

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 18.03.2024

Pronounced on: 03.04.2024

WP(C) No.1981/2023

DR. RAFI RAMZAN DAR & ORS. ...PETITIONER(S)

Through: - Mr. Arif Sikander, Advocate.

Vs.

UT OF J&K & ORS. ...RESPONDENT(S)

Through: - Mr. Mubeen Wani, Dy. AG-for R1.

Mr. Shah Aamir, Advocate-for R2&R3.

CORAM:

HON'BLE MR. JUSTICE RAJNESH OSWAL

HON'BLE MS. JUSTICE MOKSHA KHAJURIA KAZMI, JUDGE

JUDGMENT

Oswal 'J'

1) The respondent No. 3 vide notification No.09-PSC(DR-P) of 2021 dated 03.09.2021 invited applications through online mode for the posts of Assistant Professor in different disciplines in Government Degree Colleges of Union Territory of Jammu and Kashmir. The applications were also invited vide notification No.08-PSC(DR-P) of 2021 dated 18.08.2021 for the posts of Physical Training Instructor in Higher Education Department, Union Territory of Jammu and Kashmir. The petitioners applied pursuant to the above mentioned notifications for the posts of Assistant Professor and Physical Training Instructor, as the case may be. It is claimed that the

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Public Service Commission vide different notices shortlisted the petitioners for the interview for the posts applied for by them. The petitioners, who are 29 in number, have mentioned the particulars of petitioners No.1 to 27 only in para (8) of the petition while stating that they were shortlisted for the interview for the posts, they had applied for.

2) As per the Notifications (supra), the assessment of the candidates for the posts of Assistant Professor as well as Physical Training Instructor was to be made on the basis of weightage to the academic merit and on the basis of performance of the candidates in the interview/viva voce.

3) A meeting was held on 01.09.2022 under the Chairpersonship of the Chief Secretary to review Rule 45 of the Jammu and Kashmir Public Service Commission (Business and Procedure) Rules, 2021 (hereinafter referred to as “the Rules of 2021”). The said meeting was attended by the Principal Secretary to Government, Higher Education Department, Secretary to Government, General Administration Department, Secretary to Government, Department of Law Justice & Parliamentary Affairs and Secretary, J&K Public Service Commission. In

the aforesaid meeting, it was unanimously decided and proposed that the selection for the post of Assistant Professor/Librarian/PTI in Higher Education Department should be made on the basis of following criteria:

- a. Written Examination: 75 Marks
 - i) Paper-I: Relevant Subject: 60 Marks
 - ii) Paper-II: General (Multi-disciplinary, General studies, Indian History and Culture, Constitution of India, Ability Enhancement etc.): 15 marks
- b. Academic Qualification : 10 marks (criterion as per UGC Regulations)
 - i) UG/PG (on pro rata basis) : as per UGC
 - ii) NET/SET/SLET : as per UGC
 - iii) PH.D : as per UGC
 - iv) Experience : as per UGC
- c. Interview : 15 marks

Simultaneously, the respondent No.3 was requested to place the proposed criteria before the respondent No.2 to carry out the necessary changes in Rule 45 of the Rules of 2021 and other relevant rules so as to make the recruitment process fully objective and transparent. It was also proposed that the respondent No.1 would make a request to the J&K Public Service Commission and the J&K Public Service Commission would, after change in criteria for selection of Assistant Professor/PTI/Librarian, withdraw the advertised posts and re-advertise the same as per new criteria adopted by the JK PSC.

4) Thereafter the respondent No.1 in terms of communication dated 22.09.2022 forwarded the minutes of the meeting held on 01.09.2022 to the respondent No.2 and thereafter the respondent No.1 vide communication dated 01.12.2022, requested the JKPSCT to withdraw the posts advertised vide various notifications including the notifications referred above. The respondent No. 2 vide notification No.03-PSC (DR-P) of 2023 dated 01.02.2023 withdrew all the posts advertised vide different notifications including the notifications (supra).

5) The petitioners being aggrieved of the communication dated 22.09.2022 read with notification No.03-PSC (DR-P) of 2023 dated 01.02.2023, assailed the same before the Central Administrative Tribunal, Srinagar Bench, and vide order dated 08.02.2023, the learned Tribunal, while issuing notice in the OA, disposed of the interim application filed by the petitioners by directing that the claim of the petitioners shall remain subject to outcome of the OA. During the pendency of that application before the learned Tribunal, the respondent No.2 re-advertised the posts of Assistant Professor and Physical Training Instructor in the Higher

Education Department vide notification No.06-PSC (DR-P) of 2023 dated 01.03.2023 and notification No.08-PSC (DR-P) of 2023 dated 01.03.2023. The petitioners being aggrieved of the aforesaid notifications again invoked the jurisdiction of the learned Tribunal and while issuing notice in the matter, the learned Tribunal vide order dated 25.04.2023 as an ad-interim relief directed the respondents that any process of selection pursuant to the notification dated 01.03.2023 shall remain subject to outcome of the OA. The petitioners approached this Court through the medium of WP(C) No.1008/2023 thereby challenging order dated 08.02.2023 and WP(C) No.1009/2023 challenging the order dated 25.04.2023 passed by the learned Tribunal and this Court vide order dated 08.05.2023, with the consent of learned counsel for the parties, directed the respondent No.2 not to proceed with the recruitment process till the disposal of the application pending before the learned Tribunal. Thereafter the learned Tribunal, vide judgment dated 26.07.2023, dismissed both the OAs i.e. OA No.89/2023 and OA No.292/2023 preferred by the petitioners and this is how the petitioners have approached this Court through the medium of present writ petition for the purpose of assailing the order dated 26.07.2023 passed

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by the learned Tribunal in cases titled “Dr. Rafi Ramzan Dar and others vs. UT of J&K & Ors.”.

6) The petitioners have assailed the order dated 26.07.2023 on the following grounds:

- (I) *That changing the rules of the game after the game is played is not permissible but the learned Tribunal has not appreciated this issue in its right and proper perspective;*
- (II) *That though a candidate who finds a place in the select list has no vested right to be appointed to any post but the employer or the selecting authority cannot act arbitrarily and in a malafide manner withdraw the posts on the ground of change of rules for selection;*
- (III) *That the applicants were successfully shortlisted for interview to the posts of Assistant Professor or Physical Training Instructor as the case may be, as such, had a reasonable expectation that they would be appointed though they have no vested right;*
- (IV) *That the Jammu and Kashmir Public Service Commission is an autonomous institution and cannot be controlled by the Government of Jammu and Kashmir and the process to review Rule 45 the Rules of 2021 for the recruitment of Assistant Professors and Physical Education Instructors in the Higher Education Department could have been*

done at the sole discretion of the J&K Public Service Commission and the Higher Education Department Government of Jammu and Kashmir, had no authority or power vested in them to decide or to take a call to review any of the provisions of the Rules of 2021;

(V) That as the respondents could not have altered the selection criteria while the process of selection was in midway, the respondents have adopted an indirect method of doing it indirectly what they could not have done directly by withdrawing the posts in question;

(VI) That the learned Tribunal has not returned any finding on the issue that despite rule change, the Public Service Commission has proceeded with the selection for the posts of Lecturer/Assistant Professor in various disciplines of Super Specialty Hospital, Government Medical College, Jammu, in Health and Medical Education notified vide notification dated 17.02.2023;

7) The respondents No.2 and 3 have opposed the writ petition on the ground that the recruitment for the posts of Assistant Professor in Higher Education Department is held in accordance with the procedure prescribed in the concerned Recruitment Rules. The selection procedure/scheme of selection as laid down in the Recruitment

Rules governing the requisitioned posts is followed by the Commission but where the procedure and/or scheme of selection has not been provided in the Recruitment Rules, the Commission is at liberty to lay down its own criteria for selection, of course, in tune with law. Accordingly, the Rules of 2021 were notified which provide the selection procedure/scheme of selection for the post of Assistant Professor/Librarian/Physical Training Instructor in Higher Education Department under Rule 45 of the said Rules. It is stated that as per aforesaid Rule, 30 points were allotted for interview, including the demonstration points, 09 points were allotted for Research, Publications, Books, NCC, Sports, Gold medal etc. There was no provision for written test and the candidates were to be shortlisted for interview in the ratio of 1:3 based on the points obtained out of total 61 points. As per the criteria, the candidates possessing NET/SLET, JRF and PhD but having marginally less marks in their UG and PG examinations were not getting the equal playing field in the selection process. It is further stated that the criteria of assessment and awarding marks in UG/PG courses varies from University to University and from year to year and there is no uniform yardstick for awarding marks by all the

Universities. The respondent Nos. 2&3 have given an illustration of the post of Assistant Professor in Commerce Discipline in respect of open merit category, where only one post was advertised against which 96 candidates applied and as per old criteria, out of 96 candidates, only 03 candidates can be shortlisted for participation in the interview leaving 93 candidates without any chance to participate in the selection process. The respondents No.2 and 3 have further demonstrated how two candidates who got 0.13 points and 0.25 points less than the last candidate in the provisional shortlist would not be able to participate in the selection process. The respondents have also demonstrated that one candidate figuring at serial No.5 has obtained 13.39 points in PG (essential qualification for the post of Assistant Professor), which is higher than the candidate at serial No.3 in the provisional shortlist. It is further stated that considering the operation of older Rule 45 as harsh and arbitrary towards those candidates who even did not get the chance to participate in the competition merely because they have been awarded marginally less marks in their UG/PG courses, the amendment in the Rule was made and the posts were withdrawn. It has been also submitted that many such

candidates who were denied the opportunity to participate in the selection process for recruitment of Assistant Professors represented to the Commission that there should be a written examination and short-listing of the candidates in the ratio of 1:3 for interviews should be done on the basis of written examination and weightage for NET/SLET, JRF, PhD etc. may be given to the successful candidates shortlisted based on the written test. It is further contended that in order to amend the rules governing the recruitment of Assistant Professors so as to follow an objective criteria, the Chief Secretary, UT of J&K, held a meeting with other officials & Secretary J&K Public Service Commission on 01.09.2022 and the minutes of the said meeting were issued on 20.09.2022. The respondent-Commission further deliberated and decided to amend Rule 45 to bring uniformity, fairness and transparency into the selection process and it is obvious that when the candidates will be selected on the basis of rigorous competition wherein not only their academic merit/special attributes but also their subject knowledge would be tested by way of a written examination, then the finally selected candidates would be more meritorious, bright and deserving. The respondents No.2

and 3 have further mentioned the break-up of total 100 points under the new Rule 45. It is the stand of the respondents that the process of selection pursuant to the notifications mentioned above was only at its initial stage i.e. scrutiny of documents, preparation of provisional shortlist of the candidates with deficiencies in documents and final list for calling the candidates for interview was not prepared at all and no interviews were conducted. The petitioners have no vested right whatsoever on these posts and as the final action was not carried out pursuant to the advertisement notices made in 2021/2022, therefore, the same were withdrawn by virtue of notification/order dated 01.02.2023. The respondents have denied that the amended Rule 45 is in contravention of the University Grants Commission Regulations as the amended Rule 45 is intended to lay down higher standards by prescribing written examination even for the purpose of short-listing of candidates than that provided under UGC regulations. The UGC Regulations relate to the selections made by the selection committee of colleges whereas in the instant case the selection is being made by the authority constituted under Article 315 of the Constitution of India.

In reply to the selections made by the Public Service

Commission for the posts of Lecturer/Assistant Professor in Health and Medical Education Department, it has been stated that all the posts stood withdrawn and were advertised later as per the substituted Rule 44. However, in respect of total 04 posts (i.e. 02 posts in Pediatric Surgery, one post each in GMC, Jammu/Srinagar Super Specialty, 01 post of Lecturer Oral & Dental Pathology and 01 post of Lecturer Conservative and Operative Dentistry), where the selection was at advanced stage and due to public hue and cry in absence of proper facility in these disciplines, the selection was made, as such, the petitioners cannot draw any parity. It is also stated that out of 30 writ petitioners, 21 petitioners have already appeared in the examination conducted on 27.08.2023 and out of these 21 petitioners, 12 petitioners could not even qualify the written test and only four petitioners qualified for interview and were selected finally.

8) Precisely, the stand of the respondents No.2 and 3 is that the selection process was at the very initial stage and the final list of the candidates to be interviewed was not even prepared and no interview notice was issued and the petitioners have no case at all.

9) Mr. Arif Sikander, learned counsel for the petitioners submitted that the petitioners were shortlisted for interview and, as such, the respondents could not have arbitrarily withdrawn the posts for which the petitioners had applied and that too only on the ground that the criteria for selection was changed for filling up the posts of Assistant Professor/PTI. He laid much stress on the ground that in the middle of the selection process, the respondents could not have changed the criteria for selection and once the respondents could not have changed the criteria during the process of selection, they could not have withdrawn the posts as it amounted to doing a particular act indirectly which could not have been done directly. In support of his arguments, learned counsel for the petitioners placed reliance upon the following judgments:

- (I) ***East Coast Railway & anr. vs. Mahadev Appa Rao & Ors, (2010) 7 SCC 678;***
- (II) ***Dinesh Kumar Kashap & Ors. vs. South East Central Railway & Ors. (2019) 12 SCC 798;***
- (III) ***Shankarsan Dash vs. Union of India, (1991) 3 SCC 47;***
- (IV) ***Maharashtra State Road Transport Corporation & Ors. vs. Rajendra Bheem Rao Manway & Ors, (2001) 10 SCC 51;***
- (V) ***K. Manjusree vs. State of Andhra Pradesh & anr, (2008) 3 SCC 512;***
- (VI) ***Tej Kashap Prakesh Pathak & Ors vs. Rajasthan High Court & Ors. (2013) 4 SCC 540;***

- (VII) *Sushil Kumar Pandey & Ors. vs. The High Court of Jharkhand & anr. (Writ Petition (Civil) No.753/2023);***
- (VIII) *Sivanandan CT & Ors. vs. High Court of Kerala & Ors. (Writ petition (Civil) No.229 of 2017);***
- (IX) *State of Bihar vs. Shyamanadan Mishra (Civil Appeal No.7364 of 2014);***
- (X) *Union of India & Ors. vs. Mahendra Singh, SLP (Civil) No.19886 of 2019;***
- (XI) *Gambhirdan K. Gandhvi vs. State of Gujarat & Ors, (2022) LiveLaw (SC) 242;***
- (XII) *State of Tamil Nadu vs. K. Shyam Sunder & Ors, (2011) 8 SCC 737;***

10) *Per contra*, Mr. Mubeen Wani, Dy. AG, appearing for respondent No.1, submitted that it is the prerogative of the employer to go ahead with the selection process or not and the petitioners cannot object to the withdrawal of the posts by the respondents, more particularly when there was justified reason for withdrawing the posts.

11) Mr. Shah Aamir, learned counsel for respondents No.2 and 3 submitted that the contention of the petitioners that the shortlist was issued for interview of the candidates, is absolutely incorrect because it was a provisional shortlist only and any candidate who was aggrieved of the rejection of his/her name in the provisional shortlist was provided ten days' time from the date of publication of the shortlist to make representation against his/her rejection. Had any candidate been successful in his/her representation, he or she would

have also earned the place in the final shortlist for conducting interview. He further argued that the un-amended Rule 45 the Rules of 2021 was operating harshly against the candidates who were possessed of points just less than the candidates making out in the provisional shortlist and in order to get the best talent in the field, the Rule was amended so as to ensure participation of large number of candidates. Mr. Shah Aamir further argued that the 21 petitioners participated in the selection process initiated pursuant to the amended Rule 45 and only 04 petitioners could make it to the final list which clearly demonstrates that there were many more meritorious candidates than the non-selected petitioners who due to un-amended Rule were deprived of their right of consideration in the recruitment process just because the selection criteria was based on academic record and interview. He has placed reliance upon the following judgments:

- (I) ***Jatinder Kumar and others vs. State of Punjab and others, AIR 1984 SC 1850;***
- (II) ***Shankarsan Dash vs. Union of India, AIR 1991 SC 1612;***
- (III) ***Ashok Kumar Yadav and others vs. State of Haryana and others, (1985) 4 SCC 417;***

12) We have heard learned counsel for the parties and perused the record.

13) The petitioners are mainly aggrieved of the withdrawal of the posts of Assistant Professor/PTI advertised vide notifications dated 03.09.2021 and 18.08.2021 respectively. The main contention raised by the petitioners is that as per different notices issued by the respondents No.2 and 3, they were shortlisted for interview and by withdrawing the posts and re-advertising them subsequently, grave injustice has been caused to the petitioners. In order to appreciate this contention of the petitioners, this Court would deem it proper to extract the subject of all the notices in respect of short-listing/rejection of the candidates, which is as under:

"Subject: Shortlisting/rejection of candidature for the post of Assistant Professor,.....in Higher Education Department, notified vide Notification No.....dated....."

14) This Court also deems it proper to extract the last para of the notices, which is common to all the notices regarding short-listing/rejection of the candidature as mentioned above, as under:

"Any candidate, if aggrieved with the rejection of (his or her) candidature, he/she may represent before the Commission with documentary evidence within 10 days from the date of publication of this Notice. No representation/grievance whatsoever shall be entertained after the stipulated period."

15) The contention raised by the petitioner that notices(s) published by the respondent No.2 was(were)

the shortlist(s) and thereafter, only interviews were to be conducted, as such the withdrawal of the posts is an arbitrary act, is misconceived, as mere perusal of the last para of all the aforesaid notices demonstrate that the period of ten days from the date of publication of the respective notices was provided to the candidates whose candidature was rejected to make a representation against rejection of their candidature. This Court says so because had any candidate filed a representation and been successful in his/her representation, he/she would have ousted the candidate falling in the provisional shortlist but, of course, subject to merit. In this view of the matter, it cannot be held that by withdrawal of the posts, any of the rights of the petitioners has been violated because the selection process was still at the stage of infancy. The Hon'ble Supreme Court in the case of **Shankarsan Dash vs. Union of India, AIR 1991 SC 1612**, has held as under:

“7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. **Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary**

manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha and Others*, [1974] 1 SCR 165; *Miss Neelima Shangla v. State of Haryana and Others*, [1986] 4 SCC 268 and *Jitendra Kumar and Others v. State of Punjab and Others*, [1985] 1 SCR 899”
(emphasis added)

16) It would also be apt to take note of the observations made by the Hon’ble Supreme Court of India in ***State of Orissa v. Bhikari Charan Khuntia*, (2003) 10 SCC 144**, which are extracted as under:

8. As was observed by this Court in *Govt. of Orissa v. Haraprasad Das* [(1998) 1 SCC 487 : 1998 SCC (L&S) 382] whether to fill up or not to fill up a post, is a policy decision and unless it is arbitrary, the High Court or the Tribunal has no jurisdiction to interfere with such decision of the Government and direct it to make further appointments. **In the present case, no selection was made and not even any select list was in existence. Even if there had been any such selection or inclusion of any of the names in the select list, the same could not have given any right. Therefore, mere sending of names by the employment exchange could not have, and in fact, has not conferred any right.** The writ applications were thoroughly misconceived, and the Court misdirected itself as to the nature of relief to be granted.

(emphasis added)

17) Further, in the judgment relied upon by the petitioners in case titled ***East Coast Railway & anr. vs. Mahadev Appa Rao & Ors*, (2010) 7 SCC 678**, it has been held that though a candidate who has passed an examination or whose name appears in the select list

does not have an indefeasible right to appointment yet appointment cannot be denied arbitrarily nor can select test be cancelled without giving proper justification.

18) Likewise, in ***Dinesh Kumar Kashyap and others vs. South East Central Railway and others, (2019) 12 SCC 798***, the Hon'ble Supreme Court of India has held that it is not mandatory upon the employer to fill all the posts but discretion not to appoint must be exercised judiciously and not arbitrarily and at the same time, the Courts normally would not interfere with the discretion not to fill up posts except where exercise of such discretion is found to be arbitrary, capricious or whimsical.

19) The ratio laid down in all the judgments as mentioned above is that though a candidate whose name figures in the select list has no indefeasible right to be appointed but at the same time, the discretion of the employer in not filling the posts should not be arbitrary, whimsical or capricious, meaning thereby not proceeding ahead with the selection process, should not be arbitrary i.e. there must be justifiable reason for not proceeding ahead with the completion of the selection process. As already mentioned above, the process of selection

initiated by the respondents No.2 and 3 was still in its infancy and the cause projected by the respondents for withdrawing the posts was amendment of the Rule 45 of the Rules of 2021 to ensure wider participation of the candidates for getting best talent in the respective fields, cannot be termed as arbitrary or capricious. After full-fledged deliberation in a meeting chaired by the Chief Secretary of the Union Territory of Jammu and Kashmir wherein other officers also participated, it was decided that Rule 45 is required to be amended and a request for withdrawal of the posts advertised earlier was also made. The respondents have given an example of selection for the posts of Assistant Professor in Commerce to demonstrate as to how because of difference of few points, the candidates having higher merit in the PG course were not figuring in the provisional shortlist. In view of above, we do not find that the decision of the respondents in withdrawing the posts and to re-advertise the same by way of subsequent notifications is either arbitrary or unjustified.

20) The principle as contended by the petitioners that the rules of game cannot be changed midway is not applicable in the present facts and circumstances of the

case, more particularly when the game itself was not played and only preparations were being made. The respondents No.2 & 3 were yet to issue final shortlist for interview and before doing so, the notifications were withdrawn. On this ground as well, the petitioners have not case at all.

21) It was also urged by learned counsel for the petitioners that while the respondent No.2 withdrew the posts for which the petitioners had applied, the respondent no.2 continued with the selection process for the purpose of making appointments in Health and Medical Education Department on the basis of un-amended Rule 45. The respondents No.2 and 3 have met the aforesaid contention of the petitioners by submitting that the selection process for those posts had reached advanced stage and, as such, the same were filled up. The said selection pertains to Health and Medical Education Department whereas the posts in the present petition pertain to Higher Education Department. Rather the notification dated 17.02.2023 reveals that the same was shortlist for conducting the interviews of the candidates on the date and time mentioned therein, whereas in the case of the petitioners it was the

provisional select list and already observed by this court the petitioner(s) could have been ousted due to the successful consideration of representation of the meritorious rejected candidate. The petitioners, as such, cannot get any benefit out of the selections made in the Health and Medical Education Department on the basis of the un-amended Rule.

22) The last contention of the petitioners that Higher Education Department could not have taken a call for amendment of the Rule 45 of the Rules of 2021 is also misconceived as they have not thrown any challenge to the amended Rule 45.

23) We have examined the order passed by the learned Tribunal and we do not find any illegality or infirmity in the same which may warrant interference by this Court. The present writ petition is found to be misconceived and the same is, accordingly, dismissed.

(MOKSHA KHAJURIA KAZMI)
JUDGE

(RAJNESH OSWLA)
JUDGE

Srinagar
03.04.2024
“Bhat Altaf-Secy”

Whether the order is reportable: Yes/No