Sr. No. 7

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

CJ Court
Case: LPA No. 116/2024
CM No. 2915/2024

Reserved on: 22.05.2024.

Pronounced on:30 .05.2024

Qurat-ul-ain (Age 30 years) .....Appellant/Petitioner(s)
D/o Khuda Bakhish
R/O Soura,
District Srinagar, Kashmir

Through :- Mr. J. H. Reshi, Advocate.

v/s

1. Union Territory of J&K through .....Respondent(s)
Chief Secretary, Civil Secretariat,
Jammu/Srinagar.
2. Sheri Kashmir Institute of Medical
Sciences, Soura, Srinagar, Kashmir, 190011,
Kashmir.
3. Director, Sheri Kashmir Institute of
Medical Sciences, Soura, Srinagar-190011,
Kashmir.
4. Administrator (Policy), Sheri Kashmir
Institute of Medical Sciences, Soura,
Srianagar-190011, Kashmir

Through :-

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

Per. WASIM SADIQ NARGAL, J:

1. This intra-court appeal is directed against judgment and order passed by learned Single Judge on 08.05.2024 in SWP No.2538/2018, wherein the writ petition preferred by the writ petitioner has been dismissed and the interim direction stood vacated.

2. The appellant, through the medium of this appeal has assailed the impugned judgment on the following grounds:

> *i.* ***That the Hon'ble writ court has not appreciated the basic controversy but proceeded to dismiss the aforesaid writ petition on the unfounded grounds and on the basis of the judgments not cited at the bar at all or relevant to the facts and circumstances of the case.***
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> *ii.* ***That the case of the appellant before the writ court was simple that as per advertisement No.4 of 2017 dated 17.06.2017 issued in the case she had applied for Technician Medical Technician Group post and out of 20 advertised posts available with the SKIMS only 15 applied and were found eligible therefore were required to be appointed straight away in order of their merit without any need of conducting of written test and interview which are generally held for the sake of scrutiny and short listing of the candidates when the posts advertised are far less than but large number of aspirants and candidates apply for the posts advertised.***
>
> *iii.* ***That apart from that it was specifically provided in the aforesaid advertisement Notice No.04 of 2017 dated 24.07.2017 published by the SKIMS in the case that the recruitment shall be made in terms of the Jammu and Kashmir Recruitment Rules 2015 notified vide SRO 202 of 2015 dated 30.05.2015 which specifically provided that select list is to be prepared in order of merit and did not provide for conducting of any written test or interview whatsoever for short listing of candidates which aspect of the matter and contention of the appellant herein has been altogether ignored by the Hon'ble writ court while passing of the aforesaid impugned judgments and order dated 08.05.2024.***
>
> *iv.* ***That as such neither principle of estoppels or approbate and reprobate as indicated by the Hon'ble writ court in the judgment and order dated 8.05.2024 impugned herein are applicable to the facts and circumstances of the case nor the judgments relied upon by the writ court in this regard.***
>
> *v.* ***That the Hon'ble writ court has further completely ignored the judgments which were cited at the bar by the counsel of the appellant without spelling out or explaining as to how those***

were distinguishable and not applicable to the facts and circumstances of the case.

vi. That the appellant has turned around and challenged the selection process after accepting and participating in the said selection process which she admittedly cannot do in law but her case is altogether different that the SKIMS authorities cannot in law be allowed to change the selection process which it had said would be followed for making of selection of the candidates rather SKIMS authorities are guilty of changing of rules of the game which is not permissible under any law.

vii. That the appellant has been deprived of precious six years of her service ever since she had applied for the post and was found eligible to be appointed as Technician Medical Group in the SKIMS along with other similarly circumstanced candidates who had applied with her for these posts and stand appointed way back in the year 22017-2018.

viii. That appellant is a poor little girl who is unable to bear the soaring cost of this litigation to get her rights and entitlement vindicated and determined by this Hon'ble court."

3. Shorn of unnecessary details, the brief facts, which lead to the filing of the instant appeal, are that the father of the appellant served as Guard in SKIMS and died in harness on 3rd November 1995, just after she was born on 8th May 1993 and her mother brought her up single-handedly and rendered around 18 years of long service in SKIMS against Class-IV – Attendant post. It is the case of the appellant that in the year 2017, vide advertisement notice no.04 of 2017 dated 17.06.2017, applications were invited by SKIMS for filling up various posts, including Medical Technologist. The appellant, being fully eligible, applied for the same. Further case of the appellant is that the written test for the said post was held on 17.10.2018. The result of the said written test was declared by SKIMS on 23.10.2018, wherein she was shown to have secured 47 marks out of total 100 marks. It is the specific case of the appellant that the answer papers of all the candidates were snatched five minutes ahead of the scheduled time of 100

minutes fixed for holding the written test, because of which, she could not attempt all the questions and could not secure 50 qualifying marks out of 100 marks fixed for written test.

4. Feeling aggrieved of the aforesaid act of the respondents, the appellant filed writ petition bearing SWP No. 2538/2018 tilted *'Qurat-ul-ain v. State of J&K and Others'*. The learned Single Judge, while issuing notice to the other side on 31.10.2018, granted interim relief to the appellant/writ petitioner by directing the respondents that they shall conduct the interview of the appellant/writ petitioner and shall also produce the result before the court in a sealed cover.

5. On 09.12.2020, when the matter was taken up for consideration by the learned Single Judge, Mr. Reshi, learned counsel appeared for the appellant before the writ court and submitted that the appellant/writ petitioner got 7th position in the merit obtained in the viva voce. The further stand of the appellant was that out of advertised 20 posts, only 15 candidates, including the appellant, were available with the respondents, as such, there was no need of conducting any written test in terms of the rules. On the basis of the aforesaid submissions made by learned counsel for the petitioner, the learned Single Judge vide order dated 09.12.2020 directed the respondent-Director, Sheri Kashmir Institute of Medical Sciences, Soura, Srinagar, to offer appointment to the appellant in terms of merit obtained by her in the interview, as there were sufficient number of posts available.

6. Aggrieved of the aforesaid interim order dated 09.12.2020 passed by the learned Single Judge, the UT of J&K and Sheri Kashmir Institute of Medical Sciences, Soura, Srinagar preferred LPA No.24/2021 titled *'UT of JK and ors. V. Qurat ul Ain'* before this court, which was allowed by the Division Bench of this

court vide order dated 02.08.2022, whereby, impugned interim order dated 09.12.2020 was set-aside and writ court was directed to proceed and decide the writ petition bearing SWP No. 2538/2018 finally in accordance with law. And finally, vide order dated 08.05.2024, the learned Single Judge by a detailed judgment has dismissed the writ petition filed by the petitioner and has also vacated the interim direction. It is the aforesaid order dated 08.05.2024, which is impugned in the present appeal on the grounds enumerated supra.

7. Mr. J. H. Reshi, learned counsel appearing on behalf of the appellant has vehemently argued that learned writ court has not appreciated the controversy in its correct perspective. Learned counsel further submits that out of 20 advertised posts, only 15 candidates applied for the same and so the appellant was required to be straightway appointed without conducting any written test and interview. Learned counsel further submits that SRO 202 of 2015 dated 30.05.2015 does not provide for conducting of any written test and interview and it only envisages preparation of select list on the basis of order of merit. It is further submitted by the learned counsel for the appellant that the SKIMS authorities have changed the rules of the game which is not permissible under law. Lastly, it is submitted by the learned counsel that the impugned judgment cannot sustain the test of law and is liable to be set aside.

8. In the reply filed by the respondent SKIMS in the writ petition, it has been averred that the SKIMS Hospital is a premier tertiary care institute, besides, it is a deemed University and it is to be ensured that patient care is given utmost importance and ensuring minimum lacunas for giving room to negligence or improper and untrained medical as well as para medical staff. It is imperative on the part of SKIMS authorities to appoint/recruit the persons who are best suited

for the posts advertised as it is question of life and limb of a human being. The respondents after scrutinizing the eligible candidates for written test in light of SRO 439 (J&K Civil Services (Decentralization and Recruitment) Act, 2010 conducted the written test for finding/choosing the best suited candidates for the selection of Technician Medical Group). Besides, Senior Selection Committee of SKIMS, which is an autonomous authority, has a fixed criteria for selection, which lays down that all the eligible candidates shall be put to an objective test and minimum marks for being shortlisted for interview shall be 50 marks for general category candidates and 45 marks were fixed for reserved category candidates. The petitioner was fully aware about the selection process being made and has only applied after understanding the pros and cons of the selection procedure.

9. Heard learned counsel appearing on behalf of the appellant/writ petitioner at length and perused the record.

10. The primary ground, which has been urged in the appeal by the appellant before this court is that the respondents were under legal obligation to have appointed the appellant/writ petitioner straightaway in the order of merit without conducting the written test and interview, which according to the learned counsel appearing for the appellant is being held for the sake of scrutiny and short-listing of the candidates, when the posts advertised are far less than the large number of aspirants and candidates applied for the post advertised.

11. The above contention of the appellant is misplaced and has no foundation, more particularly, when the writ petitioner/appellant has gladly and voluntarily participated in the selection process and appeared in the written test without any grouse and after having appeared in the written test, the appellant/writ petitioner

is estopped under law to question the same, at this belated stage when the appellant/writ petitioner could not make the grade. Thus, the appellant is estopped under law to question the procedure of selection after having subjected herself to the said procedure and allowed her merit, eligibility and suitability to be assessed.

12. We are fortified in taking the above view by the law laid down by the Supreme Court in ***'Dhananjay Malik and others v. State of Uttaranchal and others;*** reported in ***(2008) 4 SCC 171,*** wherein the Supreme Court has opined as under:

> 7. ***It is not disputed that the respondent-writ petitioners herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as BPE or graduate with diploma in Physical Education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualifications were contrary to the Rules.***

13. In **Madras Institute of Development Studies and another v. K. Sivasubramaniyan and others**, reported in *(2016) 1 SCC 454*, similar view has been expressed by the Apex Court. Paras 14 to 18 of the aforesaid judgment are reproduced hereinbelow:

> 14. *The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra.*
>
> 15. *In **Dr. G. Sarana vs. University of Lucknow & Ors.**, **(1976) 3 SCC 585**, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Athropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held:-*

"15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in Manak Lal's case where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting:

> *9. "It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point."*

16. *In **Madan Lal & Ors. vs. State of J&K & Ors. (1995) 3 SCC 486,** similar view has been reiterated by the Supreme Court which held that:-*

> *"9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable*

> *to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla1 it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.*

17. *In **Manish Kumar Shahi vs. State of Bihar**, **(2010) 12 SCC 576**, Hon'ble Apex Court reiterated the principle laid down in the earlier judgments and observed:-*

> *"We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."*

18. *In the case of **Ramesh Chandra Shah and others vs. Anil Joshi and others**, **(2013) 11 SCC 309**, recently a Bench of Hon'ble Supreme Court, following the earlier decisions, held as under:-*

> *"In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."*

14. The Supreme Court in **Om Prakash Shukla v. Akhilesh Kumar Shukla,** reported in ***AIR 1986 SC 1043*** has held that a candidate cannot question the process of selection and call it unfair only because the result of selection process is not palatable to him after having participated in the selection process.

15. In **Ramesh Chandra Shah and others v. Anil Joshi and others, (2013) 11 SCC 309**, the Supreme Court has held that ***"by taking part in selection process with full knowledge that recruitment was being made under particular rules, the candidates had waived off their right to question advertisement or methodology adopted by recruiting agency for making selection and that learned Single Judge and Division Bench of the High Court committed grave error by entertaining grievance made by such candidates. A candidate who has participated in selection process is estopped and has acquiesced himself form questioning it thereafter".***

16. In the instant case, the appellant/writ petitioner wants to be selected/ appointed notwithstanding the criteria prescribed for selection in question by respondents having acquiesced her right, when she responded to advertisement notice and participated in selection process. Such a selective adoption is not permissible under law, as no party can be allowed to approbate or reprobate, as has been held by the Supreme Court in its various pronouncements.

17. In **R. N. Gosain v. Yashpal Dhir,** reported in **(1992) 4 SCC 683**, the Supreme Court has opined that law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that 'a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to

which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage.

18. The Hon'ble Supreme Court in **Rajasthan State Industrial Development & Investment Corporation v. Diamond & Gem Development Corporation Ltd.** reported in *(2013) 5 SCC 470* on the issue of approbate and reprobate has held as under:

> ***"9. A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner, so as to violate the principles of, what is right and, of good conscience."***

19. Further, the Supreme Court in **Union of India v. N. Murugesan,** reported in **(2022) 2 SCC 25** has expressed its views as follows**:**

> ***"APPROBATE AND REPROBATE:***
>
> ***26. These phrases are borrowed from the Scott's law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approbate and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party. We have already dealt with the provisions of the Contract Act concerning the conduct of a party, and his presumption of knowledge while confirming an offer through his acceptance unconditionally."***

20. Thus, from a bare perusal of the record and the submission advanced in the instant case, it has come to fore that the appellant/writ petitioner participated in the selection process without any demur. The appellant/writ petitioner after adhering to the terms and conditions of the process of selection has submitted herself to the process and has never protested against the selection process prior to appearing in the written test. After her participation, her merit, eligibility and suitability was assessed and after having failed in the test, the appellant is challenging the criteria for the selection in question. Thus, she is now estopped under law to question the selection process after having participated in the selection process.

21. In light of the discussion made hereinabove, coupled with the settled legal position, we do not find any legal infirmity with the judgment passed by the learned Single Judge as the same is well reasoned judgment dealing the issues raised in the petition, elaborately. We are thus, in agreement with the judgment passed by the learned Single Judge, which is thus, upheld and the appeal is dismissed, accordingly.

22. The instant Letters Patent Appeal is, accordingly, dismissed in the manner indicated above.

(WASIM SADIQ NARGAL) JUDGE

(N. KOTISWAR SINGH) CHIEF JUSTICE

JAMMU
30.05.2024
Raj Kumar

Whether the order is speaking? : Yes/No.

Whether the order is reportable?: Yes/No.