner lacked the age qualification so was ineligible to be included in the list of candidates. May be in case all the candidates who had crossed the age limit of 35 years available in the area, would have applied, may be their merit position would have been superior to him, same position could emerge in case in terms of Govt. order No.971-GAD/2005 fresh notice would have been issued inviting their applications, so again in the said background petitioner cannot claim straightway right of appointment to the exclusion of all others including meritorious, therefore, tilt of equities on such ground is in favour of respondents No. 5 and 6.

15. In the totality of the facts and circumstances, after due consideration there is no scope for interference with the position of appointment of respondents No.5 and 6, who by now have been

working continuously for last ten years, writ petition
accordingly dismissed.

(Mohammad Yaqoob Mir)
Judge

Srinagar
31 .08.2015
“Mohammad Altaf”