

(2000) 06 J&K CK 0006

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 2489/1998

Mehraj-ud-din

APPELLANT

Vs

State of J & K

RESPONDENT

Date of Decision : 02-06-2000

Acts Referred:

Citation : (2003) 3 SCT 966 : (2000) 2 SriLJ 431

Hon'ble Judges : Bashir-Ud-Din, J and O.P.Sharma, J

Bench : Division Bench

Advocate : Z.A.Shah, Z.A.Qureshi, Riyaz A.Jan, M.I.Qadiri, M.A.Bhat, Advocates appearing for the Parties

Judgement

1. The short and the only question involved for consideration in this case is the fixation of seniority between the promotees and direct recruits

appointed to the rank of SubInspectors of Police. This question was first raised by the promotees in SWP No. 240 of 1992 titled Mehrajuddin

and others versus State and others decided on 31071998. The same question was agitated by the promotees in SWP No. 47964822/1996

decided by a learned Single Judge of this Court on 09091998.

2. The Director General of Police being the appointing authority implemented the judgment vide order No. 4016 of 1998 dated 04121998.

Simultaneously with the issuance of this order, seniority list of SubInspectors of J&K Executive Police as on Sill1998 was also notified. The

petitioners challenged the order dated 04121998 (supra) on the basis of which the seniority of the direct recruits as well as the promotees has been

determined on the grounds:

i) that the same has been determined in violation of the judgment sought to be

implemented and

ii) that it is against the notification issued vide SRO104 dated 15021978 by virtue of which recruitment to the rank of SubInspectors is to be made

50% by direct recruitment and 50% by promotion from the rank of Assistant SubInspector.

3. The petitioners numbering 50 are both Assistant SubInspectors as well as SubInspectors. Their grievance is that the officialrespondents have not

worked out the yearwise vacancies before finalising the seniority list and has prejudiced them.

4. The contention of Mr. Zaffar A. Shah, appearing for the petitioners, is that fitment of the direct recruits and the promotees in the seniority had to

be made only after ascertaining the yearwise vacancy position in the absence of which correct seniority position cannot be determined. Since this

exercise has not been carried out by the officialrespondents, the seniority list is liable to be quashed. His further argument is that seniority assigned

to the direct recruits on the basis of their year of recruitment without working out the quota available to them in 1990 is bad being contrary to the

mandate of SR)104 of 1978 (supra) in terms of which the fitment in the seniority has to be in the ratio prescribed namely 1:1.

5. Mr. Riyaz A. Jan, appearing for the private respondents, has, however, justified the order impugned on the ground that the privaterespondents

though appointed in the year 1990, but their appointment was against the backlog vacancies, which remained unfilled between 1984 and 1989 for

want of recruitment from the market. Ordinarily, the privaterespondents, argued the learned counsel, should have been pushed up in the seniority

and those appointed by promotion against the posts meant for direct recruits pushed down, but this has not been insisted upon by the direct

recruits. This, however, according to learned counsel, does not mean that all the 154 vacancies on which the direct recruits were appointed have to

be treated to have become available only in the year 1990.

6. Mr. Zaffar Qureshi, who also appeared for some of the privaterespondents, while adopting the submission made by Mr. Jan, pointed out that

relief claimed by the petitioners, has in fact and substance, been denied to them by this Court while disposing of SWP No. 47964822/1996 on

09091988 (supra). He also argued that if quota rule is to be implemented, many

of those, who were promoted between 1984 and 1989, will have to be pushed down which will disturb the settled position resulting from the failure of the official respondents to adhere to the ratio for appointment to the rank of SubInspector in terms of SRO104/92 (supra).

7. The learned Senior Additional Advocate General, Mr. M.I. Qadri, has on the other hand argued that petitioners cannot have any grievance against the seniority list because some of them are yet to be promoted while others were promoted in the year 1991 and that too against the vacancies which became available after 1989.

8. In order to appreciate the rival contentions, it is necessary to consider scope of direction of this court in SWP No. 240/92, the relevant portion of which reads as under:

The question which still survives for determination is as to how the seniority of the promotees and the direct recruits is to be determined. In this

regard, reliance has been rightly placed by the petitioners on the decision of the Supreme Court reported as Union of India Vs. S D. Gupta AIR

1996 SC 3325. In the above case, the direct recruits came to be appointed later on. It was observed that they are to be fitted as per the quota

and also by taking into consideration as to when the vacancy arose. The position in this case is reverse. What was stated by the Supreme Court in

the case of direct recruits would amply apply to promotees. The promotees are well within their rights to contend that they should be fitted against

vacancies which become available to their quota. This petition is, accordingly, disposed of with the following directions: i) That the State

administration would determine as to when the vacancies arose;

ii) The rules of quota would then be implemented between the promotees and direct recruits.

How the official respondents worked out these vacancies and implemented the judgment may now be considered. In the order dated 04121998

(supra), it is indicated that between 1984 and 1989 while 296 Assistant SubInspectors were promoted to the rank of SubInspectors, only eight

persons were appointed by direct recruitment. It was only in the year 1990 that 155 SubInspectors were directly recruited in accordance with

rules. Paras 4 to 8 of this order dated 04121998 being relevant, therefore, are reproduced below:

4. Whereas, the factual vacancy position enumerated above shows that from 1984 to 1990 a total of 459 vacancies arose; and

5. Whereas, out of 459 vacancies referred to above, 296 ASIs were promoted to the rank of SubInspectors; and

6. Whereas, only 163 candidates were recruited directly; and'

7. Whereas, the above facts would show that the promotees have exceeded the quota already fixed for them as 50:50; and,

8. Whereas, the petitioners including others were promoted in 1991, the respondents totalling 155 were appointed directly in 1990 on the basis of

advertisement notices issued at various points of time w.e.f. 1984 to 1989. The recruitment came to be finalized in 1990. Against this direct

recruitment of 155 persons, 296 ASIs were promoted during this period; and,

So while 459 vacancies were available in the rank of SubInspectors between 1984 and 1990 only 163 as against 228 persons came to be

appointed as SubInspectors by direct recruitment. Thus, the appointment of 155 persons in the year 1990 was clearly against those vacancies

which became available between 1984 and 1989. Assuming that they were not entitled to fitment on the basis of the year of recruitment or as and

when the vacancies for this source became available, they are entitled to seniority from the date of their appointment. This is particularly so because

no appointments to the rank of SubInspectors were made by promotion in the year 1990. We may now notice the SRO104/78 which reads as

follows. "'SRO 104. In exercise of the powers conferred by SubSection (3) of section 43 of Police Act, Samvat 1983 (II of 1983), the Govt.

hereby made the following amendments in Jammu and Kashmir Police rules 1960, namely; 1. I. 174. Direct appointments of inspectors and

SubInspectors.

11. direct recruitment to the rank of SubInspectors shall be made as under:(1). 50% Directly

(2). 50% by promotion from the rank of Assistant SubInspector.

10. This was issued on 15021978. The notification does not make a mention of either the year of recruitment or provides how the seniority is to be

determined. Year of appointment, ordinarily, determines the seniority. This is exactly what has been done. No doubt, the ideal situation would be

that whenever appointments to the rank of SubInspectors are made, the quota

rule should be adhered, but since this has not happened, the prospective promotees or the promotees cannot claim fitment with the private respondents, who have not been appointed on the vacancies which became available in the year 1990, but against backlog vacancies. Since appointments by promotion were made right upto 1989, therefore, the promotees had no right to claim seniority over the direct recruits. It is perhaps for this reason that the judgment dated 09091998 (supra) protected the rights of the direct recruits. While noticing the earlier direction dated 31071998 (supra), the learned Single Judge observed as under:

It is however made clear that the appointment of the none of the officer who happened to be appointed directly would be put in jeopardy by the respondent authorities when process of fixing the quota and inter se seniority is undertaken. The quota would be as per vacancies existing in relevant years and when appointments came to be made.

11. If this be the position, the petitioners have no right to challenge the seniority position assigned to the private respondents on the basis of their date of appointment. Moreover, the private respondents have been appointed against the vacancies which became available between 1984 and 1989, as is the admitted case, the dispute if any could be raised only by them against those promoted during this period and not by the petitioners, who are either yet to be promoted or were promoted in 1991, because in M.S.L. Patil, Asstt. Conservator of Forests, Solarpur (Maharashtra) and others Vs. State of Maharashtra and others (1996) 11 SCC 361, there Lordships held that:

3.... It is settled law that the promotees who are appointed in excess of the quota cannot get the entire length of service. Therefore, they are required to be fitted into seniority according to the rules. As to what is the date on which the promotees or the direct recruits came to be appointed into the respective quota is a matter of record and the seniority is required to be determined according to the law laid down by this Court. In several judgments of this Court, it is now firmly settled that merely because of the fact that the State Government could not make direct recruitment due to its inaction, it cannot be said that the rule of quota has been broken down. Therefore, as and when the direct recruitment has been made, the direct recruits are entitled to placement of their seniority into the vacancies

reserved for them as per the ration and the seniority determined as per the rules within the respective quota. Similarly, when the promotees came to be promoted in accordance with the rules in excess of their quota, this Court stated in Keshav Chandra Joshi Vs. Union of India through a Bench of three Hon'ble Judges, that the promotees in excess of the quota cannot be given seniority from the respective date of their promotions. They have to be considered only from the respective dates on which their respective quota is available.

12. However, this notwithstanding the private respondents did not agitate the matter and perhaps rightly so because that would have upset the entire seniority position of promotions made to the rank of SubInspectors between 1984 and 1989 who might have been promoted further also.

Mr. Shah next referred to letter dated: 10051990 addressed to Dy. Inspector General of Police, Kashmir Range, Srinagar by the Director General of Police, J&K. Srinagar, which reads as under:

About 200 vacancies are likely to be filled in this year in the rank of SubInspectors by officiating promotions. Consequently this will necessitate the preparations of lists of promotions in the lower ranks also. Please prepare all promotion lists immediately under rules. Under an intimation to this head quarter.

13. The contention of Mr. Shah is that if vacancies were available for the promotees in 1990 they should have been appointed alongwith the direct recruits. The argument is without any merit because the specific case of the official respondents is that private respondents have been appointed against the slots which became available from 1984 to 1989 and although application for direct recruitments were invited from time to time during the period but selection could materialise only in 1990 when the appointments were made. So the private respondents have not been appointed on the slots reserved for the promotees and as such petitioners cannot challenge the seniority assigned to them. This apart petitioners never approached the Court for implementation of the letter dated 10051990 (supra) and rightly so because it is doubtful if official respondents could be directed to make promotions on the basis of this letter ignoring the claim of the direct recruits, who were waiting in the wings since 1984.

14. However, the position of seniority now appears to be settled in view of the

decision of the Supreme Court in the case of Suraj Parkash Gupta

& Others Vs. State of J&K & Others (Civil) Appeal Nos. 3035 to 3047 of 2000 decided on 28042000) where in it has been held that:

We have next to refer to one other contention raised by respondents direct recruits. They Claim that the direct recruitment appointment can be

antedated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited.

It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment

was made. Once they were so pushed down even if the direct recruit came later, he should be put in the direct recruit slot from the date on which

such a slot was available under direct recruitment quota.

This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can

claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not born in the service. This

principle is well settled. In N.K. Chauhan Vs. State of Gujarat (1977 (1) SCC 300 (at p. 321) Krishna Iyer, J, stated:

later direct recruit cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose.

Seniority will depend upon length of service. Again, in A. Janardhana Vs. Union of India (1983 (2) SCR 936). it was held that a later direct recruit

cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly, it was pointed out in A.N. Pathak,

Vs. Secretary to the Government (1987 suppl.) SCC 763 (at p. 767) that slots cannot be kept reserved for the direct recruits for retrospective

appointments".

The ratio applies to the promotees also if they are appointed subsequent to the direct recruits. No doubt, there is no reference to the earlier

decision in M.S.L. Patil case (1996) 11 SCC 361) the ratio of which is different but we need not go into this question as direct recruits are not

seeking fitment in seniority from the date prior to their date of appointment.

15. So looked from any angle, the order impugned neither violates the judgment nor SRO104 of 1978. One issue that needs to be considered is

how in case of simultaneous appointments from both the sources seniority

should be fixed between the direct recruits and promotees. This, in our opinion, should be in terms of the SRO104 of 1978 as direct recruits come first, so they should be fitted against the first vacancy followed by the promotees and so on. But this can be observed only when SRO104/1978 is observed and appointments are made on yearly basis if not simultaneously.

16. Having said so, we are of the opinion that in the facts and circumstances of the case, where quota rule has failed, the only course open to the official respondents was to fix the seniority of the direct recruits according to the date of their appointments and this has been rightly done. In the view we have taken, there is no merit in this petition, which is dismissed. No order as to costs.