

(2016) 04 J&K CK 0025

In the Jammu And Kashmir High Court

Case No : LPA No. 170 of 2013 c/w LPA Nos. 209 of 2013, 210 of 2013, 52 of 2014

Ashok Kumar

APPELLANT

Vs

State of J&K

RESPONDENT

Date of Decision : 16-04-2016

Acts Referred:

Jammu and Kashmir High Court Staff (Condition of service) Rules, 1968 — Rule 6

Citation : (2016) 4 JKJ 452

Hon'ble Judges : Mr. Ali Mohammad Magrey and Mr. Bansilal Bhat, JJ.

Bench : Division Bench

Advocate : Mr. Z.A. Shah, Sr. Advocate with Mr. A. Hanan, Advocate (in i, ii, iii & v LPAs); Mr. R.A. Jan, Sr. Advocate, with Ms Syed Amani, Advocate in LPA No. 52 of 2014, for the Appellants; Mr. B.A. Bashir, Sr. Advocate, with Ms Farah Bashir, Advocate; and Mr. M.

Final Decision : Dismissed

Judgement

A. M. Magrey, J. - These five Letters Patent Appeals have been preferred against the common judgment and order dated 30.08.2013 passed

by the learned Writ Court in four writ petitions, viz. SWP nos. 2681/2011, 2344/2011, 489/2010 and 201/2012 whereby and where under the

writ petitions stand allowed and the High Court order no.579 dated 24.10.2008 and the orders of promotion made in implementation thereof, viz.

High Court orders bearing no. 580 dated 26.10.2008; no. 667 dated 24.11.2008 and no. 476 dated 30.8.2011 have been quashed with certain

directions to the official respondents.

2. We heard learned counsel for the parties, perused the material on record and considered the mater.

3. The High Court order no.579 dated 24.10.2008 has been purportedly issued in

terms of the power under Rule 6 of the Jammu and Kashmir

High Court Staff (Conditions of Service) Rules, 1968. The source of this Rule lies in the rule making power vested in the High Court by the

relevant provision of the Constitution of Jammu and Kashmir State. The High Court of Jammu and Kashmir is the creation of the Constitution of

Jammu and Kashmir (hereinafter, the State Constitution). Part VII of the State Constitution relates to the High Court. Section 108 thereunder,

which is akin to Article 229 of the Constitution of India, relates to the appointment of officers and servants of the High Court. However, whereas in

terms of Article 229 of the Constitution of India the rule making power is vested in the Chief Justice, under Section 108 of the State Constitution

the said power is vested in the High Court. As would be seen from a plain reading of the aforesaid provision of the State Constitution, the terms

'High Court' and 'the Chief Justice' have been used therein contradistinctively. In so far as relevant here, it is extracted below:

108. Officers and servants of the High Court.â?" (1) Appointments of officers and servants of the High Court shall be made by the Chief

Justice of the Court or such other Judge or officer of the Court as he may direct;

Provided that the Governor may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall

be appointed to any office connected with the Court save after consultation with the State Public Service Commission;

(2) Subject to the provisions of any law made by the Legislature, the conditions of service of the officers and servants of the High Court shall be

such as may be prescribed by rules made by the High Court with the approval of the Governor.

(3)â?;

4. In exercise of the power thus vested in the High Court by Section 108(2) of the State Constitution, it made the rules, named, the Jammu and

Kashmir High Court Staff (Conditions of Service) Rules, 1968 (hereinafter, the Staff Rules) which were duly approved by the Governor of the

State. The High Court in terms of Rule 6 of the Staff Rules conferred the power of laying down the qualifications of a member of service and to

determine the mode of recruitment, from time to time, on the Chief Justice. Rule 6 of the Staff Rules reads as under:

6. Qualifications and mode of recruitment

The Chief Justice may from time to time lay down the qualifications of a member of service and determine the mode of recruitment.

5. It needs a mention here that the Staff Rules are not exhaustive in content and sphere, inasmuch as the same do not cover all the possible aspects

which may arise vis-a-vis a Service. The Rules only contain certain special provisions, and with respect to rest of the aspects and conditions of

service, the members of the service have been left to be governed by the Rules applicable to the State Government employees. Reference to the

relevant provision of the Rules would be made later at the appropriate place in this judgment.

6. On 24.10.2008, an order bearing no.579 came to be issued. It purported to lay down the qualifications and mode of recruitment for

appointment to and promotion on various posts in the High Court of Jammu and Kashmir. Having laid down the qualifications and the mode of

recruitment, two notes were appended thereto. The order along with the two notes is extracted below:

In exercise of the powers conferred on me under Rule 6 of the Jammu and Kashmir High Court Staff (Conditions of Service) Rules 1968 and in

supersession of all previous orders in this behalf, I, Nisar Ahmad Kakru, Acting Chief Justice of High Court of Jammu and Kashmir, on the basis

of report submitted by the committee of Hon'ble Judges, constituted for the purpose, prescribe the following qualifications and mode of recruitment

for appointment and promotion of various posts in the High Court of Jammu and Kashmir.

â?|

â?|

â?|

1) If the candidate(s) is/are not available from the relevant feeding cadre, then the selection/appointment shall be made from amongst the

candidate(s) from other equivalent cadre(s).

2) Since the requirement of graduation for entry into the High Court service was prescribed vide Notification dated 25.4.1987, at that time officials

having qualification less than graduation entered the service. Such officials having during this period gained sufficient experience in the working of

the administration, the Chief Justice may on his own or on the recommendations of committee, if so constituted, relax the qualification in cases of

officers/officials who have made their entry into the service on or before the 25th of April, 1987. Further the minimum period of experience can

also be relaxed in exceptional and appropriate cases. The officials can get only one relaxation at the time.

7. By the aforesaid order, qualification vis-à-vis the ministerial posts ranging from the post of Junior Assistant to the post of Joint Registrar

Graduation was laid down to be the minimum qualification with two years' experience in the lower post. Whereas all the posts above that of the

Junior Assistant were prescribed to be filled up by promotion from amongst the officials holding the immediate below ranks, 75% of the post of

Junior Assistant were laid down to be filled in by direct recruitment from amongst candidates possessing Graduation as the minimum qualification

and 25% by promotion from amongst Class IV employees of the establishment.

8. Subsequent to the issuance of the above order dated 24.10.2008, numerous staff members of the High Court were promoted to next higher

posts ranging from Senior Assistants to Joint Registrars in terms of order no.580 dated 26.10.2008. Those of the employees who were

matriculates and had been appointed either on Class IV posts or Junior Assistants on or before 25.04.1987, were granted relaxation in

qualifications.

9. The private respondents in these appeals had been appointed as Orderlies after 1987 and, being matriculates, were later promoted as Junior

Assistants. On the relevant date, i.e., in October, 2008, they were working as Senior Assistants. Though their juniors were also promoted to next

higher post of Head Assistant, they were ignored. They represented against their supersession and denial of promotion. The High Court later

issued another order, bearing no. 667 dated 24.11.2008. By that order while the High Court made further promotions of numerous employees, the

private respondents were also promoted to the next higher posts, but on ad hoc basis in their own pay and grade.

10. The aforesaid order no.667 dated 24.11.2008 was challenged by some of the Graduate Senior Assistants, including the appellants herein, in

SWP no.1751/2008, inter alia, on the ground that the same had been made in

violation of the qualifications laid down in High Court order no.579

dated 24.10.2008 and the note 2 appended thereto. That writ petition was allowed by the learned Writ Court by judgment dated 22.04.2010 and

the promotion of the private respondents on ad hoc basis in relaxation of qualifications was quashed. The Letters Patent Appeals filed by the

private respondents as well as the High Court, too, were dismissed by judgment dated 30.08.2011. This led to issuance of High Court order

no.476 dated 30.08.2011, whereby the graduate Senior Assistants, who were junior to the petitioners, were promoted to the next higher post of

Head Assistant.

11. Thereafter, the private respondents challenged the High Court order no.579 dated 24.10.2008 and the promotion orders made pursuant

thereto, including the order dated 30.08.2011. Those writ petitions, being SWP nos. 2681/2011, 2344/2011, 489/2010 and 501/2012, were

allowed by the learned Writ Court by a detailed and lucid judgment dated 30.08.2013. So far as the High Court order No.579 dated 24.10.2008

was concerned, the learned Writ Court held as under:

33. The classification introduced by order No.579 dated 24.10.2008 between Graduates and Matriculates as also between Matriculates and

Matriculates is unreasonable, hit by the mandate of Articles 14 and 16 of the Constitution as there is no differentia, muchless intelligible differentia,

flowing from the impugned order which could justify the classification between similarly placed employees of the High Court, constituting one

homogenous group. It is also established and held that the impugned order has no rationale nexus with the object sought to be achieved.

12. The learned Writ Court also found that High Court order No.579 dated 24.10.2008 had been issued in violation of the earlier judgment dated

08.04.2002 passed by the Court in SWP no.2887/2001 filed by one of the Readers of the Court and, therefore, held the impugned order to have

been rendered non-est on that count.

13. So far as the power of relaxation of the Chief Justice is concerned, the learned Writ Court, relying on an earlier judgment of the Court in

Abdul Hamid Khan v. Union of India, 2012 (4) JKL 144 (HC), and by reference to the relevant provisions contained in the J&K Civil

Services (Classification, Control and Appeal) Rules, 1956, the practise in the High

Court and the stance of the Registrar General taken in an earlier writ petition, SWP no.2887/2001, filed by one of the Readers of the High Court, held that the power to relax any rules is statutory in nature and is exercisable by Hon'ble the Chief Justice vis-à-vis the members of the High Court staff, and that the practical implication of Note (2) of the order dated 24.10.2008 tantamount to curtailing the statutory power conferred on Hon'ble the Chief Justice. It also amounted to amending the Statute and that the power could not be curtailed by an executive order. The learned Writ Court held that the order dated 24.10.2008 was void ab initio.

14. So far as the orders of promotion impugned in the writ petitions were concerned, the learned Writ Court held that the accrued rights of the private respondents herein (petitioners) have been taken away, so much so they were reverted back. The action of respondent no.2 in reversing the accrued rights of the private respondents and chocking their promotional avenues was totally arbitrary and, therefore, violative of their constitutional rights. Finally, the learned Writ Court allowed the writ petitions and passed the following directions:

43. For all what has been discussed and held herein above, these writ petitions are allowed. Order No. 579 dated 24.10.2008 is quashed.

Consequently, the orders bearing No. 580 dated 26.10.2008; No. 667 dated 24.11.2008 and No. 476 dated 30.8.2011 passed in implementation of order dated 24.10.2008 are also quashed to the extent and in so far as private respondents in these writ petitions, who figured junior to the petitioners in the cadre of Senior Assistants/Head Assistants, have been promoted as Head Assistants/Section Officers over and above the petitioners in these writ petitions.

44. It is provided and directed that respondent No.2 shall process the papers for a denovo exercise in the matter. While doing so, the direction contained in the judgment and order dated 08.04.2002, passed in SWP No. 2887/2001, as quoted herein above in this judgment, shall also be complied with.

45. However, it is made clear that in the event a decision is arrived at to earmark at least 25%, of posts in all categories/classes of the service/cadre, retrospectively from the date the private respondents herein were promoted, for the employees who were/are appointed against

25% of the posts of Junior Assistants from Class IV Matriculate employees, it shall be open for respondent No. 2 not to effectuate any break in the promotion of the private respondents falling within the remaining 75% of posts. Rest of the private respondents to the extent of 25% shall stand reverted and consequently, the petitioners herein shall be considered for promotion against the said 25% posts of Head Assistants/Section Officer as would thus become available. However, they shall be entitled to restoration of their seniority notionally vis-à-vis the private respondents as it existed prior to the issuance of order dated 24.10.2008.

15. Mr. Z. A. Shah, learned Senior Advocate, appearing on behalf of the appellants in four of the appeals, argued that classification on the basis of higher qualifications is permissible because higher qualification promotes efficiency; that promotion can be denied to employees having lesser qualifications; that rules of recruitment cannot be relaxed; that power of the Chief Justice to lay down the conditions of recruitment and promotion of the staff of the High Court is absolute; that if matriculates are allowed to be promoted, same would set a wrong precedent across the board; that matriculates cannot seek further promotions on the basis of historicity of service. The learned counsel during the course of his submissions cited and relied upon the judgment of the Supreme Court in *State of J&K v. Triloki Nath Khosa*, (1974) 1 SCC 19, but at the close of the arguments, produced photocopies of the judgments of the Supreme Court in the following cases:

1. *Mohammad Shujat Ali v. Union of India*, (1975) 3 SCC 76;
2. *S. L. Sachdeva v. Union of India*, (1980) 4 SCC 562;
3. *State of Gujarat v. Raman Lal*, AIR 1984 SC 161;
4. *Punjab S. E. Board v. Ravinder Kumar*, (1986) 4 SCC 617;
5. *T.R. Kapur v. State of Haryana*, 1986 (Supp) SCC 584;
6. *P.D. Aggarwal v. State of U. P.*, (1987) 3 SCC 622;
7. *Ragunath Prasad Singh v. Secretary Home*, AIR 1988 SC 1033;
8. *Roop Chand Adlakha v. Delhi Dev. Authority*, 1989 Supp (1) SCC 116;
9. *Kum. Shrilekha Vidyarthi v. State of U. P.*, (1991) 1 SCC 212;
10. *P. Mugugesan v. State of Tamil Nadu*, (1993) 2 SCC 340;

11. T.R. Kothandaraman v. Tamil Nadu Water Supply and Drainage Board, (1994) 6 SCC 282;

12. Union of India v. Tugand Rajan Mohanty, (1994) 5 SCC 450;

13. K. Narayanan v. State of Karnataka, 1994 Supp (1) SCC 44;

14. Rajasthan S.E. Board Accounts Association v. Rajasthan State Electricity Board, (1997) 3 SCC 103;

15. Chairman Railway Board v. C.R. Rangadam, (1997) 6 SCC 623;

16. Food Corporation of India v. Om Prakash, AIR 1998 SC 2628;

and the decision of a learned Single Judge of this Court in Syed Mohammad Ashraf v. State of J&K, 2005 (2) JKJ 504.

16. Mr. R.A. Jan, learned Senior Advocate, representing the High Court, submitted that the writ petitions are not maintainable as the writ

jurisdiction of the Court is for enforcement of legal rights and not for establishing a right. According to him, since the writ petitioners, private

respondents, did not possess the qualification required for promotion, they have no right of consideration and, hence, their writ petitions are not

maintainable. He next argued that it is the absolute discretion of the Chief Justice to lay down qualifications and that the words "'from time to time

used in Rule 6 of the Staff Rules means 'on conscious contemporary requirement of the job'. He submitted that the petitioners-private respondents

have no right to challenge the same; He further submitted that an employee has no right to call in question the laying of qualifications by the

employer, as the same is a policy decision, which cannot be challenged by an employee; that the writ petition is wholly based on the representation

made by them on the obiter dicta of the judgment in the two LPAs; that obiter dicta cannot give rise to an enforceable right; that the writ petition is

also hit by res-judicata because the questions raised in the present writ petitions between the same parties were substantially in issue in the earlier

writ petition.

17. On the other hand, Mr. B. A. Bashir, learned Senior Advocate, and Mr. Moomin Khan, learned Advocate, appearing on behalf of the private

respondents rebutted the aforesaid arguments on the basis of the facts brought on record and the judgments cited and relied upon by the learned

counsel for the appellants. They submitted that, in fact, the present case was wholly covered by the numerous decisions of the Supreme Court

mentioned in the judgment rendered by the learned Single Judge, with particular reference to the judgment in Food Corporation of India v. Om

Prakash (supra). Mr. Altaf Haqani, appearing for the private respondent in the fifth LPA submitted his written submissions, almost on the same

lines.

18. Having considered the matter, we think that the real issue underlying the controversy in this lis fundamentally relates to placing an embargo on

the power of the Chief Justice to relax qualifications in the matter of promotions of High Court staff and limiting it in point of time; the consequential

fall out of curtailment of such power being denial of similar treatment to the members of the staff possessing identical qualifications and, in some

cases, having been appointed from the same source and being identically situated. Mr. Z. A. Shah on behalf of appellants in four of the appeals,

during the course of arguments, raised an ancillary point that there was no such power of relaxation conferred on the Chief Justice by the Jammu

and Kashmir High Court Staff (Conditions of Service) Rules, 1968. Mr. R. A. Jan, representing the High Court in the fourth LPA, naturally, would

not subscribe to the argument so advanced at the Bar by Mr. Shah, though he did not speak on the point either way.

19. Since the real question as referred to above by us is secondary to the point raised by Mr. Shah, we deem it appropriate first of all to advert

thereto.

20. Let us first refer to what the learned Writ Court has observed and held in that behalf. The relevant paragraphs 35 and 36 of the judgment are

quoted hereunder:

35. Coming to another crucial issue involved in the case, it is contended on behalf of the petitioners that Note (2) appended to the impugned order

dated 24.10.2008 is void also on the ground that it has sought to place an embargo on the power to relax conferred on Hon'ble the Chief Justice

under a Statute. Reference in this connection is made to Rule 5 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal

Rules), 1956. Respondent No. 2 in his reply affidavit has stated that High Court Rules do not contemplate relaxation of the rules as such. Similar

contention has been raised by Mr. Shah in his written arguments.

36. The fact that Note (2) appended to the Rules speaks of relaxation coupled

with the fact such relaxations have till now continuously been accorded by Hon'ble the Chief Justice, the dispute sought to be raised in relation to the power of Hon'ble the Chief Justice by the respondents is noted only to be rejected, as being naïve and novice. This Court in Abdul Hamid Khan v. Union of India & ors, SWP No. 1485/2011, decided on 30.11.2012 [2012 (4) JKJ 144 (HC)], cited by learned counsel for the petitioners, while interpreting Rule 13 of the High Court Staff Rules, in paragraph 16 of the judgment, has held as under:

'A plain reading of the aforesaid provision of the High Court Staff Rules makes it unambiguously clear that subject to any special provisions contained in the said Rules, the rules and orders for the time being in force and applicable to Government servants shall also regulate the conditions of service of persons serving on the staff attached to the High Court and that the powers exercisable under the said rules and orders by the Governor or the Government of the State or any authority subordinate to the Governor or the Government shall be exercisable by the Chief Justice.'

In light of the above, no dispute can be entertained about the power of the Lord Chief Justice in that behalf. It may be observed here that there is no provision in the High Court Staff Rules, placing a bar on appointment of any ineligible candidate to any of the posts borne on the High Court Staff. It is Rule 17 (sic, should be 18) of the Classification, Control and Appeal Rules which prescribes such a bar. It is also nobody's case that these Rules are not applicable to the High Court Staff. In fact, reference has been made to annexure P11 at page 78 of the writ petition, which is an affidavit filed by the Registrar General before the learned Writ Court in SWP No. 2887/2001. In Para 8 thereof, the Registrar General has stated that inter se seniority amongst Readers is determined as per established norms and rules under Classification, Control and Appeal Rules. Reference is also made to the High Court order No. 205 dated 07.07.1997, placed at page 54 of the writ petition, which is an order according promotion to most of the petitioners herein as Junior Assistants. In the last paragraph of this order, the Registrar General has stated that ""their appointments by promotion shall be on probation for one year in terms of Jammu and Kashmir Civil Services (Classification, Control and Appeal)

Rules, 1956 read with High Court Staff Condition of Service Rules, 1968. These facts are noted only to show that the High Court itself has been

admitting application of these Rules to the High Court Staff and, rightly so. Rule 5 of the said Rules deals with Relaxation of rules: It reads thus

'Any of these rules or Rules made under them, may for reasons to be recorded in writing, be relaxed by the Government in individual cases, if

Government is satisfied that a strict application of the rule would cause hardship to the individual concerned or confer undue benefit on him.'

This power, as already mentioned, is statutory in nature exercisable by Hon'ble the Chief Justice vis-à-vis the members of the High Court staff. The

question is whether by an executive order, this power could be curtailed. The answer cannot, but be in negative. The practical implication of Note

(2) of the order dated 24.10.2008 tantamount to curtailing the aforesaid statutory power conferred on Hon'ble the Chief Justice. It also amounts to

amending the Statute. Manifestly, therefore, the order dated 24.10.2008 is void ab initio.

21. Mr. Shah submitted that Rule 5 of the Classification, Control and Appeal Rules does not speak of relaxation in qualifications and that, in any

case, it is settled law that recruitment rules cannot be relaxed. This argument has been effectively and adequately dealt with by the learned Writ

Court in the judgment impugned in these appeals. Nonetheless, we reiterate that there is no provision in the Staff Rules either providing for grant of

relaxation or placing any embargo on appointment of a candidate not possessing the qualifications as may be laid down under Rule 6 thereof. In

other words, it is not distinctively explained as to who would be eligible for appointment against a post in the cadre. In short, there is no

disambiguating clause in the Staff Rules. However, it is Rule 18 of the Jammu and Kashmir Civil Servants (Classification, Control and Appeal,

Rules 1956 (CCA Rules), which deals with this aspect of the matter. Before elaborating the point, it may be mentioned here that Rule 3 of the

CCA Rules prescribes the commencement and extent thereof. In terms of Sub-rule (1) of Rule 3, these rules came into force on 14.06.1956, the

date they were published in the Government Gazette. Sub-rule (2) of Rule 3, as to their application, provides as under:

(2) They shall apply to all services and to all persons appointed to any service before or after the said date, except to the extent otherwise

expressly provided:

- (a) by or under any law or rules for the time being in force; or
- (b) in respect of any member of such service by a contract or agreement subsisting between such member and the Government.

(3) â?|

The Staff Rules were made in 1968, i.e., ten years after the CCA Rules. There has been no law or rule in force at any point of time to exclude the

application of CCA Rules to the High Court Staff. In terms of Rule 3(2), as quoted above, the CCA Rules were made applicable to all services

and to all persons appointed to any service, which would include the High Court staff. Neither the CCA Rules, nor the Staff Rules, expressly or

impliedly exclude the application of CCA Rules to the High Court staff. That being so, all the Rules contained in the CCA Rules, except those in

respect of which any special provision has been made in the Staff Rules, have been made and are applicable to the High Court staff. It is to be

borne in mind that the source of these Rules does not lay in the power exercisable under Section 124 of the State Constitution, in that any doubt

could be raised as to their application to the High Court staff; but these Rules were framed by the Government in exercise of the powers under

Section 3 of the Jammu and Kashmir Civil Servants (Removal of Doubts & Declaration of Rights) Act, 1956 enacted by the State Legislature

under its plenary power under Section 5 of the State Constitution.

22. Coming back to Rule 18 of the CCA Rules, it provides that no person shall be eligible for appointment to any service, class, category or grade

or any post on the cadre thereof unless: (a) he possesses such qualifications and has passed such special tests as may be prescribed in that behalf

by the Government; or (b) possesses such other qualifications as may be considered by the Government to be equivalent to the said special

qualifications or special tests. It is, thus, Rule 18 of the CCA Rules which defines who shall be eligible for appointment to any service, which would

include the High Court staff. The act of laying down the qualifications by itself would not amount to prescribing the eligibility unless there is a

disambiguating rule or clause laid down that persons not possessing such qualifications would not be eligible for appointment. That is what is

provided in Rule 18 of the CCA Rules. Then, under Rule 5 of the CCA Rules a

power has been reserved saying that any of these rules, which would include Rule 18 aforesaid, may be relaxed by the Government in individual cases if the Government is satisfied that a strict application of the rule would cause hardship to the individual concerned or confer undue benefit on him. Reading the two provisions, i.e., Rule 5 and 18 of the CCA Rules together, it becomes manifest that the Government has the power to relax the rigor of Rule 18. The rigor of Rule 18 is that one needs to possess the prescribed qualifications to be eligible for appointment. Once the rigor of the Rule is relaxed, that is relaxation in qualifications. That is how the power to relax qualifications flows. It barely needs to be mentioned here that Government with reference to the High Court in terms of Rule 13 of the Staff Rules means the Chief Justice. Rule 13 of the Staff Rules may also be quoted hereunder. It reads thus:

13. Leave and pension etc. (1) Subject to any special provisions contained in these Rules, the rules and orders for the time being in force and applicable to Government servants of corresponding classes in the service of the Government of Jammu and Kashmir shall regulate the conditions of service of persons serving on the staff attached to the High Court; Provided that the powers exercisable under the said rules and orders by the Governor of Jammu and Kashmir State or Government of Jammu and Kashmir state or by any authority subordinate to the Governor or the Government shall be exercisable by the Chief Justice or by such person as he may, by general or special order, direct.

Any question arising as to which rules or orders are applicable to the case of any person serving on the staff attached to the High Court shall be decided by the Chief Justice whose decision shall be final.

A bare look at the contents of the above quoted provision of the Staff Rules makes it axiomatic that subject to any special provisions contained therein, the rules and orders for the time being in force and applicable to Government servants shall also regulate the conditions of service of persons serving on the staff attached to the High Court and that the powers exercisable under the said rules and orders by the Governor or the Government of the State or any authority subordinate to the Governor or the Government shall be exercisable by the Chief Justice. Rules 5 and 18 of the CCA Rules cannot be exception to the above. It is thus clear that there is a

power conferred on the Chief Justice under Rule 5 of the CCA

Rules to relax the prescribed qualifications vis-a-vis any staff member of the High Court staff. It may be also be mentioned here that the

connotation of the abbreviation 'etc.', used in the caption of Rule 13 of the Staff Rules came up for consideration before a learned Single Judge in

Abdul Hamid Khan v. Union of India (supra) and the Court in para 19 of that judgment laid down as under:

19. It also becomes imperative to refer to the caption of Rule 13 of the High Court Staff Rules. It is captioned as ""leave and pension etc."".

Learned counsel for the petitioner submitted that the abbreviation 'etc.' in context of the contents of the provision contained thereunder, should be

read to mean as 'and other things'. In this connection, it would suffice to say that the terms 'leave' and 'pension' are not used in abstract form, but

have reference to rules, i.e., leave rules and pension rules. Going by the principles of literal interpretation of statutes, whether 'etc.' is read as ""other

things in the same series"" or 'and other things', the result would be the same, and would mean 'leave rules, pension rules and other rules'. That will

not detract from what is contained in the contents of the rule, which unambiguously refers to the rules and orders applicable to the Government

servants.

We wholly concur to the view expressed and interpretation given to the abbreviation 'etc.' in context of its use in, and the overall pattern of, the

Staff Rules by the learned Single Judge in the aforesaid judgment. Rule 13 of the Staff Rules does not relate only to the leave and pension, but all

other aspects of the service as are not mentioned in the Staff Rules, but in respect of which provisions are made in the Rules framed by the

Governor in terms of Section 124 of the State Constitution or by the Government in the shape of CCA Rules.

23. We may also observe here that in their writ petition, the writ petitioners in SWP no.2681/2011 also placed a notification dated 06.06.1986 on

record as annexure P8 to the writ petition. By this Notification, the then Chief Justice (Hon'ble Mr. Justice Dr. Adarsh Sein Anand) while laying

down the qualifications for the post of Deputy Registrars in exercise of the power under Rule 6 of the Staff Rules appended a proviso thereto to

the following effect:

Provided, however, that the Chief Justice may, for the reasons to be recorded in writing, relax the minimum qualifications or period of experience, if it is intended to fill up the post by selection from amongst the staff of the High Court.

It is quite clear that such a proviso could not be appended to the Notification, unless the power had been conferred on the Chief Justice. This also demonstrates that the power to relax has been used by the Chief Justices from time to time since long, and so because this power stood conferred by the CCA Rules. Thereby historicity of the service establishes it and assumes importance.

24. In view of the above, the argument raised by Mr. Shah in this regard is held to be unfounded and, therefore, not tenable. This also answers his argument that Rules of recruitment cannot be relaxed and, in that behalf, it may also be mentioned that law is that blanket power of relaxation of recruitment rules cannot be implied. The learned Writ Court has also given well founded reasons in that behalf in the impugned judgment.

25. Now, let us come to the principal issue, which arises in context of Note 2 appended to the High Court order no. 579 dated 24.10.2008

purported to have been issued by the Acting Chief Justice in exercise of the powers under Rule 6 of the Staff Rules. It may be mentioned here that

Section 108 of the State Constitution, unlike Article 229 of the Constitution of India, confers the rule making power on the High Court. Therefore,

any alteration or amendment to be made in the said Rules can be made only by the High Court and, that too, with the approval of the Governor of

the State. Similarly, the CCA Rules have been framed by the Government in exercise of the power conferred on it by a Statute. Consequently, any

embargo, restriction, curtailment or limitation placed on such power would tantamount to amending the aforesaid two Rules, which power lies only

with the High Court in the case of Staff Rules and the Government of the State in the case of CCA Rules. Therefore, any order passed placing any

such embargo, restriction, curtailment or limitation on the power of the Chief Justice would be rendered without jurisdiction and, therefore, illegal.

26. Now, let the Note 2 appended to Order no.579 dated 24.10.2008 be examined. It says that since the requirement of the qualification of

Graduation for entry into the High Court service was prescribed vide Notification dated 25.4.1987, at that time officials having qualification less

than graduation entered the service. Such officials having during this period gained sufficient experience in the working of the administration, the Chief Justice may on his own or on the recommendations of committee, if so constituted, relax the qualification in cases of officers/officials who have made their entry into the service on or before the 25th of April, 1987. Further the minimum period of experience can also be relaxed in exceptional and appropriate cases. The officials can get only one relaxation at the time. A bare perusal of the contents of note (2) appended to the order makes it axiomatic that it has the effect of placing an embargo on the power of the Chief Justice and restricting its exercise to a specified class of persons and limiting it in point of time. Essentially, this amounts to amending and altering the Rules on the subject. On that count it cannot withstand the scrutiny of law.

27. It may also be observed here that the statement made in the aforesaid note that for entry into the High Court service the requirement of the qualification of Graduation was prescribed vide Notification dated 25.4.1987 is also factually wrong. Apart from the fact that there is no order showing that the Chief Justice had laid any such qualifications in exercise of the power under Rule 6 of the Staff Rules, except vis-à-vis the post of Deputy Registrars, it is loudly admitted that 25% of the posts of Junior Assistants are being filled in from amongst matriculate Class IV employees of the High Court. In fact, the order no.579 dated 24.10.2008, as indicated above, also makes such a provision. This has been going on since 1980 pursuant to the Circular no.13 dated 28.03.1980 issued by the Government of Jammu and Kashmir in the General Administration Department (then General Department), earmarking of 75% of the posts of Junior Assistant for direct recruitment and 25% for promotion of matriculate class IV employees to be selected on the basis of type test. The High Court also adopted the aforesaid Circular issued by the Government and ever since has been appointing/promoting matriculate Class IV employees of the High Court as Junior Assistants to the extent of 25% of the available posts from time to time. Therefore, the statement made in the note that for entry into the High Court service Graduation was prescribed vide Notification dated 25.4.1987, is wholly, factually wrong, for, the matriculate Class IV employees promoted as Junior Assistants

equally have been entering the High Court service. It is nobody's case that they are not borne on the establishment of the High Court. Therefore,

there seems to be no logic in saying that for entry into High Court Service Graduation was prescribed as qualification in 1987. The note suffers

from non-application of mind and is, therefore, rendered arbitrary.

28. Let us assume for a moment that, in fact, on 25.04.1987 Graduation was laid down as qualification for direct recruitment on the post of Junior

Assistant, the said date could not be fixed as a cut-off date for discriminating between the matriculate staff members for grant of relaxation for

purposes of future promotions on the reasoning that those appointed on or prior to the aforesaid date had gained experience. Experience is not the

attribute of working on a post up to a particular date line, it is a continuous process. Those of the matriculate staff members who were appointed

as Junior Assistants after 1987 have equally gained experience over the years, and, strictly speaking, going by the increase in the magnitude and

variety of Court work, it would not be an exaggeration to say that their experience in all respects has been more vigorous and varied. In that view

of the matter, the reasoning supplied in Note (2) appended to the order in question is wholly unjustified and unreasonable. Fixation of cut-off date,

therefore, is discriminatory, offending the mandate of Articles 14 and 16 of the Constitution.

29. Essentially, therefore, in view of the fact that Note 2 has the effect of discriminating between similarly placed employees of the High Court on

the basis of an imaginary classification, founded on a cut-off date, it, in reality, is not a case where laying down of higher qualifications is in dispute.

Had Note 2 with the above embargo not been appended thereto, the private respondents would automatically be entitled to the identical treatment

as has been given to those matriculates who were appointed on or prior to the imaginary cut-off date. Strictly speaking, this, therefore, is not a

case where classification on the basis of higher qualification is an issue. Even otherwise, it is settled law that higher qualification must have nexus

with the nature of the job. It is nobody's case that the Graduates so far appointed by the High Court have any special qualifications commensurate

to or connected with the nature and the requirements of the job one needs to perform in the High Court. The Court can take judicial notice of the

fact that the official language of the State and so also of the Courts in the State is Urdu. Normally, every student is pursuing medical, non-medical

and other subjects beyond matriculation. Thus they study Urdu only upto matriculation, like a person who stops studies after matriculation.

Naturally, therefore, higher studies and qualifications in science subjects, like, physics, chemistry, botany, biology, zoology and the like would not

impart them any specialization in writing, or filling in the relevant columns of the format, of a summons in Urdu, nor would higher studies in these

subjects make them more proficient in maintaining and managing the court files. It is a misnomer that Graduates are, or have been, more proficient

in the working of the Courts than matriculates. At least nothing has been brought on record to establish either that the matriculates have failed to

perform any job assigned to them or that Graduates have increased the administrative efficiency of the High Court.

30. So far as the argument regarding administrative efficiency is concerned, it is not the plain higher education that increases the administrative

efficiency; it is the experience and specialised training courses imparted to the employees. And given the fact scenario as delineated by the learned

Writ Court in para 32 of the judgment impugned herein, such a submission should not lie in anybody's mouth. Paragraph 32 of the judgment is

quoted hereunder:

32. In paragraph 33 of the writ petition, the petitioners have given the particulars of some of the officers/officials who on the date of filing of the

writ petition were holding higher posts. It would be profitable to reproduce these details hereunder:

i) Shri K.K. Wattal, who is only a Matriculate, holding the post of Joint Registrar in the Administrative Wing of the High Court;

ii) Shri G.M. Parray, a Matriculate, holding the post of Deputy Registrar. He was initially appointed as an orderly;

iii) Shri Ram Singh, a Matriculate, holding the post of Deputy Registrar;

iv) Shri Bua Datta, a Matriculate, holding the post of Deputy Registrar, Administration, Main Wing of the High Court;

v) Shri K.K. Sharma, Matriculate, holding the post of Assistant Registrar, Civil Section, Jammu Wing. He was initially appointed as Orderly;

vi) Shri Shanker Dass, Matriculate, holding the post of Assistant Registrar. He,

too, was initially appointed as an Orderly;

vii) Shri Kuldeep Raj, a Matriculate, holding the post of Section Officer;

viii) Shri Parveen Singh, Matriculate, holding the post of Section Officer;

ix) Shri Mian Rafiq, a Matriculate, Section Officer;

x) Shri Mohammad Akbar, a Matriculate, holding the post of Section Officer. He was initially appointed as Orderly and later as Junior Assistant

on 7.4.1995, i.e., after the cut-off date;

xi) Shri Altaf Ahmad, Matriculate, holding the post of Section Officer. He too was initially appointed as Orderly and later as Junior Assistant on

7.4.1995, i.e., after the cut-off date.

As already noted herein above, respondent No. 2 has, in his reply affidavit, dubbed these facts and figures as misconceived. These facts and

figures are based on the orders issued by respondent No. 2, from time to time, copies whereof have been appended with the petition. This only

demonstrates the casual manner in which the whole matter has been dealt with by respondent No. 2. Be that as it may, the anomaly that has

resulted from operation of the impugned order dated 24.10.2008 and the prejudice caused to the rights and interests of the petitioners is writ large.

Petitioners have been meted out invidious discrimination, without any reasonable cause or justification.

Further, it is not denied that Graduates and these matriculates have been performing identical jobs and different tables and counters are

interchangeable between them.

31. As regards the arguments of Mr. Z. A. Shah that classification on the basis of higher qualifications is permissible because higher qualification

promotes efficiency; that promotion can be denied to employees having lesser qualifications; and that if matriculates are allowed to be promoted,

same would set a wrong precedent across the board, we find that these have been effectively dealt with by the learned Writ Court in the impugned

judgment. Nothing new has been made out in this appeal before us by the learned counsel. It would be appropriate to quote hereunder the relevant

paragraphs of the impugned judgment.

23. During the course of arguments, it was repeatedly, rather, strenuously submitted by Mr. Shah, learned Senior Counsel, that classification on

the basis of higher educational qualification is permissible in order to achieve efficiency in the service. Learned counsel for the petitioners on the other hand submitted that there is nothing on record to show that the promotional posts required any higher efficiency which could be expected only of graduates and that, in any case, the impugned order dated 24.10.2008 does not disclose that as a reason. On the contrary, it has, admittedly, equated experience with higher qualification of Graduation. Learned counsel further submitted that experience could not be construed to have been the attribute of only a group of employees on the basis of a cut off date, but it is a general phenomenon relatable to years of service rendered, and that such experience has been gained by petitioners as well. Reliance in this regard is placed on a judgment of the Supreme Court in *Food Corporation of India v. Om Prakash Sharma*, AIR 1998 SC 2682.

24. In the aforesaid case, a circular was issued by the Corporation that it had been decided to make a differentiation at the time of first promotion from the recruiting grades between graduates and matriculates. According to the circular, the former would become eligible for promotion after three years of service while the later would become eligible after five years of service. (In the instant case, the promotional avenues have totally been chocked). Subsequently, amendments were made in the Staff Regulations on the aforesaid pattern. The validity of the amendments was challenged by four matriculates. The matter ultimately came up before the Supreme Court. It was submitted by the Corporation that it was felt that the differential criteria should be provided for the purpose of promotion for the category of Assistant Grade-III, Typists, Telephone Operator since Assistant Grade-III were graduates and the Telephone Operators, Typists were matriculates. The Supreme Court, finding that the matriculate Assistant Grade III (Gen) (Depot) were/are performing the duties of AG III on par with Assistant Grade III who possessed qualification of Graduation and that the duties and responsibilities of all the AG III were one and the same and the salary paid is also the same, held as under: 'The very fact that the work of AG. III (G) (Depot) are being carried out smoothly irrespective of officials possessing qualification of matriculation or graduation until this day clearly demonstrates that the qualification of matriculation is adequate to carry out the nature of work prescribed for

Assistant Grade III (Gen) and Assistant Grade III (Depot). The nature of work prescribed in the job description vouches for this argument.'

In the aforesaid case, the Supreme Court considered the law laid down in S. L. Sachdev v. Union of India, (1980) 4 SCC 562; Kumari

Shrilekha Vidyarthi v. State of UP., (1991) 1 SCC 212; State of J&K v. Triloki Nath Khosa, (1974) 1 SCC 19; Mohammad Shujat Ali

v. Union of India, (1975) 3 SCC 76; Punjab State Electricity Board, Patiala v. Ravinder Kumar Sharma, (1986) 4 SCC 617; Roop

Chand Adlakha v. Delhi Development Authority, 1989 Supp (1) SCC 116; N. Abdul Basheer v. K. K. Karunakaran, 1989 Supp (2)

SCC 344; P. Murugesan v. State of Tamil Nadu, (1993) 2 SCC 340; T. R. Kothandaraman v. Tamil Nadu Water Supply and Drainage

Board, (1994) 6 SCC 282; and Rajasthan State Electricity Board Accountants Association, Jaipur v. Rajasthan State Electricity

Board, (1997) 3 SCC 103. After analysing the law laid down in the aforesaid judgments, the Apex Court held as under:

'An analysis of the aforesaid rulings shows that the validity of the classification has to be judged on the facts and circumstances of each case. We

have already pointed out that in the facts of the present case no material has been placed before us by the Corporation to justify the amendments

introducing a classification between graduates and non-graduates.'

The Supreme Court concluded as under:

'In such circumstances we hold that the amendments to the Regulations making a differentiation between graduates and non-graduates in the matter

of promotion of the posts of AG-I and AG-II offend the equality clause and are therefore unconstitutional'.

In paragraphs 31, 32 and 33 of the judgment, further analysing the law laid down in T. R. Kapur v. State of Haryana, 1986 (Supp) SCC 584;

P. D. Aggarwal v. State of U. P., (1987) 3 SCC 622; K. Narayanan v. State of Karnataka, 1994 Supp (1) SCC 44; Union of India v.

Tushar Ranjan Mohanty, (1994) 5 SCC 450; and Chairman, Railway Board v. C. R. Rangadhamaiah, (1997) 6 SCC 623, the Apex

Court observed and held as under:

'32. The last of the above cases has been decided by the Constitution Bench in which one of us (Justice Agrawal) was a member and he spoke for

the Bench. It will be advantageous to quote the following passage in that judgment (1997 AIR SCW 3747, Para 24):

'In many of these decisions, the expressions 'vested rights' or 'accrued rights' have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution.'

33. If the principle laid down in the above judgment is applied here, there is no doubt that the impugned amendments in the present case cannot operate retrospectively.'

25. It would also be advantageous to reproduce hereunder the extracts of some of the judgments (supra) as quoted by the Supreme Court in Food Corporation of India v. Om Prakash Sharma (supra):

26. In N. Abdul Basheer v. K. K. Karunanakaran (supra), the Apex Court held as under:

'Ordinarily, it is for the government to decide upon the considerations which, in its judgment, should underlie a policy to be formulated by it. But if the considerations are such as prove to be of no relevant to the object of the measure framed by the government, it is always open to the court to strike down the differentiation as being violative of Articles 14 and 16 of the Constitution. In the present case, we have already commented on the circumstance that the conditions of employment and the incidents of service recognise no distinction between graduate and non-graduate officers and that for all material purposes they are effectively treated as equivalent. Accordingly, this contention must also be rejected.'

27. In Mohammad Shujat Ali v. Union of India (supra), Constitution Bench of the Apex Court stated the law as under:

'But from these decisions it cannot be laid down as an invariable rule that

whenever any classification is made on the basis of variant educational qualification, such classification must be held to be valid, irrespective of the nature and purposes of the classification or the quality and extent of the differences in the educational qualifications. It must be remembered that 'life has relations not capable always of division into inflexible compartments'. The moulds expand and shrink. The test of reasonable classification has to be applied in such case on its peculiar facts and circumstances.'

28. In *Roop Chand Adlakha v. Delhi Development Authority*, 1989 Supp (1) SCC 116, the Apex Court considered all the earlier cases on

the subject and held that prescription of a longer period of experience for the diploma holder to be eligible for promotion to a cadre to be made

from graduates and diploma holders was not violative of equality class. The Apex Court took note of the fact that there may be cases where the

differences in the educational qualification may not be sufficient to give any preferential treatment to one class of candidate as against another. The

Apex Court held that whether the classification is reasonable or not must necessarily depend upon facts of each case and the circumstances

obtaining at the relevant time.

29. Again in *T. R. Kothandaraman v. Tamil Nadu Water Supply and Drainage Board*, (1994) 6 SCC 282, it was reiterated that higher

educational qualification is a permissible basis of classification, but the acceptability thereof will depend on the facts and circumstances of each case.

30. Applying the law laid down by the Supreme Court, the history of the service and all other relevant factors, as stated herein above, establish

that Matriculate Orderlies appointed as Junior Assistants against 25% posts earmarked for them and the direct recruit Graduates have been and

are not only similarly placed but have been treated alike. There exists no differentia, muchless an intelligible differentia, amongst them and,

therefore, there was no reason to make classification either between graduates and Matriculates and Matriculates and Matriculates on the basis of

a cut of date. The learned counsel for the petitioners is right in saying that experience cannot be the attribute of any particular class of employees

only; it is a continuing process, gained by each passing hour. The cut off date

fixed in the impugned order dated 25.04.1987 is, therefore, rendered inconsequential and arbitrary.

31. It is also not the case of the respondents that for the discharge of functions on higher posts, higher qualification is necessarily required and, of course, it cannot lie in their mouth, for, the highest post in the Administrative set up of the ministerial cadre is presently held by a Matriculate.

Similarly, most of the higher posts are occupied by Matriculates. This has, in fact, given rise to an anomalous situation, as would be referred to hereafter.

In view of the above detailed discussion on the decisions of the Supreme Court cited by the learned counsel, we do not think that the learned Writ

Court has committed any error in appreciating the judgments in question, or anything more needs to be added thereto, except that in T. R.

Kothandaraman v. Tamil Nadu Water Supply and Drainage Board (supra) the Supreme Court in para 13 of the judgment also laid down

that historical background should be borne in mind. Para 13 of the judgment is quoted hereunder:

13. The aforesaid bird's eye view of important decisions of this Court on the question of prescribing quota in promotion to higher post based on

the educational qualification makes it clear that such a qualification can in certain cases be valid basis of classification and the classification need not

be relatable only to the eligibility criteria, but to restrictions in promotion as well. Further, even if in a case the classification would not be

acceptable to the court on principle, it would, before pronouncing its judgment, bear in mind the historical background. It is apparent that while

judging the validity of the classification, the court shall have to be conscious about the need for maintaining efficiency in service and also whether

the required qualification is necessary for the discharge of duties in the higher post.

In this regard, we have already made mention of the relevant fact scenario in paragraphs 29 and 30 herein above.

32. Now, coming to the arguments of Mr. R. A. Jan, that the writ petitions were not maintainable as the same were filed by the privates

respondents not for enforcement of legal right but for establishing a right, the answer to this point lies in the projection of their grievance vis-à-vis

Note 2 appended to the order in question. They claim equal right with other similarly situated employees. It is their positive case that though

similarly placed, they have been discriminated against and thereby their fundamental rights guaranteed under the Constitution have been violated.

They approached the Court seeking enforcement of their right. He next argued that it is the absolute discretion of the Chief Justice to lay down

qualifications and that the words "'from time to time'" used in Rule 6 of the Staff Rules means 'on conscious contemporary requirement of the job'.

No exception can be taken to such power of Lord Chief Justice, but the basic grievance projected herein is regarding placing an embargo on the

power of the Chief Justice. It is true that relaxation cannot be claimed as a matter of right, but neither can any fetters be placed on such power of

the Chief Justice, nor can any dividing line be drawn between similarly placed employees for exercise of such power by the Chief Justice. Such

dividing line would be arbitrary and unreasonable. It is reiterated that, in reality, it is not a case where the power to lay down higher qualifications is

challenged or that the private respondents are claiming any concession as a matter of right. The judgment in K. V. Rajalakshmiiah Setty v. State

of Mysore, AIR 1967 SC 993, cited and relied upon by Mr. Jan is not attracted to the facts of the present case.

33. It is also not a fact that the private respondents had founded their cause on the observations made either by the learned Writ Court in its

judgment dated 08.04.2002 while dismissing the writ petition, SWP no.2887/2001, or the observations made by the Division Bench in its

judgment dated 30.08.2011 while dismissing the two Letters Patent Appeals, LPA nos.45/2010 and 84/2010. Their cause to file the writ petitions

is independent of such observations made by the Courts. Therefore, the question of the writ petitions being based on obiter dicta does not arise.

Further, the issue involved herein was not involved in the earlier writ petition. Therein, the Graduate employees challenged the ad hoc promotion of

the private respondents on the ground that Note 2 of the order in question did not envisage grant of relaxation in their favour, they having been

appointed after 1987, and that, since they did not possess the qualification of Graduation, they were not eligible even to be promoted on ad hoc

basis. Herein the private respondents challenged Note 2 of the order, as being unreasonable, discriminatory and arbitrary. Therefore, principle of

res-judicata would not come into play.

34. For all what has been discussed above, we are of the considered view that no ground has been made out to warrant interference with the

impugned judgment of the learned Writ Court. However, we make it clear that the observations made in judgment dated 08.04.2002 passed by

the learned Writ Court while dismissing the writ petition, SWP no.2887/2001, or the observations made by the Division Bench in its judgment

dated 30.08.2011 while dismissing the two Letters Patent Appeals, LPA nos.45/2010 and 84/2010, being obiter dicta and in view of the stand

taken by Mr. R. A. Jan, learned Senior Counsel appearing for the High Court, need not be taken note of or implemented.

35. These appeals are, accordingly, dismissed together with the connected CMPs. Interim directions, if any, subsisting shall abide this final

judgment.

36. No order as to costs.