

**HIGH COURT OF JAMMU AND KASHMIR**  
AT JAMMU

LPASW No. 34/2012

And

LPASW No.29/2013

Date of order: 30.12. 2013

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P.B.Kohli and others	v.	State of J&K and ors.
Shyam Kishore and another	v.	State of J&K and ors.

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**Coram:**

**Hon'ble Mr. Justice M. M. Kumar, Chief Justice**  
**Hon'ble Mr. Justice Hasnain Massodi, Judge**

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**Appearing counsel:**

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For the appellant(s)	:	Mrs. S. S. Lehar Sr. Advocate with Mr. Meharban Singh, Advocate
For the respondent(s)	:	Mrs. Neeru Goswami, Dy.AG.

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| i) Whether to be reported<br>Press/Media        | : | Yes |
| ii) Whether to be reported in<br>Digest/Journal | : | Yes |
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**M.M.Kumar, CJ**

1. These two appeals have emerged from one judgment and are thus being disposed of by a common order. The facts have been taken from LPA(SW) No.34/2012.

2. The appellants were working on the post of Junior/Senior Pharmacist in the Health and Medical Education Department. They approached the Writ Court by filing SWP No.507/2009 relatable to the instant appeal. In the petition they had made the following prayer:-

“ It is, therefore, most humbly prayed that in view of the submissions made above and those to be urged at the time of hearing. Your Lordship may be pleased to issue a writ of certiorari quashing the Order No.410-HME of 2007 dated 21.6.2007 and also for issuance of a writ of mandamus commanding the Respondents to give three

grades to the petitioners as has been given to the Anesthesia Assistants with consequential benefits, by treating them equal with the Anesthesia Assistants. Any other writ, order or direction which Your Lordship may deem just and proper in the circumstances of the case may also be issued in favour of the petitioners and against the respondents. An Affidavit, duly sworn and attested in support of this petition is filed herewith.”

3. Before dealing with the view taken by the Writ Court, it would be appropriate to refer to the earlier round of litigation initiated by the appellants by filing SWP No.1616/1996. In that petition they claimed that the respondents had provided them only one avenue of promotion throughout their career, whereas they were entitled to as many avenues of promotions as had been given to Anesthesia Assistants, X-Ray Assistants, and Lab Technicians etc. They had placed reliance on the judgments of Hon’ble the Supreme Court rendered in the cases of Council of Scientific and Industrial Research v. K.G.S.Bhat, (1989) 4 SCC 635 and Dr.(Ms.) O.Z.Hussain v. Union of India JT (1989) 4 SC 407.

4. The Writ Court took notice of the stand taken by the respondents-State to the effect that their claim was under consideration and thus disposed of the petition on 25.11.1998 with the following observations:-

“.....The stand taken by the state is that matter is pending consideration before the state government, and a decision is likely to be taken at the earliest.

In view of the stand taken by the state, it is not thought opt to proceed further in the matter. Respondents would take notice of the decision referred to above and pass appropriate orders preferably within six months.”

5. Feeling dissatisfied with the view taken by the Writ Court, the appellants challenged its order before the Letters Patent Bench by filing LPA(SW) No.752/99, which was disposed of on 07.11.2005 by holding as under:-

“.....We are not inclined to accept this submission as ultimately it is for the state to take a decision and provide promotional avenues for the appellants. If the state was already considering their grievance, there was no scope for giving direction by the Court to do it. In any case the writ court had required the state respondent to pass appropriate orders within six months, it is not known if it has been complied with or not but if the matter being still pending for disposal with the state respondent, it would be possible for it to pass appropriate orders within one months from the date of receipt of this order, leaving the appellants free to take any other available remedy in case any adverse order is passed against them.”

6. The aforesaid paragraphs extracted from the orders passed by the Writ Court and the Letters Patent Bench would show that this Court had taken the view that once the State-respondents had taken a decision to provide promotional avenues to the appellants then there was no scope for issuance of any mandamus. In pursuance of the directions issued by this Court the Health and Medical Education Department considered the claim of the junior/senior pharmacists in terms of the order of the writ Court dated 25.11.1998 and Letters Patent Bench dated 07.11.2005. The State Government issued Government Order No.26-HME of 2006 dated 19.01.2006, which provided method of recruitment and qualification. Consequently the Government Order brought better prospects for promotion by providing more avenues of promotion to the

appellants. On 21.06.2007 the State Government through the Health and Medical Education Department passed an order (Annexure-F) indicating that there were no recruitment rules for non-gazetted service of Medical Education Department, which were framed on 19.01.2006. The recruitment rules prescribed method, qualification and provided more avenues of promotion to all the categories including Junior/Senior Pharmacists. The cases of the appellants for promotion were to be considered under government order dated 19.01.2006 as and when their turn matured. Accordingly, the government passed an order indicating that the directions issued by the Writ Court and Letters Patent Bench were complied with.

7. The appellants did not feel satisfied with the aforesaid dispensation at the instance of the state in the Health and Medical Education Department. Accordingly, they filed SWP No.507/2009 with a prayer for quashing order No.410-HME of 2007 dated 21.06.2007 (Annexure-F). It is appropriate to mention that most of the appellants have attained superannuation before the order dated 19.01.2006 was passed which provided avenues of promotions. Accordingly, the Writ Court considered the submissions with regard to legal validity of government order dated 21.06.2007 and rejected the claim of the appellants by opining as under:-

“The avenues of promotion provided to the Pharmacists vide Government Order No.26-HME of 2006 dated 19.01.2006 as indicated in Government Order No.410-HME of 2007 dated 21.06.2007, which was issued dealing with the petitioner’s claim, have neither been averted to nor questioned by the petitioners in the Writ Petition and it does not come out from what is stated therein as to how the avenues of promotion provided to the Pharmacists offend any of their rights. It, therefore, becomes difficult to address the petitioners’ grievance.

This apart, in view of the State Government’s Response to the petitioners’ Writ Petition indicating that although only one promotion was made in Pharmacist Unit before January 2009 but thereafter 2 (two) Pharmacists were promoted as Head Pharmacists and 10 (ten) as Pharmacists Supervisors in the pay scale of 6500-10500 and 5700-10100 w.e.f. 06.01.2009 after up-gradation of posts was sanctioned vide Government Order No.17-HME of 2009 dated 06.01.2009 with prospective effect, there does not appear any merit in the petitioners’ Claim that promotional avenues were not provided to the Pharmacists by the Government.

During the course of consideration of the Petition, the petitioners’ learned counsel would submit that although promotions were provided to some of the petitioners but nothing was done by the State Government for those who had retired, when the State Government was under obligation to consider their cases too for promotion.

I do not find any merit in the petitioners’ learned Senior Counsel’s this submission too, for, the directions issued in the earlier round of litigation were only to consider providing promotional avenues to Pharmacists and there was no such direction to provide promotional avenues with retrospective effect.

As the promotional avenues have been provided prospectively, so those who retired from service before the creation of fresh promotional avenues would not be entitled thereto.”

8. Mr. S.S.Lehar, learned Senior Advocate has argued that the Writ Court has failed to return any finding with regard to discrimination for providing avenues of promotion at par with Anesthesia Assistants. It has also been urged that the appellants have initiated litigation for earning avenues of promotion but merely because many of them have retired before 19.01.2006, they could not be denied promotion.

According to the learned counsel, it would result in flagrant violation of Articles 14 and 16(1) of the Constitution. In that regard reference has been made to the correspondence between the Principal Government Medical College, Jammu dated 24.03.1999, which favoured the appellants.

9. Mrs. Goswami, learned State counsel, on the other hand, has submitted that there cannot be any equality between employees of different cadres. According to the State counsel, employees belonging to one cadre cannot claim that they must be provided avenues of promotions in the same manner as has been done in the case of employees belonging to other cadre. Therefore, rejection of claim of parity with the employees belonging to the cadre of Anesthesia Assistants would not result in violation of Article 14 and 16(1) of the Constitution by any stretch of imagination because Junior/Senior Pharmacist constitutes a distinct cadre. Mrs. Goswami has further submitted that most of the appellants had already superannuated from service before 19.01.2006. The rules enacted vide Government Order No.26-HME of 2006 dated 19.01.2006 would not operate retrospectively.

10. Having heard learned counsel for the parties and keeping in view the facts of the present case, we are of the considered view that these appeals do not warrant admission. It is true that

the appellants had initiated proceedings by filing SWP No.1616/1996 which was eventually concluded by decision dated 07.11.2005 rendered in LPA(SW) No.752/1999. It was on the directions issued by the Letters Patent Bench that the Health and Medical Education Department issued Government Order No.26-HME of 2006 dated 19.01.2006. The government order prescribed method of recruitment and qualification and also provided better prospects for promotion of the Junior/Senior Pharmacists. It is equally true that further promotion to the higher posts provided vide government order dated 19.01.2006 could only be given to those who have been serving. All such employees, who have retired earlier to the aforesaid date would not qualify to be considered for promotion merely because they had initiated legal proceedings. There is no dispute that the cases of candidates, who are in service have either been considered and they have been given promotion or they are to be considered in accordance with the rules framed vide government order No.26-HME of 2006 dated 19.01.2006. The appellants have failed to point out any legal infirmity in the government order dated 19.01.2006 which is to operate prospectively. There is no challenge to the legal validity of the government order. We endorse the view taken by the learned Writ Court that promotional avenues were to be provided prospectively and in the orders passed by this Court

on 25.11.1998 and 07.11.2005 in SWP No.1616/1996 and LPA(SW) No.752/1999 respectively there was no direction that the rules were to be framed for providing avenues of promotion with retrospective effect. It is admitted position that those who continues to be in service have been considered for promotion and no promotion could be given to those who have superannuated. We are further of the view that equality can be claimed between equals. It would be discriminatory to grant equality amongst two un-equals. In other words, the prayer made by the appellants is wholly without substance that the Junior/Senior Pharmacists should be provided with same number of avenues of promotion which have been provided to Anesthesia Assistants. Any direction in that regard would violate Articles 14 and 16(1) of the Constitution because both the posts belong to two different cadres. It is not possible to say that whether in one cadre avenues of promotion should be more than such avenues of promotion in the other category. It would depend upon many factors like size of the cadre, qualification of the incumbent and requirement of experienced persons in higher echelons of service. These are the areas where the executive has its say and it would not be possible to entertain any grievance on that score by judicial intervention. Accordingly, we are unable to persuade ourselves to accept the submissions made by Mr. S.S.Lehar, learned Senior Advocate.



11. As a sequel to the above discussion, these appeals do not warrant admission and are thus liable to be dismissed. Accordingly, these appeals fail and same are dismissed.

**(Hasnain Massodi)**  
**Judge**

**(M. M. Kumar)**  
**Chief Justice**

**Jammu**  
30.12.2013  
Vinod.