

**IN THE HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

(THROUGH VIRTUAL MODE)

Reserved on: 01.06.2021
Pronounced on: 16.06.2021

**WP(C) No.1100/2021
CM No.4498/2021**

DR. SURESH SHARMA

...PETITIONER(S)

Through: Mr. Abhinav Sharma, Sr. Adv. with Mr.
Abhimanyu Sharma, Advocate.

Vs.

UNION TERRITORY OF J&K & ORS.

....RESPONDENT(S)

Through: Mr. H. A. Siddiqui, Sr. AAG-for R1 & R2.
Mr. Sudershan Sharma, Adv-for R3.
None for R4.

CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1) The petitioner, in this petition, has, *inter alia*, prayed for the following reliefs:

- (I) Writ in the nature of Mandamus, declaring the reserve category (RBA) certificates issued by the competent authority in favour of respondent No.,3 and 4 in the year 2008 and 2007 respectively, as null and void;
- (II) Writ in the nature of Certiorari, to quash order No.111-HMED of 2009 dated 02.03.2009 and

Government Order No.438-HME of 2008 dated 26.05.2008, whereby and where under the respondent No.3 and 4 respectively have been promoted as Incharge ADMOs in the department of ISM;

(III) Writ in the nature of Prohibition, restraining the official respondents from regularizing incharge promotion of the respondent No.3 and 4;

2) The short grievance of the petitioner, as projected in this petition, is that respondent No.3 and 4 have, by concealment of material facts and by playing fraud have obtained category certificates and on the basis thereof have succeeded in getting accelerated promotion.

3) Before adverting to the challenge made to the impugned certificates and the impugned orders, it would be appropriate to, briefly, notice few material facts.

4) Both the respondent No.3 and 4 are substantively holding the post of Medical Officer (Ayurvedic) in ISM department of Union Territory since the year 2001 and 2000 respectively. Both, as claimed, were selected and appointed as Medical Officers (Ayurvedic) as general category candidates.

5) It is alleged that the respondent No.3 in the year 2006 applied for issuance of RBA category certificate to the competent authority. Tehsildar, Kishtwar, the competent authority, issued RBA category certificate in favour of respondent No.3 on 8th of March, 2006,

purportedly, under SRO 126 of 1994, though in the year 2006, the Jammu and Kashmir Reservation act, 2004 and the rules framed there-under vide SRO 294 of 2005, had already come into operation.

6) It is the further allegation of the petitioner that the respondent No.3 without surrendering his RBA certificate issued in the year 2006, once again applied for RBA category certificate to the competent authority on 28th of August, 2008 and got a fresh certificate issued in his favour on 12th of September, 2008.

7) With regard to respondent No.4, it is contended that he applied for the category certificate on 27th of December, 2006 and the same was issued to him by the competent authority on 6th of January, 2007

8) It is also pleaded by the petitioner that with regard to issuance of RBA category certificate in favour of respondent no.3 by Tehsildar, Kishtawar on 12th of September, 2008, a criminal complaint under Section 417, 418, 420 and 468 of RPC was registered in Police Station, Crime Branch, Jammu. The Crime Branch conducted the preliminary enquiry and found that the allegations made against respondent No.3 were not proved. The complainant, Mr. Anil Kant Gupta, filed a protest petition before learned Magistrate to whom the status report had been submitted by the Crime Branch and the learned Magistrate vide order dated 14th March, 2017, did not accept the status report and directed further enquiry in the matter. Against this order of Magistrate, the

respondent No.3 filed a quashment petition before this Court wherein this Court has stayed the operation of the impugned order.

9) In the aforesaid backdrop, the petitioner has assailed the validity and sustainability of the RBA certificates issued by the competent authority in favour of respondent No.3 and 4. The reliefs prayed for in the petition have been sought, *inter alia*, on the following grounds:

1. That the impugned RBA certificate issued in favour of respondent No.3 is invalid for the reason that in the face of existence of earlier RBA certificate issued in the year 2006, the second category certificate could not have been applied for by respondent No.3 and issued by the competent authority;
2. That the respondent No.3 was not entitled to the issuance of certificate for the reason that in terms of Section 2(o)(ix) of the Act, the annual income of respondent No.3 from all sources to be determined in terms of Rule 22 of the Jammu and Kashmir Reservation Rules, 2004, was exceeding Rs.3 lakhs;
3. That the respondent No.3 having being appointed as Medical Officer(Ayurvedic) in the year 2001

was all along serving in Jammu and, therefore, could not be said to have been residing in the backward area at or before the issuance of RBA certificate;

4. That in terms of Proviso to Section 2(o)(ix) of the Act, the income ceiling is not applicable to a person who has lived and completed his entire school education from an area identified as Backward or Line of Control. The respondent No.3, without demonstrating the aforesaid aspect, could not have been granted the exemption from the income sealing;
5. That the impugned RBA category certificate issued in the year 2008 without first cancelling the similar certificate issued in the year 2006, was obtained by respondent No.3 by concealment of material facts and by playing fraud and therefore cannot be treated as valid;

10) To the similar effect are the allegations leveled against the respondent No.4. It is claimed that the respondent No.4 who was appointed as Medical Officer (Ayurvedic) on 08.06.2000 under open merit category, was also not residing in the area identified as backward at the time of issuance of category certificate or any time

prior thereto. The impugned RBA category certificate issued in favour of respondent No.4 has also been assailed on the ground that the respondent No.4 suppressed the material facts from the competent authority and did not place before it the relevant material with regard to his annual income and, thus, obtained the category certificate by practicing fraud. It is on the basis of this manipulated and managed RBA category certificates, the respondent No.3 and 4 got the benefit of incharge promotions as ADMOs and are likely to be confirmed on the said post on substantive basis to the serious prejudice of the petitioner.

11) Having heard Mr. Abhinav Sharma, learned senior council representing the petitioner, Mr. H.A. Siddiqui, senior Additional Advocate General for official respondents and Mr. Sudershan Sharma learned council for respondent No.3, I am of the considered view that the writ petition involves adjudication of facts of complicated nature which cannot be determined in the writ jurisdiction. Admittedly, the category certificates which are placed on record by the petitioner are issued in the year 2008 and 2007 respectively. The petitioner did not raise any grievance at any time during last 14 years though respondent No. 3 and 4 are colleagues of the petitioner and have been working with him all along. It is true that one Ravi Kant had lodged a complaint before the Judicial Magistrate 1st Class in terms of Section 156(3) of Cr. P.C, which came to be referred to Police Station, Crime Branch Jammu. The

Police Station Crime Branch Jammu, however, did not find any substance in the complaint and, accordingly, submitted its status report to the learned Magistrate. The complainant Ravi Kant filed a protest petition and the learned Magistrate after considering the matter found deficiency in the preliminary investigation conducted by the Crime Branch and thus directed further investigation. The matter landed before this Court in a quashment petition filed by respondent No.3. This Court has intervened in the matter and stayed the operation of the impugned order.

12) So far as respondent No.4 is concerned, he too has been granted the category certificate by the competent authority, which has not been assailed by any person aggrieved before any authority except by way of this petition.

13) It is true that on the basis of category certificates issued in favour of respondent No.3 and 4, the respondent No.3 and 4 have been given a benefit of incharge promotion as ADMOs and may be, as apprehended by the petitioner, they get the benefit of accelerated substantive promotion as well. The petitioner has raised serious issues with regard to the validity of the certificates issued in favour of respondent No.3 and 4.

14) It is the contention of learned senior counsel that the competent authority did not follow the provisions of the J&K Reservation Act, 2004 and the rules framed there-under in their true

spirit. As a matter of fact, it is the argument of Mr. Sharma that respondent No.3 and 4, by sheer misrepresentation of facts, persuaded the competent authority to issue the category certificates to which they were not entitled to in law because of various handicaps. It is claimed that the respondent No.3 and 4 had neither resided for continuous period of 15 years in the backward area nor were they residing at the time of issuance of RBA certificates in their favour. It is also not the case of respondent No.3 and 4 that they had lived and completed their school education from an area identified as backward so as to claim exemption from the income ceiling provided under Section 2(o)(ix). It is also alleged by the petitioner that being Medical Officers in the ISM department and having handsome salary, the respondent No.3 and 4 were having annual income from all sources exceeding Rs.3.00 lakhs.

15) The allegations made, on the face of it, involve adjudication of complicated disputed facts, the determination whereof may require evidence, oral as well as documentary. Without disputing the legal position adumbrated by Mr. Sharma, learned counsel for the petitioner, by reference to various provisions of the J&K Reservation Act, 2004 and the rules framed there under, suffice it to say that the Reservation Act and the rules framed there-under is virtually a complete Code in itself and provides for various remedies for redressal of grievance that may arise out of the applicability of the Reservation Law.

16) In terms of Section 17 of the Act, a person aggrieved by an order of the competent authority under Section 16 of the Act, is given a right of appeal before the Deputy Commissioner if the order appealed against is passed by an officer below the rank of Deputy Commissioner in his capacity as a competent authority and before the Divisional Commissioner, if the order appealed against is passed by the Deputy Commissioner in his capacity as a competent authority. The period of limitation for filing the appeal is 90 days from the date of the order.

17) Apart from Section 17 providing for an appeal, Section 18 confers upon the Appellate Authority revisional jurisdiction as well which such Authority may exercise either *suo moto* or on an application made to it.

18) Rule 25 of the Reservation Rules, 2005, also provides for an appeal at the instance of an aggrieved person against the order of rejection by the competent authority under Rule 23.

19) Reading of Section 16 and 17 of the Act of 2004, in juxtaposition with Rule 23 and 25 of the Rules of 2005, an anomaly clearly emerges and, therefore, for better appreciation of this anomaly, it is necessary to set out Section 16 and 17 of the Act of 2004 and Rule 23 and 25 of the Rules of 2005.

“16. Issuance of Certificate

The Competent Authority shall, within fifteen days from the date of the receipt of the application and for reasons to be recorded in writing either accept the

application or reject it. On acceptance of the application, the authority shall immediately issue the requisite certificate to the applicant in the prescribed form.

17. Appeals

(1) Any person aggrieved by an order of the Competent Authority under section 16, may, at any time before the expiry of ninety days from the date of the order, prefer an appeal to:-

- (i) Deputy Commissioner, if the order appealed against is passed by an officer below the rank of Deputy Commissioner in his capacity as Competent Authority; or
- (ii) Divisional Commissioner, if the order appealed against is passed by Deputy Commissioner in his capacity as Competent Authority.

(2) The Appellate Authority shall, within 30 days from the date of receipt of the appeal, pass such orders on it as it deems fit:

Provided that no order shall be made against any person without affording him a reasonable opportunity of being heard.

23. Issuance of Certificate

The Competent Authority shall within 15 days from the date of the receipt of the application for reasons to be recorded in writing either accept the application or reject it. On the acceptance of the application, the authority shall immediately issue the requisite certificate to the applicant in Form VII, IX, X, XI, XII, XIII, XIV, as the case may be.

25. Appeals

(1) Any person aggrieved by an order of rejection of the Competent Authority under rule 23 may, prefer an appeal to the appellate authority under section 17 of the Act.

20) From a careful reading of Section 16 and 17 of Act of 2004, it clearly transpires that an order of the competent authority under Section 16, whereby the application for grant of reserved category certificate is either accepted or rejected, is appealable before the Appellate Authority at the instance of any person aggrieved. It

clearly means that any person, who is aggrieved by the order of competent authority passed under Section 16 of the Act, can avail of the remedy of appeal within a period of 90 days from the date of order. If the application for grant of category certificate is rejected, obviously the person aggrieved would be the applicant but where such an application is accepted and a category certificate is granted, any person aggrieved or affected by the issuance of such certificate may also file an appeal. There is, however, a rider on the exercise of appellate powers by the Appellate Authority that no order against any person shall be made without affording him a reasonable opportunity of being heard. Obviously, this remedy was available to the petitioner but the same has not been availed of.

21) Looking to Rule 23 and 25 of the Rules of 2005, it would transpire that an appeal to the Appellate Authority under Section 17 of the Act of 2004 is available only against the order of rejection of the application and it can be at the instance of the applicant for there could be no other person other than the applicant who would be aggrieved of rejection of his application for grant of reserved category certificate. There is, thus, clear anomaly in the two set of provisions noted above but this anomaly may not detain the Court from proceeding further in the matter. Needless to say that the rules framed under the Act are subservient to the Act and must succumb to the extent of any anomaly or incongruity.

22) Be that as it is, it is equally important to notice that Section 22 of the Act contains a provision for cancellation of category certificate and forfeiture of benefit etc. if it is found that any person has obtained a certificate under the Act by misrepresentation, fraud or concealment of any material fact or impersonation etc. For facility of reference, Section 22 of the Act is also reproduced here-under:

“22. Penalty for contravention of the provisions of the Act.

Any person who obtains a certificate under the Act by misrepresentation, fraud or concealment of any material fact or impersonation shall, in addition to prosecution under the law for the time being in force, be liable to:-

- (a) cancellation of the certificate and forfeiture of benefit;
- (b) removal or dismissal from service; and
- (c) fine of not less than rupees ten thousand.

23) It is true and as is contended by Mr. Sharma, the petitioner has lost the remedy of appeal under Section 17 of the Act by efflux of time but it is equally true that the petitioner has a remedy under Section 18 of the Act which confers on the Appellate Authority the revisional powers to be exercised either *suo moto* or on an application made to it. The Act does not provide for any limitation and, therefore, the revisional jurisdiction of the Appellate Authority can be invoked by the Appellate Authority *suo moto* at any time and there is no limitation to do that. However, if it is to be invoked by a party aggrieved by making an application, then it ought to be done within reasonable time.

24) What would be the reasonable time for invoking the revisional jurisdiction may depend on the facts and circumstances of each case and no straightjacket formula can be laid down therefor. However, so far as the case of the petitioner is concerned, the same clearly falls under Section 22 of the Act. It is the categoric case of the petitioner that the respondent No.3 and 4 have managed RBA category certificates by misrepresentation, fraud and concealment of material facts. If that be the position, the petitioner is well within his rights to approach the authority which has granted the certificate and place before it the material to substantiate his allegations of misrepresentation, fraud and concealment of material facts.

25) It is the contention of Mr. Sharma, learned senior counsel, that in the absence of any authority prescribed under the Act and the rules framed there-under for cancellation of the category certificates once issued, the provisions of Section 22 are virtually rendered otiose. I am not impressed with the argument of Mr. Sharma. Needless to say that the power to grant includes the power to withdraw or cancel. Otherwise also, any order or certificate obtained by fraud, misrepresentation or concealment of facts is nullity in the eye of law and, therefore, nothing prevents the authority, which was persuaded to pass such order or grant such certificate by misrepresentation, fraud or concealment of material facts, to make such declaration and cancel/withdraw the certificate so obtained/issued.

26) In view of the nature of controversy raised in this petition, which necessarily needs evidence and a sort of trial/enquiry to determine the facts of complicated nature, the writ petition is not the appropriate remedy. Otherwise also, looking to the scheme of the Act and the rules framed there-under wherein there are enough of remedies provided for redressal of grievance of the nature projected by the petitioner in this petition, I am not inclined to exercise the extraordinary jurisdiction.

27) I am aware that where fundamental rights are breached or an order is passed in violation of principles of natural justice, this Court may no relegate the parties aggrieved to the statutory alternative remedy and in appropriate cases may even embark upon determining the disputed questions of fact but it all depends on the facts and circumstances of each case.

28) It is trite that where complicated disputed questions of fact are involved, the determination whereof requires evidence to be led before the prescribed Statutory Authority, it is not prudent to exercise extraordinary jurisdiction. The allegations of misrepresentation and fraud are, admittedly, subtle questions of fact, the determination whereof needs evidence of impeccable character. The determination of such facts and disputes can be better done by the authority concerned. In the instant case, the competent authority has issued the certificates, obviously, on being satisfied with regard to respondent No.3 and 4 meeting the requirements of the Act and

the rules framed there-under and if it is the case of the petitioner that the competent authority was misled by respondent No.3 and 4 by misrepresentation and concealment of material facts or by playing fraud, the onus is on the petitioner to prove before the authority concerned that but for misrepresentation/concealment of material facts or fraud played by respondent No.3 and 4, the competent authority would not have issued the category certificates.

29) Before I close, I deem it appropriate to refer to a recent judgment of the Supreme Court in the case of **Punjab National Bank and others v. Atmanand Singh and others** (arising out of SLP(C) No.11603/20217 decided on 6th of May, 2020), wherein Hon'ble Supreme Court relying upon its two earlier judgments i.e. **Thansingh Nathmal and others v. Superintendent of Taxes, Dhubri and others** (AIR 1964 SC 1419) and **Suganmal v. State of Madhya Pradesh and others** (AIR 1965 SC 1740), held thus:

HIGH COURT
JUDGES & KASHER

“We restate the above position that when the petition raises questions of fact of complex nature, such as in the present case, which may for their determination require oral and documentary evidence to be produced and proved by the concerned party and also because the relief sought is merely for ordering a refund of money, the High Court should be loath in entertaining such writ petition and instead must relegate the parties to remedy of a civil suit. Had it been a case where material facts referred to in the writ

petition are admitted facts or indisputable facts, the High Court may be justified in examining the claim of the writ petitioner on its own merits in accordance with law.

30) In view of the foregoing, I find no justification to entertain this petition and the same is, accordingly, dismissed along with connected CM. It shall, however, remain open to the petitioner to work out his remedy before the competent forum in accordance with law and as per the observations made hereinabove.

(Sanjeev Kumar)
Judge

Jammu

16.06.2021
“Bhat Altaf, PS”

Whether the order is speaking: Yes
Whether the order is reportable: Yes

Judgment pronounced today on 16.06.2021 in terms of Rules 138 (3) of the Jammu and Kashmir High Court Rules, 1999.

(Javed Iqbal Wani)
Judge