

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

SWP No. 44/2014 c/w

SWP No. 362/2014

Reserved On : 01.06.2022

Pronounced On: 28.06.2022

Arshid Ahmad Lone

.....Petitioner(s)

Through: Mr.Mir Manzoor Ahmad, Advocate

Versus

State of J&K & Ors.

.....Respondent(s)

Through: Mr.Mohd. Rais-ud-din Ganai, GA
Mr. Shafaqat Nazir, Advocate

CORAM: HON'BLE MR JUSTICE M.A.CHOWDHARY, JUDGE

JUDGMENT

1. District Rural Health Society, Shopian headed by respondent no. 2 issued an Advertisement Notice in the month of September, 2013, for engagement of medical/para-medical staff on contractual basis under National Rural Health Mission (NRHM) Scheme. The posts advertised included that of Lab. Assistant in CHC Keller against consolidated remuneration of Rs. 10,800/- per month with requisite qualification of 10+2 (Science) with diploma in Medical Laboratory Technology from the institute recognized by the SMF J&K.
2. Petitioner and respondent no. 5 in response to the notification amongst other candidates applied for the post of Lab. Assistant. Respondents shortlisted 1. Arshid Ahmad Lone 2.Sheeraz Ahmad Kumar 3. Ulfat

Amin 4. Bilal Yousuf Wani for the post of Lab. Asstt CHC Keller and called them for interview on 27.12.2013. In the screening test/interview only three candidates appeared, whereas Bilal Yousuf Wani absented. The merit list was thus drawn as under:

1. Arshid Ahmad Lone : 67.183 Points

2. Sheeraz Ahmad Kumar: 59.133 Points

3. Ulfat Amin : 49.647 Points

3. Respondent no. 3 Vice Chairman of District Rural Health Society, Shopian issued a select list vide No. CMO/Spn/NRHM/2294-97 dated 31.12.2013, wherein for the post of Lab. Assistant at CHC Keller Block, petitioner Arshid Ahmad Lone was shown as selected whereas respondent no. 5 Sheeraz Ahmed Kumar was shown waiting and the selectees were directed to report within a period of 7 days alongwith all original testimonials failing which provisional selection of the candidates shall be deemed as cancelled.
4. Petitioner Arshid Ahmad Lone vide Order No. CMO-Spn/NRHM/14/2318-23 dated 01.01.2014 issued by respondent no. 3 came to be engaged on contractual basis at a monthly consolidated remuneration of Rs. 10,800/- with no other allowances or monetary benefits, whatsoever and was posted as Lab. Assistant at CHC Keller.
5. Petitioner alleges that after some time he was not allowed to mark his attendance on the plea that somebody had filed complaint against him before respondent no. 3. The petitioner aggrieved of this action on the part of respondent no. 4 (Block Medical Officer Keller Shopian), filed this petition, This court vide order dated 8.03.2016 passed in IA NO. 46/2014 in SWP No. 44/2014, directed respondents that position

against which petitioner claims to be selected shall not be filled up till next date before the Bench and this direction continued from time to time.

6. Pursuant to notice official respondents asserted that for the post of Lab. Assistant the requisite qualification prescribed was 10+2 (Science) with diploma in Medical Laboratory Technology from an institute recognized from J&K SMF; that the petitioner came to be appointed, however, pursuant to the complaints made against his appointment the said order was kept in abeyance till further orders. It was further pleaded that the post of Lab. Assistant under NRHM Scheme was advertised by CMO, Shopian vide the above mentioned qualification; that the petitioner was 10+2 (Arts) with diploma from the institute of Public Health and Hygiene New Delhi; that despite his ineligibility petitioner's selection was considered and subsequently he was appointed against the said post though he was not having required qualification of 10+2 (Science) but was having 10+2 (Arts). It has been further contended that the criterion had been adopted as per Govt. Order No. 164-HME of 2007 dated 16.03.2007 read with Govt. Order No. 357-HME of 2007 dated 24.5.2007. It is also pleaded that the petitioner without having academic qualification of 10+2 (Science) had applied for the post though he had secured diploma from the institute of Public Health and Hygiene, New Delhi during 2010-12 when the said institute had also not been recognized with the J&K State Medical Faculty. Having this view of the matter his diploma was also not valid and recognized.

7. Private respondent No. 5 in his objections alleged that the petitioner has suppressed and concealed the material facts from the court thereby tried to mislead the court. He further pleaded that the answering respondent being a Science graduate having 10+2 (Science) with diploma from a recognized institute had applied for the post of Lab. Assistant and that he had also been interviewed. However, the official respondents selected the petitioner though he was not qualified to be appointed against the post advertised and prayed that the petition be dismissed.
8. The private respondent filed a representation against the selection of petitioner to Chief Medical Officer Shopian who sought necessary instructions from District Development Commissioner Shopian Chairman of District Rural Health Society and on receiving directions kept in abeyance Order No. CMO/Spn/NRHM/14/2318-23 dated 02.01.2014, whereby petitioner had been appointed, till further orders, vide his Order No. CMO/Spn/NRHM/14/2355-57 dated 20.01.2014. Petitioner during the pendency of the aforesaid petition, when came to know that his appointment order has been kept in abeyance, filed connected SWP No. 362/2014. Through the medium of this petition it was prayed to quash the order impugned passed by respondent no. 3 and the complaint filed by private respondent. Further commanding the respondent No. 5 to allow the petitioner to mark his attendance as Lab Assistant in CHC Keller in the health department (NRHM) and also command the respondents not to disturb the present status of the petitioner without following due procedure prescribed by the rules governing the services of the petitioner.

9. Heard, perused and considered.
10. Learned counsel for the petitioner argued that as per the rules and norms prescribed under NRHM Scheme, eligibility for appointment against the post of Lab. Assistant is Matric with diploma in Lab. Assistant training course and the eligibility shown by the respondents in Advertisement Notification as 10+2 (Science) with diploma is neither provided under recruitment rules nor under the norms prescribed by the employer/Govt. under NRHM scheme for appointment against the post of Lab. Assistant. The selection authority is not entitled to prescribe additional qualification/eligibility not envisaged by the Rules if the Rules prescribe such qualification as eligibility criterion. The petitioner was thus eligible having Matric as academic qualification and also diploma course to his credit. The petitioner has been rightly selected by the selection body on merit basis. It was prayed that the respondents be commanded not to disturb the position of the petitioner and that he be allowed against the post for which he was selected and appointed.
11. Learned counsel for the respondents, ex adverso, controverted the assertions of the petitioner in their arguments and laid a stress that the selection of the petitioner without requisite qualification of 10+ 2 (Science) and the institute wherefrom diploma course had been obtained by the petitioner being not recognized with the State Medical Faculty(SMF) was illegal, as such, he could not have been appointed and prayed that petition be dismissed and that the private respondent being next in merit deserves to be engaged against the post of Lab. Assistant in question.

12. The moot question to be decided by this court is that as to whether petitioner who was not having the qualification of science subjects in 10+2 could have been appointed against the post of Lab. Assistant for which, in the advertisement notice, qualification had been prescribed as 10+2 (Science) with diploma in Medical Laboratory Technology from any institute recognized with J&K SMF. To appreciate the rival submissions it is important to take note of the Health and Medical (Subordinate) Service Recruitment Rules 1992. The qualification for appointment as Lab. Assistant as per Schedule of these Rules, has been provided as Matric with diploma. Since the Rules of 1992 prescribed a qualification that can be changed by way of amendment in the Rules itself and not by issuance of Government Order as having been claimed in the case.
13. In the considered opinion of this court the criteria as provided under the Statutory Rules referred hereinabove cannot be changed by the Government by issuing any order and the academic qualification, as provided under the Rules, can only be prescribed for engagement of a Lab. Assistant even on contractual/remuneration basis.
14. A constitutional Bench of the Supreme Court in the case titled *Sant Ram Sharma Vs. State of Rajasthan* reported as *AIR 1967 SC 1910* held that the Government cannot amend or supersede Statutory Rules by administrative instructions, but if the Rules are silent on any particular point Government can fill up the gaps and supplement the Rules and issue instructions not inconsistent with the Rules already framed. A three judge Bench of the Supreme Court in the case **Union of India vs. K.P. Joseph**, reported as **(1973) 1 SCC 194** has reiterated

the same view. The Supreme Court in the case of *Syed T.A. Naqshbandi & Ors. V. State of Jammu & Kashmir and Ors.* reported as (2003) 9 SCC 592 had held in para 8 that the conditions of service of members of any service for that matter are governed by statutory rules and orders, lawfully made. In the absence of rules to cover the area which has not been specifically covered by such rules, and so long they are not replaced or amended in the manner known to law, it would be futile for anyone to claim for those existing rules/orders being ignored yielding place to certain policy decisions taken even to alter, amend or modify them.

15. The Health and Medical (Subordinate) Service Recruitment Rules 1992 are statutory and framed under the provisions of the Constitution of India. This court is of the opinion that the Government instruction/guidelines of the case in hand are at variance the provisions incorporated in the recruitment rules which have to be followed. In Annexure-A as schedule in terms of clause 5 of the aforesaid rules, the requisite qualification of the Lab Assistant has been provided by direct recruitment with qualification of Matric and diploma in Medical Assistant Training Course from SMF or any other recognized Institute. The petitioner admittedly was having qualification of Matric and had a diploma from the Institute of Public Health and Hygiene Delhi.
16. Another aspect of the matter is as to whether the Diploma issued from the Institute of Public Health and Hygiene New Delhi was recognized by the J&K SMF. The CMO, Shopian vide his communication No. CMO/Spnm/NRHM/15/648-50 dated 2.07.2015 took up the matter

with the President of J&K State Paramedical Council Govt. Medical College, Srinagar regarding the recognition of some institutions including institute of Public Health and Hygiene, New Delhi and in response to this communication vide communication dated 04.07.2015, it was informed that the Institute of Public Health and Hygiene New Delhi was recognized by Government vide Order No. 291/HME/13 dated 23.4.2013 for two years and that had expired on 23.4.2015.

- 17.** The petitioner had applied for the post advertised in the year 2013 against an Advertisement Notice dated 2.9.2013 which means that in the year 2013 when the post was advertised the institute of Public Health and Hygiene New Delhi was recognized with the State Para Medical Council. Otherwise also the policy of the Government to recognize some institutes for some period can be said to be detrimental to the interests of those students and the candidates who during that period had to undergo courses for some diploma.
- 18.** Having regard to the facts that the prescribed qualification for the post of Lab. Assistant under Health and Medical (Subordinate) Service Recruitment Rules 1992, is Matric with diploma in Laboratory course from SMF or any other recognized Institute. Petitioner admittedly was Matriculate and was having diploma in Lab. Assistant Training Course to his credit from Public Health and Hygiene Institute, New Delhi, having been duly recognized by the Govt. of J&K with SMF in the year 2013, when post was advertised.
- 19.** Petitioner in view of the fact that he had the requisite qualification of Matriculation and a diploma in Medical Laboratory Technology from

a recognized institute was eligible to apply and be considered for appointment to the post of Medical Assistant, to which he had been appointed. The official respondents, de-hors the Rules of 1992 applicable to the case on hand, could not have altered the requisite qualification of Matriculate to 10+2 (Science) by administrative instructions and by doing so they have done violation to the Health and Medical (Subordinate) Service Recruitment Rules 1992, governing the subject in view of the law laid down by the Hon'ble Apex Court discussed hereinabove. Since the petitioner being more meritorious has already been selected against the post of Lab Assistant and appointed, as such, he has right to continue on that post.

20. Having regard to the above discussion and the observations made hereinabove both the petitions are allowed. Impugned order No. CMO/Spn/NRHM/14-2355-57 dated 20.0.12014 whereby appointment of petitioner was kept in abeyance is hereby quashed. As a result, the official respondents are directed to allow the petitioner to work against the post of Lab Assistant in CHC Keller, without any hindrance and not disturb his status. A copy of this judgment shall be placed on the connected file.

21. Both the petitions are, accordingly, disposed of.

SRINAGAR

28.06.2022

**(M.A.CHOWDHARY)
JUDGE**

Mujtaba

Whether the order is reportable: Yes/No.

