

Ashok Kumar Sharma and Another

Vs

Chander Shekher and Another

State of Jammu & Kashmir

Vs

Chander Shekher and Others

Civil Appeal Nos. 5407-08 of 1992

(Dr. T.K. Thommen, V. Ramaswami-II, R.M. Sahai JJ)

18.12.1992

JUDGMENT

THOMMEN, J. -

1. Leave granted.

2. By the impugned judgment dated December 13, 1991 in L.P.A. No. 8 of 1985, the learned Judges of the Division Bench of the Jammu & Kashmir High Court reversed the judgment of the learned Single Judge. As a result of the impugned judgment, the appellants, who were promoted as Assistant Engineers are in danger of being placed junior to persons who had obtained lower ranks than the appellants at the time of their appointment as Junior Engineers. At the time of selection to the post of Junior Engineers, the appellants were allotted higher ranks on the basis of merits in comparison to the respondents. Writ petition filed by some of the candidates was rejected by the High Court on the ground of laches and also for the reason that the selection had to be broad based. A similar petition was filed by the present respondents and it was dismissed by the learned Single Judge which was reversed by the impugned judgment.

3. The question which arises in the present appeal is whether or not candidates who were fully qualified to be appointed as Junior Engineers on the dates of interview, but whose results had not been declared on the dates of submission of their applications, were entitled to be considered for appointment to the post of Junior Engineer. If the answer is in the affirmative, the appellants who had become qualified on the dates of interview and had admittedly acquired higher marks in the interview were rightly appointed as Junior Engineers on the basis of their merits and were rightly promoted to the post of Assistant Engineer by reason of seniority in preference to the respondents who were also appointed as Junior Engineers and subsequently promoted, but placed junior to the appellants.

4. Advertisement inviting applications for appointment to the post of Junior Engineer was published on June 9, 1982. The last date for submitting applications was specifically stated to be July 15, 1982. By that day, the appellants and the respondents had submitted their applications. The appellants had appeared for the B.E. (Civil) examination and had been awaiting their results until

the results were published on August 21, 1982. Interviews were held on various dates commencing on August 24, 1982. The appellants were declared selected on April 21, 1983 and appointed as Junior Engineers. By reason of their merits, they were placed senior to the respondents. The respondents contended in the High Court that since the appellants were not qualified to apply for the post of the date of submission of applications as their results had not been declared until after that date, they were not qualified to appear for interview and the results announced on the basis of interview and the marks obtained by the were invalid and their applications ought to have been rejected, the announcement of the results prior to the interview and their obtaining higher marks, notwithstanding.

5. The respondents' challenge against the selection of the appellants did not appeal to either of the two Single Judges who heard the writ petitions filed by some of the respondents. The learned Judge in their respective decisions held that the challenge was belated and the selection of the appellants who had obtained higher marks and who had been fully qualified prior to the dates of interview made the whose selection process broad based.

6. The learned Judges of the Division Bench, however, taking a technical view and on the wrong assumption of mala fide on the part of the appointing authority, reversed the judgment of the learned Single Judge and by their impugned judgment, held that the appellants were wrongly selected.

7. Certain statements in the impugned judgment show that the learned Judges of the Division bench assumed mala fide on the part of the concerned authorities in selecting the appellants. We have perused the relevant files and we see nothing in them suggesting mala fide of any kind on the part of the concerned authorities. The simple question is whether the appellants were rightly appointed.

8. It cannot be gainsaid that on the dates of interview the appellants were fully qualified, for their B.E. (Civil) examination results had been declared on August 21, 1982. The interviews were held on August 24, 1982 and subsequent dates. It cannot also be gainsaid that on July 15, 1982 which was the last date for submission of applications, the B.E. (Civil) examination result in respect of the appellants had not been declared, although they were awaiting their results of the examination conducted earlier. The advertisement notice No. 2 of 1982 dated June 9, 1982 specifically stated :

".... The applicants should not be more than 30 years and not less than 18 years of age on the 1st January, 1982 and should possess the qualification as noted against each post.....

Attested copies of the following certificate (original to be produced at the time of interview before the State Rectt. Board) should be attached with the application.

* * *##

(4) Academic/Technical Examination Certificate.

* * *##

Incomplete applications and those not accompanied by the requisite certificates shall not be entertained.

..... Candidates who fulfil the qualifications prescribed for appointment to the posts advertised shall alone be eligible for being called for interview and others need not

therefore, apply."

9. Mr. Milon Kumar Banerjee, appearing for the appellants, contends that on the dates of interview the appellants were eligible for being called for interview. Their applications were not liable to be rejected, for they had the requisite qualifications at the crucial time, namely, the dates of interview. It is true that when the applications were submitted, but appellants had not obtained the results and were awaiting the same, but the intent of the appointing authority, as clearly stated in their affidavit, was to allow candidates who had obtained the necessary qualification on the date of interview to appear for interview. The appellants had fulfilled all the necessary qualifications for being interviewed and their selection on the basis of the results announced on the basis of the marks obtained by them was rightly made.

10. Mr. Banerjee refers to Rule 37 of the Public Service Commission Business Rules and submits that the principle of that rule is applicable to the case of the appellants, although that rule was meant specially for selection by Public Service Commission and the present selection was not one made by the Public Service Commission. Nevertheless, the principle adopted by the Public Service Commission Business Rules makes a selection broad based, as found by the learned Single Judge, and the best talents available for recruitment are not rejected merely by reason of the fact that the results of the examination were, for not fault of theirs, delayed until after the last date prescribed for submission of applications, but were announced before the dates of interview.

11. Rule 37 of the Public Service Commission Business Rules reads :

"37. Applications of candidates who have appeared in the examination, the passing of which may make them eligible to appear in an interview for recruitment to a post to be made otherwise than by a competitive examination, but results whereof have not been declared up to the date of making of the application, may be entertained provisionally, but no such candidate shall be permitted to take the interview if he is declared as having failed in the examination or if the results are not available on the date the viva-voce test is held."

12. Counsel for the respondents submits that Rule 37 has no application to the instant case, for the selection was not made by the Public Service Commission. In any case, the advertisement notice had not stated that the applications of candidates whose results had not been announced would be allowed to appear for the interview provisionally, as required by Rule 37.

13. It is true Rule 37 is in terms applicable only to Public Service Commission candidates and due notice of provisional entertainment of their application, subject to their passing examination before the date of the interview, is a requirement peculiar to Rule 37 and is not applicable to the present case.

14. If the principle of Rule 37 is by analogy applicable, the fact that notice of provisional entertainment of applications, subject to passing of the examination before the date of interview, is a requirement in the interests of candidates who fell within that category. The appellants are by analogy persons of that category, but they have no complaint on any such ground.

15. The fact is that the appellants did pass the examination and were fully qualified for being selected prior to the date of interview. By allowing the appellants to sit for the interview and by their selection on the basis of their comparative merits, the recruiting authority was able to get the

best talents available. It was certainly in the public interest that the interview was made as broad based as was possible on the basis of qualification. The reasoning of the learned Single Judge was thus based on sound principle with reference to comparatively superior merits. It was in the public interest that better candidates who were fully qualified on the dates of selection were not rejected, notwithstanding that the results of the examination in which they had appeared had been delayed for no fault of theirs. The appellants were fully qualified on the dates of the interview and taking into account the generally followed principle of Rule 37 in the State of Jammu & Kashmir, we are of opinion that the technical view adopted by the learned Judges of the Division Bench was incorrect and the view expressed by the learned Single Judge, was, on the facts of this case, the correct view. Accordingly, we set aside the impugned judgment of the Division Bench and restore that of the learned Single Judge. In the result, we uphold the results announced by the recruiting authority. The appeal is allowed in the above terms. However, we make no order as to costs.

CIVIL APPEAL No. 5408 of 1992

(Arising out of SLP (C) No. 10503 of 1992)

16. Leave granted.

17. In view of our judgment in Civil Appeal No. 5407 of 1992 (arising out of SLP (C) No. 12215 of 1992), this appeal is also allowed. However, we do not make any order as to costs.

R. M. SAHAI, J. (partly dissenting) -

Although I agree with Brother Thommen, J., that the appeals deserve to be allowed and the seniority of the appellants and respondents, who were selected as Junior Engineers in 1982, had to be determined by the marks they secured in the interview conducted by the Selection Broad but with profound respect, in my opinion, they are entitled to this relief not as a matter of law but due to equitable considerations arising in peculiar facts and circumstances of the case. I would have refrained from expressing any opinion on eligibility of the appellants who, admittedly, were not possessed of requisite qualifications till the last date of submission of forms for selection as Junior Engineer but if the submission of the appellants is accepted and it is held that their applications were not liable to be rejected as they acquired the requisite qualifications prior to commencement of the interview then it is likely to create misapprehension about the legal implications of such notification not only in the State of Jammu & Kashmir but even other State where similar rules are in force or where similar advertisements may be issued.

19. To appreciate legality of the issue involved the full text of the advertisement dated June 9, 1982 is extracted below :

GOVERNMENT OF JAMMU AND KASHMIR STATE RECRUITMENT BOARD

Advertisement Notice No. 2 of 1982, dated June 9, 1982

Applications are invited on the prescribed form along with a self addressed envelope of 50 paise and one copy of passport size photograph duly attested which should reach the office of the undersigned on or before 15th July 1982, from the permanent residents of J&K State who are eligible for the posts shown in the annexure to this notification. The applicants should not be more than 30 years and not less than 18 years of age on the 1st January 1982 and should possess the qualification as noted against each post. Upper age limit is however, relaxable in the case of those in Government

service and candidates representing Scheduled Caste by 5 years and 2 years respectively and in the case of ex-servicemen up to 45 years.

Vacancies shall be reserved for SC candidates where applicable under rules.

Attested copies of the following certificates (original to be produced at the time of interview before the State Rectt. Board) should be attached with the application :

1. Matriculation/Higher Secondary Elect. Examination
2. Permanent resident certificate.
3. Character certificate.
4. Academic/Technical Examination Certificate.
5. Marks certificate of each examination.
6. Experience certificate, if any.

Incomplete applications and those not accompanied by the requisite certificates shall not be entertained.

Applicants who are already in Government service should submit their applications through their heads of Deptt./offices. They can however, send a copy of application direct to the Convenor State Recruitment Board but such applications will be considered only on receipt of the copy of application through proper channel.

Persons receiving stipend under the Self-Employment Scheme will be considered for employment provided they refund the stipend in full. Those having received loans are, however, debarred from employment. Candidates should indicate the stipends/loan if any drawn, in the application. Candidates who fulfil the qualifications prescribed for appointment to the posts advertised shall alone be eligible for being called for interview and others need not therefore apply.

Fresh candidates who are selected shall be governed under the J&K Apprentice (Recruitment) Rules, 1981. Since the rules have been stayed by the Hon'ble High Court the fresh candidates recruited would be entitled to only half of the pay and allowances of the post if the rules impugned subsequently upheld.

Candidates applying for the posts mentioned in the Annexure shall have to appear on their own expenses for practical test and/or interview before the Board.

Sd/- Hamid Ullah Administrative Officer, State Recruitment Board, Srinagar.##

Annexure to advertisement Notice No. 2 of 1982 dated August 9, 1982.

#Sl. No. Name of the Post Grade Qualifications 1. JE Civil 875-1400 B.E. Civil 2. Sectional Officer 680-1240 3 years diploma in (Elect.) Elect Engg. 3. Sectional Officer 680-1240 3 years diploma in (Civil) Civil Engg. 4. Draftsman (Civil) 680-980 2 years draftsman Course in Civil Engg.##

The relevant part of the notification has been underlined by me. It can be divided in three parts. The first and the most important part required a candidate to apply on or before, the date specified, if he satisfied the requirement of, (i) being a permanent resident of Jammu & Kashmir; (ii) was eligible for the post shown in the annexure to the notification; (iii) was not more than 30 years and not less than 18 years of age on 1st January 1982; and (iv) was possessed of the qualifications as noted against each post. If the notification would have stopped there, probably, much could be said in favour of the appellants but the second part required every candidate to file authenticate copy of the certificate in proof of each of the conditions. The notification further provided that, 'incomplete applications and those not accompanied by the requisite certificates shall not be entertained'. The notification, therefore, provided not, only, the conditions which a candidate was required to possess when applying for the post mentioned in the notification but he was also required to support it with authenticated certificate and if he failed to do so then the application was not liable to be entertained. In legal terminology where something is required to be done and the consequences of failure to do so are also provided then it is known as mandatory. The mandatory character of possessing the requirements as provided in the first part of the notification stands further strengthened from the third and last part of the notification which prohibited the candidates from applying if they did not possess the requisite qualifications. In view of these clear and specific conditions laid down in the advertisement those candidates who were not possessed of the B.E. qualifications were not eligible for applying nor their applications aware liable to be entertained nor could they be called for interview. Eligibility for the post mentioned in the notification depended on possessing the qualification noted against each post. The expression, 'shall be possessed of such qualifications, is indicative of both the mandatory character of the requirement and its operation in praesenti. That is a candidate must not only have been qualified but he should have been possessed of it on the date the application was made. The construction suggested by the learned counsel for the appellant that the relevant date for purposes of eligibility was the date of interview and not the date of application or July 15, 1982 the last date for submission of forms is not made out from the language of the notification. Acceptance of such construction would result in altering the first part of the advertisement prescribing eligibility on the date of applying for the post as being extended to the date of interview. If it is read in the manner suggested then the requirement that incomplete applications and those not accompanied by the requisite certificates shall not be entertained, shall become meaningless. Purpose of filing certificate along with application was to prove that the conditions required were satisfied. Non-filing of any of the certificates could have resulted in not entertaining the application the requirements as specified would have been presumed to be non-existent. Fulfilment of conditions was mandatory and its proof could be directory. The former could not be waived or deferred whereas the defect in latter could be cured even subsequently. That is proof could be furnished till date of interview but not the eligibility to apply for the post. Any other construction would further be contrary to the last part of the notification.

20. Nor can the notification, inviting applications, be construed in light of what was stated by the Government in the affidavit filed by it in the High Court. The stand of the Government that it always intended to permit candidates who qualified till date of interview was against record. Such subsequent embellishment by Government to shield its officers of permitting such candidates who were not qualified cannot be countenanced. The courts should not approve of it as it emanates in unfairness and ends in arbitrariness. Every candidate appearing in the B.E. examination could not have had knowledge, as was spelt out by the Government in its affidavit before the High Court, except probably those few who despite clear words of the notification chose to apply may be with knowledge that the interview shall not be held till their results were announced. The language of the notification must have prevented large number of candidates who must have appeared in the B.E.

examination from applying as they were not qualified in terms of its whereas others of same group or class stood to gain due to intention of Government which was not known to a common man and was put up before the High Court in reply to the writ filed by the respondent. It is not borne out from the record. The appellants, thus, who were not only not qualified and were not entitled to apply and whose applications were not liable to be entertained by this method got an unfair advantage over those who for lack of knowledge of Government's intention did not apply. May be no one from those who were prevented from applying due to unawareness of the intention of Government which came to light in the High Court only could challenge the selection yet it is the duty of the Court under the Constitution once it is apprised of true facts to make the Government act fairly. I do not want to say further on this aspect except that the affidavit filed by the State could not be correct to which I shall advert when I deal with the other submission founded on Rule 37. I am, therefore, of the opinion that the appellants being ineligible on the date of application they could not have been called for interview. The conduct of the appellants in applying without being qualified, the unusual behaviour of the Board in keeping such applications alive and not intimating the candidates that their applications could not be entertained and above all the Government's affidavit that their intention was to allow candidates who had obtained necessary qualifications on the date of interview leave much to be desired. Such practice should be discouraged not in the interest of those who appeared and were placed lower in merit but for sake of those who have neither the approach nor have the financial resource to be aware of such uncommon happenings.

21. Rule 37 of the Public Service Commission Rules reads as under :

"37. Applications of candidates who have appeared in the examination, the passing of which may make them eligible to appear in an interview for recruitment to a post to be made otherwise than by a competitive examination, but results whereof have not been declared up to the date of making of the application, may be entertained provisionally, but no such candidate shall be permitted to take the interview if he is declared as having failed in the examination or if the results are not available on the date the viva-voce test is held.

The advertisement notice issued by the Commission shall carry a note to this effect invariably.

This shall not apply to applications for sitting in a competitive examination in which case the applicants shall have to be in possession of the prescribed qualifications on the date of making the application."

Efficacy of the rule or the objective of its enactment to throw open the competition by making it more broad based and attract best talents cannot be disputed. But the issue involved is if it could be extended by analogy to any selection or competition held by any other body. Unfairness of construing the notification, in the manner suggested, has already been dealt with. Rules framed under the Statute to carry out the objective of the enactment. If the rule making authority goes beyond the power conferred on it the rule is rendered invalid. A rule framed under one Statute, therefore, cannot be invoked for carrying out the objective of another enactment. I have, therefore, grave doubt if rules framed by the Public Service Commission could be utilised for proposes of construing the notification issued by the department of Government which has separate set of rules.

22. Having dealt with legal aspect it is necessary to be stated that it transpired from the records which were produced by the learned counsel for State of Jammu & Kashmir that a few days before

the interview of first batch of candidates was to commence the result of B.E. was announced. Some of the appellants who had applied, even though they were not qualified, approached the Secretary in the department concerned to direct the Board to interview the as they were qualified now. The matter was examined thereafter and after ascertaining from the Commission that such practice was prevalent a decision was taken by the appropriate authority to follow the same. Therefore it was not a case where the rule of the Commission need be extended by analogy but factually the appropriate authority had taken decision to follow the same. It was thus adoption of the Public Service Commission Rule for purposes of calling the appellants for interview by the Board. Whether this could be done or not and if it could have been done then at what point of time need not be gone into as I agree with the High Court that it would be unfair to quash the selection after such a long time. But before parting with this aspect it is necessary to be stated that the official who filed the affidavit in the High Court did not either peruse the records before filing the affidavit or he deliberately attempted not to place the facts in true perspective. In either case it was bad. And the Government should chastise such officers who do not place the facts correctly even before courts. From the record it appeared that the Board before issuing interview letters had taken a decision that those candidates who were not qualified were not entitled to be called. It was only after the result was announced that the Secretary to the Government, at the instance of some of the candidates, got the matter examined. To state, therefore, that the Government intended from the beginning to call such candidates who qualified at the time of interview was incorrect and against the record.

23. What has persuaded me, however, to allow the appeals, is not that there was not illegality in calling the appellants for interview or that the Board was justified in taking the decision to follow the practice of Commission but similar claim of the respondents had been rejected earlier by the High Court and by the time it was allowed more than ten years had elapsed since the examination was held and selection was made. The High Court for this very reason did not enter into the question of eligibility and tried to adjust the equities between the parties by directing that all those candidates, namely, the appellants who were not qualified on the date of application should be placed as junior to respondents who had applied earlier and were qualified. The order of the High Court, in my opinion, is manifestly unjust. Once the eligibility bar was lifted by the High Court, for whatever reason may be as said by it due to passage of time or because of erroneous application of Rule 37 of the Public Service Commission Rules, the appellants who were subjected to same interview as the respondents and were found better qualified and secured higher marks, could not be placed junior to others. The equity does not know the half way. Once the appellants were held to be eligible may be not strictly under law but on equitable considerations, then it was wholly unjust to place them junior and under those who in the same examination secured lesser marks.

24. I would, therefore, in agreement with Brother Thommen, J., allow the appeals, set aside the order passed by the High Court and restore that of the Single Judge.

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