

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

SWP No.2048/2014

MP Nos.3195/2014 & 2746/2014

Date of order : 21st October, 2016

Lokesh Bakshi & ors.	Vs.	State & ors.
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Coram:

Hon'ble Mr. Justice B. S. Walia, Judge

Appearing counsel:

For petitioner (s) : Mr. K. Nirmal Kotwal, Advocate.

For respondent(s) : Mr. P. S. Chandel, Dy.A.G.

i/	Whether to be approved for reporting in Digest/Journal	:	Yes.
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ii/	Whether to be approved for reporting in Press/Media.	:	Yes.
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Judgment.,

1. Sum and substance of the relief sought is for quashing of promotion of respondent Nos.6 to 16 as made from Class-IV to the post of Junior Assistants in Government Medical College, Jammu and for directing respondent No.2 to conduct type test of the private respondents including the petitioners through an Independent Agency and to make promotion thereafter on the basis of merit.
2. Brief facts of the case on the basis of which the instant writ petition was filed are that vide Order, Annexure-A dated 15.03.2012, services of the petitioners were regularized on the recommendations of the Empowered Committee constituted vide Government Order No.1423-GAD of 2009 dated 14.10.2009 in terms of the Jammu and Kashmir Civil Services (Special Provisions) Act, 2010 (hereinafter referred to as the Act). While some of the petitioners are stated to be discharging duty in Government Medical College, Jammu, others are stated to be working in Associated Hospitals of Government Medical College, Jammu. It is stated that in the

absence of rules for recruitment and promotion in Government Medical College, Jammu and its Associated Hospitals, draft rules were forwarded to the Jammu and Kashmir Government and vide order dated 19.01.2006 the same were extended to non-gazetted services in both the Medical Colleges.

3. Plea is that Annexure-B to Government order dated 19.01.2006 provides for unit-wise draft rules for the Administrative Unit under Category-1, inter alia for the post of Junior Assistant / Typist (in the pay scale of 3050-4910), as per which aforesaid posts are to be filled up by direct recruitment / promotion, from graduates / Matriculate Orderlies, Jamadars having 25 words speed in type writing per minute, on the basis of seniority in the ratio of 75% / 25%. Relevant extract of the qualifications for recruitment to the post of Junior Assistant / Typist as per draft rules are reproduced hereunder :

Administration Unit.

Category	Designation of Post	Pay Scale of Post	Minimum Qualification	Method of Recruitment
I	Junior Assistant /Typist	3050-4910	i/ Graduation from any recognized University with knowledge of type writing having no less than 35 words speed per minute for direct recruitment ii/ Six months certificate course in Computer applications from a	i/ 75% by direct recruitment ii/ 25% by promotion from amongst matriculate Orderlies /Jamadars having 25 words speed in type writing per minute on the basis of seniority.

			recognized Institute	
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4. That it is further stated that applications were invited from all eligible Class-IV candidates vide notice Annexure-C, dated 23.10.2013 to submit applications for promotion to the post of Junior Assistant on or before 24.10.2013 through the Head of the Department / Medical Superintendent and to appear for type test on 26.10.2013. The petitioners having submitted applications complete in all respects in response to Notice, Annexure-C, were allowed by respondent Nos.1 to 5 to appear along with the private respondents in the type test. However, result of the type test was not notified nor displayed on the notice board and despite the private respondents neither having qualified the type test nor possessing the requisite speed stipulated under the recruitment rules were allowed to join against the promotional post of Junior Assistant by respondent Nos.1 to 5 on wholly extraneous considerations by issuing individual order's to each of the private respondents.
5. Petitioners state that they submitted a representation, Annexure-D, dated 02.12.2013 for being provided copy of order of promotion of the private respondents as Junior Assistants in terms of Notice, Annexure-C dated 23.10.2013, but neither copy of promotion order of private respondents was provided nor was the result of the type test notified to enable them to ascertain the correct position. It is claimed that extraneous consideration were evident from the fact that respondent No.13, who was undergoing training as X-Ray Assistant was allowed to join against the post of Junior

Assistant without being relieved by the Principal, AMT School, Jammu.

6. That in the aforementioned background, the petitioners state that they filed SWP No.2662/2013. However, vide order dated 11.07.2014, the aforementioned writ petition was allowed to be withdrawn with liberty to file a fresh writ petition and it was thereafter that respondent Nos.3 & 4 provided Annexure-G dated 21.11.2013 i.e. the result of type test which clearly indicated that respondent Nos.11, 13, 14, 15 & 16 had failed in the type test. Result of the candidates in the type test is reproduced hereunder:-

S. No	Name of the Candidate	Place of Posting	Total words typed	Mistakes	Total correct words	Rmks
1	Ashwani Samyal	Accounts Section, GMC	357	13	344	Pass
2	Rakesh Kumar	Surgical	346	04	342	Pass
3	Rajeev Kumar	Psy. Diseases Hospital	341	16	325	Pass
4	Neena Padha	Psy. Diseases Hospital	296	8	288	Pass
5	Bansi Lal	CD Hospital	302	34	268	Pass
6	Gulam	Deptt. of Medicine	260	5	255	Pass
7	Kamal	Student Section	256	19	237	Fail
8	Kuljit Singh	Deptt. of Ophthalmology	195	7	188	Fail
9	Gagandee p Kour	AMT School	178	0	178	Fail
10	Lokesh Bakshi	AMT School	175	4	171	Fail
11	Rahul Dubey	Record Section SMGS	164	0	164	Fail
12	Ashwani Kumar	Record Section	159	3	156	Fail
13	Bandana Devi	SMGS Hospital	164	10	154	Fail
14	Seema	Record	162	11	151	Fail

	Jamwal	Section SMGS				
15	Sunil Kumar	Principal Office	152	4	148	Fail
16	Datt Pal Singh	Administrative Section	161	14	147	Fail
17	Jamesh Khokar	Purchase Committee	157	12	145	Fail
18	Sunil Saroj	Deptt. of Medicine	184	41	143	Fail
19	Anjali Raina	Col. Chopra Nursing Home	136	8	128	Fail
20	Swarn Lal	Community Medicine	138	10	128	Fail
21	Ramesh Kumar	Planning Section GMC	129	7	122	Fail
22	Darshan Kumar	Principal Office	126	16	110	Fail
23	Masoom Begum	SSH	109	13	96	Fail
24	Jang Bhadur	Hostel	95	1	94	Fail
25	Romesh Kumar	Deptt. of Bio chemistry	94	8	86	Fail
26	Narinder Kour	ECG Deptt.	96	11	85	Fail
27	Bashir	Psy. Diseases Hospital	72	6	66	Fail
28	Anil Kumar	Deptt. Anatomy	95	35	60	Fail
29	Ravinder Kumar	Deptt. of Orthopedics	195	140	55	Fail
30	Gopal Krishan	Principal Office	52	3	49	Fail

7. That it is the plea of the petitioners that if respondent Nos.6, 8, 9, 10 & 12 were put to type test, they would not qualify the same as per the requirement of the rules and that respondent Nos. 3 to 5 had helped the aforementioned respondents to qualify the same. On the basis of the same, it is contended that type test was not conducted by respondent Nos. 3 to 5 in a fair manner and promotion's to the post of Junior Assistants

were made by adopting a policy of pick and choose, otherwise than on merit, therefore the promotion of private respondents as Junior Assistants was illegal being contrary to Rule 25 of the Jammu and Kashmir Civil Services (Classification, Control & Appeal) Rules, 1956.

8. That Rule 25 of the Jammu and Kashmir Civil Services (Classification, Control & Appeal) Rules, 1956 is reproduced hereunder:-

“25. Promotions.

(1) All promotions shall be made by the appointing authority.

(2) Promotions to a service or class or to a selection category or grade in such service or class shall be made on grounds of merit and ability and shall be subject to the passing of tests that Government may prescribe in this behalf, seniority being considered only where the merit and ability are approximately equal.

(3) All other promotions shall be made in accordance with seniority and subject to any tests or special qualifications prescribed by Government unless:-

(a) the promotion of a member has been withheld as a penalty; or

(b) a member is given special promotion for conspicuous merit and ability.

(4) Where it is necessary in the public interest owing to an emergency, which has arisen and could not have been foreseen, to fill immediately a vacancy by promotion from a lower category, and where promotion in accordance with these rules would involve undue delay or expenditure or cause administrative inconvenience, the appointing authority may promote a person otherwise than in accordance these rules, but such temporarily, but such temporary promotion shall in no case exceed

three months on each occasion.

(5) A person promoted under sub-rule (4) shall not be entitled by reason only of such promotion to any preferential claim to future promotion.”

9. That it needs notice here that despite service, respondent Nos.7, 11, 13 to 16 did not put in appearance, therefore vide order of this Court dated 14.10.2014, said respondents were proceeded ex-parte. It also needs mention that earlier record had been directed to be produced, however, the same has not been produced. However, learned counsel argued the case on the basis of the material on record on the ground that the same was sufficient for the adjudication of the controversy in issue.
10. That in the objections filed on behalf of respondent Nos.1 to 5 it has been stated that copy of result of type test conducted was put up on the Notice Board of Associated Hospitals, Jammu vide order dated 21.11.2013 and vide order Annexure-R-3 dated 29.11.2013, 07 Class-IV employees who had qualified the type test were placed as Junior Assistants in their Own Pay & Grade (OPG) whereas 09 Class-IV employees who had appeared in the type test conducted at different times but had not cleared the said type test but were senior to the 07 Class-IV employees who had passed the type test were also placed as Junior Assistants in their Own Pay & Grade. Details of seven candidates who qualified the type test besides 09 candidates who did not qualify the type test yet were placed as Junior Assistants in OPG. Names of 07 Class-IV employees who qualified the type test are as under:-

Sr	Name of	D.O.A	Regular /	Category	Type test	Result
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No	the Official		Probationer.		conducted	Declared
1	Rohit Chandel	2010	Regular	SC	9.07.13	21.11.13
2	Neena Padha	2010	Probationer	OM	26.10.13	21.11.13
3	Bansi Lal	2010	Probationer	OM	-do-	-do-
4	Gulam Ahmed	2010	Probationer	ST	-do-	-do-
5	Ashwani Samyal	2010	Probationer	SC	-do-	-do-
6	Rakesh Kumar	2010	Probationer	OM	-do-	-do-
7	Rajeev Kumar	2010	Probationer	OM	-do-	-do-

11. Names of 09 candidates who did not qualify the type test yet were placed as Junior Assistants in OPG are as under:-

S. No.	Name of the Official	D.O.A.	Regular/ Probationer
1.	Jang Bhadur	1994	Regular
2.	Narinder Kour	2006	Regular
3.	Masoom Begum	2006	Regular
4.	Rahul Dubey	2008	Regular
5.	Gagandeep Kour	2010	Regular
6.	Sunil Kumar	2010	Regular
7.	Seema Jamwal	2011	Regular
8.	James Khokhar	2011	Regular
9.	Shahid Hussain Tak	1994	Regular

12. The placements made vide Annexure R-3 were subject to the following conditions :-

- i. *This appointment is purely a stop gap arrangement made to meet over the shortage of staff in the absence of regular appointments.*
- ii. *They shall have no claim whatsoever unless their names are cleared by DPC for their regular promotion under rules and as per seniority.*
- iii. *They shall not claim any monetary benefit for which their services are placed as Junior Assistants unless the same becomes due to them under rules.*
- iv. *Those candidates who have failed to qualify the Type-Test will have to qualify as and when the Type-Test is conducted.*
- v. *The names of those Class-IV employees who have not cleared their Type-Test, their names shall not be taken up in the DPC unless they qualify for the same and laid*

down conditions.

- vi. This order shall not confer any preferential right to hold the post on regular basis.*
- vii. This order is subject to any directions passed or may be passed by any legal forum/authority.*

13. That in the aforementioned background, it is contended that the placement of Class-IV employees as Junior Assistants vide order (Annexure-R-3) dated 29.11.2013 was purely by way of stop gap arrangement, subject to the condition's stipulated therein which inter alia provided that Class IV employees placed as Junior Assistants would have no claim whatsoever on the said post unless and until their names were cleared by the DPC for regular promotion as per rules and seniority, as such, no right of the petitioners, much less a fundamental right had been violated, therefore, the writ petition was misconceived and liable to be dismissed.
14. That as regards the petitioners, it is stated that none of them qualified the type test. As far as private respondent No.7 was concerned, it is stated that he had neither applied nor appeared in the type test nor was placed as Junior Assistant in the OPG. Respondent Nos.6, 8, 9, 10 and 12 were admitted to have appeared in the type test and qualified the same, therefore, were placed as Junior Assistants in OPG while remaining respondent Nos.11, 13, 14, 15 & 16 are stated not to have qualified the type test. However, conduct of type test otherwise than in a fair and proper manner was denied as wrong and incorrect. It was contended that a committee had been constituted to conduct the type test and the same had been conducted in a proper and fair manner and since the

petitioner's could not pass the same, therefore, as an afterthought were levelling baseless allegations. It has been reiterated that the placement of Class-IV employees as Junior Assistants vide Annexure R-3 dated 29.11.2013 was purely as a stop gap arrangement to meet the shortage of staff in the absence of regular appointment and had not resulted in the violation of any of the rights of the petitioners, that the petitioners could not claim to be promoted to the post of Junior Assistants in contravention of the Rules and Regulations as the same would amount to backdoor promotion and violation of Article 14 & 16 of the Constitution of India.

15. That respondent Nos.6, 8, 9, 10 & 12 also filed objections stating that they were promoted as Junior Assistants in OPG vide Office Order Annexure R-3 dated 29.11.2013 on their having qualified the type test from Class-IV to the post of Junior Assistants, that at best the claim of the petitioners was for promotion as Junior Assistants on the analogy of the 09 Class-IV employees who although had not qualified the type test yet were promoted vide order (Annexure R-3) dated 29.11.2013 but it was settled law that a claim in derogation of rules was not maintainable.
16. That as per position noted above, it is clear that the result of the type test conducted for promotion to the post of Junior Assistants in October, 2013 was placed on the notice board of Associated Hospitals, Jammu vide order No.AHJ/2013/2757 dated 21.11.2013. As per Annexure-R-3 i.e. Order No.320/AHJ of 2013 dated 29.11.2013, 09 Class-IV employees qualified the type test conducted from time to time

out of which 02 candidates had already been placed as Junior Assistants in OPG therefore the remaining 07 Class IV employees were placed as Junior Assistant in OPG. In addition thereto, 09 candidates/Class-IV employees who had appeared in the type test conducted at different times but had not cleared the same but were senior to the aforementioned 07 Class-IV employees who had passed the type test were also placed as Junior Assistants in OPG subject to the condition that they would qualify the type test as and when the same was conducted.

17. That perusal of Annexure R-3 dated 29.11.2013 also reveals that the placement of all the candidates/Class-IV employees as Junior Assistants was purely a stop gap arrangement made to meet the shortage of staff in the absence of regular appointment and subject to the condition that such appointees would have no claim whatsoever unless the same were cleared by the DPC for regular promotion under rules as per seniority nor they would claim any monetary benefit for service as Junior Assistants unless the same become due in terms of the rules, that candidates who had failed to qualify the prescribed type test would have to qualify the same as and when the type test was conducted. Names of Class-IV employees who had not cleared the type test would not be taken up to the DPC unless they qualified the type test and fulfilled the conditions stipulated in respect thereto.
18. That as evident, the aforementioned arrangement does not confer a right on either of the candidate's to hold the post on regular basis. Besides, none of the petitioners qualified the

type test and all of them failed in the same. Respondent No. 7 neither applied nor appeared in the type test nor was placed as Junior Assistant in the OPG. Respondent Nos.6 & 8 to 16 appeared in the type test but out of them only respondent Nos.6, 8, 9, 10 & 12 qualified the type test, therefore, were placed as Junior Assistants in OPG whereas remaining respondent Nos.11, 13, 14, 15 & 16 could not qualify the type test and are stated not to have been placed as Junior Assistants in OPG. However, the same is not factually correct as is evident from the details noted above.

19. The petitioners having failed to qualify the type test cannot make any grievance qua their non placement as Junior Assistant in OPG. They cannot seek a Mandamus that despite not having cleared the type test, they should be appointed as Junior Assistant in OPG on the analogy of others having been so appointed. The placement of Class IV employees as Junior Assistants in OPG vide Annexure R-3 dated 29.11.2013 was subject to the condition's as have been referred to therein. The placement of 09 Class IV employees as Junior Assistants despite their not having cleared the type test is also claimed to have been made to meet an administrative exigency and on account of said employees being senior to the 07 Class IV employees who had cleared the type test and were placed as Junior Assistant in OPG. However, the stop arrangement made vide Annexure R-3 cannot continue indefinitely. Appointments have to be made as per rules applicable otherwise, apart from compromising efficiency, it would lend credence to the plea of

the official respondents acting arbitrarily in circumvention of the rules.

20. In the circumstances, the writ petition is allowed. Official respondents shall conduct type test for promotion of Class IV employees to the post of Junior Assistants as per rules from amongst eligible candidates, (including Class IV employees who were placed as Junior Assistants in OPG as stop gap arrangement in administrative exigency despite their not having cleared the type test), and finalise promotions within three months from today.

Official respondents are also directed to process in accordance with rules within three months from today the placements made vide Annexure R-3 of those who qualified the type test for grant of benefits if admissible in terms of stipulated conditions and rules applicable. The placements of 09 Class IV employees as Junior Assistants in OPG despite their not having qualified the type test has the effect of blocking the right of Class IV employees who become eligible from being considered for promotion to the post of Junior Assistants as per rules. Therefore, stop gap arrangement as in force at present shall be discontinued beyond the aforementioned period of three months.

(B. S. Walia)
Judge

Jammu
21st October, 2016
(Ram Murti)