

(2010) 07 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Service Writ Petition (SWP) No. 1654 of 2009 C/W SWP No's. 02 of 2007 and 1619 of 2006

Nazir Ahamad Wani

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 29-07-2010

Acts Referred:

Jammu and Kashmir Drugs and Food Control (Gazetted) Service Recruitment Rules, 1997 — Rule 8

Citation : (2010) 4 JKJ 975

Hon'ble Judges : Gh. Hasnain Massodi, J

Bench : Single Bench

Judgement

Gh. Hasnain Massodi, Judge

1. The petitioner, appointed as Assistant Controller Drugs vide Government order No. 260-HME of 2003 dated 20th March 2003, appears to

have spent most of past seven years in law courts than in discharge of his official duties.

2. The petitioner after his appointment has filed as many as six writ petition registered as SWP No.343/2004, SWP No. 599/2004, SWP No.

1085/2005, SWP No. 1619/2006, SWP No. 02/2007 and SWP No. 1654/2009. The rounds of litigation initiated by the petitioner have

triggered counter cases by his opponents-promotee Assistant Controller Drugs / Assistant Drug Analysts. Ms. Irfana Ahamad/Assistant Controller

Drugs filed two writ petitions registered as SWP 821/2005 and 549/2005, Sh. Mushtaq Ahmad Khateeb a colleague of the petitioner filed SWP

No. 382/2004.

3. The writ petition, bearing SWP No. 343/2004 was dismissed vide order dated

6.7.2004 and petitioner held not entitled to continue as Deputy

Controller Drugs Kashmir, even as a stopgap arrangement. The writ petitions 599/2004 and 1085/2005 came to be decided vide order dated 2nd

June 2006 along with other two petitions filed by one of the promotee Assistant Drug Controller/ Assistant Drug analyst. The petitioner was held to

have been validly appointed as Assistant Controller Drugs vide order dated 20.3.2003, though the petitioner, in the recommendations forwarded

by Public Service commission vide letter No. PSC/DR/3/ Assistant Drug/2Y dated 31.10.2002, was placed in the waiting list. The respondents

were directed to consider the case of other Assistant Controller Drugs promoted on adhoc basis subject to clearance of the Departmental

Promotion Committee and on completion of the process prepare a seniority list, placing the promotee Assistant Controller Drugs and direct

recruits at their respective places in accordance with rules.

4. The controversy between the of the direct recruits (present petitioner) and promotees (respondents) as regards their respective place(s) in the

seniority list and entitlement to future promotions nonetheless, refuses to die down.

5. The petitioner aggrieved that he has not been given due place and position in seniority list of Assistant Controller Drugs/Assistant Drug Analysts

and denied subsequent promotions has filed three more writ petitions registered as SWP NOs. 1619/2006,02/2007, and 1654/2009 which are

being taken up for final disposal with consensus of the counsel for the parties.

6. The petitions are admitted to hearing Learned counsel for the respondents waive post admission notice and at their request reply in each of the

three petitions is treated as Counter. The petitioner does not intend to file any rejoinder.

7. Before going to the grievance voiced in writ petitions awaiting disposal, it would be appropriate to summarize the admitted facts:-

The petitioner and respondents S/Sh. Ashok Gupta, Satish Gupta and Mtr. Irfana Ahmad joined--Health and Medical Education Department as

Drug Inspectors on 04.08.1989, 29.01.1977, 08.12.1983 and 04.08.1989 respectively and thereafter were promoted in the grade of Senior Drug

Inspectors/Instrument Technicians on 10.11.1994, 29.11.1989 and 10.11.1994.

8. The State Public Service Commission (respondent No. 2, herein) at the

request of the Competent Authority vide notifications No. 22 of PSC of 2000 dated 24th October 2000, advertised one post of Assistant Controller Drugs /Assistant Drug Analyst. The petitioner and his colleague Mrs. Lotika Khajuria, Senior Drug Inspectors, responded to the advertisement notice. Needless to mention that the rule 8 of Jammu and Kashmir Drugs and Food Control (Gazetted Service) Recruitment Rules 1997 (hereinafter referred to as Recruitment Rules of 1997) entitled even in-service candidates to opt for direct recruitment route notwithstanding, having a chance to get promoted as Assistant Controller Drugs /Assistant Drug Analyst on their own turn. In the meantime to meet administrative exigency the petitioner and respondents in the aforementioned writ petitions and their colleagues Lokita Khajuria, Shuban Lal Kaul were vide Government order No. 01- HME of 2002 dated 1.1.2002 promoted in their own pay and grade as Assistant Controller Drugs, pending clearance by the Departmental Promotion Committee/ Public Service Commission.

9. The respondent No. 2 after conducting necessary examination vide its communication No. PSC/DR/3/Assistant Drug of 2002 dated 21.10.2002 recommended Mrs. Lotika Khajuria for appointment to the post of Assistant Controller Drugs/Assistant Drug Analyst. The petitioner figured in the waiting list. The respondent No.1 accepted the recommendations of the respondent No.2 and vide Government order of 260/HME of 2003 dated 20th March 2003 appointed Mrs. Lotika Khajuria as Assistant Controller Drugs/Assistant Drug Analyst and as appointee was already on deputation to State Aids Society, Union Territory Chandigarh, the petitioner figuring on the waiting list was also appointed as Assistant Controller Drugs/Assistant Drug Analyst against the vacancy that had become available due to said deputation. Mrs. Lokita Khajuria on her return from deputation was also allowed to join back as Assistant Controller Drugs/ Assistant Drug Analyst against the post that had become available on superannuation of Sh. S.L. Bhat, Assistant Drug Controller.

10. In wake of judgment dated 02.06.2006 whereby the respondents were asked to take steps to refer the case of respondents S/Shri Ashok Kumar Gupta, Shuban Lal Koul, Satish Kumar Gupta and Mrs. Irfana Ahmad, to DPC/PSC, and as far as practicable to complete the process within one month, the respondent No. 1 referred the case of the aforementioned

respondents, who were earlier promoted in their own pay and grade as Assistant Controller Drugs/Assistant Drugs Analyst vide order No.01-HME of 2002 dated 01.01.2002, to the respondent No. 2 for clearance.

11. The respondent No. 2 vide communication No. PSC/DPC/Drug/94/23 dated 28.12.2006 cleared the aforementioned respondents as also one

Smt. Purnima Kabu for promotion to the post of Assistant Controller Drugs/Assistant Drug Analyst. The respondent No. 1 on receipt of the

aforementioned communication vide Government Order No. 265-HME of 2008 dated 25.3.2008 regularized the appointment by promotion of

Shri Ashok Kumar Gupta and four others with effect from the dates tabulated hereunder:-

S.No. Name of the Officer Date of promotion as Asstt. Controller Drug/ Asstt.

Drugs analyst

01 Shri Ashok Kumar Notionally w.e.f. 26.2.1997 and regular from 1.1.2002.

02 Shri Satish Gupta Notionally from 29.11.1997 and regular from 1.1.2002

03 Ms. Irfana Ahmad w.e.f. 30.6.2002

04 Ms. Rifat Arifa 9.12.2003

05 Smt. Purnima Kabu Notionally w.e.f. 01.7.2004 & regular from 30.3.2005.

12. It would be appropriate at this stage to have an over view of case set up by the petitioner in SWP Nos. 1619/2006, SWP No. 02/2007, and

SWP No. 1654/2009. SWP No. 1619/2006

13. The case set up by the petitioner, is that the respondents 1 to 3, are keen to appoint private respondents namely S/Sh. Ashok Gupta, Satish

Gupta and Mtr. Irfana Ahmad as Assistant Controller Drug/Assistant Drug in violation of Jammu and Kashmir Drugs and Cosmetics Act-

Recruitment Rules 1997, and in disregard to the mandate of law declared on the subject in Suraj Prakash Gupta's case. The petitioners' case is

that the quota for promotees in the cadre of Assistant Drug Controllers/ Assistants Drug Analyst stands exhausted and no position in the said cadre

was available against which the proposed appointments by promotion could be made. The petitioner apprehends that the proposed appointment

by promotion of private respondent was designed to change the seniority position of the petitioner in the seniority list of the Assistant Controller

Drugs/Assistant Drug Analyst.

14. The petitioner on the strength of the averments made seeks writ in the nature of mandamus declaring the selection process for the post of

Assistant Controller Drugs/Assistant Drug Analyst initiated by respondents NO's 1 to 3 violative of Recruitment Rules 1997. The petitioner prays

for a writ of certiorari quashing the selection process for appointment by promotion of respondents 4 to 6 as Assistant Controller Drugs / Assistant

Drug Analyst, a Writ in the nature of mandamus commanding the respondents No. 3 to refrain from making the promotions of respondents 4 to 6

commanding the respondent No.3 to make appointments by promotion, in accordance with Recruitment Rules 1997, and refrain from altering the

seniority position of the petitioner in the seniority list of Assistant Controller Drugs/ Assistant Drug Analyst.

SWP No.02/2007

15. The petitioner in SWP No. 02/2007 is aggrieved of communication No. PSC/DPC/Drug/94 /23 dated 28.12.2006, addressed by the

respondent No. 2 in the writ petition, to the respondent No. 1 whereby the respondent No. 2 has conveyed clearness to regularization of

promotion to the respondents 4 to 6 to the post of Assistant Controller Drugs / Assistant Drug Analyst retrospectively.

16. The petitioners case is that the post of Assistant Controller Drug/Assistant Drug Analyst having become available only on 31st January 2005,

30th April 2005, and 31st October 2005 the respondent No. 1, fell in gross error by regularizing appointment by promotion of respondents 4 to 6

retrospectively with effect from 02.06.1997, 29.11.1999, and 30.6.2002. Exercise undertaken by the respondents, according to the petitioner is a

fraud on the Recruitment Rules of 1997 and also against the mandate of law laid down in Suraj Prakash Gupta's case. The petitioner pleads that he

having been appointed as Assistant Controller Drugs/Assistant Drug Analyst on 20.03.2003 became member of Jammu and Kashmir Drugs and

Food Control (Gazetted) Service with effect from the said date and that the

respondents 4 to 6 on 20.03.2003 and even on the date the petition was filed continued to be members of the Sub-ordinate Service and the respondent No. 2 by regularizing their promotion retrospectively in effect enabled the respondents to steal march over the head of the petitioner. The proposed action according to the petitioner is violative of Articles 14 and 16, Constitution of India and amounts to denial of the right of equal opportunity in the matter of service to the petitioner. The respondent No. 2 by regularizing promotion of the respondents 4 to 6 retrospectively, is said to pave way for exceeding promotion quota, not permissible under law laid down in Suraj Prakash case. The petitioner prays that the communication dated December 2006, addressed by the respondent No. 2 to the respondent No.01, be declared void ab-initio and de-hors to the Recruitment Rules of 1997. The petitioner prays for a direction commanding the respondents to desist from acting upon the aforesaid communication or to take any action prejudicial to the seniority position of the petitioner as available under the Recruitment Rules of 1997.

17. The immediate cause that prompted the petitioner to file the instant writ petition is Government order No. 416 - HME of 2008 dated

30.9.2008 whereby Sh. Gupta one of the promotee Assistant Controller Drugs has been appointed as In-charge Drug Controller Food

Organization Jammu and Kashmir Government. The aforesaid Government order according to the petitioner has been issued in violation of Court

order dated 24th March 2008 in SWP No. 02/2007 and in utter disregard of the Recruitment Rules of 1997. The petitioner re-iterating the

averments made in other two writ petitions insists that the petitioner became member of Jammu and Kashmir Government Drugs and Food Control

(Gazetted Service) on 20th March 2003 when Sh. Gupta the respondent No. 05 in the writ petition was a member of Subordinate Service of the

department. The petitioner pleads that the regularization of promotion of respondent No. 5 retrospectively with effect from 29.11.1999 was

violative of the fundamental rights of the petitioner guaranteed under Article 14 and 16 of the Constitution of India, as also de-hors the Recruitment

Rules of 1997. The retrospective promotion, according to the petitioner was made against a non-existing post and the respondents had in-effect by

their illegal action enabled the respondent No. 5 to leap over the head of the

petitioner. The petitioner in essence, claims to be senior to the respondent No. 5 and to have a superior right to be appointed as Controller Drugs. The petitioner disappointed by the response to representation made to the respondents 1 and 2 has felt constrained to file this writ petition. The petitioner seeks an appropriate writ declaring the impugned Government order No. 416 -HME of 2009 dated 30.8.2009 as void ab-initio and fraud on the Recruitment Rules of 1997. The petitioner prays for a writ of certiorari quashing the aforesaid Government order, and also writ of mandamus commanding the respondents 1 and 2 to desist and refrain from giving effect to the Government order in question. A writ commanding the respondents to make appointment against the post of Controller Drug and Food Control Organization in accordance with Recruitment Rules 1997 and to pending such appointment appoint the petitioner on officiating and substantive basis is also sought.

18. The facts and events that prompted the petitioner to file three writ petitions in succession may be different but the grievance all through remains same and so is the stand taken by the respondents to the three petitions. The petitioners case through-out has been that the petitioner having been appointed by direct recruitment as Assistant Controller Drugs vide Government order No. 260-HME of 2003 dated 20th March 2003, when the respondents S/Sh. Ashok Gupta, Satish Gupta and Mtr. Irfana Ahmad were not even borne on the J&K Drug and Food Control Organization (Gazetted) Service, the petitioner is senior to the private respondents and having a superior right to be considered for promotion to the next higher position.

19. The stand taken by the respondents on the other hand is that the petitioner as also private respondents, were vide Government order No. 01 - HME of 2002 dated 01.01.2002 promoted in their own pay and grade as Assistant Controller Drugs pending clearance by the Departmental Promotion Committee/Public Service Commission in accordance with Recruitment Rules of 1997; that two of the promotees namely Nazir Ahmad Wani-petitioner and Lotika Khajuria decided not to follow the promotional avenue and took the direct recruitment route; that both petitioner and Lotika Khajuria were appointed as Assistant Controller Drugs vide Government order No. 260-HME of 2003 dated 20th March 2003, whereas

the private respondents continued to hold the post of Assistant Controller Drugs in their own pay and grade; that in compliance of High Court

judgment dated 02.06.2006 in SWP's 599/2004 and 1085/2005 the case for regularization of private respondents was submitted to the

Departmental Promotional Committee/Public Service Commission, and the respondent No. 2, recommended regularization of the private

respondents as Assistant Controller Drugs/Assistant Drug Analysts retrospectively, where-after formal orders were issued in favour of the private

respondents. The Government order regularizing promotion of the private respondents according to the respondents was issued on joint request of

the parties who projected before the Court that they would be sufferers in the event the stalemate was allowed to continue. The respondents insist

that the regularization of private respondents from date, the posts in promotional quota had become available is in accordance with law laid down

in Suraj Prakash Gupta's case. The private respondents insist that they are senior to the petitioner and deserve to be considered for promotion to

the next higher position in department in order of their seniority. It is insisted that the petitioner, in-dependant of the stand of the respondents, has

no right to maintain the writ petitions in as much as the petitioner by his own admission is junior to Ms. Lokita Khajuria, who has not found it

necessary to question seniority of the private respondents. As regards appointment of Sh. Gupta as In-charge Controller Drug and Food Control

Organization, the respondents insist that Sh. Gupta vide order No. 416-HME of 2009 dated 30th September 2009 has only been asked to look

after the work of Controller, Drugs and Food Control Organization Jammu and Kashmir in his own pay and grade till further orders and the

respondents were within their rights to make the arrangement in view of order dated 24th March 2008 in SWP No. 02/2007. The respondents

deny to have promoted Sh. Gupta on substantive basis or to have in any manner violated the rights of the petitioner. It is reiterated that Mrs, Lotika

Khajuria, senior to the petitioner, having a better claim as against the petitioner to question the above mentioned Government order, has not thrown

challenge to the order though in the event the petitioner's case meets success it is Ms. Lotika Khajuria and not the petitioner who is to be

considered for appointment as Controller Drugs, Jammu and Kashmir Drug and Food Control Organization.

20. I have heard Learned Counsel for the parties and have gone through the record, which over the years because of repeated rounds of litigation

between the parties, has become quite voluminous.

21. The fate of present bunch of petitions hinges on answer to the following questions:-

(i) Whether posts of Assistant Controller Drugs /Assistant Drug Analyst were available in promotional quota on the dates where from the private

respondents were regularized vide Government Order No. 265-HME of 2008 dated 25th March 2008.

(ii) Whether the respondents 1 and 2 while directing retrospective regularization of private respondents as Assistant Controller Drugs/Assistant

Drug Analyst exceeded the promotional quota.

22. Let us, scan the pleadings and the record to find out the answer to above questions.

23. In 1997 Jammu and Kashmir Drugs and Food control (Gazetted) Service Recruitment Rules 1997, were framed and notified vide SRO 56.

1997, dated 03.02.1997 (for short Recruitment Rules of 1997). Rule 5 of the Recruitment Rules of 1997 reads as under:-

Rule 5 of the Recruitment Rules of 1997

5. Qualifications and method of recruitment:- (i) No person shall be eligible for appointment or promotion to any post in any class, category or

grade in the service unless he /she possesses the qualifications as laid down in the schedule II and fulfils other requirements of recruitment as

provided in the rules and orders for the time being in force.

(ii) Appointment to the service shall be made-

(a) By direct recruitment (which will include appointment by transfer)

(b) By promotion; and

(c) Partly by direct recruitment and partly by promotion in the ratio and manner mentioned against each post in the Schedule.

Provided that in case a post can not be filled up by promotion according to the rules due to non availability of suitable qualified person, the post

shall be filled up by direct recruitment and vice versa with the prior approval of the Commission.

24. In case of Assistant Controller Drugs/Assistant Drug Analyst, Schedule II

prescribes following method of recruitment:-

Class Category Designation Grade Min. qualf. for Method of
direct recruitment

recruitment

III (a) Assistant 2125-3600 (i) Postgraduate(i) 20% by

Controller, in Pharmacy or direct

Drugs/Assistant Pharmaceutical recruitment,

Drugs Analyst Chemistry or

Medicine with (ii) 80% by

specialization in promotion from

clinical amongst Senior

Pharmacology Scientific

or Officers and

Microbiology Senior Drug

from University Inspector,

established in Instrument

India by law. Technicians of

Drugs and Food

(Subordinate)

Service subject

to fulfillment of

statutory

qualification laid

down in the

following ratio :

(i) Senior

Scientific Officer

-- 20% (ii)

Senior Drug

Inspector/

Instrument

Technician --

60%

Prior to Recruitment Rules of 1997, the recruitment and promotion in Drug and Food

Control Organization of Health and Family Planning Department, were governed by

Jammu and Kashmir Medical (Gazetted Service) Recruitment Rules, 1970 notified vide

SRO -- 200 of 29th April 1970. The Recruitment Rules of 1970 did not make any room for direct recruitment to the post of Assistant Controller Drugs Schedule (Part-I)

Entry-V (a) substituted by SRO 147 of 05.04.1985, needs to be noticed :-

V. (a) Asstt. Drug 300-750 Degree in By promotion

Analyst, Medicines/ from Senior

Assistant Drug Masters degree Drug Inspector.]

Controller in Bio-Chemistry,

Pharmacy,

Analytical

Chemistry, or

Pharmaceutical

Chemistry with

one years

experience in

analysis of drugs

and/or chemicals

in a laboratory

recognized by the

OR A Graduate

in Pharmacy with

three years

experience in
analysis of drugs
and/or chemicals
in a laboratory
recognized by the
Government.

25. The respondent No. 1, sometime in 1991 promoted on adhoc basis S/Sh. P.N. Koul and A.C. Mahajan borne on the cadre of Senior

Scientific officers / Senior Drug Inspectors/ Instrument Technicians to the post of Assistant Controller Drugs /Assistant Drug Analyst. The adhoc

promotion of S/Sh. P.N. Koul and A.C. Mahajan, was followed by promotion on adhoc basis vide Government order No. 892-HME of 1991

dated 29.11.1991 of six other Senior Scientific Officers/Senior Drug Inspectors/ Instrument Technicians. It follows that the sanctioned strength of

cadre of Assistant Controller Drugs/Assistant Drug Analyst is Eight posts and all the Eight (8) posts were filled up by promotion in the year 1991

on adhoc basis. The respondent No. 1, thereafter referred the cases of all the Eight (8) adhoc Assistant Controller Drugs/Assistant Drug Analysts

to the respondent No.2, for clearance, so as to order their regularization. The respondent No. 2 on consideration of the matter cleared S/Sh. P.N.

Koul and A.C. Mahajan for promotion as Assistant Controller Drugs/Assistant Drug Analyst. The cases pertaining to other six adhoc promotees

namely S/Sh. R. L. Dass, G.L. Angurana, Mohammad Aslam, M.K. Bakshi, Mushtaq Ahmad Khateeb and Shibani Lal Koul, were not cleared for

promotion. Sh. R.L. Dass and other five adhoc promotees, nonetheless, continued to serve as Assistant Drug Controllers/ Assistant Drug Analyst

on adhoc basis. The adhoc promotees with exception of Sh. G.L. Angurana, who retired on 31.10.1997, filed a writ petition before this Court

insisting that they had been cleared by the respondent No. 2, for promotion as Assistant Drug Controllers/ Assistant Drug Analyst and it was

respondent No. 1, who despite recommendations had withheld the regularization orders. The writ petition registered as SWP No. 256/2000 was

allowed on 03.11.2001 and the petitioners held entitled to be promoted as Assistant Controller Drugs / Assistant Drug Analysts with effect from

30.11.1994. In wake of judgment dated 3.11.2001 the matter pertaining to promotion of Sh. R.L. Dass and other adhoc promotees was again

placed before the respondent No. 2, and the respondent No. 2 on 26.5.2003 convened a meeting of Departmental Promotion Committee and the

Committee cleared all the officers for promotion to the post of Assistant Drug/ Controller/Assistant Drug Analyst with effect from 30.11.1994. The

respondent No. 2, conveyed its decision vide PSC/DPC/Drug/94/22 dated 3.6.2003 to the respondent No. 1. The respondent No. 1 vide

Government order No. 768-HME of 2006 dated 1.7.2006 in compliance of the judgment dated 03.11.2001 that till date has remained un-

assailed, accorded sanction to promotion of Sh. R. L. Dass and five other adhoc promotees as Assistant Drug Controllers/ Assistant Drug Analyst

with effect from 30.11.1994.

26. The case set up by the petitioner that Sh. R.L. Dass and five others though holding the post of Assistant Drug Controller/Assistant Drug

Analyst on adhoc basis till their names were cleared by the respondent No. 2 for promotion to the post of Assistant Drug Controller/ Assistant

Drug Analyst, continued to be a members of the Subordinate Service and the / respondent No. 1 in view of Recruitment Rules of 1997, could not

have regularized their promotion retrospectively, is bereft of any merit and projected oblivious to the fact that the order No. 768-HME of 2006

dated 1.7.2006 was made in compliance of the judgment of this Court dated 03.11.2001.

27. It may be stated at the cost of repetition that petitioner's grievance is that the petitioner and Ms. Lotika Khajuria having been appointed as

Assistant Drug Controller/Assistant Drug Analyst on substantive basis vide Government Order No. 260-HME of 2003 dated 20.03.2003 were

senior to Sh. R. L. Dass and five others, who according to the petitioner on the date of Government Order No. 260-HME of 2003 dated

20.03.2003, were still members of Subordinate Service. The averment is made unmindful of the fact that the promotion of Sh. R.L. Dass and five

others was governed by Recruitment Rules of 1970 and the Recruitment Rules of 1997, did not stand in the way of respondent No. 1, to order

regularization of Sh. R.L. Dass and other adhoc promotees with effect from 30.11.1994, more so, when the regularization was made strictly in

compliance of the judgment in SWP No. 256/2000 dated 3.11.2001. It may be recalled that the Recruitment Rules of 1970, did not identify direct recruitment as a source for filling up the vacancies of Assistant Drug Controller/ Assistant Drug Analyst. The first limb of the petitioner's case assailing clearance to regularization of promotion of Dr. R. L. Dass and other adhoc promotees with effect from 30.11.1994 as communicated to respondent No.1, PSC/DPC /Drug/94/22 dated 3.6.2003 and the Government order No. 768-HME of 2006 dated 1.7.2006 and questioning promotion of Sh. R.L. Dass and five others as Assistant Drug Controllers/ Assistant Drug Analyst with effect from 30.11.1994 is without any basis and destined to fail.

28. The Recruitment Rules of 1997, for the first time made a provision for direct recruitment to the post of Assistant Controller Drugs/Assistant Drug Analyst by reserving 20% of the posts for direct recruitment. Ms. Lotika Khajuria and the petitioner herein having competed for the direct recruitment posts were appointed as Assistant Controller Drugs vide Government order No. 260-HME of 2003 dated 20th March 2003. It may be recalled that Ms. Lotika Khajuria, the petitioner, S/Sh. Ashok Gupta, Satish Gupta, Ms. Irfana Ahmad and Shri S. L. Koul were vide Government order No. 01-HME of 2002 dated 01.01.2002 promoted in their own pay and grade as Assistant Controller Drugs/Assistant Drug Analyst, Ms. Lotika Khajuria and petitioner thereafter opted for direct recruitment route and were on the aforementioned date appointed against direct recruitment quota. The respondents S/Sh. Ashok Gupta, Satish Gupta, Ms. Irfana and S.L.Bhat, continued to work as Assistant Drug Controllers in their own pay and grade pending clearance from the Departmental Promotion Committee/ Public Service Commission. Ms. Lotka Khajuria and the petitioner, thus cannot claim seniority earlier to the date of their appointment i.e. 20th March 2003. To conclude, whether the respondent No. 1 while regularizing S/Sh. Ashok Gupta, Satish Gupta, S.L. Koul and Ms. Irfana Ahmad retrospectively usurped the direct recruitment quota or exceeded the promotion quota, it is necessary to work out the date (dates) on which the posts of Assistant Controller Drugs became available. The baseline is that in case on the date of appointment of Ms. Lotika Khajuria and the petitioner, all the (8) posts of Assistant

Controller Drugs/Assistant Drugs Analysts were occupied by the promotees, the two of the promotees are to be held to have occupied two posts

meant for the direct recruits on stopgap basis and on appointment of Ms. Lotika Khajuria and the petitioner, to make way for the direct recruits.

The two displaced promotees are in that case, to figure in the seniority after the direct recruits, of course, if any posts are left in promotion quota.

To focus on the real controversy, it would be appropriate to tabulate position on the date the Recruitment Rules of 1997 came into force on

01.01.2002 when adhoc/stopgap promotees were made, and the position as on 20th March 2003 when Ms. Lotika Khajurai and the petitioner

were appointed as Assistant Controller Drugs /Assistant Drug Analysts.

(A) Position as on 03.02.1997, when Recruitment Rules of 1997 came into force

S.No.Particulars of the officers w. e. f. Regularized w.e.f.

01 Sh. A. C. Mahajan 1991 1991

02 Sh. R.L. Dass 1991 Awaited

03 Sh. G. L. Angurana 1991 do

04 Sh. M. AslamKhateeb 1991 do

05 Sh. M.K. Bakshi 1991 do

06 Sh. Mushtaq Ahmad 1991 do

Khateeb

07 Sh. S.L. Koul 1991 do

(B) Position as on 1.1.2002 when the respondents were promoted on adhoc/ stop gap basis

S.No. Particulars of the officers Adhoc/stopgap promotion

w.e.f.

01 Sh. M. AslamKhateeb 1991

02 Sh. M.K. Bakshi 1991

03 Sh. Mushtaq Ah. 1991

Khateeb

04 Sh. S.L. Koul 1991

05 Sh. Ashok Gupta 01.01.2002

06 Sh. Satish Gupta 01.01.2002

07 Irfana Ahmad 01.01.2002

08 LotikaKhajuria 01.01.2002

09 Sh. Nazir Ahmad Wani 01.01.2002

(C) Vacancy availability statement between 03.02.1997 to 20.03.2003

01 25.02.1997 Due to promotion of Sh. A.C. Mahajan

02 31.10.1997 Due to retirement of Sh. G.L. Angurana

03 29.11.1999 Due to promotion of Sh. R.L. Dass

04 30.6.2002 Due to promotion of Sh.

MohamadAslamKhateeb

(D) Retrospective regularization of respondents

01 Shri Ashok Notionally w.e.f. 26.02.1997 Fallen vacant due to

Gupta and regular from 01.01.2002 promotion of Sh A.C.

Mahajan

02 ShriSatish Gupta Notionally w.e.f. 29.11.1999 Fallen vacant due to

and regular from 01.01.2002 promotion of Sh. R.L

Dass

03 Mtr. Irfana With effect from 03.06.2002 Fallen vacant due to

Ahmad promotion of

ShMohdAslamKhateeb

(E)

Position as on 20.03.2003, when the petitioner and Lotika Khajuria were appointed by direct recruitment as Assistant Controller Drugs.

01 Shri M.K. Bakshi Promoted on adhoc/ stopgap baste in 1991

02 Shri S.L. Koul Promoted on adhoc/ stopgap basis in 1991

03 ShriMushtaq Ahmad Promoted on adhoc/ stopgap basis in 1991

Khateeb

04 Shri Ashok Gupta Promoted on adhoc/ stopgap basis on

01.01.2002

05 Shri Salish Gupta Promoted on adhoc/ stopgap basis on

01.01.2002

06 Mtr. Irfana Ahmad Promoted on adhoc/ stopgap basis on

01.01.2002

29. In the circumstances, on the date the Recruitment Rules 1997 came into fore(sic) one post of Assistant Controller Drugs was vacant and on

the date Ms. Lotik(sic) Khajuria and the petitioner were appointed as Assistant Controller Drugs / Assistant Drug Analyst two posts of Assistant

Controller Drugs /Assistant Drug Analysts we(sic) lying vacant and only six promotees were in place which otherwise represented the promotion

quota, having regard to the Recruitment Rules of 1997. The respondent No. 1, thus did not exceed the promotion quota nor did the private

respondents usu(sic) the quota meant for the direct recruits. There is in the circumstances, no substance in the petitioner's claim that the respondent

No. 1 by directing retrospective regularization of the private respondents had violated the Service Rules or prejudicially affected the seniority of

Mrs. Lotika Khajuria and petitioner. The petitioner's claim to be senior(sic) to the private respondents for the reasons discussed, is thus bereft of

any merit.

30. Since both the parties to the writ petitions seek to draw support from the law laid down in Suraj Parkash Gupta and Others Vs. State of

Jammu & Kashmir Others, it would be advantageous to reproduce hereunder excerpts of the judgment relevant to the present controversy. The

Apex Court after noticing relevant Rules of Jammu and Kashmir Civil Service (CCA Rules) 1956 held:

52.....Rule 23 does not make any distinction between different modes of recruitment. It is well settled that in the case of a direct recruit, the

probation can commence only from a date after his selection and he can hold a permanent vacancy only after such selection. According to service

jurisprudence (see in fact, discussion under Point 4). A direct recruit can not claim appointment from a date much before his selection. So far as a

promotee and also one who is recruited by transfer, are concerned, before such persons are appointed as members of the service under Rule 23,

first their probation must commence. Then such person becomes a probationer for purposes of Rule 23. Once he is on probation, and if a

substantive vacancy in the permanent cadre existed in which the promotee or a recruit by transfer can be accommodated, and if such a vacancy

has arisen from a date previous to the issue of the order of appointment (i.e. appointment by promotion or transfer) then under Rule 23 he may be appointed to the service (i.e. regularly) with retrospective effect from such anterior date (or, as the case may be, from such subsequent date) from which he has been continuing on duty on a non-pensionable (sic pensionable) post [see Rule 2(e) defining ""member of service""]. This period can certainly be one that a person holds in a stopgap or adhoc manner. The order of ""promoting a person in the service"" regularly from an anterior date and the order of probation from an anterior date can be simultaneously passed. That is now under Rule 23, a person holding a temporary, stopgap or adhoc appointment beyond three months can become a probationer and get appointed regularly to the service with retrospective effect.

31. It was further observed:

56. It is true that while Rule 15 permits probation to be commenced from an anterior date in the case of one ""appointed"" temporarily there is no such mean that in respect of a person temporarily promoted or a person temporarily appointed by transfer, probation can not be commenced from an anterior date. In our view, this power is implicit in Rule 23 itself when it speaks of a probationer being appointed as a member of a service with retrospective effect. Once a promotee or recruitee by transfer is appointed on probation, it is permissible to appoint him under Rule 23 as a member of the quota. It is then obvious that such power to make a retrospective appointment of a member implies a power to commence probation of such person from an anterior date when a clear vacancy existed in his quota. We can not imagine that the rule-making authority did not visualize delays in regularization of adhoc or stopgap or temporary service rendered by the promotees or those recruited by transfer and kept in mind delay only in cases of appointments under Rule 14.

32. Supreme Court while rejecting the plea that failure on part of the Government to consult Public Service Commission where ad hoc appointment exceeds six months renders adhoc service non est and such service can not be regularized even by consulting the Public Service Commission at a later stage observed:-

59. We are unable to hold that the entire service of a promotee continued beyond six months without consulting the Commission must be treated

as non est and should stand wiped out altogether and that only service rendered in accordance with rules can be retrospectively regularized.

33. The Court proceeded to hold:-

69. Thus, there is overwhelming authority of this Court to hold that adhoc, stopgap service could be regularized from an anterior date after

consulting the Service Commission from the date of vacancy in the promotee quota, after considering fitness, eligibility, suitability and ACRs.

Therefore, the adhoc/stopgap service rendered by promotees beyond six months and without the consent of the Public Service Commission as per

Regulation 4(d)(ii) can not be treated as non est. It can be regularized later after consulting the Commission in respect of posts in the promotion

quota and subject to eligibility and suitability based on ACRs, etc. Only the period rendered outside the quota or the period rendered within the

quota when the promotee was not eligible or found fit has to be excluded.

34. It follows that ad hoc/stopgap services of the promotees is capable of being regularized with retrospective effect from the date of occurrence

of clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors and that a direct recruit can claim seniority only from

the date of his appointment. The direct recruitment-appointment can not be ante dated from the date of occurrence (sic) a vacancy in the direct

recruitment quota in as much as a direct recruit can not claim seniority from a date when he was not born in service.

35. In the present case, the private respondents were promoted in their own pay and grade as Assistant Controller Drugs vide Government order

No. 01-HME dated 01.01.2002 with effect from 01.01.2002 against all the available vacancies. Promotion of private respondents was

subsequently on the recommendation of Departmental Promotion Committee / Public Service Commission, regularized against the promotional

quota without usurping the direct recruitment quota or exceeding the promotional quota. With the promotion of Sh. A.C. Mahajan on 25.2.1997,

the number of promotees was reduced to six which represented the promotee quota under the recruitment rules of 1997. In wake of retirement of

Sh. G.L. Angurana on 31st October 1997, the number of promotees was reduced to five making one post (sic) promotee available for

regularization of adhoc/stopgap promotee. In the circumstances the respondent

Sh. Ashok Gupta could validly be regularized against the said post with effect from 31.10.1997. With the promotion of Shi R.L. Dass on 29th November 1999, the number of promotees was reduced to five as against promotion quota of six posts. One post from the promotion quota thus became available against which an adhoc/stopgap promotee could be regularized and regularization of Sh. Satish Gupta respondent with effect from 29th November 1999 did not exceed the promotion quota. Same is true about respondent Irfana Ahmad who appointed on adhoc/stopgap basis was regularized with effect from 30.6.2002, against the post that had become available on the said date due to promotion of Sh. Mohammad Aslam Khateeb. The respondent No. 1, thus did not exceed or violate the promotion quota while accepting the recommendations of respondent No.2. Reliance placed by the petitioner on law laid down in Suraj Prakash Gupta's case is thus grossly misplaced. The law laid down on the other hand runs contrary to the case set up by the petitioner.

36. It is nobody's case that the private respondents were not eligible for promotion as Assistant Controller Drugs/ Assistant Drug Analyst.

Otherwise also, as the petitioner and the private respondents come from two different sources, the petitioner cannot claim any right to question

regularization of adhoc/stopgap promotees against the promotee quota. In *Mukul Sakia & Ors. v. State of Assam & Others* AIR 2008 SCW

7971, where the select list candidates for the posts of CDPOs questioned regularization of ad hoc/stop gap promotees on the ground that their

regularization was not in conformity with rules and that posts filled up by such regularization were to go to the candidates he select list, Supreme

Court held

The appellants and private respondents stand on a completely different footing. The service of the private respondents have been regularized

against the vacancies meant for promotees and the source of legal right of the appellants and the private respondents being from two different and

distinct sources, their relative rights can not be compared with each other and therefore there can not be any violation of fundamental rights under

Article 14 of the Constitution of India as a consequence of the regularization of the services of the respondents.

37. From the above discussion it emerges that violation of fundamental and

Constitutional rights as alleged by the petitioner in three writ petitions is devoid of any basis. Mrs. Lotika Khajuria who was the only candidate recommended by respondent No. 2, for appointment as Assistant Controller Drugs and thus senior to the petitioner, who figured in the waiting list and was appointed only because of deputation of Mrs. Lotika Khajuria, may have a better claim to her placement in the seniority list of Assistant Controller Drugs/ Assistant Drug Analysts, at a higher up place. But as Mrs. Lotika Khajuria has opted not to question her placement in the seniority list, and is not before court, it would not be proper to dilate on that aspect of the matter.

38. In the circumstances and for the reasons discussed SWP NO's. 1654/2009, C/ W. SWP No. 02/2007 and SWP No. 1619/2006 along with all connected CMP's are dismissed with costs.