

A PANKJESHWAR SHARMA AND OTHERS  
v.  
STATE OF JAMMU & KASHMIR AND OTHERS  
(Civil Appeal No(s).3904-3905 of 2020)

B DECEMBER 03, 2020

[L. NAGESWARA RAO, HEMANT GUPTA AND  
AJAY RASTOGI, JJ.]

C *Service Law – Irregular appointments – Negative equality – 2nd Respondent-Director General of Police invited applications for the post of Sub-Inspector of Police (Executive) in the State – The 2nd respondent under its own assumption published the select list province wise – In the first round of litigation, the unsuccessful candidates filed a writ petition – In compliance of the order of Division Bench of the High Court, a fresh redrawn State-wise merit*  
D *list was notified which appointed 259 candidates and cancelled the appointment of 47 candidates – In the second round of litigation, the ousted candidates challenged the redrawn State-wise list – The Division Bench of the High Court directed that those who did not come within the merit zone in the redrawn merit list cannot be allowed to continue – The said order was challenged in a SLP by the ousted*  
E *candidates – In the SLP, various interlocutory applications were filed by a total of 22 candidates for their impleadment – The Supreme Court without examining the inter se dispute of the parties and taking note of the statement made by Advocate General of the State on its face value accommodated all the 47 ousted candidates and 22*  
F *impleaded candidates on the post of Sub-Inspector – In the third round of litigation, the candidates who were higher in the order of merit qua those 22 candidates filed writ petition on premise that the writ petitioner were denied their legitimate right of fair consideration being higher in the redrawn list vis-a-vis, the 22 candidates – The*  
G *Single Judge of the High Court allowed the writ petition and held that the writ petitioners had a right of fair consideration in seeking appointment based on their order of merit – The Division Bench of the High Court set aside the order of the Single Judge and recorded a finding that the Supreme Court had exercised its power u/Art. 142 of the Constitution – Before the Supreme Court, the appellants*

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*contended that the appointment of 22 candidates was not legally sustainable and violative of Art.14 of the Constitution – Held: The appointments are to be made strictly in the order of merit in terms of the select list prepared by the competent authority and any appointment in contravention is in violation of Art.14 of the Constitution with a proviso that if any appointments are made deviating from the merit drawn by the competent authority in exceptional cases as being reflected in the instant case where there was on-going litigation and subsequent selection was also held to give quietus to the on-going litigation – The same cannot be approved – The said appointments are irregular and cannot be held to be illegal appointments – Further, if an appointment is made illegally or irregularly, the same cannot be made the basis of further appointment and erroneous decision cannot be permitted to perpetuate further error to the detriment of the general welfare of the public or a considerable section – Art.14 of the Constitution does not envisage negative equality – In the instant case, 22 candidates have completed 12 years of service and have gained rich experience in the field – In the given situation, the Supreme Court is not inclined to disturb the appointment of 22 candidates – The reasoning of the High Court that appointments were made by the Supreme Court u/Art. 142 of the Constitution is not approved.*

**Dismissing the appeals, the Court**

**HELD: 1.** It is a settled principle of service jurisprudence and has been consistently followed by this Court that the rules of recruitment to various services under the State or to a class of posts under the State, the State is bound to follow the same and to have the selection of the candidates to be made as per the scheme of recruitment rules and appointments shall be made accordingly. At the same time, all the efforts shall be made for strict adherence to the procedure prescribed under the recruitment rules. On the contrary, if any appointments are made bypassing the recruitment procedure known to law, will resulted in violation of Article 14 and 16 of the Constitution. This Court in *State of U.P. and Others vs. Rajkumar Sharma and Others* and later in *Arup Das and Others vs. State of Assam and Others* considered the question of filling up of vacancies over and above the number of vacancies advertised and held that the filling up of

- A vacancies over and above the number of vacancies advertised would be violative of fundamental rights guaranteed under Article 14 and 16 of the Constitution and the selectees could not claim appointments as a matter of right. This Court further held that even if in some cases appointments had been made erroneously or by mistake, that did not confer any right of
- B appointment to another person as Article 14 of the Constitution does not envisage negative equality and if the State or its authority had committed a mistake at any given stage, it cannot be forced to perpetuate the said mistake under the writ jurisdiction of the High Court under Article 226 of the Constitution. In a situation
- C where the posts in excess of those advertised had been filled up in extraordinary circumstances, instead of invalidating the excess appointments, the relief could be moulded in such a manner so as to strike a just balance keeping the interest of the State and the interest of the person seeking public employment depends upon the facts of each case for which no set standard can be laid
- D down. [Para 24][210-F-H; 211-A-D]

2. Further submission made by the Senior counsel for the appellants that they are higher in the order of merit qua these 22 candidates who were appointed by the 2nd respondent taking shelter of the order of this Court dated 10th May, 2007 is not
- E legally sustainable and violative of Article 14 of the Constitution. The submission in the first blush appears to be attractive but it lacks foundation for the reason that the appointments in the ordinary course are to be made strictly in the order of merit in terms of the select list prepared by the competent authority as contemplated under the relevant statutory recruitment rules and
- F any appointment in contravention indeed is in violation of Article 14 of the Constitution with a proviso that if any appointments are made deviating from the merit list drawn by the competent authority in exceptional cases as being reflected in the instant case where there was on-going litigation and subsequent selection was also held to give quietus to the on-going litigation, still on
- G principle cannot be approved by this Court, are irregular appointments and cannot be held to be illegal as claimed by the appellants. [Para 33][214-F-H-; 215-A-B]

3. It is also not the case of the appellants that they are amongst 22 candidates in the order of merit published by the 2nd
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respondent awaiting appointment in reference to an advertisement dated 25th February, 1999 and if their submission is accepted at the face value as prayed for, atleast the present appellants may not get a march over 22 candidates waiting in the order of merit who in the ordinary course could claim appointment to the post of Sub-Inspector and the action of the State in extending its concession which has been recorded under the order of this Court dated 10th May, 2007 is indeed the mistake being committed, still it cannot be forced by the person as alleged to be aggrieved to perpetuate the said mistake. [Para 34][215-B-D]

4. This Court in *Union of India and Another vs. Kartick Chandra Mondal and Others* observed that if something is being done or acted upon erroneously that cannot become the foundation for perpetuating further illegality. If an appointment is made illegally or irregularly, the same cannot be made the basis of further appointment and erroneous decision cannot be permitted to perpetuate further error to the detriment of the general welfare of the public or a considerable section. This has been the consistent approach of this Court. [Para 35][215-D-E]

5. In *Arup Das and Others vs. State of Assam and Others*, this Court observed that “even if in some cases appointments had been made by mistake or wrongly, that did not confer any right of appointment to another person, as Article 14 of the Constitution does not envisage negative equality and if the State had committed a mistake, it cannot be forced to perpetuate the said mistake.” [Para 36][215-E-F]

6. It is indisputed that by the time this Court is called upon to decide the matter, the so-called 22 candidates against whom there is a lis raised by the present appellants, had completed almost more than 12 years of service and thus having rich experience in the field and the subsequent selection has also been held of the post of Sub-Inspector pursuant to an advertisement issued in February, 2001 and the concession which was recorded of the Advocate General of the State by this Court in its order dated 10th May, 2007 at a given point of time also appears to be bonafide, to give quietus to the on-going litigation pending in Courts for sufficient long time and no other litigation at that given point of time was pending in the court of law, in the

A given situation, this Court is not inclined to disturb the appointment of those 22 candidates which has been questioned by the appellants/candidates in the present batch of appeals. [Para 37][215-G-H; 216-A-C]

B 7. This Court is also of the view that the appointments of 22 candidates made by the 2nd respondent vide orders dated 23rd February, 2008 and 11th March, 2008 which has given rise to a further litigation are irregular appointments and not in conformity to the recruitment rules, still what being prayed by the appellants if accepted by this Court that will perpetuate the illegality which has been committed by the State-respondent and negative equality cannot be claimed to perpetuate further illegality under Article 226 of the Constitution of India. [Para 40][216-E-F]

D *Arup Das and Others vs. State of Assam and Others* (2012) 5 SCC 559 : [2012] 1 SCR 445 – relied on.

E *State of U.P. and Others vs. Rajkumar Sharma and Others* (2006) 3 SCC 330 : [2006] 2 SCR 877; *Surinder Kumar Sharma vs. State of Jammu and Kashmir and Others* decided on 16th October, 2000; *Union of India and Another vs. Kartick Chandra Mondal and Others* (2010) 2 SCC 422 : [2010] 1 SCR 1099; *Gujarat State Dy. Executive Engineers' Assn. vs. State of Gujarat* (1994) Supp 2 SCC 591 : [1994] 3 SCR 983; *Buddhi Nath Chaudhary vs. Abahi Kumar* (2001) 3 SCC 328 : [2001] 2 SCR 18 – referred to.

#### Case Law Reference

F	[2006] 2 SCR 877	referred to	Para 24
	[2012] 1 SCR 445	relied on	Para 24
	[2010] 1 SCR 1099	referred to	Para 35
	[1994] 3 SCR 983	referred to	Para 38
G	[2001] 2 SCR 18	referred to	Para 39

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3904-3905 of 2020.

From the Judgment and Order dated 20.03.2013 of the Division Bench of High Court of Jammu and Kashmir at Jammu in LPA (SW) 2/2011 and LPA (SW) No.4/2011.

With

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C.A. Nos. 3923-3929, 3911-3917, 3910, 3932-3933, 3918, 3921-3922, 3934, 3930-3931, 3919, 3920, 3908-3909, 3907 of 2020

Paramjit Singh Patwalia, Sr. Adv., Rajshekhar Rao, Kotla Harshavardhan, Kshitij Maheshwari, Abhinav Mukerji, Ms. Renu Gupta, Ms. Diksha Rai, Sumit Singh, Navyug Sethi, P. D. Sharma, Rajeev Sharma, Anup Kumar, Mishra Saurabh, Arjun Garg, Ms. Rati Tandon, Ms. Shashi Juneja, M. Shoeb Alam, Satish Pandey, Anupam Raina, Sunando Rana, and Ms. Purnima Bhat, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

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**RASTOGI, J.**

These present batch of appeals have been instituted by the unsuccessful appellants being aggrieved with the impugned judgment dated 20<sup>th</sup> March, 2013 passed by the Division Bench of the High Court of Jammu & Kashmir in LPA No.02/2011 and LPA No.04/2011 and placing reliance on its judgment dated 12<sup>th</sup> March, 2013, cognate LPAs at a later stage were disposed of.

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2. The case has a chequered history and in order to appreciate the grievance of the appellants, it will be necessary to glance through the relevant background facts. It is the third round of litigation arising out of the selection process held pursuant to an advertisement (No.Pers/Rectt/SI/EX-99/A-405) dated 25<sup>th</sup> February, 1999 issued by the 2nd respondent-Director General of Police, J&K State inviting applications for the post of Sub-Inspector of Police (Executive), the post which is included in the Schedule appended to the J&K Police (Executive) Rules to be filled by open selection in terms of the procedure prescribed under the Rules.

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3. Admittedly, it is neither provided in the scheme of Rules nor mentioned in the advertisement notice that the merit list of the candidates based on the written and viva-voce test is to be separately prepared for the Provinces of Jammu & Kashmir. It reveals from the record that the last selected candidate from Jammu Province secured 56 marks whereas, in Kashmir Province, the last selected candidate secured 50 marks. The 2nd respondent under its own assumption published the select list of total candidates of 252 Province-wise i.e. separately for Jammu & Srinagar on 23<sup>rd</sup> April, 2000.

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A First round of litigation

4. The unsuccessful candidates challenged the selection process by filing SWP No.567/2000<sup>1</sup> on manifold grounds inter alia that the select list which was prepared Province-wise is not legally permissible and it ought to have been prepared as one select list for the whole of the State of Jammu & Kashmir as the post of Sub-Inspector is a State cadre post and therefore, the selection ought to have been made by treating the State as a unit and not on the basis of residence of the candidates of Jammu & Kashmir Provinces.

5. The writ petitioners succeeded in persuading and the learned Single Judge by judgment and order dated 16<sup>th</sup> October, 2000 allowed the writ petitions with the direction that the select list be prepared afresh of the State (J&K) and those who secured 50 or more marks in the revised select list be considered for appointment without disturbing the appointments already made. Against the order of the learned Single Judge, State-respondent filed LPAs before the Division Bench of the High Court and the Division Bench by its judgment dated 19<sup>th</sup> August, 2002 modified the order of the learned Single Judge with the direction to redraw the merit list State-wise and on redrawing the merit list, if the candidates who have already been selected/appointed and come within the merit zone, they should not be disturbed but their seniority would be determined in accordance with their placement in the order of merit which would be finally prepared. The above order of the Division Bench dated 19<sup>th</sup> August, 2002 was the subject matter of challenge in SLP(C) No.24798/2002 which came to be dismissed by this Court under order dated 10<sup>th</sup> February, 2004.

6. In compliance of the order of the Division Bench dated 19<sup>th</sup> August, 2002, a fresh redrawn State-wise merit list dated 19<sup>th</sup> May, 2004 came to be notified by the 2<sup>nd</sup> respondent appointing 259 candidates and at the same time, cancelled the appointment of 47 candidates who were already in service since their names did not find place in the revised merit list at the State level.

G Second round of litigation

7. That the ousted candidates approached the learned Single Judge of the High Court by filing a writ petition challenging the redrawn State-

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H <sup>1</sup> *Surinder Kumar Sharma vs. State of Jammu and Kashmir and Ors.*

wise merit list dated 19<sup>th</sup> May, 2004 and the Learned Single Judge by its order dated 24<sup>th</sup> May, 2004 issued interim directions to allow such ousted candidates to continue in service until the next date of hearing. Meanwhile, contempt proceedings being COA(LPASW) No.22/2004 were also initiated against the 2nd respondent for non-compliance of the order of the Division Bench dated 19<sup>th</sup> August, 2002 and against the continuation of such 47 ousted candidates in the service. The Division Bench of the High Court by its order dated 03<sup>rd</sup> December, 2004 disposed of the contempt petition with a direction that “*those who did not come within the merit zone in the re-drawn merit list cannot be allowed to continue and if any such person is being so continued, he will be removed as already directed by the order dated 19.05.2004.*”

8. That came to be challenged in a SLP at the instance of the 44 ousted candidates who have been directed to be removed from service by the Division Bench by order dated 03<sup>rd</sup> December, 2004. Various interlocutory applications by a total of 22 candidates were filed for their impleadment before this Court in the pending Special Leave Petition which was later converted into Civil Appeal No.4758/2006. This Court by its order dated 10<sup>th</sup> May, 2007 without examining the inter se dispute of the litigant parties and taking note of the statement made by the learned Advocate General of the State on its face value that all the 47 ousted candidates who are likely to loose their job as a result of the order of the High Court dated 03<sup>rd</sup> December, 2004 passed in contempt petition and such of 22 impleaded candidates on filing of their interlocutory applications before this Court, will be accommodated on the post of Sub-Inspector, disposed of the appeal with the following order:-

“Mr. Altaf H. Nayak, learned Advocate General submits that all the 47 petitioners who are likely to go out of job as a result of the impugned order passed by the High Court and 22 respondents herein will be accommodated on the post of Sub-Inspector. He further submits that all the 47 petitioners who were selected on account of impugned selection and are presently working will be allowed to continue on their posts. In view of this statement made by learned Advocate General, we do not think we need to determine any legal question involved in this matter. Consequently the Appeal stands disposed of in view of the statement made by learned Advocate General.”

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- A 9. That apart from the 47 ousted candidates who were earlier in the order of merit but could not find place because of the merit list being redrawn in purported compliance of the directions made by the High Court in its order dated 19<sup>th</sup> August, 2002, the 2<sup>nd</sup> respondent appointed 22 candidates vide its orders dated 23<sup>rd</sup> February, 2008 and 11<sup>th</sup> March, 2008. It reveals from the record that these 22 candidates were much lower in the redrawn merit list and their placement in the order of merit was not brought to the notice of this Court and that gave rise to a further litigation.

Third round of litigation

- C 10. Some of the left out candidates who were higher in the order of merit qua these 22 candidates who were appointed by the 2<sup>nd</sup> respondent vide orders dated 23<sup>rd</sup> February, 2008 and 11<sup>th</sup> March, 2008 under the so-called alleged compliance of the order of this Court dated 10<sup>th</sup> May, 2007, approached the High Court by filing of a writ petition being SWP No.1084/2008 and SWP No.1145/2008 on the premise that the writ petitioners were denied their legitimate right of fair consideration being higher in the redrawn merit list vis-a-vis, the 22 persons who were indisputedly less meritorious still appointed and action of the State is in violation of the statutory rules and is also a denial of equal opportunity in seeking appointment on the envil of Article 14 of the Constitution.
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- E 11. It reveals from the record that such of the 22 candidates of whom reference has been made in the order of this Court dated 10<sup>th</sup> May, 2007, majority of them were lower in the order of merit qua the candidates/writ petitioners who were contesting their right claiming equal and fair opportunity for seeking appointment as per their placement in the order of redrawn merit. The learned Single Judge by order dated 26<sup>th</sup> August, 2010 allowed the writ petitions with the direction that any appointment made on the basis of concession made by the learned Advocate General of the State, would not deprive the legitimate claim of the writ petitioners being higher in the order of merit from seeking appointment to the post of Sub-Inspector qua these 22 candidates and they indeed have a right of fair consideration in seeking appointment based on their order of merit that gave rise to filing of LPA No.02/2011 and cognate appeals before the Division Bench of the High Court at the instance of the persons aggrieved.
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- H 12. These batch of appeals were disposed of by the Division Bench by its judgment dated 12<sup>th</sup> March, 2013 setting aside the judgment of the

learned Single Judge dated 26<sup>th</sup> August, 2010. Relying upon the said judgment of the Division Bench dated 12<sup>th</sup> March, 2013, other cognate appeals were at a later stage decided by the Division Bench and that became the subject matter of challenge in appeals before us. A

13. Mr. Paramjit Singh Patwalia, learned Senior counsel for the appellants submits that the order of this Court dated 10<sup>th</sup> May, 2007 merely recorded the concession made by the learned Advocate General of the State and it has been completely misconstrued by the Division Bench of the High Court in holding that as the order has been passed by this Court in exercise of its power under Article 142 of the Constitution to do complete justice, it is not open to question in the collateral proceedings. B C

14. Learned Senior counsel further submits that by appointing such 22 persons as Sub-Inspectors who had been nowhere in the redrawn merit list prepared pursuant to an advertisement dated 25<sup>th</sup> February, 1999, at least right of the appellants of fair consideration in seeking appointment who admittedly placed higher in the order of redrawn merit list could not have been divested in taking defence to the order of this Court dated 10<sup>th</sup> May, 2007 and such appointments made by the respondents of 22 persons as Sub-Inspectors is not only in violation of the statutory recruitment rules but also in violation of Article 14 of the Constitution are unsustainable and dehors the rules. D E

15. Learned Senior counsel further submits that there is no delay or laches which could be attributed to the present appellants as few of them earlier approached the Court at the initial stage when the selection process came to be questioned in the year 2000 but they were primarily aggrieved when 22 candidates were offered appointment by the State-respondent under its orders dated 23<sup>rd</sup> February, 2008 and 11<sup>th</sup> March, 2008 as they are nowhere in the order of redrawn merit list prepared by the State-respondent in compliance of the judgment of the Division Bench of the High Court dated 19<sup>th</sup> August, 2002 in the first round of litigation and in the given circumstances, they cannot be said to be the fence sitters as observed by the Division Bench in the impugned judgment. F G

16. Learned Senior counsel for the appellants has made a further feeble attempt to justify that there are 26 appellants who are before this Court assailing the impugned judgment of the Division Bench of the High Court in the instant proceedings and 10 of the appellants are H

- A presently serving as a Head Constables/Constables in Jammu & Kashmir Police and 9 are serving in various Government departments and only 7 of the appellants are such who are employed in private sector and what being contended by the appellants if not acceded to by this Court and permitting the persons who are lower in merit to continue as Sub-Inspectors, will be a heartburn and mental agony to them and at
- B least the on-going injustice with them ought not to be permitted to continue. He furthermore submits that there will be no financial implications to the respondents as the appellants are not claiming any back wages and there still exists to their information more than 100 vacant posts of Sub-Inspectors in Jammu & Kashmir and the present appellants can
- C also be accommodated without disturbing these 22 candidates who were appointed as Sub-Inspectors pursuant to an advertisement dated 25th February, 1999.

17. The appellant in SLP(C) No.34564 of 2014 was selected in a subsequent selection for the post of Sub-Inspector pursuant to an advertisement issued in February, 2001 and was appointed vide order dated 01<sup>st</sup> February, 2002 and on acceptance of what being prayed by him, he will be entitled for seniority and consequential benefits from 23<sup>rd</sup> April, 2000 and according to him, that may not disturb even the appointments which are made by the respondent of 47 plus 22 persons in respect of whom grievance has been raised by the appellants in the
- D instant proceedings.
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18. Per contra, while supporting the impugned judgment of the Division Bench of the High Court, learned counsel for the respondents submits that 47 ousted candidates whose services were terminated after the redrawn merit list was published, were initially allowed to continue on the strength of the interim order passed by the learned Single Judge of the High Court and during pendency of the litigation, such 47 ousted candidates have been continuously working in the department right from their appointment in the year 2000 and the department had incurred huge expenses on their training courses. Besides this, the said 47
- F candidates have taken part in anti-insurgency operations in the State and as such there were apprehension of threat to their life. The State accordingly wanted to retain them and when the matter was listed before this Court in the earlier round of litigation on 10<sup>th</sup> May, 2007, the difficulties were pointed out to this Court and it was conceded that in case the appointment of such 47 candidates is saved, there were 22 vacancies
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available and such 22 applicants were not only became a party but have A  
been litigating since the year 2000 and in the given circumstances, it was  
considered appropriate that in order to settle the issue one for all and to  
sum up the on-going litigation pending for the last eight years and  
subsequent selections were also held for the post of Sub-Inspector B  
pursuant to an advertisement notified in February, 2001, 22 such  
candidates may be accommodated along with 47 ousted candidates who  
were allowed to continue since the year 2000. In the given situation, the  
statement was made by the learned Advocate General of the State under  
the bonafide impression that it will at least give quietus to the on-going  
battle between the selected candidates inter se pending since the year C  
1999.

19. Learned counsel further submits that it is not the case of the  
appellants that they are the senior most 22 candidates in the order of  
redrawn merit list, who have been left over from consideration for  
appointment and also informed that there are good number of candidates  
who are higher in the order of merit qua the present appellants in the D  
redrawn select list which was prepared pursuant to a direction of the  
High Court in the first round of litigation and the candidates with whom  
the present appellants had a lis have been appointed in the year 2008  
and have served for more than 12 years and further submits that what  
has been contended by the appellants if accepted by this Court the E  
appointments are to be made strictly in the order of redrawn merit list,  
against 22 vacancies which are in dispute, majority of appellants may  
not find their name in queue in seeking appointment as they are not the  
senior most 22 candidates in the order of redrawn merit deprived from  
consideration for appointment and submits that in the peculiar facts and  
circumstances, what has been observed by the High Court in the impugned F  
judgment needs no further interference.

20. We have heard the counsel for the parties and with their  
assistance perused the material on record.

21. Unfortunately, the advertisement to the post of Sub-Inspector  
which was published by the 2nd respondent way back on 25<sup>th</sup> February, G  
1999 with the condition that one has not crossed the age of 28 years as  
on 01<sup>st</sup> January, 1999, after 21 years down the line, is still has not been  
finalised and we are pondering over the inter se dispute of the candidates  
who had participated in the selection process must have crossed the age

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- A of 43-47 years under the belief that they may still be considered for appointment.

22. In the first round of litigation, when the controversy initially arose as to whether the merit list Province-wise in Jammu & Kashmir could have been prepared by the respondent and how far it can held to be in conformity with the scheme of rules, while examining the controversy, the learned Single Judge categorically observed that all those candidates who have secured less than 50 marks have no right to contend that they have been arbitrarily ignored on the basis of Province-wise selection and the claim of those candidates who have obtained 50 or more than 50 marks was left open to be considered by the learned Single Judge in the proceedings initially in the year 2000. The further dispute which was revisited/reviewed/re-examined by the Court at the later stage in the second round of litigation primarily confined to the candidates who obtained 50 or more than 50 marks under the zone of consideration for being considered for appointment on the post of Sub-Inspector pursuant to an advertisement dated 25<sup>th</sup> February, 1999.

23. The indistputed facts which manifest from the record as noticed above is that the advertisement came to be notified by the 2nd respondent dated 25th February, 1999 holding selections for the post of Sub-Inspector and the present batch of appeals are preferred by the appellants/ participants being higher in the order of merit qua those 22 candidates who were appointed by the 2nd respondent vide orders 23<sup>rd</sup> February, 2008 and 11<sup>th</sup> March, 2008 on the basis of the concession made by the learned Advocate General of the State recorded under order dated 10<sup>th</sup> May, 2007 of this Court, with the claim that they have been deprived from fair consideration in seeking appointment.

24. It is a settled principle of service jurisprudence and has been consistently followed by this Court that the rules of recruitment to various services under the State or to a class of posts under the State, the State is bound to follow the same and to have the selection of the candidates to be made as per the scheme of recruitment rules and appointments shall be made accordingly. At the same time, all the efforts shall be made for strict adherence to the procedure prescribed under the recruitment rules. On the contrary, if any appointments are made bypassing the recruitment procedure known to law, will resulted in violation of Article 14 and 16 of the Constitution. This Court in *State of U.P. and*

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*Others vs. Rajkumar Sharma and Others*<sup>2</sup> and later in *Arup Das and Others vs. State of Assam and Others*<sup>3</sup> considered the question of filling up of vacancies over and above the number of vacancies advertised and held that the filling up of vacancies over and above the number of vacancies advertised would be violative of fundamental rights guaranteed under Article 14 and 16 of the Constitution and the selectees could not claim appointments as a matter of right. This Court further held that even if in some cases appointments had been made erroneously or by mistake, that did not confer any right of appointment to another person as Article 14 of the Constitution does not envisage negative equality and if the State or its authority had committed a mistake at any given stage, it cannot be forced to perpetuate the said mistake under the writ jurisdiction of the High Court under Article 226 of the Constitution. In a situation where the posts in excess of those advertised had been filled up in extraordinary circumstances, instead of invalidating the excess appointments, the relief could be moulded in such a manner so as to strike a just balance keeping the interest of the State and the interest of the person seeking public employment depends upon the facts of each case for which no set standard can be laid down.

25. Initially when the selections were challenged in the year 2000, it was in reference to the policy decision taken by the State Government in preparing two separate merit lists of Jammu & Kashmir Provinces arising from a common advertisement dated 25th February, 1999 and it was indeed in clear contravention to the scheme of rules and the learned Single Judge of the High Court categorically observed that as the key of marks for Jammu & Kashmir Provinces are different and 50 marks being the lower among the two Provinces secured by the last candidate, the limited controversy examined by the learned Single Judge of the High Court was in the four corners confining it to the persons/candidates who obtained 50 or more marks in the selection process and still deprived from consideration for appointment.

26. To make this fact further clear, it was observed by the learned Single Judge in *Surinder Kumar Sharma vs. State of Jammu and Kashmir and Others*<sup>4</sup> decided on 16<sup>th</sup> October, 2000 i.e. the first round of litigation. The controversy center around is reproduced hereunder:-

<sup>2</sup> *State of U.P. and Others vs. Rajkumar Sharma and Others* (2006) 3 SCC 330

<sup>3</sup> *Arup Das and Others vs. State of Assam and Others* (2012) 5 SCC 559

<sup>4</sup> SWP No.576/2000 titled *Surinder Kumar Sharma vs. State of Jammu and Kashmir*

A           “Therefore, all those candidates who have received less than 50 marks have no right to contend that they have been wrongly ignored on the basis of Province wise selection. The claims of those candidates who have obtained 50 or more than 50 marks would be considered in the light of this judgment.”

B           27. At the outset, those who secured less than 50 marks, their claim of consideration for appointment was eliminated by the learned Single Judge even in the first instance when the controversy initially raised by the candidates affected at a very threshold after the select list was notified by the 2<sup>nd</sup> respondent in the year 2000 and if any person was aggrieved on account of his non-selection, secured 50 or more than 50 marks being deprived from fair consideration in seeking appointment, cause of action was accrued to him at such given point of time in the first place, when examined and decided by the learned Single Judge of the High Court by its judgment dated 16<sup>th</sup> October, 2000 and directed the State authorities to consider all such candidates for appointment who  
C           have secured 50 or more than 50 marks if left out from being considered for appointment as their right of fair consideration is being seriously jeopardized which was although modified by the Division Bench at the later stage by its judgment dated 19<sup>th</sup> August, 2002 as a consequence, 47 candidates were going to be affected in the first round of litigation. The later controversy remained confined to examine the fate of those 47  
D           ousted candidates who could be over and above the candidates who are to be appointed in the redrawn merit list of the State of Jammu & Kashmir, to be adjusted despite being appointed and working for sufficient time deserve indulgence of the Court.

E           28. That further litigation was raised at the behest of 47 ousted candidates, it has come on record that they were allowed to continue in the first instance under the interim order as they were already working for quite some time and finally their controversy reached to this Court in the second round of litigation and since much water has flown in the Ganges by that time and the alleged 47 ousted candidates were working  
F           right from the year 2000 and the department had incurred huge expenses on their training courses and they had taken part in anti-insurgency operations in the State and the State was concerned about them as there were apprehension of threat to their life, under these circumstances, the State has shown its intention to retain them in service.  
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29. It reveals from the record that the Government intended to give quietus to the on-going litigation and in the second round of litigation in this Court as there were 22 interlocutory applications filed by the applicants in the pending proceedings, who were claiming their appointment, under the bonafide belief that certain vacancies are available with the State and if such 22 candidates who have filed their applications for impleadment in the pending proceedings in this Court if taken care of, atleast there will be a quietus to the on-going litigation and that appears to be the reason to which the learned Advocate General of the State made a statement before this Court that not only 47 ousted candidates who have been appointed and served for the last 7 years, such 22 candidates may also be accommodated on the post of Sub-Inspector and after recording the statement made by the learned Advocate General of the State, there left no legal issue to be examined in the pending civil appeal and on the basis of the alleged concession made by the learned Advocate General, this Court by order dated 10th May, 2007 disposed of the appeal.

30. It is true that ordinarily in the open selection, appointments are to be made strictly in the order of merit in terms of the procedure prescribed under the relevant statutory recruitment rules or in absence under the guidelines if prescribed, still if appointments are made for exceptional reasons deviating from the merit list which ordinarily is not permissible but in unforeseen exigencies, if the State with a bonafide intention to give quietus to the on-going litigation pending for the last eight years extended its concession to adjust such 22 candidates who are under litigation for long time with no malafides or bias being imputed to the State action could have been possible only if those who are litigating and agitating their grievance reached upto this Court cannot be held to be faulted.

31. Mr. P.S. Patwalia, learned Senior counsel for the appellants has pointed out certain instances and it is also reflected from the written submission that such of the candidates who have secured 50 or more marks have also been deprived from consideration in seeking appointment but the statement of fact does not hold factually correct for the reason that in the first round of litigation, the learned Single Judge categorically observed that the dispute remain confined to such of the candidates who have secured 50 or more than 50 marks in the selection process held by the respondent pursuant to an advertisement dated 25<sup>th</sup> February, 1999.

- A In the given circumstances, if the candidates who have secured 50 or more marks and still left from consideration for appointment, their right accrued to make their claim when the judgment was initially pronounced by the learned Single Judge dated 16th October, 2000 although modified by the Division Bench in the first round of litigation by judgment and order dated 19th August, 2002 but none of the so-called appellants/
- B candidates who have secured 50 or more than 50 marks ever made their claim in seeking appointment at a later stage and what is reflected from the record that there were only 47 ousted candidates who secured 50 or more than 50 marks and if the present appellants who have secured 50 or more marks as claimed by them were not there within 47 ousted
- C candidates, no grievance at a belated stage could be raised and open to be entertained and deserves rejection.

32. The submission further made by learned Senior counsel for the appellants that the finding recorded by the Division Bench of the High Court that the appointment of these 22 candidates against whom
- D there was a grievance raised by the appellants, are being appointed by this Court in exercise of its power under Article 142 of the Constitution for doing complete justice, is not reflected from the order of this Court dated 10<sup>th</sup> May, 2007. We find substance in what being urged and hold that the order of this Court dated 10<sup>th</sup> May, 2007 was not under Article
- E 142 of the Constitution and it was clearly reflected from the order itself that it was passed on the basis of the concession made by the learned Advocate General of the State and recorded by this Court in its order dated 10<sup>th</sup> May, 2007.

33. Further submission made by the learned Senior counsel for the appellants that they are higher in the order of merit qua these 22
- F candidates who were appointed by the 2<sup>nd</sup> respondent taking shelter of the order of this Court dated 10<sup>th</sup> May, 2007 is not legally sustainable and violative of Article 14 of the Constitution. The submission in the first blush appears to be attractive but it lacks foundation for the reason that the appointments in the ordinary course are to be made strictly in the
- G order of merit in terms of the select list prepared by the competent authority as contemplated under the relevant statutory recruitment rules and any appointment in contravention indeed is in violation of Article 14 of the Constitution with a proviso that if any appointments are made deviating from the merit list drawn by the competent authority in exceptional cases as being reflected in the instant case where there was
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on-going litigation and subsequent selection was also held to give quietus to the on-going litigation, still on principle cannot be approved by this Court, are irregular appointments and cannot be held to be illegal as claimed by the appellants. A

34. It is also not the case of the appellants that they are amongst 22 candidates in the order of merit published by the 2<sup>nd</sup> respondent awaiting appointment in reference to an advertisement dated 25<sup>th</sup> February, 1999 and if their submission is accepted at the face value as prayed for, atleast the present appellants may not get a march over 22 candidates waiting in the order of merit who in the ordinary course could claim appointment to the post of Sub-Inspector and the action of the State in extending its concession which has been recorded under the order of this Court dated 10<sup>th</sup> May, 2007 is indeed the mistake being committed, still it cannot be forced by the person as alleged to be aggrieved to perpetuate the said mistake. B C

35. This Court in *Union of India and Another vs. Kartick Chandra Mondal and Others*<sup>5</sup> observed that if something is being done or acted upon erroneously that cannot become the foundation for perpetuating further illegality. If an appointment is made illegally or irregularly, the same cannot be made the basis of further appointment and erroneous decision cannot be permitted to perpetuate further error to the detriment of the general welfare of the public or a considerable section. This has been the consistent approach of this Court. D E

36. In *Arup Das and Others vs. State of Assam and Others*<sup>6</sup>, this Court observed that “even if in some cases appointments had been made by mistake or wrongly, that did not confer any right of appointment to another person, as Article 14 of the Constitution does not envisage negative equality and if the State had committed a mistake, it cannot be forced to perpetuate the said mistake.” F

37. It is indisputed that by the time we are called upon to decide the matter, the so-called 22 candidates against whom there is a lis raised by the present appellants, had completed almost more than 12 years of service and thus having rich experience in the field and the subsequent selection has also been held of the post of Sub-Inspector pursuant to an G

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<sup>5</sup> *Union of India and Another vs. Kartick Chandra Mondal and Others* (2010) 2 SCC 422

<sup>6</sup> *Arup Das and Others vs. State of Assam and Others* (2012) 5 SCC 559

A advertisement issued in February, 2001 and the concession which was recorded of the learned Advocate General of the State by this Court in its order dated 10<sup>th</sup> May, 2007 at a given point of time also appears to be bonafide, to give quietus to the on-going litigation pending in Courts for sufficient long time and no other litigation at that given point of time was pending in the court of law, in the given situation, this Court is not inclined to disturb the appointment of those 22 candidates which has been questioned by the appellants/candidates in the present batch of appeals.

38. In *Gujarat State Dy. Executive Engineers' Assn. vs. State of Gujarat*<sup>7</sup>, this Court recorded a finding that appointments given under the “wait list” were not in accordance with law. It, however, refused to set aside such appointments in view of length of service (five years and more).

39. In *Buddhi Nath Chaudhary vs. Abahi Kumar*<sup>8</sup>, this Court has observed that appointments were held to be improper. But this Court did not disturb the appointments on the ground that the incumbents had worked for several years and had gained good experience. “We have extended equitable considerations to such selected candidates who have worked on the post for a long period”.

40. We are also of the view that the appointments of 22 candidates made by the 2nd respondent vide orders dated 23<sup>rd</sup> February, 2008 and 11<sup>th</sup> March, 2008 which has given rise to a further litigation are irregular appointments and not in conformity to the recruitment rules, still what being prayed by the appellants if accepted by this Court that will perpetuate the illegality which has been committed by the State-respondent and negative equality cannot be claimed to perpetuate further illegality under Article 226 of the Constitution of India.

41. To conclude, we do not approve the reasoning of the High Court that appointments of these 22 candidates have been made under Article 142 of the Constitution to do complete justice but after the matter has been dilated by us, we are not inclined to disturb the appointment of these 22 candidates against whom a grievance has been raised by the appellants in the present batch of appeals.

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<sup>7</sup> *Gujarat State Dy. Executive Engineers' Assn. vs. State of Gujarat* (1994) Supp 2 SCC 591

<sup>8</sup> *Buddhi Nath Chaudhary vs. Abahi Kumar* (2001) 3 SCC 328

PANKJESHWAR SHARMA v. STATE OF JAMMU & KASHMIR 217  
[AJAY RASTOGI, J.]

42. Consequently, we find no substance in the present appeals A  
and are accordingly dismissed. No costs.

43. Pending application(s), if any, stand disposed of.

Ankit Gyan

Appeals dismissed.