HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

SWP No. 2032/2015
MP Nos. 01/2015 and 02/2015

Date of order:23.02.2016

Jabeen Akhter Lone vs. State of J&K and others

Coram:

Hon'ble Mr. Justice Janak Raj Kotwal, Judge

Appearing counsel:

For petitioner/appellant(s): Mr. H. A. Siddiqui, Adv.
For respondent/caveator(s): Mr. W. S. Nargal, AAG for Nos. 1 to 4
Mr. K. Nirmal Kotwal, Adv. for No. 5

(i) Whether to be reported in Press, Journal/Media: Yes/No
(ii) Whether to be reported in Journal/Digest: Yes/No

1. This writ petition seeks primarily quashing of Government Order No. 263-Home of 2015 dated 08.07.2015 whereby the Government, Home Department, herein respondent No. 1, has accorded sanction to the cancellation of the stopgap placement of the petitioner as Incharge Deputy Superintendent of Police (Dy. SP) under the RBA category vide Government Order No. Home-328 of 2014 dated 11.07.2014 and to the placement of respondent No. 5 as Incharge (Dy. SP) under the RBA category against roster point No. 86 in his own pay and grade.

2. Heard. I have perused the record.

3. Admitted ground of both the sides emerging from the

pleadings and Government order dated 08.07.2015 (supra) is that vide Government Order dated 11.07.2014 (supra) thirteen inspectors of the Jammu and Kashmir Police (Executive) were placed as Incharge Dy. SP in their own pay and grade. Four of them, figuring at serial Nos. 10, 11, 12 and 13, were given such placement under RBA category according to applicable roster. The seniority list of the Inspectors issued by the Police Headquarters vide order No. 1403 of 2010 dated 08.04.2010 was operated for making these placements. Inspector figuring at serial No. 10, Mohammad Shafi, figured at seniority position No. 239 in the seniority list and was given placement as Dy. SP in RBA category against roster point 66. Inspector figuring at serial No. 11, Abdul Khalid, figured at seniority position No. 279 and was given placement against roster point 76. Inspector figuring at serial No. 12, Manzoor Ahmad Dar, herein, respondent No. 6, figured at seniority position No. 314 and was given placement against roster point No. 86 and Inspector figuring at serial No. 13, Jabeen Akhter Lone, herein petitioner, figured at seniority position No. 317 and was given promotion against roster point No. 96.

4. Inspector, Himat Singh, herein respondent No. 5 figures at seniority position No. 281 in the seniority list of Inspectors. He submitted his representation to the Police Headquarters for his promotion as Incharge

Dy. SP on the ground that he belongs to the RBA category and that his two juniors of the same category figuring at seniority position Nos. 314 and 317, that is, respondent No. 6 and the petitioner, have been placed as Incharge Dy. SPs ahead of him. He also submitted his valid RBA category certificate and documents evidencing that he already had submitted the said certificate to the Police Headquarters on 20.11.2013 through the Superintendent of Police, Vigilance Organization vide communication dated 19.11.2013 where he was posted at the relevant point of time. Government accorded consideration to the representation of respondent No. 5 in consultation with the Police Headquarters and found that respondent No. 5 belongs to RBA category. He had submitted valid RBA category certificate in time to the Police Headquarters but the later had not taken his papers into account. Government also took the view that it was the responsibility of the Police Headquarters to update the seniority list of the Inspectors, mentioning the appropriate category against the name of respondent No. 5 and that he cannot be deprived of the benefit of promotion available to him.

5. Respondent No. 1, therefore, found that respondent No. 5 satisfied all the conditions for promotion as Incharge Dy. SP, he was senior to respondent No. 6 and

the petitioner in RBA category and was, therefore, entitled to promotion against roster point No. 86 which has been utilized by respondent No. 6 Government also took the view that respondent No. 6 shall be deemed to have been promoted in RBA category against roster point No. 96 and consequently stopgap placement of the petitioner would be liable to be cancelled as there is no vacancy of Dy. SP available under promotion quota or roster point allocable to RBA category to accommodate her. Government, therefore, vide impugned order dated 08.07.2015 (supra) accorded sanction to the cancellation of stopgap placement of petitioner as Dy. SP and further sanction to the placement of respondent No. 5 as Incharge Dy. SP in RBA category against roster point No. 86.

6. Petitioner has assailed the impugned order mainly on the ground that it has been issued at the back of the petitioner without hearing her or issuing her notice and, therefore, is violative of the principles of Natural Justice. It is contended that petitioner's promotion having remained in operation for more than a year vested right has accrued to her to continue on that position. The cancellation order has the effect of reversion and amounts to punishment in violation of constitutional provisions.

7. It is contended by the petitioner also that a number of promotions have been effected even after the promotion of the petitioner and she should have been adjusted against roster point No. 4 in the RBA category. It is contended also that respondent No. 5 had not submitted his RBA certificate in time so category was not incorporated in the seniority list.

8. Respondent Nos. 1 to 4 on one hand and respondent No. 5 on the other have opposed the writ petition. Their response is in line with the statement contained in the impugned order.

9. The main plank of the submission of Mr. H. A. Siddiqui, learned counsel for the petitioner, was that the impugned order has been issued in violation of the principles of Natural Justice as the same was issued behind the back of the petitioner without providing her opportunity of being heard. Mr. Siddiqui, argued empathetically that denial of right of hearing and passing of adverse order against a person without hearing him causes prejudice and the order is liable to be set aside. Learned counsel sought to emphasize that the violation of the principles of Natural Justice admits of no exception. Mr. Siddiqui would submit that respondent No. 1 has acted arbitrarily in cancelling the promotion of the petitioner and even not giving her

appropriate slot in RBA category in the promotions made after promotion order dated 11.07.2014.

10. Per contra, Mr. W. S. Nargal, learned AAG, submitted that by promoting the petitioner over and above the respondent No. 5, great injustice was done to the latter so for correcting such injustice no notice was required to be issued to the petitioner.

11. Indisputably, respondent No. 5, Inspector Himmat Singh, was senior to the petitioner, Jabeen Akhter Lone and respondent No. 6, Manzoor Ahmed Dar in the seniority of the Inspectors. Respondent No. 5 figured at Serial No. 281 whereas petitioner and respondent No. 6 figured at serial Nos. 314 and 317 respectively. Respondent No. 5 was, therefore, entitled to promotion under RBA category after Inspector Abdul Khaliq figuring at S. No. 11 in the placement order dated 11.07.2014 and before respondent No. 6 figuring at serial No. 12. Petitioner and respondent No. 6, however, stole a march over respondent No. 5 only for the reasons that in the seniority list they were shown as falling in RBA category, whereas similar category of respondent No. 5 was not shown. Petitioner and respondent No. 6 were, therefore, given the benefit of reservation over and above respondent No. 5, who to be deprived of his due benefit.

12. As per the impugned order, Government after taking up the matter with the Police Headquarters on a representation by respondent No. 5 has found that respondent No. 5 had submitted a valid RBA category certificate in time to Police Headquarters but the latter had not taken the same into account. Finding on this point of fact is indisputable in this writ petition nor can be assailed. What is thus, clear is that had the Police Headquarters not failed in their duty to duly take on record the RBA category certificate produced by respondent No. 5 and reflect the said category in the seniority list against his name, he would have been promoted on Incharge basis against roster point 86 and consequently respondent No. 6 would have been adjusted in RBA category against roster point 96 and the petitioner would not have figured in that promotion order as she was last candidate to be promoted at that time. It, however, is a different question as to whether the petitioner should have been adjusted in the promotion made after that. It, however, needs to be pointed out that as per the roster applicable to promotions no post in RBA category after roster point No. 96 is reserved up to roster point 100 and next promotion in that category would be against roster point No. 4.

13. By issuing the impugned order and thereby giving respondent No. 5 his position against roster point 86

and consequently, cancelling the placement/stopgap promotion of the petitioner after adjusting respondent No. 6 against roster point No. 96, the Government has only rectified the wrong and injustice to respondent No. 5 committed by it. No right on the basis of a placement/stopgap promotion, which was not due to him, can be said to have accrued to the petitioner.

14. The only question arising, however, is whether for rectifying the aforementioned wrong, Government before issuing the impugned order, should have issued notice to the petitioner.

15. Legal position in this regard is discernible from Supreme Court Judgment in M/s Mahavir Jute Mills Ltd Vs. Shri Shibhan Lal Sexana and others, 1975 (2) SCC 818. Their Lordships have held that if a decision has been arrived at by the Government on the administrative side it could be altered if the Government is satisfied that the decision was wrong and in such a case there is no violation of the principles of Natural Justice.

16. I cannot rather entertain any confusion or disagreement about the importance of observance of the principles of Natural Justice, in particular the principle of *audi alteram partem*, while passing administrative orders having civil or criminal consequences like that in the judicial and quasi judicial

proceedings. Principle of *audi alteram partem* envisages that no one should be condemned unheard. No adverse order against a person should be passed without notice and providing him opportunity of being heard. Passing adverse order without notice and opportunity of being heard may cause prejudice to the person against whom it is passed because he would not be in position to put forth his case.

17. Having regard to the legal position in retrospect and as it by now has by virtue of various judicial pronouncements developed, I, however, cannot subscribe to a view that an administrative decision should be set aside once it is shown that the same has been taken in breach of the principle of *audi alteram partem* without requiring the petitioner to show that the prejudice has been caused and the position would have been different had he been issued notice and heard. In R. S Dass v. Union of 'India & ors., 1986 Supp. SCC 617, Their Lordships of the Supreme Court have observed; “it is well established that Rules of Natural Justice are not rigid rules, they are flexible and their application depends upon the setting and the back-ground of statutory provisions, nature of the right which may be affected and the consequences which may entail, in the facts and circumstances of each case”.

18. What is required to be determined is whether and to what extent the prejudice has been caused by not following the principle of *audi alterem partem* and can the situation change or improve if the order is set aside and opportunity in terms of the principle is provided. It may be stated that if an adverse order is passed in breach of the principle of *audi alteram partem* the affected person may approach the Court to say that the prejudice has been caused by not hearing him. But if no substantial or *de facto* prejudice is caused question of breach of the principle would not arise. If it can be said that the situation would not have been different had the person been heard, no prejudice can be said to have been caused.

19. If the facts are admitted or indisputable and there is no possibility of change or improvement in situation even after hearing the person against whom the order is passed 'useless formality theory' can be brought into service. This theory has now got recognition and can be applied in the cases where the facts are admitted or indisputable. The 'useless formality theory' has received consideration of Their Lordships of the Supreme Court in M. C. Mehta v. Union of India,(1999) 6 SCC 237 (AIR 1999 SC 2583). Their Lordships in para 15 in M. C. Mehta have declared that, "whenever there is a clear violation of the principles of natural justice, the Courts can be approached for a declaration that

the order is void or for setting aside the same" but have posed a question, 'whether the Court in exercise of its *discretion* under Article 32 or Article 226 can refuse to exercise discretion on facts or on grounds that no de *facto* prejudice is established'. In para 16 of the judgment Their Lordships have pointed out that "Courts are not infrequently faced with a dilemma between breach of the rules of Natural Justice and the Court's discretion to refuse relief even though the rules of Natural Justice have been breached, on the ground that no real prejudice is caused to the affected party". In para 17, Their Lordships relying upon Gadde Venkateswara Rao v. Government of A. P**,** AIR 1966 SC 828 reiterated that "it is not always necessary for the Courts to strike down an order merely because the order has been passed against the petitioner in breach of Natural Justice. The Court can under Article 32 or Article 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed earlier in favour of the petitioner and against the opposite party, in violation of the principles of natural justice or it otherwise not in accordance with law".

20. Having observed as above, Their Lordships have taken into consideration the contention that "once natural justice was violated, the Court was bound to strike down the order and there was no discretion to refuse

relief and no other prejudice need be proved." Their Lordships have referred to **Ridge v Baldwin, 1964 AC 40,** where it has been held that *"*breach of principles of natural justice is in itself sufficient to grant relief and that no further de facto prejudice need to be shown" But Their Lordships have moved along to point out that the Supreme Court has not laid down any absolute rule. In this regard Their Lordships have referred with approval to **S. L. Kapoor v Jagmohan and others, (1980) 4 SCC 379**, where Their Lordships after stating that "principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed" and that "non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary" have also laid down an important qualification, which reads:

> "17. ….Where on the *admitted or indisputable* facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it approves the non-observance of natural justice but because courts do not issue futile writs. But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary."

21. Their Lordships (in M. C. Mehta) have thus concluded

in para 21 that:

> "It is therefore; clear that if on the admitted or indisputable factual position, only one conclusion is possible and permissible, the Court need not issue a writ merely because there is violation of principles of the natural justice."

22. In Umanath Reddy, AIR 2009 SC 2375(supra), Their Lordships of the Supreme Court have observed in para-5 as under:

> "The crucial question that remains to be adjudicated is whether principles of natural justice have been violated; and if so, to what extent any prejudice has been caused. It may be noted at this juncture that in some cases it has been observed that where grant of opportunity in terms of principles of natural justice do not improve the situation, "useless formality theory" can be pressed into service".

23. As a wrong and thereby injustice to respondent No. 5 was committed by a fault on the part of Police Headquarters in not duly reflecting the petitioner's reserved category in the seniority list, Government can be said to have committed no illegality by issuing the impugned order without issuing notice to the petitioner, who was beneficiary of the wrong.

24. Even if it is presumed for the sake of argument that principles of *audi alteram partem* should have been followed by issuing notice to the petitioner, petitioner deserves no benefit in this writ petition as "useless

formality theory" is directly and strongly attracted in this case. Indisputably, rather admittedly, petitioner is senior to respondent Nos. 5 and 6 and all of them claim benefit under the same reserved category. No prejudice, therefore, can be said to have been caused to the petitioner by issuing the impugned order without hearing her. Position would not have been different, even if a notice had been issued to the petitioner nor the position would change if such a notice is issued hereafter and petitioner is heard because in no case respondent No. 5 can be denied his legitimate right for the reason of a wrong having earlier been committed by the department/Government nor the benefit of that wrong having accrued to the petitioner can be claimed as a right by her. No prejudice, therefore, can be said to have been caused to the petitioner by giving respondent No. 5 his due place and consequently divesting the petitioner of the place to which she was not entitled to at the relevant time.

25. Petitioner's claim to reservation in the promotions made after promotion order dated 11.07.2014 (supra) is not relateable to claim of respondent No. 5 and she can independently put forth her claim to any such right, if it has been denied to her, before the competent authority(ies).

26. For all said that discussed above, this writ petition has no merit and is, therefore, dismissed.

27. Disposed of.

(Janak Raj Kotwal)
Judge

Jammu:
23.02.2016
Meenakshi