

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

CSA No. 3/2017

Reserved on: 26.05.2022

Pronounced on: 21.07.2022

Raisa BanooAppellant(s)

Through: Mr. G. A. Lone, Adv. & Mr. Mujeeb Andrabi, Adv.

Vs.

Mst. Shameema and Ors. ...Respondent(s)

Through: Mr. Rayees Ahmad Ganaie, GA
Mr. Showkat Ali Khan, Adv.

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGMENT

1. In this Civil Second Appeal filed by the appellant, the following three substantial questions of law have been framed vide Order dated 20.11.2017:
 - (i) Whether a suit instituted against the Government and its functionaries, in which emergency is invoked, can be maintained and continued, when no interim relief is granted in the case?
 - (ii) Whether in terms of sub-section (3) of section 80 it was mandatory for the Court to return the plaint to the plaintiff as no interim relief was granted in the case with regard to the appointment of the appellant?
 - (iii) Whether in judging the appointment of the appellant as FMPHW, a criteria has been introduced which is foreign to the advertisement notice as also the norms fixed by the Government for making engagement of staff in N4 on contractual basis?
2. Before considering the substantial questions of law for determination, it would be appropriate to give brief facts of the case.
3. Chief Medical Officer, Pulwama, in his capacity as Vice Chairman District Health Society, Pulwama, issued advertisement bearing

endorsement No.CMO/PuI/NRHM/Apptt./Cont./4486-93 dated 06.02.2012, inviting applications on prescribed format from eligible candidates of District Pulwama, under National Rural Health Mission (for short “NRHM”), RCH-II, as per the criteria shown in the advertisement notice, amongst others, for the posts of Female Multipurpose Health Worker (for short “FMPHW”) for Sub Centre Amlar. The prescribed qualification was Diploma in FMPHW from SMF/any recognized Institute. The terms and conditions prescribed as eligibility for applying to the post included that the candidate should be resident of the locality where the Health Institution is located so as to ensure continuous presence for 24 x 7 days’ service. In pursuance of the advertisement notice and the rules prescribed by the Government of India for making selection of candidates against the post of FMPHW, the candidates applying for the post, included the appellant and respondent No.1. The appellant, vide order dated 19.05.2012, was appointed as FMPHW at Sub-Centre Amlar, Block Tral, and she joined her duties on 21.05.2012 and since then has been continuously performing her duties. The respondent no.1/plaintiff filed a suit against the appellant/defendant no.6, before the Trial Court and the Trial Court granted the following relief:

“The plaintiff accordingly prayed for a decree of declaration declaring the appointment of engagement of defendant no.6 as FMPHW NRHM as null and void and decree of declaration declaring the plaintiff entitled to the said post and decree of permanent injunction restraining the defendants from giving any effect to said order and may be restrained from drawing any sort of salary in favour of defendant no.6. Any other relief which the Court may deem fit may also be granted in favour of the plaintiff and against the defendants.

Before deliberating upon the relief it transpires that the official defendants have acted in derogation to rules guidelines in

derogation to notification on a mistaken assumption either because of negligence or deliberately in considering Nowpora as a village and appointed defendant no.6. There is no evidence on record to show that the defendant no.6 has induced to work in derogation to rights of plaintiff which paves a leniency of consideration by official in favour of defendant no.6 as her appointment could not stand on the basis of decision struck for determination in the instant case.

Therefore, the reliefs as prayed for by the plaintiff in the instant suit are passed in her favour declaring the appointment of defendant no.6 as FMPHW under NRHM as null and void and declaring the plaintiff to be entitled to the said post and further an injunction is passed against the defendants from not giving an effect to the said order. The defendants are further directed to appoint plaintiff in place of defendant no.6 as FMPHW under NRHM. The defendants are at liberty to consider the defendant no.5 for engagement as FMPHW under NRHM subject to availability. No order as to costs.

File is disposed off accordingly. Office shall prepare a decree sheet accordingly and compile the records and after compilation of the records file shall be consigned to records.”

4 The issues which were raised in the suit filed by the plaintiff/respondent no.1 were as under:

- (i) Whether the plaintiff and defendant no.6 are residing in Mohalla Nowpora and Khandaypora of village Amlar?...OPP.
- (ii) Whether the appointment order of the defendant no.6 is illegal and in derogation to the rules because the plaintiff is more meritorious than the defendant no.6?....OPP.
- (iii) Whether the order of the defendant department as EXPW-3 is illegal and liable to be quashed?...OPP
- (iv) Whether the plaintiff has no cause of action to file the present suit?OPD

5 The Trial Court after considering the evidence on record decided the aforesaid issues and held that the Nowpora in which the plaintiff/respondent no.1 is residing and Khandaypora, where the appellant/ defendant no.6 is residing are the mohallas of village Amlar and secondly, the Trial Court held that the defendant no.6/appellant had been illegally appointed in derogation to the rules as plaintiff/respondent no.1, was more meritorious than defendant/appellant and mainly on the finding of these issues, the suit of plaintiff was decreed in terms as indicated above. The appellant

being aggrieved of the said judgment and decree, challenged the same by filing a Civil First Appeal before the learned Principal District Judge, Pulwama, and the Principal District Judge, concurred with the finding of facts on issues 1 and 2 as recorded by the Trial Court and dismissed the Appeal. The appellant has filed this Civil Second Appeal, claiming therein that the substantial questions of law which it framed in para 9 arise for determination in this case. The proposed substantial questions of law as stated in para 9 are as under:

- a) Whether a suit against the State Government and its functionaries engaged in service of official duties in regard to the appointment made in favour of the appellant, can be instituted without service of notice under section 80 CPC and without seeking leave of the Court?
- b) Whether a suit instituted against the Government and its functionaries, in which emergency is invoked, can be maintained and continued, when no interim relief is granted in the case?
- c) Whether in terms of sub-section (3) of section 80 it was mandatory for the Court to return the plaint to the plaintiff as no interim relief was granted in the case with regard to the appointment of the appellant?
- d) Whether in the absence of seeking leave from the Court to institute the suit and in absence of any interim relief having been granted in the case, the suit could not have been instituted and entertained and the entertainment of the suit by the trial court is without jurisdiction vitiating the judgment of the trial court as also of the 1st appellate court?
- e) Whether the judgments passed by the courts below have been passed on irrelevant considerations?
- f) Whether the trial court as also the 1st appellate court have ignored the material evidence, leading to failure of justice?
- g) Whether in judging the appointment of the appellant as FMPHW, a criteria has been introduced which is foreign to the advertisement notice as also the norms fixed by the Government for making engagement of staff in NRHM on contractual basis?
- h) Whether the suit suffers from non-joinder of necessary parties and, therefore, the judgments rendered by the courts below are inexecutable?
- i) Whether the suit was liable to be dismissed on account of non-joinder of necessary parties as Mission Director, NRHM and Chairman and Vice Chairman of the District Health Societies have not been made party in the case who are the authorities concerned with the selection and appointment of the appellant?
- j) Whether the appellate court has ignored even to refer to the evidence not to speak of appreciating the evidence led by the parties. The non-appreciation of the evidence by the appellate court is a serious legal error which is fatal to the case and the

judgments rendered by the courts below are liable to be set aside and suit liable to be dismissed?

- k) Whether the appellate court has failed to exercise the jurisdiction in the manner prescribed by law inasmuch as the appellate court has not even bothered to make reference of the name of any of the witnesses examined by the court below and the documents relied upon by the parties, rendering the judgment liable to be set aside?

6 This Court, while considering the Appeal and the record, has framed three substantial questions of law, as indicated above and these substantial questions of law require consideration and determination. Questions (i) and (ii), framed as substantial questions of law, are interconnected. For determination of these two questions, provision contained in Section 80 CPC is required to be considered, which is reproduced as under:

“80. Notice

(1) Save as otherwise provided in sub-section (3), no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been in the case of the Government, delivered to, or left at the office, stating the cause of action the name, description and place of residence of the plaintiff and the relief which he claims; and plaint shall contain a statement that such notice has been so delivered to left.

(2) No suit shall be instituted against the Government of India, the Government of any other State in India, or the Government of any Union territory, until the expiration of two months next after notice writing has been delivered to, or left at the office of

(a) in the case of a suit against the Government of India, a Secretary to that Government; and

(b) in the case of a suit against the Government of any other State, or the Government of any Union Territory, in India, a Secretary to that Government or the Collector of the district in that Government, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that the notice has been so delivered or left.].

(2-A) Where a notice is delivered to, or left at the office of, any officer specified under sub section (1) or sub-section (2), the officer shall cause the notice to be examined and send reply to the notice given before expiry of a period of two months from the date of its receipt.

(2-B) Where the office concerned fails to send the reply or sends an evasive and vague reply, he shall be subject to disciplinary action in accordance with rules for failure to discharge the statutory obligations.

(3) A suit to obtain an urgent or immediate relief against the Government (including the Government of India, the Government of any other State in India or the Government of any Union Territory), or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted with the leave

of the Court, without serving any notice as required by sub section (1); but the Court shall not grant relief in the suit, whether interim or otherwise except after giving to the Government or public officer, as the case may be, reasonable opportunity of showing cause in respect of the relief prayed for in the suit.

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

(4) No suit instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be dismissed merely by reason of any error or defect in the notice referred to in sub-section (1), if in such notice

(a) the name, description and the residence of the plaintiff had been so given as to enable the appropriate authority or the public officer to identify the person serving the notice and such notice had been delivered or left at the office of the appropriate authority specified in sub-section (1), and

(b) the cause of action and the relief claimed by the plaintiff had been substantially indicated.”

- 7 From the language of Section 80 of CPC, it is clear that at the time of filing of the suit, if the plaintiff establishes that there is an urgency to seek the relief, the Court on its satisfaction may dispense with the requirement of notice as required under Section 80 CPC, before filing a suit. Ordinarily, a suit is to be filed after a notice of two months is given to the Government.

In the present case, such a notice has not been given and respondent no.1/plaintiff sought leave to file the suit without issuing notice under Section 80 of CPC as he invoked provisions of Subsection (3) of Section 80. The leave was granted to the plaintiff in serving a notice as required under Section 80 of CPC.

It is provided under Section 80 of CPC that in case the Court feels that there is no relief to be urgently granted, it shall refuse to grant such leave, which means that the requirement of filing a suit and satisfaction of the Court is to the filing of the suit and at that time Court may refuse in its finding that there is no urgency of granting immediate

relief, refuse such leave and return the plaint. Once the leave has been granted, another requirement is that in case any interim injunction is sought, the same cannot be granted unless notice is given to the respondent. Issuance of notice would follow only when such leave has been granted to the plaintiff for filing the suit. So, refusal to grant relief or to grant relief is to be considered at the stage when suit is sought to be filed without issuance of notice as required under Section 80 of CPC. The plaint would be returned in case, at that stage, the Court finds that there is no urgency in the suit or in passing an urgent relief. In case the interim stay sought is not granted after the leave has been granted to the plaintiff that does not mean that the plaint is to be returned on refusing to grant such injunction. So far as substantial questions of law (i) and (ii) are concerned, since provision itself is clear, therefore, both these questions are answered as under.

- 8 That even if grant of interim relief is refused, suit filed after the leave is granted by dispensing with the requirement of notice under Section 80 CPC, the suit will continue, as such, substantial questions of law (i) is decided, accordingly, against appellants.

That apart, it would be apt to mention here that the Supreme Court in ***Raghunath Dass v. Union of India and another, AIR 1969 SC 674***, has held that “*The object of the notice contemplated by Section 80, CPC is to give to the concerned Government and public officers opportunity to reconsider the legal position and to make amends or settle the claim, if so advised without litigation. The legislative intention behind that section is that public money and time should not*

be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigation. The purpose of law is advancement of justice. The provisions in Section 80 are not intended to be used as booby trap against ignorant and illiterate persons.”

- 9 So far as substantial question of law (ii) is concerned, it is clear from the plain reading of Section 80 (3) of CPC along with proviso attached to the said subsection that plaint can be returned if leave is refused. Grant of leave or refusal of leave would arise at the time of filing of the suit. The consideration of application for grant of temporary injunction would arise after leave is granted and notice in such application is given to the State or Government functionaries. The proviso to subsection (3) does not include in it the cases whereafter the leave is granted and, injunction refused the suit is to be returned back. Therefore, question as contained in substantial question of law (ii) is also replied that as per the proviso attached to subsection (3), the question of returning of the plaint would arise when, at the time of the filing of suit, Court finds that no urgent relief could be granted, but not later on, as such, this question is also answered, accordingly, against appellants.
- 10 Insofar as substantial question (iii) is concerned, it relates to the criteria applied in the case. According to the plaintiff, whether the criteria introduced which is not as per the advertisement notice can be taken into account for judging appellant's appointment as FMPHW. The case of the appellant is that the Trial court had considered the criteria for

deciding the issue regarding the appointment of appellant and respondent no.1, which was not part of the advertisement notice and was also not prescribed by Government for making engagement of FMPHW on contractual basis. To find out whether or not there had been introduction of any other criteria which has been taken into consideration by the Court while deciding the claim of the plaintiff/respondent no.1 and appellant/defendant, the post of FMPHW as per the advertisement notice (Annexure A) is at S.No.4 and total number of posts are two; one post in Almar and one post in Badriwan. The terms and conditions of Advertisement notice for hiring of staff under District Health Society Pulwalat S. No. 10 provides as under:

“The contractual appointment shall be at District Level/District Hospital Level/Block Level/& Local Criteria (Village Level), where the Health Institutions is located, so as to ensure continuous presence of the Staff for 24X7 days service. However, in case of non-availability of the Candidate in the Block, the same can be filled from the adjacent Block.”

- 11 So, the local criteria are at the village level. In terms of Annexure B, Almar consists of Almar and Nowpora. There is evidence recorded by the Trial Court as also discussed by the Appellate Court, which shows that the place of residence of plaintiff/respondent no.1 and that of defendant/ appellant is of two mohallas of the same village, i.e., village Almar, and after holding that respondent no.1 is more meritorious, appointment of appellant was held illegal and decree was passed, accordingly. Thus, on the basis of the record, the Trial Court has not introduced the criteria which were foreign to the advertisement notice. Both appellant and respondent no.1 in a suit were from the same village and fulfilled the criteria as contained in advertisement notice –

Annexure A. Since there is no introduction of any criteria, not mentioned in the advertisement notice and the criteria mentioned in advertisement notice had been taken into account and consideration while deciding the suit, therefore, this question is also answered in negative.

- 12 Viewed in the above context, I do not find any merit in the instant appeal and is, accordingly, **dismissed**. However, in the event, appellant makes any representation before the official respondents, they may consider the same if permissible under law.

(VINOD CHATTERJI KOUL)
JUDGE

SRINAGAR
21 .07.2022
Manzoor

Whether the order is speaking: Yes/No.
Whether the order is reportable: Yes/No.