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**(2002) 11 J&K CK 0006**

**Jammu & Kashmir High Court**

**Case No:** LPA(SW) No. 466/2001

State & Ors.

APPELLANT

Vs

Maharaj Krishan Bhat &  
Ors.

RESPONDENT

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**Date of Decision:** Nov. 10, 2002

**Acts Referred:**

- Constitution of India, 1950 - Article 14, 16

**Citation:** (2003) KashLJ 19

**Hon'ble Judges:** B.L.Bhat, J and V.K.Jhanji, J

**Bench:** Division Bench

**Advocate:** P.N.Raina, Ashok Parihar, Advocates appearing for the Parties

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### **Judgement**

1. This appeal by the State is directed against order dated 30.04.2001 passed by the learned Single Judge, whereby State has been directed to

grant the same relief to the writ petitioners as was granted to the writ petitioner in SWP No. 519/87.

2. In brief, the facts are that one Hamidullah Dar, who had been enrolled in the Police Department as a Constable in the year 1978, possessing

Masters' Degree (Previous) from Kashmir University applied for the post of Sub Inspector in relaxation of recruitment rules. He at that time was

posted in the Office of Director General of Police, J&K, Jammu. On receipt of his application, DIGP for Director General of Police, J&K

recommended that sanction be granted to the appointment of Hamidullah Dar, constable as Sub Inspector of Police in relaxation of recruitment

rules. Government vide order dated 01.04.1987 granted sanction to the appointment of Hamidullah Dar as Sub Inspector of Police against direct

quota vacancy in relaxation of recruitment rules. Writ petitioners, who were graduates, felt aggrieved of the appointment of Hamidullah Dar as Sub

Inspector, as according to them they were also fully qualified to be appointed as Sub Inspector being not only physically, educationally and morally

fit but also had better merit and suitability than Hamidullah Dar. They represented to the Government to accord same treatment to them as has

been given to constable Hamidullah Dar, but since the Government did not act on the representation, the petitioners filed writ petition being SWP

No. 351/87 before the High Court Wing at Jammu praying therein that they be treated at par with Hamidullah Dar in the matter of appointment as

sub Inspector. On 13.09.1991 writ petition was disposed of with a direction to the State that while making appointment to the post of ASI/SI, the

writ petitioners be also considered against the direct recruitment quota as per rules. Director General of Police, J&K vide Order No. 1809 of

1991 dated 13.12.1991 rejected the representation of writ petitioner on the ground that they had appeared in the test but did not make the grade

and thus are not entitled for appointment to the post of ASI/SI. The writ petitioners were not satisfied with the order whereby representation was

rejected as they were under the impression that they were to be given the same treatment in the matter of the appointment as Sub Inspector as it

was done in the case of Hamidullah Dar. The petitioners thus filed contempt petition being COA No, 24/92 for initiation of contempt proceedings

against Director General of Police. The contempt petition was disposed of on 23.01.1992 with a direction to Director General of Police to consider

the case of writ petitioner in case they fall in the eligibility clause and also on the touch stone of the case of Hamidullah Dar for promotion/

appointment as Sub Inspector. The case of writ petitioner was reconsidered, but vide order dated 16.09.1992 the same was rejected, being

aggrieved of the order, writ petitioner filed another contempt petition being COA No.162/92. However, vide order dated 09.05.1994 the

contempt petition was dismissed as the learned Judge deciding the contempt petition was of the view that the direction for consideration of writ

petitioners case afresh did not imply that they had to be necessarily selected or appointed nor envisaged that all the rules should be given go bye

for appointing them to the post of sub Inspector. Since the court's order directing their consideration subject to eligibility had been carried out, the

rule issued in the contempt petition was discharged. The writ petitioners took the matter in appeal, but appeal too was dismissed on 11.07.1997.

3. Undeterred, write petitioners filed SVVP No. 3735/97, order passed in which is the subject matter of this appeal, seeking directions that they

be appointed Sub Inspector retrospectively by treating them at par with Hamidullah Dar. They also sought quashing of order whereby the

representation had been rejected by the Director General of Police. Upon notice of the writ petition, the State filed counter through Director

Prosecution. The state took up the plea that the writ petitioners cannot be given out of turn promotion/appointment ignoring the claim of hundreds

of Constables/Head, Constables and Assistant Sub Inspector, and appointment if given will amount to grant of promotion against the rules. It was

also stated that in police force accelerated or out of turn promotion can be granted by the Director General of Police of one rank only and that too

on the extra ordinary performance by the official concerned, and in this case the writ petitioners had not done anything which would entail them for

out of turn promotion to the rank of Sub Inspector. The State denied the allegation of writ petitioners that Director General of Police had assured

them that they would be given the same treatment as was given to Hamiduliah Dar and rules would be relaxed in their case as well. The stand of

the State was that relaxation of recruitment rules is not within the power of Director General of Police but within the power of State Government

and Govt. alone is competent to relax the rules. It was denied that there was any discrimination visavis the writ petitioners. 4. Before the writ court,

the writ petitioners not only cited the case of Hamidullah Dar for giving them out of turn promotion/appointment, but also submitted that the

appointment of Hamidullah Dar was challenged by one Abdul Rashid in SWP No. 519/87 and the said writ petition was allowed by the Srinagar

Wing of High court on 24.09.1998. Learned Single Judge relying on the order passed in the said writ petition, whereby appointment of Hamidullah

Dar was not disturbed but Abdul Rashid was directed to be given the same treatment as was given to Hamidullah Dar, allowed the writ petition

directing that the petitioners be given the same treatment. Learned Single Judge also took notice of fact that against the order passed in SWP No.

519/87, letters patent appeal was preferred by the State, but the same was dismissed and the SLP was also dismissed by the Supreme Court.

Hence the appeal by the State. 5. Learned counsel for the appellants contended that the writ petitioners cannot seek appointment against the rules

nor any appointment which was made against the recruitment rules can be made the basis to seek appointment to the post. The precise submission

of the learned counsel for the State is that Article 14 of the Constitution of India cannot be invoked on the basis of an order in favour of other

person which was contrary to law. On the other hand learned counsel appearing on behalf of writ petitioners contended that the writ petitioners are

not only similarly situated but Hamidullah Dar was possessing lesser merit, suitability and efficiency as compared to writ petitioners. He also

contended that Abdul Rashid, who had challenged the appointment of Hamidullah Dar, has since been appointed and on this score alone the writ

petitioners are entitled to the same treatment. He contended that the learned Single Judge has not acted erroneously in directing the State to give

similar treatment to writ petitioners as has been given to Hamidullah Dar and Abdul Rashid.

6. We have heard learned counsel for the parties at length and carefully gone through the record of this case.

7. In SWP No. 519/87 filed by Abdul Rashid a definite finding was recorded by the writ court that appointment of Hamidullah Dar was in

relaxation of recruitment rules and the relaxation so granted was contrary to the decision given by the Supreme Court in "J&K Public Service

Commission Vs. Dr. Narinder Mohan & others" AIR 1994 SC 1808. Hamidullah Dar was appointed in the year 1987 and the writ petition

challenging his appointment came to be decided in September 1998. The writ court considering the appointment of Hamidullah Dar had been made

11 years before, did not deem it fit to quash his appointment. The State, however, was directed to accord same treatment to Abdul Rashid. The

State being aggrieved took the matter in appeal but the LPA Bench after noticing that Hamidullah Dar had been in service as Sub Inspector for 11

years and it would not be proper to cancel his appointment dismissed the appeal. The State went to the Supreme Court in SLP but the same was

dismissed in limine. Because of the directions given by the writ court, State had no option but to appoint Abdul Rashid. The appointments

Hamidullah Dar as well as Abdul Rashid were against the vacancies meant for direct recruits. In the case of Hamidullah Dar recruitment rules were

relaxed although relaxation was contrary to the decision of Supreme Court in Narinder Mohan's case (supra), whereas Abdul Rashid too had not

undergone the process of selection but was appointed in pursuance of directions given by the court in a writ petition filed by him. It is further not in

dispute that direct recruitment to the post of Sub Inspector is on the basis of selection to be made by the J&K State Service Selection Board.

Thus, the only question which arises for consideration is whether the writ petitioners are entitled to the same relief which was given to others in

violation of recruitment rules.

8. In "Chandigarh Administration & another Vs. Jagjit Singh & another", AIR 1995 SC 705, Supreme Court opined that if the order in favour of

the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, then such illegal or unwarranted order

cannot be made the basis of issuing a writ compelling the authority to repeat the illegality or to pass another unwarranted order. It was also said that

extraordinary and discretionary power of the High Court cannot be exercised for such a purpose and that too because the authority had passed

one illegal/unwarranted order. Giving effect to each plea would be prejudicial to the interests of law and will do incalculable mischief to public

interest. It will be a negation of Law and the rule of Law. 9. In ""Gursharan Singh & others Vs New Delhi Municipal Committee & others"" , AIR

1996 SC 1175, the Supreme Court said that ""the guarantee of equality before law is a positive concept and it cannot be enforced by a citizen or

court in a negative manner. To put it in other words, if an illegality or irregularity has been committed in favour of any individual or a group of

individuals, the other cannot invoke the jurisdiction of the High court or of the supreme court, that the same irregularity or illegality be committed by

the State or an authority which can be held to be State within the meaning of Article 12 of the Constitution, so far such petitioner are concerned, on

the reasoning that they have been denied the benefits which have been extended to others although in an irregular or illegal manner. Such petitioners

can question the validity of orders which are said to have been passed in favour of persons who were not entitled to the same but they, cannot

claim orders which are not sanctioned by law in their favour on principle of equality before law. Neither Art 14. of the Constitution conceives

within the equality clause this concept nor Art.226 empowers the High Court to enforce such claim of equality before law. If such claims are

enforced, it shall amount to directing to continuance and perpetuate an illegal procedure or an illegal order for extending similar benefits to others.

Before a claim based on equality clause is upheld , it must be established by the petitioner that his claim just and legal, has been denied to him, while, it

has been extended to others and in this process there has been a discrimination.

10. In ""I.C.A.R. & another T.K. Suryanarayan & others"" , AIR 1997 SC 3108, the Supreme court reiterated that ""even if in some cases,

erroneous promotions had been given contrary to the Service rules and consequently such employees have been allowed to enjoy the fruits of

improper promotion, an employee cannot base his claim for promotion contrary to the statutory Service Rules in Law courts. Incorrect promotion

either given erroneously by the department by misreading the said Service Rules or such promotion given pursuant to judicial orders contrary to

Service rules cannot be a ground to claim erroneous promotion by perpetrating infringement of statutory Service Rules, in a court of Law,

employees cannot be permitted to contend that the Service Rules should not be adhered to because in some cases erroneous promotions had been

given.

11. In ""Union of India & others VS Rakesh Kumar"" , AIR 2001 Sc 1877, the Supreme Court took the view that ""by erroneous interpretation of

the rules if pensionary benefits are granted to someone it would not mean that the said mistake should be perpetuated by direction of the Court. It

would be unjustifiable to submit that by appropriate writ, the court should direct something which is contrary to the statutory rules. In such cases ,

there is no question of application of Article 14 of the Constitution. No person can claim any right on the basis of decision which de hors the

statutory rules nor there can be any estoppel. Further, in such cases there cannot be any consideration on the ground of hardship.

12. in the light of law laid down by the Supreme Court in the aforementioned cases that relief wrongly given to others cannot be made the basis to

issue writ or order in another case, it is now to be seen whether the writ petitioners have enforceable legal right to claim appointment to the post of

Sub Inspector. It is not in dispute that the writ petitioners were recruited as Constable and in due course were promoted to the post of Head

Constable and presently are holding the post of Assistant SubInspector. In case the state is directed to give same treatment to them as was given

to Hamidullah Dar and Abdul Rashid, the effect would be that the State will have to appoint them as Inspector because presently Hamidullah Dar

and Abdul Rashid are holding the posts of Inspector. It would mean that without undergoing the process of selection in accordance with the

recruitment rules the writ petitioners would rank senior to the persons who may come to be appointed in police force much prior to the petitioner.

The main contention of the writ petitioner is that they being graduates are entitled to be promoted as Sub Inspectors as was done in the case of

Hamidullah Dar. The State in its counter has stated that hundreds of graduates and post graduates are working as Constable/ Head Constable in

the police department and if the writ petitioners are directed to be appointed as Inspectors, then all those who are graduates and post graduates

shall seek the same treatment and in that eventually all will have to be appointed without undergoing the process of selection.

13. During the course of hearing of this learned counsel for the writ petitioners fairly conceded that against the vacancies meant for direct recruits,

the writ petitioners had completed but not selected as they did not make the grade. The writ petitioners, who did not make the grade on merit,

cannot seek appointment to the post of Sub Inspector simply because they are graduates nor this Court can direct the State to appoint them as sub

Inspector/Inspector in relaxation of rules as it will amount to negation of rules. The Supreme court in ""Suraj Parkash Gupta & others Vs State of

J&K & others"" , AIR 2000SC 2386, while noticing that State of J&K in making appointments had been flouting basic rules of recruitment by

relaxing the rules and also rules requiring consultation with PSC/ DPC for promotions/recruitment, gave certain general directions to the State of

Jammu and Kashmir so as to ensure that the rules are not flouted in future One of the directions was that the State of J&K will ensure that no

relaxation is made for direct recruitment through PSC/DPC for purpose of appointment, regular promotion/recruitment by transfer. This being the

law and there being no rule providing that all graduates as a matter of course are to be appointed as Sub Inspector, writ petitioners do not have

any enforceable legal right and thus are not entitled to the relief sought for in the writ petition.

14. It will not be fair if we do not notice the judgments cited by the learned counsel for the writ petitioners. Learned counsel for the writ petitioners

cited ""H.C. Puttaswamy & others Vs The Hon'ble Chief Justice of Karnataka High court, Bangalore & others"", AIR 1991 SC 295, in which their

Lordships of the Supreme Court after considering that the employees who had been appointed against the recruitment rules were in service for

more than 10 years and some of them in the normal course had been promoted to the higher cadre and had crossed the age for entry into any

other service, did not quash their appointment. Reading of para16 of the Judgment shows that the circumstances of said case justified an

humanitarian approach and the appellants there in deserved justice ruled by mercy.

15. In Dr. Narinder Mohan's case (supra), the Supreme Court said held that in absence of Statutory rules the State in exercise of Article 162 can

create civil posts and fill them up according to executive instructions consistent with Articles 14 and 16 of the Constitution. We fail to understand in

what manner this judgment can be applied to the facts of present case.

16. in ""J.C.Jadav& others Vs State of Haryana & others"", AIR 1990SC 857, the Supreme Court opined that if the rule confers power on the

Government to dispense with or to relax the requirement of any of the rules to the extent as it may consider necessary for dealing with the case in a

just and equitable manner, the same can be exercised. There is no dispute with this preposition of law because the object and purpose of

conferring such a power on the Government is to mitigate undue hardship in any particular case and to deal with a case in a just and equitable

manner. It is also true that the power to grant relaxation can be exercised in case of any individual to remove the hardship being caused to him or

number of individuals who may be similarly placed, but in the case of writ petitioners if rules are directed to be relaxed that will cause hardship to

hundreds of Constables/ Head constables and Assistant Sub Inspectors who are in line for promotion to the post of Sub Inspector.

17. In our view the judgments cited by the learned counsel for the writ petitioners do not render any assistance to the case of writ petitioners.

18. In view of the above, the appeal is allowed and judgment of learned Single Judge is set aside, resultantly the writ petition is dismissed with no

order as to costs.