

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

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LPASW no.208/2017  
IA no.01/2017

Date of order: 28.02.2019

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**Dr. Javed Chowdhary**

**v.**

**State of J&K and others**

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***Coram:***

**Hon'ble Mr Justice Ali Mohammad Magrey, Judge  
Hon'ble Mr Justice Sanjeev Kumar, Judge**

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***Appearing Counsel:***

For Petitioner(s):	Mr S. H. Thakur, Advocate
For Respondent(s):	Mr M. A. Chashoo, AAG for respondents 1,2&4 Mr Shah Amir, AAG for respondents 3&5 Mr M. A. Qayoom, Advocate for respondent no.6

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***Whether approved for reporting?***

***Yes/No***

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**Sanjeev Kumar J:**

1. This intra court Appeal is directed against the judgement of the Writ Court dated 27<sup>th</sup> October 2017, passed in SWP no.894/2017, titled *Javaid Choudhary v. State of J&K and others*, whereby the challenge of the appellant to the Cabinet Decision dated 28<sup>th</sup> April 2017 and consequential Government Order dated 8<sup>th</sup> May 2017, has been rejected by the Writ Court.
2. The brief facts leading to the filing of this Appeal and as projected by the appellant in the writ petition are that in the year 2013 the respondents initiated the process to fill up the post of the Principal, Government Medical College (GMC), Srinagar, on regular basis. As per the Note prepared by the Department of Health and Medical Education (H&ME), for placement before the Establishment-cum-Selection Committee, the appellant was figuring at serial no.2, amongst the eligible candidates. It is stated that the respondents

ignored the claim of the appellant and decided to re-employ Dr Rafiq Ahmad Pampori, after his retirement on 28<sup>th</sup> February 2014, for a period of one year. This was done by the respondents vide Government Order no.122-HME of 2014 dated 25<sup>th</sup> February 2014. Dr. Rafiq Ahmad Pampori, however, tendered resignation before the date of expiration of his extension and in his place Dr. Qaiser Ahmad Koul, who was figuring at serial no.3 of the Eligibility List, was picked up and made incharge Principal, vide Government Order no.814-HME of 2015 dated 19<sup>th</sup> December 2015. The petitioner claims that he assailed the appointment of Dr Qaiser Ahmad Koul as incharge Principal, GMC, Srinagar in this Court and succeeded, but the respondents permitted Dr Qaiser Ahmad Koul to continue on the arrangement. It was only on 8<sup>th</sup> May 2017, when respondent no.6 came to be appointed as the Principal on regular basis, Dr Qaiser Ahmad Koul gave way. It is submitted that with a view to fill up the post of the Principal, GMC, on regular basis, a memorandum was prepared by the Health & Medical Education Department for submission to the Government. It is stated that as is evident from the memorandum, there was a Panel of five senior most Professors falling in the zone of consideration, which was considered by the Establishment-cum-Selection Committee. The appellant was senior most of all, whereas respondent no.6 was at the bottom. The Committee assessed the service records of all the Professors in the zone of consideration and on the basis of assessment of their service record, performance, comparative merit as reflected in their Annual Performance Reports (APRs) and other eligibilities, graded them in the order and ultimately recommended the appointment of the appellant as Principal, GMC, Srinagar. The appellant has also placed on record

of the writ petition the minutes of meeting of the Establishment-cum-Selection Committee. It is alleged that the Cabinet, acting arbitrarily and in most perfunctory manner, picked up respondent no.6 and approved her for appointment as Principal, GMC, Srinagar. The decision in this regard was taken by the Cabinet on 28<sup>th</sup> April 2017 and in pursuance thereto respondent no.1 vide Government Order no.252-HME of 2017 dated 8<sup>th</sup> May 2017, appointed respondent no.6 as Principal, GMC, Srinagar.

3. Aggrieved, the appellant, claiming to be senior most Professor and a candidate recommended by the Establishment-cum-Selection Committee on evaluating the overall merit, assailed the Cabinet Decision no.50/04/2017 dated 28<sup>th</sup> April 2017 as well as Government Order no.252-HME of 2017 dated 8<sup>th</sup> May 2017 in SWP no.894/2017. The order impugned in the writ petition was assailed by the appellant primarily on the ground that the Cabinet Decision impugned and the consequential government Order issued for appointment of respondent no.6, was illegal, arbitrary and violative of Article 14 and 16 of the Constitution. It was urged before the Writ Court that once the Establishment-cum-Selection Committee had recommended the name of the appellant on the basis of his overall merit and suitability, the Cabinet could not have taken a contrary decision and that too without recording any reason. It was asserted that once the Committee was constituted to evaluate the merit and to make the recommendations of a suitable candidate after evaluating the merit and suitability of all eligible candidates falling in the zone of consideration, the Cabinet ought to have given respect to the aforesaid recommendations and even if it had to differ, it must have only been done by recording the reasons.

4. The writ petition was contested by the official respondents as well as respondent no.6. The Cabinet Decision and the Government Order impugned, whereby respondent no.6 was appointed as Principal, GMC, Srinagar, was justified by the respondents on the ground that the recommendations of the Establishment-cum-Selection Committee were not binding on the Cabinet and the Cabinet was well within its rights to take a decision independent of the recommendations made by the Committee if such a decision was required in larger public interest. It was also submitted that the decision of the Cabinet did not suffer from any legal infirmity nor the same was actuated by any *mala fides*. In short, it was submitted that the decision of the Cabinet was based on collective wisdom and the same could not be faulted on the ground that it was not in consonance with the recommendations of the Establishment-cum-Selection Committee. The reply affidavit filed by respondent no.6 was also on the same lines.
5. The Writ Court considered the rival contentions of the learned counsel appearing for the parties and dismissed the writ petition. The writ petition was dismissed primarily on the ground that the recommendations of the Committee were non-statutory and therefore not binding on the Cabinet. Simply because the petitioner had been recommended by the Committee, he did not get any enforceable right to seek the appointment on the post. It was also held that as the recommendations of the Selection Committee being non-statutory in nature, did not create any right in favour of the appellant. In absence of mala fide or arbitrariness, the decision of the Cabinet to appoint respondent no.6 could not be interfered with.

6. The appellant is aggrieved of the judgement of the Writ Court and is before us in this Appeal.
7. Having heard the learned counsel for the parties and perused the record, it would be necessary to first set out the relevant provisions of the recruitment rules providing for minimum qualification and method of recruitment to the post of Principal, GMC. The appointment to the post of Principal, GMC, is governed by the J&K Medical Education (Gazetted) Recruitment Rules, 1979. Relevant extract of Scheduled-II reads as under:

S. No.	Subject	Designation of the post	Minimum qualification	Minimum teaching / research experience
1.		Principal/ Dean	The same qualification as prescribed for a Professor / Head of the Teaching department.	A minimum of 10 years teaching experience as Professor / Associate Professor in a Medical College out of which at least 5 years should be as Professor in a Department.

8. It is not in dispute that both the appellant and respondent no.6 hold the requisite qualification and are eligible to be appointed as Principal of a Medical College. Apart from the appellant and respondent no.6, three more candidates had attained the eligibility for the post on the date the process for filling up the post was set in motion. The appointing authority of the Principal, Government Medical College, is the Government and in terms of the J&K Government Business Rules, the matter falls within the domain of the Cabinet. It is also seen that the post of Principal, GMC, is required to be filled up by way of promotion from Class-II. The relevant extract of Schedule III of the Rules of 1979 is noticed hereunder:

Class	Category	Designation of the post	Grade	Method of recruitment
<b>A. Teaching Wing:</b>				
I		Principal	1200-1900	By promotion from Class II.
II		Professor	1200-1900	By promotion from Class III

9. Contrary to what is provided in the Rules, it was vehemently contended before us that the post is selection post and is required to be filled up by the Government on the recommendations of the Establishment-cum-Selection Committee. We have carefully gone through the Rules of 1979 and do not find any such mandate contained in any of the rules. Plain reading of the Rules would suggest that the post of the Principal is one amongst the various gazetted posts born on the Medical Education (Gazetted) Service, constituted by the Rules of 1979 and *a fortiori* required to be filled up on the same lines as the other posts are to be filled up. However, since the post of the Principal, Medical College, has been exempted from the purview of the Public Service Commission in terms of amendment carried out in SRO 53 dated 30<sup>th</sup> January 1987 and because of that reason, the same has been placed before the Establishment-cum-Selection Committee.

10. Be that as it may, the fact remains that the Government has treated post of the Principal, GMC, as the selection post and, therefore, placed the matter with regard to the selection of Principal, GMC, Srinagar, before the Establishment-cum-Selection Committee constituted vide Government Order no.1244-GAD of 2016 dated 17<sup>th</sup> November 2016. The Committee, as is apparent from the records, considered the name of five eligible Professors falling in

the zone of consideration for appointment to the post in question. The Committee held its meeting on 15<sup>th</sup> September 2016, graded all the five candidates on the basis of their merit in the following manner:

S. No.	Name of the officer	2010-11	2011-12	2012-13	2013-14	2014-15	Overall Grading
1.	Dr Javid Choudhary	Very Good	Very Good	Very Good	--	Good	Very Good
2.	Dr Qaiser Ahmad	Very Good	Very Good		Very Good	Very Good	Very Good
3.	Dr Parvaiz Ahmad Shah	Very Good	Very Good	Good	Very Good	Very Good	Very Good
4.	Dr Samia Rashid	Very Good	Outstanding	Good	Very Good	Very Good	Very Good
5.	Dr Showkat Geelani	--	Very Good	Good	Good	Good	Good

11. On the basis of assessment and evaluation made by the Committee, the appellant was recommended for appointment as the Principal, GMC, Srinagar. Based on the recommendations of the Establishment-cum-Selection Committee, the Department of Health & Medical Education prepared a memorandum for submission to the Cabinet. The resolution, which was drafted by the Department for its approval by the Cabinet, deserves to be noticed and reads as under:

“Sanction is hereby accorded to the appointment of Dr Javid Choudhary Professor Paediatrics Govt. Medical College Srinagar as Principal Government Medical College, Srinagar in the pay scale of Rs.37400-67000, with grade pay of Rs.12,000/-.”

12. It further transpires that when this memorandum prepared by the Health & Medical Education Department reached the Department of General Administration, the same was found to be without accompanying the Annexure B, depicting the grading of the eligible incumbents. Accordingly, the memorandum was returned



vide U.O. no.GDC-188/2016 dated 22<sup>nd</sup> December 2016, with the following advice:

“Returned. The Department has annexed Annexure-A with the memorandum which relates to the Grading of Senior Consultants in the Health & Family Welfare Department. Accordingly, the Department is advised to annex the annexure (Annexure B) with the memorandum relating to the grading of eligible doctors for the post of Principal Government Medical College, Srinagar which was cleared by the Establishment-cum-Selection Committee on 30.11.2016.”

13.In response to the advisory issued by the General Administration Department, the Department of Health & Medical Education resubmitted the proposal after doing the needful for placing the same before the Cabinet. This was done by the Department concerned vide U. O. no.ME/Gaz/249/2004-II dated 26<sup>th</sup> December 2016. The aforesaid proposal, which was complete in all respects, was ultimately placed before the Cabinet with the draft resolution of the Department of Health & Medical Education, drawn with the approval of the Minister incharge, which we have reproduced herein above. The Cabinet, as is apparent from the perusal of the records, without deliberating on the matter, did not accord with the recommendations of the Establishment-cum-Selection Committee and chose respondent no.6 for appointment as the Principal, GMC, Srinagar. We made frantic effort to find out the reasons supporting the aforesaid decision from the contemporaneous record, but in vain. What we found from the records reads as under:

“The Cabinet decided to appoint Dr Samia Rashid as Principal, Medical College, Srinagar.”

14.In the backdrop of the aforesaid narration of sequence of events, the twin questions that beg determination by this Court can be as under:



- (a) Whether the recommendations made by the Establishment-cum-Selection Committee in the matter of selection of a candidate to a post are merely recommendatory in nature and, therefore, do not bind the Cabinet; and
- (b) Whether the decision of the Cabinet rejecting the candidature of the office recommended by the Establishment-cum-Selection Committee and taking a decision independent of the recommendations is justiciable.

15. Undoubtedly, the constitution of the Establishment-cum-Selection Committee is non-statutory in nature. The learned counsel appearing for the parties could not point out any statutory source under which the Government constitutes the Establishment-cum-Selection Committee. To us, it appears that Establishment-cum-Selection Committee is constituted by the Government to assist the Cabinet to take an informed decision in the matter of selection and appointments, which fall within the domain of the Cabinet. It is akin to the J&K Public Service Commission and J&K Services Selection Board, which are entrusted the job of making the selection to the gazetted and non-gazetted posts respectively. The only difference we find is the nature of authority vested in these selection bodies and the Establishment-cum-Selection Committee, constituted by the Government. The former selection bodies are constituted under the Statute whereas the latter is creation of executive fiat. The Establishment-cum-Selection Committee is a creation of the Government and, therefore, its recommendations are in the nature of placing the relevant material before the competent authority to take a decision and, thus, cannot be said to be binding on the Government. As narrated above, the appointing authority vis-à-vis the Principal of Government Medical College of the State, is the Government. The Principal of Government Medical

College, being a major head of the Department, falls in the list of cases, which are required to be brought before the Cabinet under the J&K Government Business Rules framed by the Governor in exercise of powers conferred by Section 43 and subsection (2) of Section 45 of the Constitution of Jammu and Kashmir.

16. The learned counsel appearing for respondent no.6, Mr Qayoom, has referred to the several judgements of the Hon'ble Supreme Court as well as of this Court, viz. *1991 (3) SCC 47*; *1993 (1) SCC 154*; *1994 (Supp) (1) SCC 250*; *AIR 2000 SC 2513*; *AIR 2003 SC 3103*; *AIR 1995 SC 568*; *AIR 1984 SC 1850*; *2018 (1) SLJ 44*, to bring home the point that the recommendations made by the Establishment-cum-Selection Committee are not binding on the Government/Cabinet and the Cabinet is free to take a call independent of such recommendations and if from the material placed before it, it finds a candidate other than the one recommended by the Committee to be suitable, it can approve appointment of such a candidate and ignore the recommendations of the Establishment-cum-Selection Committee. The law in this regard is well settled and, therefore, we do not think it necessary to further delve into it. The Courts have gone to the extent of holding that even the recommendations of the Constitutional authority, like the Public Service Commission, are not binding on the appointing authority and the appointing authority, for good reasons, can refused to act upon the recommendations of the Public Service Committee. To the similar fact is the law developed with regard to the recommendations of the other selection bodies, like service selection boards. Since there is not much debate or divergence of opinion, we, therefore, refrain from burdening this judgement with the citations referred to at the

Bar by the learned counsel for the respondents. We, accordingly, hold that the recommendations of the Establishment-cum-Selection Committee, which is a non-statutory and a creation of Government, are not binding on the Cabinet and the Cabinet is free to take a decision independent of and even contrary to the recommendations made by the Committee.

17. This brings us to second question, which pertains to justiciability of the decisions of the Cabinet. It is vehemently contended by the learned counsel for the respondents that the decisions made by the Cabinet are immune to judicial review. We cannot countenance the proposition propounded by the learned counsel for the respondents.

18. India – a constitutional democracy – is governed by rule of law. The monarchy, which used to rule the roost in the pre-constitutional era, has since vanished. Every authority, howsoever high it may be, is bound by the Constitutional law. No authority is envisaged under the Constitution, which possesses the powers, the exercise whereof is not questionable in the court of law. True it is, that the recommendations of the Establishment-cum-Selection Committee made in favour of the appellant were not binding on the Cabinet, but the Cabinet could not have differed with the recommendations and taken a decision different from the one recommended by the Establishment-cum-Selection Committee without assigning any reason. We are conscious of the fact that while embarking upon the judicial review of the Cabinet decision, we may not go into sufficiency of the reasons or even correctness of the said decision. But, nonetheless, if the Court finds that the decision is totally arbitrary, whimsical and fanciful, it would step in and quash such decision. It does not matter whether such decision is made by the

Cabinet or some authority higher than that of the Cabinet. All decisions of the Cabinet must conform to the provisions of Article 14 and 16 of the Constitution.

19. Arbitrariness is antithetic to equality. Any decision, which is arbitrary, violates the equality clause, the soul of rule of law. We are in 21<sup>st</sup> century. Things were different in 19<sup>th</sup> century, when feudal setup had unfettered power and discretion of the crown and such concept was not alien. However, in a democracy, governed by rule of law, where arbitrariness in any form is eschewed, no Government or authority including the Cabinet has a right to do what it pleases. The Constitution does not give any licence to the Cabinet to act arbitrarily, capriciously or whimsically. It is presumed that discretionary powers conferred in absolute and unfettered terms on any public authority, will necessarily and obviously be exercised reasonably and for public good. We have examined the whole record carefully and do not find any reason worth the name that has been recorded by the Cabinet in any corner of the contemporaneous record. The two-line decision, reproduced above, to appoint respondent no.6 cannot be justified on any count, particularly when the Establishment-cum-Selection Committee, appointed by it, had on evaluation of whole record, recommended the appellant for appointment as Principal, GMC, Srinagar. To reiterate, it may be stated that we are not for a minute holding or suggesting that the Cabinet could not have taken a decision independent of the recommendations of the Establishment-cum-Selection Committee, but, in doing so, it was constitutionally obliged to record its reasons for dissent with the recommendations of the Committee and for taking a decision independently on the basis of record placed before it.

20. For the foregoing reasons, we are constrained to intervene in the matter and therefore hold the Cabinet Decision and consequential Government order, impugned in the writ petition, bad in the eye of law and not sustainable. Accordingly, we allow this Appeal and set-aside the judgement of the Writ Court dated 27<sup>th</sup> October 2017, passed in SWP no.894/2017. As a result, the writ petition (SWP no.894/2017) is allowed and Cabinet Decision no.50/04/2017 dated 28<sup>th</sup> April 2017 and Government Order no.252-HME of 2017 dated 8<sup>th</sup> May 2017, impugned in the writ petition, are quashed, with a direction to the respondents to place the whole material, consisting of minutes of the decision of the Establishment-cum-Selection Committee along with Annexure A&B, before the Cabinet/State Administrative Council (SAC), as the case may be, for its reconsideration. Let the Cabinet/SAC take appropriate decision as may be warranted in light of the observations made by us herein above, within a period of four weeks from the date certified copy of this order becomes available to the respondents. Till such decision is taken by the Cabinet/SAC, it shall be open to the Government to make the incharge or temporary arrangement to run the day to day affairs of the office of the Principal, Government Medical College, Srinagar.

21. **Disposed of.**

22. To avoid any delay in the process, let a copy of this order be sent by the Registry to Principal Secretary to Government, Health & Medical Education Department.

**(Sanjeev Kumar)**  
**Judge**

**(Ali Mohammad Magrey)**  
**Judge**

**Srinagar**

28.02.2019

*Ajaz Ahmad, PS*