

**(2004) 06 J&K CK 0004**

**In the Jammu And Kashmir High Court**

**Case No :** Service Writ Petition (SWP) No. 555 of 1990 and LPA No. 16 of 1993

Mukhtar-ul-Aziz

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

**Date of Decision :** 07-06-2004

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 2(17)  
Constitution of India, 1950 — Article 14, 226  
Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 — Rule 5  
Ranbir Penal Code, 1989 — Section 21

**Citation :** (2005) 2 JKJ 583 : (2005) 2 LLJ 1059

**Hon'ble Judges :** S.N. Jha, C.J.; Syed Bashir-Ud-Din, J

**Bench :** Division Bench

**Advocate :** M.A. Qayoom, for the Appellant; Altaf Naik, General and Moksha Qazmi, GA for Respondents 1 and 2, G.A. Lone and Z.A. Shah, for the Respondent

**Final Decision :** Dismissed

## Judgement

S.N. Jha, C.J.—The dispute in the writ petition/appeal relates to the appointment of respondent No. 4, Asif Hamid Khan, (hereinafter

referred to as the respondent) on the post of Trade Agent. In the writ petition prayer of the petitioner/appellant, Mukhtar-ul-Aziz, is for quashing

the impugned order of appointment dated 13.12.1990 and for a mandamus to allow him (petitioner) to continue on the post till proper selection and

appointment. By order dated 12.3.1990, a learned Single Judge of this Court referred the case to larger Bench for decision on the points

formulated. Feeling aggrieved by observations/findings regarding contractual nature of his employment, terminable at one month's notice by either

side, the petitioner preferred appeal in hand under Clause 12 of the Letters Patent. The dispute being same and the appeal arising from the writ

petition itself, both writ petition and appeal were taken up for hearing together.

2. The case of the petitioner, briefly stated, is that on 15.1.1990 he was appointed as Trade Agent and posted at Bombay on contract basis for a

period of one year. Prior to that, he was practising law and working as Government Advocate at Srinagar. He was given assurance that the

appointment would be regularized within six months. He joined on 29.1.1990. In April 1990 he came to learn that his services were terminated.

He filed a writ petition, SWP No. 23/1990, in which on 24.4.1990 interim order was passed and he was allowed to continue on the post, ""if not

already relieved."" According to the petitioner, he was not relieved from the post as none had joined in his place by that time, and he would

therefore be deemed to continue on the post by virtue of the interim order. He also received salary for the month of April 1990. There is a dispute

in this regard. According to the respondents, the petitioner stood relieved prior to the interim order and in his place one G.M. Zahid was posted.

Regarding drawal of salary it is said that the petitioner himself was the Drawing and Disbursing officer and thus managed to get salary. Be that as it

may, the petitioner challenged the order of transfer/posting of G.M. Zahid in SWP No. 168/1990 and the order was stayed. On 16.7.1990 the

respondent was appointed as Additional Trade Agent on the newly created post for six months. According to the petitioner, the additional post

was created only to accomodate the respondent. On 23-12-1990, the post of Additional Trade Agent was abolished and the respondent was

appointed as Trade Agent and posted in place of G.M. Zahid who was sent to Delhi as Secretary to Resident Commissioner. He filed the present

writ petition on 27.12.1990.

3. Mr. M.A. Qayoom, learned counsel for the petitioner, submitted that the respondent was appointed on extraneous considerations as he

happened to be the son of a senior bureaucrat, Shri Hamidullah Khan, the then Additional Chief Secretary, who used his clout and influence on the

administration to get him appointed. Section 133 of the Constitution of Jammu and Kashmir provides for prior consultation with the Public Service

Commission in all appointments to civil services and on civil posts, but completely bypassing the Commission and violating all norms the

appointment was made. The creation of the post of Additional Trade Agent for a

period of six months and abolition of the post even before the expiry of the stipulated period was aimed at accomodating the respondent. Under Rule 5 of the Jammu and Kashmir Hospitality and Protocol (Gazetted) Service Recruitment Rules, 1981, appointment could be made by direct recruitment, among other modes, but for making the appointment the post was required to be advertised and applications invited from intending candidates which was not done resulting in violation of the fundamental rights of the petitioner under Articles 14 and 16 of the Constitution of India. There was also violation of the provisions of the Jammu and Kashmir Public Service Commission (Limitations of Functions) Regulation, 1957. These violations, according to the Counsel, rendered the appointment of the respondent void and illegal. The initial appointment being void ab initio, notwithstanding that the respondent was later adjusted on different ex-cadre posts, the impugned order of appointment deserves to be quashed and the respondent ousted from his present post.

4. Mr. Altaf Naik, learned Advocate General, appearing for the State submitted that the petitioner suppressed the fact that he had appeared at the Combined Competitive Examination in 1982 and filed a writ petition seeking direction for his appointment on the ground that he was one of the selected candidates. After favourable direction in the case, some time after filing the present writ petition, on 13.11.1992 he was appointed as Tehsildar in the Revenue (Gazetted) Service which is a feeder service to the Kashmir Administrative Service. The petitioner, infact, has been allowed seniority from 24.9.1984. Thus notionally he is a member of the Revenue (Gazetted) Service since 1984. He also suppressed the fact that he had filed writ petition in the Bombay High court challenging the ad hoc appointment of the respondent which was dismissed. These facts have been brought on record by the respondent in his counter affidavit which he has recently filed. By suppressing material facts, the petitioner has approached this Court with unclean hands.

5. On merit of the respondent's case, learned Advocate General submitted that the appointment was made by the Administrative Council on the proposal of the then Advisor to the Governor Shri Jamil Qureshi, duly approved by the Governor. He referred to the circumstances in which respondent came to be appointed and produced the relevant file for our perusal.

He stated that as a matter of fact the father of respondent at the relevant time was posted as Chairman of the Subordinate Service Selection Board as described by the petitioner himself in the cause title of the petition, and not as Additional Chief Secretary (Home), as alleged, and he had played no role in the appointment of the respondent. The case of the petitioner that he got the respondent appointed is without any basis.

6. Dealing further with the merit of the respondent's case learned Advocate General submitted that Jammu and Kashmir Hospitality and Protocol

(Gazetted) Service Recruitment Rules 1981, since repealed by 2002 Rules, were applicable to the service and posts specified in Schedule I

namely Deputy Director, Hospitality and Protocol and Assistant Director, Hospitality and Protocol. The post of Trade Agent not being a post in

the Schedule, the rules were not applicable. The post finds place for the first time, under the nomenclature Assistant Resident Commissioner, in the

2002 Rules framed vide SRO 159 dated 23.4.2002. The post of Trade Agent being a non-cadre post, appointment thereto was governed by

general rules known as Recruitment to Gazetted Services Procedure Rules, 1939 (hereinafter referred to as 1939 Rules). Rule 5 of the said Rules

contemplates direct recruitment by nomination except in the case of the services for which competitive examination is prescribed.

7. Learned Advocate General submitted that Section 26 of the Constitution of Jammu and Kashmir vests executive power in the Governor. The

State at the relevant time was under the Governor's Rule and the Governor functioned through Administrative Council. The Governor thus was

competent to make/authorize appointment of the respondent. In any case, Rule 5 of the J&K Civil Services (CCA) Rules empowers the

Government to relax the rules in individual cases and, therefore, the fact that the respondent was appointed without consulting the Commission

does not invalidate his appointment.

8. Mr. Zaffar A. Shah appearing for the respondent questioned the very efficacy of continuance of the proceedings. He submitted that the cause of

action for filing the writ petition was appointment of the respondent in the context of infringement of the petitioner's right of consideration. As during

the pendency of the case, soon after the commencement of the proceeding, he was appointed on the post of Tehsildar in the Revenue (Gazetted)

Service, the cause of action cease to exist and his right to be considered for the post of Trade Agent became infructuous. According to Mr. Shah, procedural violations or motive behind the appointment may be relevant considerations for certiorari but not quo-warranto. In fact, in the writ petition averments were completely absent to justify issuance of quo-warranto. The thrust of the petitioner's case is infringement of his fundamental right and violation of the rules. These supposed violations may render the appointment irregular or even illegal, but they are not such which cannot be cured, and, therefore, they do not constitute relevant grounds on which respondent can be ousted from the post by a writ of quo-warranto. A writ of quo-warranto, it was submitted, can be issued only where violations are not curable or where the person concerned was ineligible or disqualified for the post. There is no averment in the entire writ petition, it was pointed out, that the respondent was not eligible or qualified for the post of Trade Agent.

9. Dwelling upon the question of procedural violations, Mr. Shah submitted that the provisions of Section 133 of the Constitution of the Jammu and Kashmir (Article 320 of the Constitution of India) are not mandatory and even if recruitment rules are held to be mandatory, it is only the basic rules of recruitment which cannot be relaxed. There being no such rule with respect to the post of Trade Agent in the Hospitality and Protocol (Gazetted) Service Rules, 1981, the validity or otherwise of the impugned appointment of the respondent has to be considered on the basis of the general rules i.e. 1939 Rules and Civil Service (CCA) Rules 1956. Whereas 1939 Rules provides for appointment by nomination, the CCA Rules permits relaxation in individual cases.

10. Mr. Shah also submitted that quo-warranto can be issued in respect of high offices such as post under the Constitution of statutory posts. The post of Trade Agent is a subordinate post in the hierarchy, it is not an independent public post as understood in various decisions, and as such not amenable to quo-warranto jurisdiction of this Court.

11. We find substance in the submission of Mr. Zaffar Shah that the writ petition was filed seeking writ in the nature of certiorari, though a passing

mention was made of quo-warranto as well. The relief portion runs as under

a) that the government Order No. 29-GR(H&P) of 1990 dated 13.12.1990 issued

by respondent No. 2 to the extent of the appointment of the respondent No. 4 be quashed by issuance of writ of certiorari quo-warranto in favour of the petitioner.

(b) Through a writ of mandamus the respondents 1 and 2 be directed to allow the petitioner to continue to hold the post till proper selection and

appointment is made in accordance with the law and rules ;

(c) By issuance of writ of mandamus, directing respondents No. 1 to Hold an enquiry through the Vigilance Department or some other independent

authority to enquire into the circumstances.....

12. So far as averments are concerned, in paragraphs 1 and 2, the petitioner stated his status as a State Subject and qualifications as M.A. L.L.B

having nine years standing at the bar including over 3 years as Government Advocate; in paragraphs 3 and 4 he stated about his appointment on

the post of Trade Agent and termination of his service; in paragraph 5 he stated about posting of G.M. Zahid; in paragraphs 6 and 7 he stated

about appointment of the respondent, in paragraphs 8 he stated the grounds of challenge. Ground 1 refers to violation of the orders of this Court;

ground 2 refers to non-consultation with PSC u/s 133 of the Constitution of J&K, grounds 3 and 5 refer to violation of Articles 14 and 16 of the

Constitution of India; grounds 4 and 8 refer to his 'superior' claim over the respondent; ground 6 refers to the illegality in relaxation of rules in

appointing the respondent; ground 7 refers to the appointment as mala fide and extraneous considerations; ground 9 again refers to violation of the

rules of procedure/Business Rules.

13. In P.L. Lakhanpal Vs. A.N. Ray and Others, a Full Bench of five Judges of the Delhi High Court dwelling upon the scope of writ of quo

warranto held that where the alleged irregularity or defect in one's appointment is curable by his re-appointment, issuance of writ of quo warranto

would be futile. In that case the appointment of Justice A.N. Ray as Chief Justice of India was challenged on the ground that there had been no

consultation as required under Article 124(2) of the Constitution of India. The learned Judges took the view that even if requirement of consultation

under Article 124(2) of the Constitution of India is held to be mandatory, the defect would be rectified by holding consultation subsequently and

Justice Ray could be re-appointed as Chief Justice of India. The relevant test,

according to the learned Judges, was not whether the person would"" be re-appointed but whether he ""could"" be re-appointed after removing the defect. If the defect/irregularity can be cured and the person can be re-appointed, writ of quo warranto should not be issued. It would be useful to quote the relevant observations as under:-

..... .There can be no doubt that the requirement of consideration contemplated by Article 124(2) of the Constitution even if it be mandatory

can be fulfilled by having the requisite consultation. There is no legal impediment in the way of such consultation being held. That being so, the

question for consideration is whether after such consultation Justice A.N. Ray could be re-appointed. The answer can only in the affirmative

because the relevant question is not whether he ""would"" be re-appointed but whether he ""could"" be re-appointed after such consultation.....

14. The Court noticed that indisputably Justice A.N. Ray did not lack in qualifications mentioned in Article 124(3) nor there was any legal

impediment in the sense of a statutory disability in the matter of his personal qualifications in the way of his re-appointment.

15. It was, accordingly, rightly argued by Mr. Zaffar Shah that there being no dispute in the absence of any averment to the contrary in the writ

petition, about the respondent's eligibility and qualification for his appointment on the post of Trade Agent, the only dispute being absence of

consultation with Public Service Commission and/or public notice/advertisement in making appointment allegedly resulting in violation of Articles 14

and 16 of the Constitution of India, and/or procedural violations, even if petitioner's case were to be accepted, the defects are not such that the

respondent cannot be re-appointed if the post is advertised and selection is made now, because the test is not whether respondent ""would"" be

appointed, but whether he ""could"" be appointed on the post. The answer being in affirmative, a writ of quo warranto cannot be issued. We find

force in the submissions of Mr. Shah.

16. Halsbury's Laws of England, Third Edition, volume 11, para 281 contains a summary of the decisions of English Courts with regard to

discretion of the Court in issuing a writ of quo warranto. It is said- ""An information in the nature of a quo warranto was not issued, and an injunction

in lieu thereof will not be granted, as a matter of course. It is in the discretion of

the Court to refuse or grant it according to the facts and circumstances of the case.....the Court might in its discretion decline to grant a quo warranto information where it would be vexatious to do so, or where an information would be futile in its results, or where there was an alternative remedy which was equally appropriate and effective.

17. In one of the leading cases on quo-warranto, *R. v. Speyar* (1916) 1 KB 595 Lord Reading observed that if the irregularity in the appointment of an office held at pleasure could be cured by immediate re-appointment, "the Court in the exercise of its discretion would doubtless refuse the information." Another Judge on the Bench, Lush J, expressed the view that the Court would not make the order ousting the holders of public offices from their office if the existing defect, if there is one, could be cured and they can be re-appointed.

18. The concept of quo-warranto has its origin in England Formerly the remedy of quo-warranto was confined to cases of usurpation upon the Crown directly but later extended in respect of offices of a public and substantive nature created by or under a statute or under Charter granted by the Crown requiring the person to know under what authority he was exercising his office, franchise or liberty. The writ of quo-warranto which is in the nature of information poses the question to the holder of the office, in plain English language, "where is your warrant of appointment by which you are holding the appointment?" In *The University of Mysore and Another Vs. C.D. Govinda Rao and Another*, the nature of writ of quo-

warranto was stated by a Constitution Bench of the Apex Court in these words:

Broadly stated, the quo-warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo-warranto ousts him from that office. In other words, the procedure of quo-warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to the public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right, it would thus be

seen that if these proceedings are adopted subject to the conditions recognized in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo-warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo-warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not.

19. As pointed out by Mr. Zaffar Shah, usurpation of post may arise in two situations (a) invalidity in appointment on account of non-observance with the laid down rules of recruitment or procedure and (b) ineligibility or disqualification of the person for the post. The procedural violations also are of two types - curable and incurable. Where usurpation arises from violations of rules which are capable of rectification, quo-warranto may not be issued though in appropriate cases the writ certiorari may be. It is only when the person is found to be disqualified to hold the post that his title can be said to be defective and he can be said to be usurper of post for the purpose of quo-warranto.

20. Mr. Qayoom submitted that the observation in the extracted passage from Govinda Rao case (supra) "".....that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not,"" suggests in all cases of appointments ""not in accordance with law,"" writ of quo-warranto can be issued to oust him from the post.

21. In our view, the import of the expression ""in accordance with law or not"" occurring in the aforequoted passage has to be understood in the context of nature and scope of quo-warranto proceedings. Any thing illegal is often, loosely, if we may so, described as ""not in accordance with law."" Generally, it is undoubtedly so. But the consequence may not be the same and the reliefs may not be granted in the same terms. As pointed out above, the consequence of defect in appointment on account of non-observance of rules and procedure or ineligibility and disqualification of

the person may not be the same in the context of quo-warranto. The subsequent observations in Govinda Rao (supra) itself shows that lack of

qualifications was considered to be the relevant ground for quo-warranto. However, as pleadings were lacking, the Court did not go into the

question finally. The relevant observations may be quoted as under :-

.....The matter appears to have been argued before the High Court on the assumption that if the appointment of appellant No. 2 was shown to

be inconsistent with the qualifications as they were advertised by the appellant No. 1, that itself would justify the issue of a writ of quo-warranto. In

the present proceedings, we do not propose to consider and decide whether this assumption was well founded or not. We propose to deal with

the appeals on the basis that it may have been open to the High Court to quash the appointment of appellant No. 2 even if it was shown that one or

the other of the qualifications prescribed by the advertisement published by appellant No. 1 was not satisfied by him." (emphasis by us).

22. At this stage the distinction between 'quo-warranto' and 'certiorari' may briefly be pointed out. Writ of certiorari is issued at the instance of a

person who has got personal interest in the subject matter, what is called, locus standi to file the petition for enforcement of personal rights. An

applicant for quo-warranto on the other hand, need not have any personal interest in the subject matter, the reason being that he seeks removal of

an 'usurper; from a public office, and not enforcement of his personal rights and relief for himself. The scope of inquiry and interference in cases of

quo-warranto therefore is narrower, the degree of proof stricter and grant of relief discretionary to save the respondent from vexatious and mala

fide proceedings - vis-a-vis certiorari proceedings. Thus where illegality in appointment is established, writ of certiorari may be issued and the

order of appointment may be cancelled to facilitate enforcement of personal right of the applicant unless the cancellation of the appointment would

result in revival or some wrong and cause injuries to the person, but writ of quo-warranto may be declined even in the face of illegality as no

question of enforcement of personal rights or interest of the applicant is involved.

23. In A. Ramachandran Vs. A. Alagiriswami, Govt. Pleader High Court, Madras and Another, , appointment of the respondent as Government

Pleader was held to be fraudulent use of power but the Madras High Court

declined to interfere observing:

Acts of favouritism by way of backdoor appointment and diviations from fair play and justice are not uncommon features in the administration of

any government, in any country. But the jurisdiction of the courts is not the role of a sentinel of the *qui vive* to guard against the vagaries of the

State executive. Prerogative writs which the High Court can issue under the terms of Article 226 have got their strict limits which have to be

adhered to. The province of the High Court in a quo-warranto proceeding is to determine whether there has been usurpation of a public office and

not to search the conscience of the appointing authority to ascertain his motive.

24. In *Baij Nath Singh Vs. The State of Uttar Pradesh and Others*, the Allahabad High Court found that the petitioner had been denied quality of

opportunity but declined to interfere observing that the person was holding the post for a long time, and there was no complaint against him, and

the issue of writ of quo-warranto could be vexatious. In *Mahabir Prasad Sharma v. Prafulla Chandra Ghose* AIR 1969 CHC declined to entertain

the writ petition seeking quo-warranto alleging mala fide against the Governor. In *A. Ramachandran v. A. Alagiriswami* (supra) also it was held

that the question of alleged motive and purpose supposed to constitute the background for the order of appointment of the respondent are wholly

foreign to the scope of quo-warranto proceedings. In *Dineshwar Prasad v. State of Bihar* (supra) the appointment of the respondent on the post of

Superintending Engineer in the Bihar State Housing Board was challenged on grounds of violation of the statutory provisions, non-consultation with

the Public Service Commission and mala fide. The Court observed that these are good grounds for issuance of writ of certiorari but not quo-

warranto. It may be useful to quote the relevant observations as under;

.....The arguments which had been advanced before us, were good arguments and bit to be considered in a case where there is a prayer for the

issue of writ of certiorari. The scope of quo-warranto, as it has been discussed earlier, is very limited and this Court has to see whether the

appointment of respondent No. 6 is by proper authority and in accordance with law. I may, further, add that possession of public office under a

Government order is not usurpation of office for which alone writ of quo-warranto lies. Even if government order is violative of fundamental rights

or against the rules and procedure laid down under the law, it will not be void, though liable to be quashed by writ of certiorari..." (emphasis by us)

25. Considering the nature and scope of quo warranto, and the precedents declining to issue the writ even in cases of illegal and mala fide

appointments, in the facts and circumstances, we find it difficult to remove the respondent by a writ of quo warranto.

26. In view of our finding, it is not necessary to go into the question as to whether the writ of quo warranto can be issued only in respect of

statutory posts and constitutional offices. No direct decision taking that view was brought to our notice. Nor any statutory definition of the term

'public office' or 'public post' was brought to our notice. We may however for purpose of guidance refer to the definition of term 'public officer' in

Section 2(17) of the CPC and 'public servant' in Section 21 of the Indian/Ranbir Penal Code. In our opinion, what is determinative of the nature of

office is the duties and functions of the office. The Trade Agent is a post remunerated by the State Government and the incumbent performs duties

of public nature. We are not inclined to accept a narrow interpretation of the term as correct one and to hold that the post of 'Trade Agent' would

not be amenable to writ of quo warranto.

27. This takes us to the question as to whether the impugned order of appointment of the respondent should be set aside by a writ of certiorari. As

seen above, the distinguishable feature of writ of certiorari is the element of personal right of the applicant. If he fails to establish a subsisting

personal interest in the subject matter of the case, his petition for certiorari may not be entertained. De hors enforcement of personal rights, the

petition may be one for quo warranto.

28. We find merit in the contention on behalf of the respondent that whatever be the position when the writ petition was filed, the factual scenario

of the case has undergone material change with the passage of time. The petitioner now is a member of a gazetted service which is a feeder service

to the Kashmir Administrative Service like the Hospitality Service to which the respondent belongs. Quashing of appointment of the respondent by

a writ of certiorari will render the post vacant, but it would not result in enforcement of the personal right of the petitioner which he claimed when

he filed the writ petition. It was submitted on behalf of the petitioner in response

to this branch of argument of the respondent that in the event of post of Trade Agent falling vacant, he would apply for the post. This according to us is said for sake of argument. It is difficult to believe that the petitioner would forge his twenty years' seniority in the Revenue (Gazetted) Service for the sake of appointment on the post of Trade Agent now known as Assistant Resident Commissioner) on the entry point pay. Thus in the event of the post falling vacant, the petitioner may have the proverbial 'pound of flesh' and nothing more. He does not possess a subsisting personal right or interest and, therefore, is not entitled to writ of certiorari either.

29. On the other hand, so far as the respondent is concerned, the consequence of quashing of the order of appointment would be immense. It would take away the post which he has held for about fourteen years. In Jacob M. Puthuparambil and others Vs. Kerala Water Authority and others, the Apex Court observed:

..... It is unfair and unreasonable to remove people who have been rendering service since some times as such removal has serious consequences. The family of the employee which had settled down and accomodated its needs to the emoluments received by the bread winner, will face economic ruination if the job is suddenly taken away. Besides, the precious period of early life devoted in the service of the establishment will be wholly wasted and the incumbent may be rendered 'age barred' for securing a job elsewhere. It is indeed unfair to use him, generate hope and a feeling of security in him, attune his family to live within his earning and then suddenly to throw him out of job. Such behaviour would be an affront to the concept of job security and would run counter to the constitutional philosophy, particularly the concept of right to work in Article 41 of the Constitution...

30. Nothing was brought to our notice to find fault with the functioning of the respondent all these years. Having worked for above 14 years, without any complaint, on a post for which he did not lack in qualification, we do not think it would be proper to exercise of discretion at this stage to cancel his appointment.

31. We would however hasten to observe that the fact that the post of Trade Agent was not a cadre post and there were no recruitment rules, as

such, governing appointment of the post, did not take it out of the pale of 'public employment' or a post under the State, as submitted on behalf of

the respondent. Whether there were recruitment rules or not, it is too late in the day to contend that appointment on a public post can be made

without advertisement and competitive selection. The power to make appointment on the basis of nomination under Rule 5 of 1939 Rules has to be

read subject to the mandate of equality under Articles 14 and 16 of the Constitution of India. The question is whether impugned appointment of the

respondent is fit to be quashed on that ground.

32. In fairness to the respondent at this stage, the facts leading to his appointment may be noticed. The file [GAD (Adm) TA.20/90;V] referred to

above, reveals that the respondent had submitted an application to the Governor for appointment as Deputy Superintendent of Police. The Advisor

to the Governor who dealt with the application recommended his case stating that his father Shri Hamidullah Khan had done work of outstanding

merit in establishing winter secretariat and made it to work throughout during the difficult period of turmoil running an extra-ordinary grave threat to

himself and members of his family. The family members out of fear had left Kashmir. In such a situation it was the duty of the State to provide

necessary protection to the family members. The Advisor noted that the respondent was a first class Arts Graduate, he had to abandon his studies

in law on account of law and order situation in the State as a result of threat to his life. In these premises he recommended the respondent for

appointment on the post of Trade Agent for period of six months at one of the Trade Agencies of the Jammu and Kashmir Government at

Amritsar, Chandigarh or Bombay where public property worth several crores had been misappropriated by influential people masquerading as

loyalists of the Jammu and Kashmir Government." The proposal for a while ran into difficulties on account of objection by the Finance Department.

Finally, the Finance Department agreed for temporary appointment of the respondent for six months against the post of Additional Trade Agent.

Upto this stage, the father of the respondent was not in the picture. The respondent was finally appointed on the post of Trade Agent vide

impugned order pursuant to the decision of the Administrative Council dated 11.12.1990 "relaxing the recruitment rules.

33. A good deal of argument was made on the point of relaxation. On behalf of the petitioner reliance was placed on J and K. Public Service

Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., and Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others,

amongst others. Mr. Zaffar Shah submitted that there is distinction between basic rules of recruitment and rules relating to conditions of service.

Whereas the basic rules cannot be relaxed, service conditions/rules can be. He further submitted that in many cases in the past the Supreme Court

has upheld appointment made in relaxation of rules. The law that the basic rules of recruitment cannot be relaxed is a ""recent trend"" as observed in

the case of Suraj parkash Gupta (supra). The impugned appointment had been made in 1990, its validity should be judged in accordance with the

law as understood at that time and not as now interpreted. He placed reliance on Sandeep Kumar Sharma Vs. State of Punjab and others, and

Raj Kishore Vishwakarma and Ors. v. Union of India and Ors . In the former case the appointment of the appellant on the post of Dy. S.P in

relaxation of recruitment rules on the ground that his relatives had either suffered due to terrorism or had boldly faced terrorism and contributed

towards overcoming it, was upheld. The following observations in para 14 of the judgment may usefully be quoted:

.....The power of relaxation even if generally included in the service rules could either be for the purpose of mitigating hardships or to meet special

and deserving situations. Such rule must be construed liberally, according to the learned Judges. Of course arbitrary exercise of such power must

be guarded against. But a narrow construction is likely to deny benefit to the really deserving cases. We too are of the view that the rule of

relaxation must get a pragmatic construction so as to achieve effective implementation of a good policy of the Government.

34. In State of Maharashtra Vs. Jagannath Achyut Karandikar, it was observed:-

..... the power to relax the conditions of the rules to avoid undue hardship in any case or class of cases cannot now be gained.

35. In J.C. Yadav and others Vs. State of Haryana and others, , it was observed:

.....The relaxation of the rules may be to the extent the State Government may consider necessary for dealing with a particular situation in a

just and equitable manner. The scope of rule is void enough to confer power on

the State government to relax the requirement of rules in respect of an individual or class of individuals to the extent it may consider necessary for dealing with the case in a just and equitable manner. The power of relaxation is generally contained in the Rules with a view to mitigate undue hardship or to meet a particular situation. Many a time strict application of service rules create a situation where a particular individual or a set of individuals may suffer undue hardship and further there may be a situation where requisite qualified persons may not be available for appointment to the service. In such a situation the Government has power to relax requirement of rules. The State Government may in exercise of its powers issue a general order relaxing any particular rule with a view to avail the services of requisite officers. The relaxation even if granted in a general manner would ensure to the benefit of individual officers.

36. In *Ashok Kumar Uppal and Others Vs. State of Jammu & Kashmir and Others*, it was observed:

Power to relax Recruitment Rules may or any other Rule made by the State Government, under Article 309 of the Constitution of which the corresponding provision is contained in Section 124 of the Constitution of Jammu and Kashmir, is conferred upon the Government to meet any emergent situation where injustice might have been caused or is likely to be caused to any individual employee or class of employees or where the working of the Rule might have become impossible. Under service jurisprudence as also the Administrative Law, such a power has necessarily to be conceded to the employer particularly the State Government or the Central Government who have to deal with hundreds of employees working under them in different departments including the Central or the State Secretariat.

37. Some of these cases were noticed in *Suraj Parkash Gupta v. State of Jammu and Kashmir* (supra) and the Court observed:

.....This was done on the theory of implied relaxation of recruitment rule to all posts within and outside the promotion quota. But this case, in our view, is to be treated as an exception because the promotees there were not regularized for 15 to 20 years and it was held that the non-regularization over such a long period violated Articles 14 and 16 of the Constitution of India. It is no doubt true that the constitution Bench in

Direct Recruitment Class II Engg. Officers' Ass. v. State of Maharashtra referred to Narender Chadha case (see at p. 726, para 13) and

observed:"" there is considerable force in this view also."" But as we shall presently show, the recent trend of cases in this Court is entirely different.

38. It is true that direct recruitment to gazetted posts bypassing the Public Service Commission has not been approved in cases such as Dr M.A.

Haque and Others Vs. Union of India (UOI) and Others, J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc.,

Dr. Surinder Singh Jamwal and another Vs. State of Jammu and Kashmir and others, and in Suraj Parkash Gupta v. State of J&K (supra). In the

last one it was held that if direct recruitment is permitted without consulting the Public Service Commission there would be total ""chaos"" in the

recruitment process and it will lead to backdoor appointment at the risk and faces of Government."" However in the special facts of the particular

cases direct recruitment relaxing the rules was also upheld in the past, as seen above. Rule 5 of the Jammu and Kashmir Civil Services (CCA)

Rules, 1956 contains relaxation clause conferring power on the government to relax the rules in individual cases, if the government is satisfied that

the strict application of the rules cause hardship to the individual concerned or confer undue benefit on him. The impugned appointment was made

in purported exercise of relaxation power, as then understood. The appointment, prima facie, does not appear to be an act of bad faith as it was

made by the Administrative Council with the approval of the Governor in exigency of situation as then existing. The appointment has held the field

for about fourteen years. Though not a comemndable act, in the facts and circumstances, it would not be proper to cancel the appointment after

fourteen years. While declining to interfere we would nevertheless observe that such an appointment may not be made an instance for making

similar appointment in future, lest it may only undermine confidence of the people in the recruitment system.

39. Coming to the letters patent appeal, as seen above, the appeal is directed against the finding of the learned Single Judge regarding contractual

nature of petitioner's appointment. No exception can be taken to such a finding. In any view, findings came to be recorded while stating the facts in

order of reference. Not being final and subject to ultimate decision, it cannot be the subject matter of any appeal. The appeal therefore, must be

held as not maintainable.

40. In the result, both the writ petition and the letters patent appeal are dismissed but without any order as to costs.