

(2001) 04 J&K CK 0010

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 1844 of 1998

Jaddev Raj and ors.

APPELLANT

Vs

State of Jammu and Kashmir and others

RESPONDENT

Date of Decision : 30-04-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2003) 2 SCT 891

Hon'ble Judges : Tejinder Singh Doabia, J

Bench : Single Bench

Advocate : Seema Shekhar, M.K. Bhardwaj, Advocates appearing for the Parties

Judgement

Tejinder Singh Doabia, J.—The petitioners submit that they are working as Assistant Inspectors and Fitters. Three orders came to be

passed. Copies whereof are Annexures ""A"", ""B"" and ""C"", to the writ petition. These orders make mention of the fact that the petitioners would not

claim the benefit of higher pay scale. The petitioners submit that they cannot be asked to perform the duty on a higher post on a lower grade for all

times to come. It is further submitted that even if they had given some undertaking to the State and that cannot stand in the way for all times to

come.

2. It is a settled proposition of law that fundamental rights cannot be waived. The earliest view on the subject would find reported as *ehram*

Khurshid Pesikaka v. State of Bombay, AIR 1955 SC 123. It was observed that doctrine of waiver enunciated by some American judges in

construing the American Constitution cannot be introduced in our Constitution. The rights described as fundamental rights are a necessary

consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social economic and political; liberty of thought, expression, belief, faith and worship; equality of status and the opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they came into operation in considering individual rights. These have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. It was said that reference to some of the Articles, inter alia, Articles 15(1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the State ""you can discriminate"".

In a still clearer language the Supreme Court in the case reported as *Bheshar Nath v. Commissioner of Income Tax, Delhi and Rajasthan* and another, AIR 1959 SC 149 observed that Article 14 is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person. The obligation thus imposed on the State, no doubt, enures for the benefit of all persons, as a necessary result of the operation of this Article, they all enjoy equality before the law. It was further observed that a person or a citizen may or may not waive any right but he cannot certainly give up or waive a breach of the fundamental right.

A Full Bench of Allahabad High Court in *Pradip Tandon v. State of Uttar Pradesh and ors.*, AIR 1972 Allahabad 1 considered this question. It was observed that merely because a citizen has filled some form would not confer upon the State a power to discriminate in violation of the constitutional injunction. No question of estoppel or waiver arises where the State lacks the constitutional power to enforce a rule which is unconstitutional and thus ultra vires. Another Division Bench speaking through Shri R.S. Pathak (Latter Chief) Justice of India expressed the same sentiments in *Abdul Wahid Khan's case* 1971 Lab IC 773 and held in no uncertain terms that the State is not relieved of the obligation to comply with the constitutional mandate merely because a person affected chose to exercise a particular option. A right to discriminate against cannot be waived. See *Omega Advertising Agency v. State Electricity Board*, AIR 1982 Gauhati 37.

3. This petition is accordingly disposed of with a direction to the respondent authorities to consider the claims of the petitioners for grant of grade to

the posts against which the petitioners are working. Let a decision be taken within a period of three months from the date copy of the order passed

by this Court is made available by the petitioners to the respondent authorities and also to the counsel who has put in appearance today on behalf

of the respondents. The decision so taken would be prospective in nature.

4. Disposed of as such.