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STATE OF J & K AND ORS.

v.

SANJEEV KUMAR AND ORS.

FEBRUARY 24, 2005

B

[ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Service Law :

C

Jammu and Kashmir Medical Education Gazetted Service Recruitment Rules, 1979; Rule 57 :

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Appointment of doctors by direct recruitment—Grant of ad hoc promotion to departmental employees approved by State Public Service Commission—Panel/select list drawn by the Commission in pursuance of direct recruitment—Appointments from list/panel—Challenge to—Allowed by High Court holding that the appointments were made from future vacancies/beyond the notified vacancies—On appeal, Held: Commission recommended for promotion for departmental employees within a very short period from the date of the advertisement for direct recruitment—Thus, there existed vacancies—High Court did not examine the validity of select list/panel beyond one year—File record containing policy decision with regard to the appointments in question not produced by the Department in spite of specific directions by the High Court—Hence, the case is remitted to the High Court for consideration afresh.

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Appellant-State of Jammu & Kashmir issued an advertisement for appointment of lecturers/doctors in the Medical Education Department. In the meantime, four departmental employees were granted ad hoc promotion. Later, State Public Service Commission (Commission) accorded its approval for the promotion. Pursuant to the advertisement for the direct recruitment, the Commission prepared a select list and waiting list. In pursuance thereof, three persons were appointed. Their appointment was challenged by the respondents. The challenge was held to be without substance by the High Court. However, in the Letters Patent Appeal, Division Bench of the High Court held that the appointments were beyond the notified vacancies as indicated in the advertisement for the appointment but it was in respect of future vacancies. Hence the present appeals.

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It was contended by the appellant-State that the approach of the High Court was erroneous both factually and legally; that it failed to notice that because of the officiating promotions given to four persons, there existed four vacancies, merely because they were not notified, that did not make the situation different; and that since petitioners were not eligible for appointment, they did not have *locus standi* to challenge the selection.

Respondents submitted that the State did not make requisition for appointment for six posts but it had categorically advertised for appointment for two posts; that had the Commission considered the four vacancies to be existing vacancies, it would have made list of six candidates and would not have drawn up waiting list; and that though the writ petitioners were found to be ineligible on the date of advertisement, they were eligible on the date the select list was drawn up.

Disposing of the appeals, the Court

HELD : 1.1. The Government can by a policy decision appoint persons from the waiting list; and that while issuing advertisement the Government could have taken into account the likely vacancies. [406-B]

Prem Singh and Ors. v. Haryana State Electricity Board and Ors., [1996] 4 SCC 319 and *Virender S. Hooda and Ors. v. State of Haryana and Anr.*, [1999] 3 SCC 696, relied on.

1.2. In fact, within a very short period from the date of the advertisement, Public Service Commission approved the recommendations for promotions for four persons. Therefore, it cannot be *prima facie* said that there were no existing vacancies or likely vacancies. Moreover, the effect of Rule 57 has not been considered by the Division Bench of the High Court on the strong reasoning that though Single Judge of the High Court had referred to Rules, the specific rule was not indicated, though such a rule exists. It was not the case of the writ petitioners in the Appeal before the Division Bench that no such rule exists. The effect of the rule was required to be considered by the High Court. [406-D-E]

1.3. The question as to why the Commission prepared select list of only two persons, when it could have drawn up list of six persons, while drawing up of the select list, needs to be considered by the High Court. Though a reference has been made by the High Court to the Commission's stand in its judgment, the details are not indicated. Another question that

A needs to be considered is if there were six vacancies (two notified and four existing), whether the eligibility to be reckoned with reference to the date as indicated in the advertisement for appointment or from the date select list was prepared. [406-F-G]

B 2.1. In the facts and circumstances of the case, the matter is remitted to the High Court for fresh consideration. Parties shall be permitted to file further affidavits and documents in support of their respective stand. Policy decision files shall be produced by the State as and when required by the Bench hearing the appeal. [407-C]

C 2.2. It is clarified that no opinion has been expressed on the merits, which shall be considered by the High Court uninfluenced by any observation made by it earlier in the impugned judgment. [407-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1396-1397 of 2005.

D From the Judgment and Order dated 25.8.2003 of the Jammu and Kashmir High Court in L.P.A. (SW) Nos. 168 and 303 of 2002.

WITH

E C.A. Nos. 1411-1412 of 2005.

Anis Suhrawardy for the appellant in C.A. No. 1396-1397/2005.

F P.P. Rao, P.Ramesh Kumar, Achal Sethi, Ms.Aparna Bhat and Mushtaq Ahmad for the Appellant in C.A. Nos. 1411-1412/2005 and Respondent Nos. 2-4 in C.A. Nos. 1396-97/2005.

A. Mariarputham and Ms.Aruna Mathur for M/s. Arputhan and Aruna & Co. for the Respondents.

The Judgment of the Court was delivered by

G ARIJIT PASAYAT, J. Leave granted.

H These appeals are directed against the judgment rendered by a Division Bench of the Jammu and Kashmir High Court holding that the appointment of three doctors, namely, Dr. Muzaffar Jan, Dr. Ghulam Rasool Wani and Dr. Ghanshyam Saini-the appellants in the civil appeals corresponding to SLP

(C) Nos.21954-21955 of 2003 to be illegal. They are also private respondents in the appeals filed by the State of Jammu and Kashmir, and Jammu and Kashmir Public Service Commission (in short the 'PSC').

Backgrounds facts in a nutshell are as follows :

An advertisement was issued on 12.10.1998 by the State inviting applications for appointment as lectures in Paediatrics in the Medical Education Department of the State of Jammu and Kashmir. Before that date four persons had been granted *ad-hoc* promotion as Assistant Professors. Such promotion was subject to approval by the PSC. On 23.10.1998 PSC accorded approval to the promotion of the four lecturers as Assistant Professors.

In response to the advertisement, several persons had applied. Dr. Sanjeev Kumar and Dr. Arun Gandotra (the writ petitioners before the High Court) had also applied. Since they were not found eligible for appointment they were not called for interview. Questioning such action writ petitions were filed by them. Pursuant to interim orders by the High Court they were allowed to participate in the selection process; but were not found eligible. The writ petitions filed by them were dismissed. There was no further challenge. Subsequently, a select list was prepared by the PSC indicating that one Dr. Nazir Ahmad Parray was placed at No. 1 while the result in respect of second post was with held. A waiting list was prepared where names of Dr. Muzaffar Jan, Dr. Ghulam Rasool Wani and Dr. Ghanshyam Saini were listed. The select list was prepared on 25.10.1999. According to the operative Rules i.e. Jammu and Kashmir Medical Education Gazetted Service Recruitment Rules, 1979 (in short the 'Rules') period of validity of the list is one year which may be extended by another six months on special request of the Government if the request for such extension is made before the expiry of the validity of the panel. The relevant Rule is Rule 57. Before the expiry of the one year, period Dr. Muzaffar Jan, Dr. Ghulam Rasool Wani and Dr. Ghanshyam Saini were appointed. Questioning their appointments, Dr. Sanjeev Kumar and Dr. Arun Gandotra filed writ petitions before the Jammu and Kashmir High Court. A learned Single Judge dismissed the application holding that the appointments were made in accordance with the Rules, and there was nothing infirm and in any event the writ petitioners who were found ineligible initially and their challenge to the selection was held to be without substance cannot raise any dispute. Letters Patent Appeals were filed before the High Court. By the impugned judgment the Division Bench of the High Court allowed the appeal holding that the appointments were beyond the notified

- A vacancies as per advertisement and this was not really a case of existing vacancies which were not notified. On the contrary, it was in respect of future vacancies. It was held that though learned Single Judge had referred to certain Rule as regards preparation of select list, the specific Rule was not noted. The writ petitioners had locus standi to question the selection as they could have come within the zone of consideration had these posts been notified.
- B Though reference was made to certain policy decisions to justify the appointments the relevant files were not produced in spite of specific directions.

- C In support of the appeals, learned counsel for the appellants submitted that the High Court rejected the State's stand that the policy decision was taken to appoint the selected persons, in view of the piquant situations, the relevant files could not be produced. The files would clearly indicate that to meet the requirements as stated by the Medical Council of India (in short the 'MCI') appointment from the waiting list was imperative. The approach of the High Court was erroneous both factually and legally. It failed to notice that because of the officiating promotions given to four persons, there were
- D four vacancies existing. Merely because they were not notified, that did not make the situation different. It was not really a case of future vacancies but anticipated and existing vacancies. Since it is permissible, no faults should have been found by the High Court. The writ petitioners did not possess the requisite qualifications and, therefore, they did not have locus standi to challenge the selection.
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- F In response, learned counsel for the writ petitioners (respondents in the present appeals) submitted that the State had not made any requisition for six posts. It had categorically advertised for two posts. If in reality the PSC had considered the four vacancies to be existing vacancies, it would have made list of six candidates and would not have drawn up waiting list. Though the writ petitioners were found to be ineligible on the date of advertisement, they were eligible on the date the select list was drawn up. The advertisement indicated the eligibility criteria to be as on 26.10.1998.

- G The legal position so far as the case of existing vacancies, notified vacancies and future vacancies has been set out by this Court in several decisions. In *Prem Singh and Ors. v. Haryana State Electricity Board and Ors.*, [1996] 4 SCC 319, in paragraphs 25 and 26 it was laid down as follows:

- H "25. From the above discussion of the case-law it becomes clear that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not

for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case.

26. In the present case, as against the 62 advertised posts the Board made appointments on 138 posts. The selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 2-11-1991 and the selection process which followed thereafter. But as the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of retirement etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. However, the appointments which were made against future vacancies - in this case on posts which were newly created - must be regarded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of retirement and 12 because of deaths. The vacancies which were likely to arise as a result of retirement could have been reasonably anticipated by the Board. The Board through oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the appointments made against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be quashed. Therefore, in view of the special facts and circumstances of this case we do not think it proper to invalidate the appointments made on those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid. Though the

A High Court was right in the view it has taken, we modify its order to the aforesaid extent. These appeals are allowed accordingly. No order as to costs."

B As is clearly spelt from the quoted portion, the Government can by a policy decision appoint people from the waiting list. It has been laid down that on the facts of *Prem Singh's* case (supra) while issuing advertisement the Government could have taken into account likely vacancies. The principle in *Prem Singh's* case (supra) was followed in *Virender S. Hooda and Ors. v. State of Haryana and Anr.*, [1999] 3 SCC 696.

C It appears from the records that prior to the date of advertisement cases of four persons who had been promoted on officiating basis were receiving consideration of the PSC. In fact, within a very short period from the date of the advertisement, PSC approved the recommendations for promotions for four persons. Therefore, it cannot be *prima facie* said that there were no existing vacancies or likely vacancies. Additionally, the effect of Rule 57 has not been considered by the Division Bench on the strong reasoning that though learned Single Judge had referred to a Rule, the specific Rule was not indicated. It is not in dispute that such a Rule exists. It was not the case of the writ petitioners in the Appeal before the Division Bench that no such Rule exists. The effect of the Rule was required to be considered by the High Court.

E But several other questions also need to be considered. One is why the PSC prepared select list of only two persons, when it could have drawn up list of six persons, while drawing up of the select list on 25.10.1999 after the interview on 14.9.1999. Though a reference has been made by the High Court to the PSC's stand in its judgment, the details are not indicated.

F Further the question that needs to be considered is if there were six vacancies (two notified and four existing), whether the eligibility was to be reckoned with reference to 26.10.1998 or from the date select list was prepared on 25.10.1999. This has to be considered in the background of the dismissal of the earlier writ petitions filed by Dr. Arun Gandotra and Dr. Sanjeev Kumar. There is no definite finding recorded by the Division Bench in this regard.

G Additionally we find that though the State was asked to produce the files, it appears that for reasons beyond its control the files containing the alleged policy decision could not be produced for perusal of the Bench hearing

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the appeals.

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In the aforesaid background, we remit the matter to the High Court for fresh consideration. Parties shall be permitted to file further affidavits and documents in support of their respective stand. As undertaken by the learned counsel for the State, files shall be produced as and when required by the Bench hearing the appeal.

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The existing position pursuant to interim order of this court shall continue till disposal of the matter afresh by the High Court. We make it clear that we have not expressed any opinion on the merits, which shall be considered by the High Court uninfluenced by any observation made by it earlier in the impugned judgment.

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The appeals are accordingly disposed of without any order as to costs.

S.K.S.

Appeals disposed of.