

HIGH COURT OF JAMMU AND KASHMIR

AT JAMMU

LPASW No. 138/2011,
 LPASW No. 139/2011,
 LPASW No. 172/2011,
 LPASW No. 154/2011,
 LPASW No. 189/2011,
 LPASW No. D-69/2014,
 LPASW No. D-70/2014,
 LPASW No. 73/2014,
 LPASW No. D-74/2014
 LPASW No. 75/2014

Date of order: 31.12.2015

LPASW No. 138/2011

1. Rohit Gupta S/o Shri Bodh Raj Gupta age 37 years,
 Sr. Prosecuting Officer, Vigilance Organization, Jammu
 R/o H. No. 181 Sec. 2 Phase- II JDA Housing Colony, Rajinder Nagar,
 Bantalab, Jammu
2. Mohd Amer Almansoor, S/o Majid Anwar Salaria
 Age 40 years, Sr. Prosecuting Officer, Police Head
 Quarter, J&K Srinagar/Jammu R/o H. No. 128 Gujjar Nagar, Jammu

.....Appellants.

versus

1. Shri Ajay Kumar age 38 years, S/o Shri Dhani Ram Sharma
 R/o Village Muthi, Tehsil and District Jammu, Sr. Prosecuting Officer,
 Presently posted as I/C Fir Hection in the O/o Sr. Superintendent
 Of Police Vigilance Organization, Jammu.
 and 18 others respondents

.....Respondents

LPASW No. 139/2011

1. Rohit Gupta S/o Shri Bodh Raj Gupta age 37 years,
 Sr. Prosecuting Officer, Vigilance Organization, Jammu
 R/o H. No. 181 Sec. 2 Phase- II JDA Housing Colony, Rajinder Nagar,
 Bantalab, Jammu
2. Mohd Amer Almansoor, S/o Majid Anwar Salaria
 Age 40 years, Sr. Prosecuting Officer, Police Head
 Quarter, J&K Srinagar/Jammu R/o H. No. 128
 Gujjar Nagar, Jammu

.....Appellants.

Versus

1. Shri Manzar Khayam, S/o Sh. Abdul Majid Khan
 R/o Kalar Mohr, Tehsil Mendhar Distt. Poonch,
 Sr. Prosecuting Officer, O/o Directorate of Prosecution
 PHQ J&K Srinagar.
 and 10 other respondents.

.....Respondents

LPASW No. 172/2011

- 1. Rakesh Sambyal aged 41 years, S/o Sh. Angad Singh
R/o Ward No. 6, Mandi Sher Singh, Kathua.
- 2. Shahid Mustafa, aged 38 years,
S/o Shri Mohd Amin, R/o Naka Jabber Thanamang
Tehsil Darhal, District Rajouri.
- 3. Pankaj Sethi, aged 37 years,
S/o Sh. J. P. Sethi,
R/o H. No. 536 Sector No. 3, Channi Himmat Housing Colon6y,
Jammu
- 4. Gurjot Kour, aged 39 years,
W/o Shri Satbir Singh,
R/o 25-A (Privte) Gandhi Nagar, Jammu
- 5. Prithipal Singh aged 42 years,
S/o Sh. Sahib Singh,
R/o 1312 6/9 Nanak Nagar, Jammu

.....Appellants

Versus

- 1. State of Jammu and Kashmir,
Through Chief Secretary,
Jammu and Kashmir Government,
Civil Secretariat, Srinagar.
and 33 other respondents.

....Respondents.

LPASW No. 154/2011

- 1. Sanjay Kohli, Age 42 years,
S/o Shri R R. Kohli R/o 23/5 Nanak Nagar, jammu
At present posted as Senior Prosecuting Officer, Jammu
- 2. Anil Masgotra, age 42 years,
S/o Shri V. S. Magotra,
R/o 605, Sector E Sainik Colony, Jammu
At present posted as Senior Prosecuting Officer,
Jammu
- 3. Bachan Lal age 45 years,
S/o Late Shri Dhanu Ram,
R/o Ward No. 12 R. S. Pura, jammu
At present Prosecuting Officer, Jammu

.....Appellants.

Versus

- 1. State of Jammu and Kashmir,
Through Commissioner/Secretary
Home Department,
Jammu and Kashmir Government,
Civil Secretariat, Srinagar
and 26 other respondents.

.....Respondents.

LPASW No. 189/2011

- 1. Rakesh Sambyal aged 41 years, S/o Sh. Angad Singh
R/o Ward No. 6, Mandi Sher Singh, Kathua.
 - 2. Shahid Mustafa, aged 38 years,
S/o Shri Mohd Amin,
R/o Naka Jabber Thanamang
Tehsil Darhal, District Rajouri.
 - 3. Pankaj Sethi, aged 37 years,
S/o Sh. J. P. Sethi,
R/o H. No. 536 Sector No. 3,
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Channi Himmat Housing Colony,
Jammu

4. Gurjot Kour, aged 39 years,
W/o Shri Satbir Singh,
R/o 25-A (Privte) Gandhi Nagar, Jammu

5. Prithipal Singh aged 42 years,
S/o Sh. Sahib Singh,
R/o 1312 6/9 Nanak Nagar, Jammu

...Appellants

Versus

1. State of Jammu and Kashmir,
Through Commissioner-Cum-Secretary to Govt.
Home Department , Jammu and Kashmir Government,
Civil Secretariat, Srinagar.
and 82 other respondents.

....Respondents.

LPASW No. D-69 of 2014

1. State of Jammu and Kashmir,
Through Chief Secretary

2. J&K State, Civil Sectt. Jammu
Principal Secretary to Government
Home Department Civil Sectt.
Jammu

3 Director General of Police,
J&K State, PHQ, Jammu

.....Appellants.

Versus

1. Manzar Khayam
S/o Abdul Majid Khan,
R/o Kular Mohr, Tehsil Mendhar,
District Poonch
and 9 other respondents.

.....Respondents.

LPASW No. D-70/2014

1. Principal Secretary to Government
Home Department,
Civil Secretariat, Jammu

2. Director General of Police,
J&K State,
PHQ, Jammu

.....Appellants.

Versus

1. Zia-ur-Rehman S/o
Ab.Rehman Khan,
R/o Rambagh, Srinagar
Presently posted as Prosecuting Officer
Vigilance Organization Kashmir.

2. Rubina Akhter D/o Khazir Mohd Dar
R/o Baramulla,
Presentely posted as Prosecuting Officer,
PD Budgam
and 84 other respondents.

..... Respondents.

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LPASW No. D-73 of 2014

1.

State of Jammu and Kashmir,
Through Chief Secretary
J&K State,
2.

Principal Secretary to Government
Home Department Civil Sectt.
Jammu
- 3

Director General of Police,
J&K State PHQ, Jammu
-Appellants.

Versus

1.

Ajay Kumar
S/o Sh. Dhani Ram Sharma,
R/o Village Muthi,
Tehsil and District Jammu
and 17 other respondents.
-Respondents.

LPASW No. 75/2014

1.

State of J&K
Principal Secretary to Government
Home Department,
Civil Secretariat, Jammu
2.

Director General of Police,
J&K State,
PHQ, Jammu
-Appellants.

Versus

1.

Suresh Kumar
S/o Shri Bansilal Dogra,
R/o Village Sunjwan, P.o Sainik Colony,
Tehsil and District Jammu.
and 27 other respondents.
- Respondents.

LPASW No. D-74 of 2014

1.

State of Jammu and Kashmir,
Through Chief Secretary
J&K State,
2.

Principal Secretary to Government
Home Department Civil Sectt.
Jammu
- 3

Director General of Police,
J&K State PHQ, Jammu
-appellants.

Versus

1.

Ajay Dogra
S/o Shri Romesh Chander,
R/o Ward No. 04
Mahadev Road, Udhampur.
and 34 other respondents.
-Respondents.

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in terms of Rule 111(2) of the Police Rules and not in terms of Rule 24 of the J&K Civil Services(Classification, Control & Appeal) Rules, 1956. Similarly in SWAP No.1384/2008 the case of the writ petitioner before the Writ Court was that he having been selected as Prosecuting Officer on 26.07.1999, in the final seniority list issued on 06.12.2003 his name figured at serial No.6 and he along with 28 other candidates was promoted as Senior Prosecuting Officer in his own pay and grade. It was contended that though in the confirmed list of Prosecuting Officers his name figured at serial No.94, the writ petitioner has been affected by the act of respondents in re-drawing the seniority list of Prosecuting Officers of 1998, 2002 and 2004 batches.

The writ petitioners in SWP No.1744/2008 were also aggrieved of the re-drawing of the seniority list in terms of Rule 111(2) of the Police Rules as having been appointed as Prosecuting Officers on 31.12.2003.

In SWP No.1668/2008 the writ petitioners had made challenge to the re-drawn seniority list by contending that they are selectees of 2002 batch and after issuance of final seniority list on 10.01.2007, they were even promoted as Senior Prosecuting Officers also and respondent No.2 has wrongly redrawn the seniority list of 1998, 2002 and 2004 batches of the

Prosecuting Officers in terms of Rule 111(2) of the Police Rules.

Similarly in writ petition No. SWP No.1493-S/2008 the case of the writ petitioners is that respondent No.2 has wrongly redrawn the seniority list in terms of Rule 111(2) of the Police Rules.

3. The case of the writ petitioners before the learned Single Judge was that the Prosecuting Officers, who were selected through Police Recruitment Board were given seniority not on the basis of their merit secured in the selection process/select list but on the merit secured by them during the training. The merit position and the rank given as per Select List having been changed after the completion of probation based on Rule 111(2) of the Police Rules, 1960 the said action was challenged by the writ petitioners by contending that Police Rule 111(2) cannot be applied and seniority having been fixed already in terms of Rule 24 of the J&K Civil Services(Classification, Control and Appeal) Rules, 1956, merely because some persons filed objections regarding the seniority already fixed, the Government constituted a Committee and based on the suggestions of the Committee the seniority already fixed was re-fixed that too without issuing notice to the writ petitioners, who were already shown as

seniors and some of whom were even promoted temporarily before re-fixing the seniority.

4. The thrust of the argument by learned counsel for the writ petitioners before the Writ Court was that seniority fixed by applying Rule 24 of CCA Rules based on the merit secured by them in the selection, namely written test as well as oral test and they having completed the probation within a period of three years, it is not open to the official respondents to change their seniority already fixed by applying Rule 111(2) of the Police Rules and in one of the writ petitions, namely SWP No.1630/2008 an alternate prayer was made to declare Rule 111 of the Police Rules as *ultra vires*.

5. The learned Single Judge allowed the writ petitions, declared Rule 111 of the Police Rules as *ultra vires* of the Constitution and struck down the same and restored the seniority fixed without reference to the merit secured by the candidates during the training course. Having aggrieved by the said decision of the learned Single Judge, the Government as well as the Prosecuting Officers, whose seniority was fixed based on the merit secured by them during the training, have filed these appeals.

6. Learned Senior counsels M/s U.K.Jalali, and M.K.Bhardwaj, Mr. W.S.Nargal, learned AAG and Mr. Rahul

Pant, Advocate, have elaborately argued the appeals and the thrust of their argument is as follows:-

(a) The Prosecuting Officers are selected by the J&K Police Recruitment Board and appointed based on the selection and they are part and parcel of Police Officers at the rank of Inspectors. In the recruitment notification as well as the order of appointment given to the Prosecuting Officers it is mentioned that they will be selected after screening them, namely physical measurements and such of those candidates who were found qualified on physical measurements, were allowed to appear in the written test and based on the merit secured by them in the written test the candidates were called to appear in the viva voce test and based on the merits possessed by the candidates in the written as well as in the viva voce test the selection list of the candidates were issued and thereafter formal appointment orders to be issued on condition that their probation will be declared after completion of 3 years of probation and on completion of probation their seniority will be fixed based on the merit possessed by them in the basic training course. The basic training course includes rigorous physical exercise, cross country races, short races, jumps, gymnastics, march past prades with and without arms, weapons handling and firing from pistol to LMG/grenade launcher etc., mob control drills, indoor classes which include laws, forensic/scientific aids in

investigations, investigation techniques etc. and after completion of the training the candidates are examined along with others by the board of senior officers constituted by the Police Headquarters. The seniority of the Prosecuting Officers up to 1995 i.e., 1988, 1992 and 1995 was fixed and maintained in terms of Rule 111(2) of the Police Rules, however, an error was crept in while fixing the seniority list of subsequent batches, namely 1998, 2002 and 2004 and seniority of those batches was wrongly finalized without reference to Rule 111(2) of the Police Rules and some of the aggrieved persons who had secured higher marks in the training course challenged the final seniority list and some of them filed applications to remove the anomaly of erroneous fixing of seniority and prayed for re-fixing the seniority based on Rule 111(2) of the Police Rules. The Government after receiving the representations/applications seeking re-consideration/removing the anomaly appointed a high level senior officers committee comprising of ADGP(CID), IGP Kashmir, IGP Security and Director Prosecution, PHQ, by PHQ order No.2485 of 2007 dated 17.07.2007, which was thereafter re-constituted due to administrative reasons through PHQ order No.2676 of 2007 dated 04.08.2007. The Committee after holding detailed deliberations and noticing the fixing of the seniority of the earlier batches, recommended that for

determination of seniority in respect of direct recruits including the Prosecuting Officers, the merit secured in the initial selection together with merit obtained in the basic training course, which is necessary for confirmation in the department, has to be followed.

(b) Legal opinion was also sought from the learned Advocate General and based on the legal opinion it was ordered to re-draw the seniority list of Prosecuting Officers appointed from time to time i.e. of 1998, 2002 and 2004 batches by adopting uniform criteria. The said re-drawn seniority was in accordance with Rule 111(2) of the Police Rules and the same is sought to be sustained by the appellants in these appeals.

7. The learned counsels argued that Rule 111 of the Police Rules applies to all the non-gazetted posts under Police Force. If persons selected in the common select list were deputed for training, during probation period and on successful completion of the basic training and probation, for determining the seniority of the particular batch merit secured by the candidates during the training course is contemplated and if different batches of Prosecuting Officers are promoted to any rank on the same date their seniority has to be determined by the date of confirmation in the rank and in the event of several officers being confirmed on the same date their seniority amongst

themselves shall remain the same as during the period of probation.

9. The respective learned counsels argued that if persons are not appointed on the same date and are selected on the same date then their seniority shall be determined as per Rule 24 of the CCA Rules, 1956 and as if there is no ambiguity or inconsistency or illegality or unconstitutionality in Rule 111 of the Police rules. The said rule is in-vogue from the year 1960. It is also contended the J&K Police Rules, 1960 were issued by the Government as Special Rules, therefore, the CCA Rules, 1956 which, being general rules, the special rule will prevail in determining the seniority of the Prosecuting Officers as they form part of the Police Force, though discharging their duties as Prosecuting Officers and sometimes police duty, which is one of the wings of the Police. The learned counsels further argued that the seniority of the private respondents in the writ petitions having been erroneously fixed without following Rule 111(2) of the Police Rules, it is always open to the department to remove the anomaly or rectify the mistake and re-fix the seniority based on the merit obtained by the Prosecuting Officers, who were selected in the same batch, sent for training and completed probation on the same date. The learned counsels submitted that in the light of the rule position and having regard to the fact that no other factual aspect need to be looked into while re-

fixing the seniority, the persons who were shown senior in the earlier final seniority list need to be issued any notice and calling for objection is an empty formality as the writ petitioners have no grievance to make as they were selected in the same batch, appointed on the same date, sent for training except respondent no.3 in LPASW No. 154/2011 and having completed the training and declared the probation on the same date.

10. Mr. W. S. Nargal learned Additional Advocate general and Mr. U.K.Jalali, learned Senior Advocate appearing in LPASW No. 154/2011 submitted that respondent no.3 even though was selected along with others and on medical examination he was initially not found fit. However, the subsequent medical board declared him as fit and therefore he was issued appointment order belatedly. He joined the duty belatedly and was sent for training belatedly. He completed probation belatedly though his confirmation was ordered by a common order. The said candidate having joined later and completed probation later, he can be treated as junior to others in the batch.

11. Mr. Abhinav Sharma, appearing for respondent No. 3 in LPASW 154/2011, on the other hand submitted that he was selected and assigned 1st rank in the select list. He was not given appointment alongwith others due to the fault of the

department in wrongly assessing his medical fitness and he having been found medically fit he was appointed and sent for training and he completed the training. Hence he is deemed to be appointed along with other selected candidates and he has to be given seniority as per the selection list though he completed the training belatedly and not on the same date. Thus his seniority has to be fixed as per Rule 24 of the CCA Rules. Learned counsel also submitted that the seniority already assigned to him was re-fixed without issuing notice to him, which has caused great prejudice to his client.

12. Leaned counsel appearing for the private respondents vehemently argued that Police Rules are not applicable to the Prosecuting Officers as they are not discharging regular Police duties and this Court has already taken a view that for Prosecuting Officers Police Rules cannot be applied. Mr. D. C. Raina, learned senior counsel heavily relied on judgment of Supreme Court reported in (2008) 1 SCC 722 (**S. K. Abdul Rashid v. State of J&K**) and contended that in the said judgment it was declared that for determining seniority of Prosecuting Officer, Rule, 24 of the CCA Rules alone will apply.

13. In answer to the said submission, Mr. U. K. Jalali, learned counsel appearing for one of the appellant argued that the decision rendered by Hon'ble the Supreme Court in (2008) 1 SCC 722 (supra) is not with reference to Rule, 111 of the

Police Rules and the said decision having been rendered without analyzing the implications of Rule 111, has no application of facts of this case and Hon'ble the Supreme Court in the subsequent decision reported in **(2011) 14 SCC 243, State of J&K and others vs. Ajay Dogra** has applied the Police Rules for appointment of Prosecuting Officers. The argument was also advanced by learned counsel appearing for one of the appellant that the Prosecuting Officers are not police personnel in strict sense in terms of the Police Act 1960 as all the Police Officers are required to issue a certificate who alone will exercise the powers, functions and privileges of the Police Officers and no such certificate was issued to the Prosecuting Officers, therefore, they cannot be treated as Police Officers to apply the Police Rules.

14. Learned counsels appearing for the appellant on the other hand submitted that for Police Gazetted Service, separate recruitment rules were framed by the Government in the year, 2002 wherein separate rule, namely, Rule 9 is provided to maintain the seniority lists and in the said rule it is specifically stated that the seniority of the Gazetted service Police Officers are to be regulated in the Jammu and Kashmir Civil Services (Classification Control and Appeal) Rules, 1956 and as per Rule, 12, the previous rules applied were repealed.

15. Learned counsels submitted that for Non-Gazetted service, Police Rules is still in operation and there is no conflict between Rule 24 of the CCA Rules and Rule 111 of the Police Rules as both are operating in different circumstances. Learned counsel cited various decisions in support of their respective contentions.

16. We have considered the rival submissions meticulously.

17. The issues which arose for determination in these appeals are:

(1) Whether the Prosecuting Officers are Police Officers, i.e. whether they are the separate wing in the police force.

(2) Is there any conflict between Rule 24 of CCA Rules and Rule 111 of the Police Rules in fixing seniority and whether writ petitioners are justified in contending that their seniority shall not be determined by applying Rule 111(2) of the Police Rules and their seniority already determined as per Rule 24 of the CCA Rules be maintained.

(3) Whether non issuance of the notice before altering the seniority of the Prosecuting Officer of 1998, 2002 and 2004 batches of the Prosecuting Officers have vitiated seniority list impugned in the writ petitions.

(4) Whether the official respondents are entitled to alter the seniority of the writ petitioners which was finalized by the official respondents and acted upon by giving temporary promotions.

Issue No.1

18. The applications were invited for the posts of Prosecuting Officers by the Police Recruitment Board prescribing the physical measurement test under Rule 176 of the Police Rules with regard to height, chest and expansion of chest. The applicability of the said Police Rules, namely Rule 176 came up for consideration before this Court in OWP No. 533/2000. In the said writ petition, Ajay Dogra, who had not satisfied the eligibility of physical standard and whose application was rejected, challenged the rejection of his application and the said writ petition was allowed by the learned Single Judge which was affirmed by the Division Bench in LPASW No.180/2002 by judgment dated 19.08.2002. The said order was challenged by the State of J&K before the Hon'ble Supreme Court and contention raised by the candidate in the appeal was that applications having been invited for the post of Prosecuting Officer who has to appear in the Court and who is required to exhibit mental ability rather than the physical standards and therefore, physical qualification for selection to the said post of Prosecuting Officer has no rationale. The Hon'ble Supreme

Court in the decision reported in **(2011) 14 SCC 243**, specifically held that physical conditions prescribed in the Advertisement Notice are in consonance with Rule 176 of the Police Rules, which are statutory rules and the said prescription of qualification being as per the rules made in the advertisement and some of the Prosecuting Officers may be posted at a high altitude they are required to have proper physique to enable them to be posted at those places. In the said judgment even though the Hon'ble Supreme Court has pointed out the condition imposed in the rule, namely, Rule 176 nor the advertisement issued pursuant thereto was challenged, it was held that the prescription of physical standards for the post of Prosecuting Officers are reasonable i.e. with justifiable reasons. In the light of the said judgment of the Hon'ble Supreme Court, the private respondents in the writ petitions are not justified in contending that they are not Police personnel and Police Rules cannot be applied for selection, fixation of seniority and other service conditions. The decision cited by learned senior counsel, Mr. D. C. Raina, namely, **(2008) 1 SCC 722** arose in a case of giving retrospective promotion affecting the seniority of the persons already promoted. On the above facts, Hon'ble the Supreme Court held that giving retrospective promotion from the date when the person was not born in the cadre so as to adversely affect others, is improper. Hence the said judgment

is distinguishable on facts as the issue in these cases are claim of inter se seniority of the Prosecuting Officers appointed directly in the year, 1998, 2002 and 2004.

19. The learned senior counsels appearing for the respondents fairly submitted that the Prosecuting Officers have to wear uniforms and sometimes they may also be assigned the duties which are to be performed by police. Admittedly the Prosecuting officers being recruited under the Police Act, they are enjoying 2 ½ days salary as allowance, kit maintenance, uniform allowance hardship allowance etc.

20. It is well settled in law that a person can be sent to perform police duties only if he is in the cadre of police officers. Thus it is beyond doubt that the Prosecuting Officers post is one of the Wings of the Police Department and they have to satisfy the physical measurement before appearing in the written test followed by viva voce test and they must also undergo six months training during the three years probation period. The appointment order given to the 1st respondent in LPASW No. 138/2011 through Order No. 205 of 2002 dated 24.06.2002 by the Inspector General of Police clearly states that he has to report before the Director SKPA Udhampur within a period of seven days after collecting uniform articles from DPL Jammu for undergoing the training course at Academy during the probation period. It is also stated in the order that the

appointee shall have the seniority as per the order of merit in the selection list. Thus there is no shadow of doubt in our mind that the Prosecuting Officers post is one of the Wing of Police Department and Police Act as well as the Police Rules will apply to them.

21. It is further to be noted that the Government of Jammu and Kashmir through SRO 132 of 2002 dated 03.04.2002 framed rules, namely, the Jammu and Kashmir Police (Gazetted) Service Recruitment Rules 2002 separately for gazette posts in the Police Department. In Schedule-II (C) the post of Senior Prosecuting Officer, Chief Prosecution Officer, Deputy Director of Prosecution, Joint Director of Prosecution and Director Prosecution are mentioned. Similarly in Schedule-II (a) the posts of Deputy Superintendent of Police, Deputy Superintendent of Police (Selection Grade), Superintendent of Police and Superintendent of Police (Selection Grade) are included. On perusal of the above Rules also it is evident that Prosecution Wing is treated as a separate wing of the Police force and not independent to that of Police Department. Thus issue no.1 is answered in favour of the appellants.

Issue No.2

22. Rule 111 of the Jammu and Kashmir Police Rules, 1960 reads thus:

“ 111. COMMAND AND PRECEDENCE:

- (1) Command and precedence among Police Officers shall be by seniority according to rule 24 of C.C.S. R. Officers holding officiating appointments take the rank and seniority of such appointment for the time that they hold it only, on reservation they taken seniority in accordance with their position in their substantive ranks.
- (2) Officers appointed in or promoted to any rank will take seniority in the order which they are appointed or promoted and in the case of several being appointed or promoted on the same date, promoted officers will be placed first in order according to their previous seniority, and officers appointed direct will follow according to age; provided that the seniority of candidates directly appointed on the same date, who are required to pass any course or departmental examination as a necessary condition of their subsequent confirmation, shall depend on their order of merit in such course or examination. Notwithstanding the foregoing rules, the seniority of officers appointed or promoted on probation to any rank shall be finally determined by the date of confirmation in that rank and in the event of several officers being confirmed on the same date, their seniority as among themselves shall remain the same as during the probationary period.”

Rule 24 of the Jammu and Kashmir Civil Services

(Classification, Control & Appeal) Rules, 1956 reads thus:-

“24. Seniority.-(1) The seniority of a person who is subject to these rules has reference to the service, class, category or grade with reference to which the question has arisen. Such seniority shall be determined by the date of his first appointment to such service, class, category or grade as the case may be.

Note 1.-The rule in this clause will not effect the seniority on the date on which these rules come into force of a member of any service, class, category or grade as fixed in accordance with the rules and orders in force before the date on which these rules come into force.

Interpretation.-The words "date of first appointment" occurring in the above rule will mean the date of first substantive appointment, meaning thereby the date of permanent appointment or the date of first appointment on probation on a clear vacancy, confirmation in the latter case being subject to good work and conduct and/or passing of any examination or examinations and / or tests:

Provided that the **inter se** seniority of two or more persons appointed to the same service, class,

category or grade simultaneously will, notwithstanding the fact that they may assume the duties of their appointments on different dates by reason of being posted to different stations, be determined

(a) in the case of those promoted by their relative seniority in the lower service, class, category or grade;

(b) in the case of those recruited direct except those who do not join their duties when vacancies are offered to them according to the positions attained by and assigned to them in order of merit at the time of competitive examination or on the basis of merit, ability and physical fitness etc., in case no such examination is held for the purpose of making selections;

(c) as between those promoted and recruited direct by the order in which appointments have to be allocated for promotion and direct recruitment as prescribed by the rules.

Note 2.-Any substantive appointments or permanent promotions made in any department prior to 15th May, 1953, will not be disturbed if otherwise in order unless such appointments or promotions are already the subject of any appeal, review or revision or otherwise pending decision.

(2) A member of a service, class, category or grade, unless he is reduced in seniority as a punishment shall retain seniority in such service or grade as determined by sub-rule (1) notwithstanding any delay in the completion of his probation or his appointment as a member of such service, class, category or grade.

(3) Where a member of any service, class, category or grade reduced to a lower service, class, category or grade he shall be placed at the top of the latter unless the authority ordering such reduction directs that he shall rank in such lower service, class, category or grade next below any specified member thereof."

23. Rule 111(1) of the Police Rules clearly states that Command and precedence among Police Officers shall be by seniority according to Rule 24 of C.C.A. Rules and their seniority in accordance with their position in their substantive rank. Sub Rule (2) of Rule 111 is the core issue which calls for

close scrutiny in these appeals. The said Rule says that officers appointed on the same date as in this case will take seniority in the order in which they are appointed. As per proviso in case of several officers being appointed on the same date, who are required to pass any course or departmental examination as a necessary condition to their subsequent confirmation whose seniority will depend on their order of merit in their course or examination for confirmation. The non-obstante clause clearly states that, notwithstanding the foregoing Rules above mentioned, namely, Rule 111(1) and Rule 111(2), the seniority of the officers appointed or promoted on probation to any rank and in the event of several officers being confirmed on the same date their seniority as against themselves shall remain the same as during the probationary period. On reading the entire Rule it would give only one conclusion that if the training is completed and probation is declared on the same date, seniority shall be fixed on the basis of marks secured in selection only.

24. In other words, if several officers appointed directly or promoted were send for training to complete the probation and they passed the training within the probation period, their rank in the seniority shall be finally determined by the confirmation of that rank and if several officers being confirmed on the same date, their seniority as amongst themselves shall remain the

same as during the probation period. A similar issue arose before the Hon'ble Supreme Court in the decision reported in **(1997) 4 SCC 416 (Mohan Lal and ors v. State of H.P. and ors)**. In the said case the determination of inter se seniority of the direct recruits in the posts of Excise and Taxation Inspectors of H. P. Excise and Taxation Department (Inspectorate Staff, Class III) Service was under consideration. The question relates to the interpretation of Rule 11 of the (Seniority) Service Rules read with Rule 4 (Examination) of the Rules. It is whether examination has to be passed within two years from the date of appointment and joins the duty, indisputably under Rule 11(3) of the Rules, on confirmation on the Expiry of probation, the seniority relates back to the date of appointment. The situation where a candidate does not pass the examination within two years but within the extended period of four years is dealt with under proviso to sub rule (3) of Rule 11 which reads thus:

"11(3) On the completion of the period of probation a person and passing the prescribed examination the appointment authority may

(a) if his work and conduct is found satisfactory.

(i) confirm such person from the date of his appointment if appointed against a permanent vacancy; or

(ii) confirm such person from the date from which a permanent vacancy occurs; if appointed against a temporary vacancy ; or

(iii) declare that he has completed his probation vacancy; or

(b) if his work or conduct has not been, in its opinion, satisfactory and in the case of non-passing of prescribed departmental examination.

(i) dispense with his services, if appointed by direct appointment or if appointed otherwise revert him to his former post, or deal within such other manner as the terms and conditions of his previous appointment; permit; or

(ii) extend his period of probation and thereafter, pass such orders as it could have passed on the expiry of the first period of probation.

This shall also apply mutatis mutandis to the departmental examinations;

Provided that the total period of probation and the time allowed for passing the departmental examinations, including extension, if any shall not exceed four years."

In paragraph 8 it is held thus:-

"It appears that series of orders came to be passed by the administrative Tribunal and one arising therefrom was decided by this court. In the first round of litigation in which one Sud was the applicant, the Tribunal had held that the seniority would be conferred on those who passed within two years from the date of joining the service and those who passed subsequently would rank juniors to them. In the case of Mohan Lal & Ors., in the second set of litigation, it was held that those who passed the test within two years, would get seniority from the date of joining the post and those who passed within the extended period of four years, would rank inter-se seniority from the date of the passing of the test.

A reading of this rule relating to conduct of examination would indicate that the Government shall hold the examinations twice a year between 3rd week of April and 1st week of November, or on such other dates as are notified by the Excise and Taxation. Commissioner. The examination so conducted by the Institute of Public Administration, Shimla shall be in the manner prescribed in paragraph (ii) of Rule 4 of the Rules. It is, therefore, clear that the Government is required to conduct the examinations twice a year and the candidates are required to pass the examinations within two years from the date of joining the post on probation. The Rule does not give four chances to every candidate. They shall pass the departmental examination within two years. On successful completion of probation and declaration thereof, his seniority would relate back to the date of appointment.

It is further held that such of those candidates who did not pass the examination within the prescribed two years but passed the examinations beyond two years will get seniority from the date of passing the examinations and not as per the select list."

25. In these cases the probation was completed by the directly recruited Prosecuting Officers in terms of the condition mentioned in the appointment order and the confirmation of

probation in the rank of Prosecuting Officers was also issued on the same date. By virtue of non obstante clause Rule 111(2) of the Police Rules, cannot be applied to fix seniority of such of those direct recruits who were sent for training, completed the training and were confirmed by a common order and they shall be given seniority during the probation period which means that they should be given seniority as assigned in the select list which was based on the merit as assessed in written test as well as viva voce test. If some of the selected candidates who were sent for training during probation period on the same date, failed to pass the training course and if confirmation was delayed, then only the occasion will arise to consider the merit secured by the said candidates in such course or examination for determining seniority after confirmation. Thus there is no ambiguity in Rule 111(2) of the Police Rules and there is no inconsistency between Rule 24 of the CCA Rules and Rule 111 (2) of the Police Rules.

26. The learned counsels appearing for the appellants argued that Police Rule being a special Rule, it will prevail over the CCA Rules which is a general rule. Their argument can be appreciated only if there is any inconsistency in both the Rules. Rule 111 (2) of the Police Rules will apply only if candidates appointed and sent for training on the same date failed to pass

out the training and the confirmation was delayed due to delay in passing the training course or confirmation was delayed for some other reasons. On the basis of the above finding we are of the view that Rule 111 of the Police Rules need not to be declared as *ultra vires* and the respondents in these appeals having been found more meritorious during the selection and were treated as seniors during probation period of three years, which is not disputed and they have been sent for training on the same date and confirmed on completion of three years probation on the same date after passing the training course, they are bound to be treated as seniors as per the non obstante clause contained in Rule 111. The decisions cited by the learned counsels for the appellants having been rendered based on the relevant Rules, the said decisions have no application to the facts and circumstances of these cases.

27. Insofar as respondent No. 3 in LPASW No. 154/2011 is concerned, a contention was raised that he was selected along with the appellants but was given appointment only on 26.07.1999 though the appellants were given appointment on 24.12.1998 itself, respondent no.3 having been appointed after seven months from the date of appointment of the appellants, he cannot claim seniority over and above the appellants. It is also contended that his date of confirmation was shown later as he commenced probation after seven months.

28. It is not in dispute that respondent no.3 in LPASW No. 154/2011 was found meritorious than the appellants during the selection, however, due to wrong assessment of his medical fitness initially issuance of appointment order to him was delayed for about seven months and after re-assessment he was appointed and sent for training and he also completed the training successfully within three years and he was confirmed within three years. The issue as to whether a person can claim seniority as per the select list even though he was given appointment order belatedly due to no fault of the candidate was considered by Hon'ble the Supreme Court in the decision reported in **AIR 2000 SC 3238 (Sanjay Dhar v. Jammu and Kashmir Public Service Commission and anr)**. Incidentally that case also arose from the State of Jammu and Kashmir. The three Judge Bench of Hon'ble the Supreme Court answered the said issue specifically in paragraphs 9 and 16, which reads thus:-

"9.the issue raised by him survives for adjudication as the appellant has been wrongfully denied appointment in the year 1995 pursuant to the 1992-1993 selections and if in spite of his having been selected, the appointment was wrongfully withheld then the relief sought for by him ought not to be denied to him and if the appellant be found entitled to appointment in the year 1995 then his seniority in the cadre of Munsif should be calculated from the date with which other incumbents figuring in the select list, in which the appellant also figured, were appointed. We find merit in this submission.

16. It is directed that the appellant shall be deemed to have been appointed along with other appointees under the appointment order dated 6.3.1995 and assigned a place of seniority

consistently with his placement in the order of merit in the select list prepared by J&K PSC and later forwarded to the Law Department. During the course of hearing the learned senior counsel for the appellant made a statement at the Bar that the appellant was interested only in having his seniority reckoned notionally in terms of this order and was not claiming any monetary benefit by way of emoluments for the period for which he would have served in case he would have been appointed by order dated 6.3.1995. We record that statement and direct that the appellant shall be entitled only to the benefit of notional seniority (and not monetary benefits) being given to him by implementing this order. The appeal is disposed of accordingly. The contesting respondents shall pay the appellant costs quantified at Rs.5,000/-."

Similar view was taken by the Hon'ble Supreme Court in the decision reported in **AIR 1997 SC 250 (Pilla Sitaram Patrudu and ors v. Union of India and ors)**.

29. In the light of the categoric pronouncements made by Hon'ble the Supreme Court, we are of the firm view that the contention of the appellants in LPASW 154/2011 that respondent no.3 should be treated as junior to the appellants, cannot be countenanced and the said plea is rejected and the seniority assigned to him in the final seniority list before re-fixation is restored.

30. As rightly contended by the learned counsel appearing for the 1st respondent in LPASW No. 138/2011, in the appointment order it is stated that the appointee shall have the seniority as per the order of merit in the select list. Non obstante clause mentioned in Rule 111 of the Police Rules clearly states that in the event of several officers being confirmed on the same date

their seniority shall remain the same as during the probation period. Thus the learned Single Judge was right in quashing the re-fixation of the seniority. On the reasons stated supra we are of the view that Rule 111 of the Police Rules ought not to have been declared *ultra vires* or unconstitutional as there is no irrationality in the said Rule. Further the Hon'ble Supreme Court in the decision reported in (2011) 14 SCC 243, held that Police Rule is a statutory Rule. The relevant portion of paragraph 10 reads thus:-

“10.We find that the physical conditions prescribed in the advertisement are in consonance with Rule 176 of the Police Rules which are statutory rules.....”

31. Thus we hold that there is no inconsistency between Rule 24 of the CCA Rules, 1956 and Rule 111(2) of the Police Rules, 1960 and both operates at different occasions.

Issue No. 3

32. Non-issuance of notice to the persons who are already shown as seniors and some of whom were already given temporary promotions and altering their seniority by applying the low merit secured by them in the training course underwent during the probation period, in the facts and circumstances of this case, is not justified. If notices were issued while altering the final seniority list the writ petitioners/private respondents could have put forward their contentions to come to a different conclusion as we have arrived in our findings in respect of issue

no.2. The arguments advanced by the learned counsel for the appellants that even if notice is issued they have explanation to offer in the light of the Rule position and issuance of notice would be an empty formality and therefore the theory of useless formality can be applied, is not found acceptable. As already stated, the official respondents have given wrong interpretation of Rule 111 (2) of the Police Rules ignoring the non obstante clause which resulted in altering the final seniority list which was prepared after calling for objections to the provisional seniority list. Thus non-issuance of notice to the private respondents while altering their final seniority list in this case has vitiated the action of the official respondents. Issue no.3 is answered in favour of the private respondents.

Issue No. 4

33. It is not disputed that the Prosecuting Officers appointed in the years 1998, 2002 and 2004 were given final seniority list by applying Rule 24 of the CCA Rules, 1956 and not as per Rule 111(2) of the Police Rules as interpreted by official respondents and the said final seniority fixed had been acted upon at least for giving temporary promotion to the next cadre. It is well settled in law that even while making temporary/adhoc promotion or while officiating persons in promotional posts the same would be based on seniority unless the promotions are to be made by selection on merit. The said position is made clear

by Hon'ble the Supreme Court in the decision reported in 2013 (5) LNN 413 (SC) (State of Uttranchal and anr v. Shiv Charan Singh Bhandari and ors). In paragraph 12 it is held thus:-

“ 12. It can be stated with certitude that when a junior in the cadre is conferred with the benefit of promotion ignoring the seniority of an employee without any rational basis the person aggrieved can always challenge the same in an appropriate forum, for he has a right to be considered even for ad hoc promotion and a junior cannot be allowed to march over him solely on the ground that the promotion granted is ad hoc in nature. Needless to emphasise that if the senior is found unfit for some reason or other, the matter would be quite different. But, if senior incumbents are eligible as per the rules and there is no legal justification to ignore them, the employer cannot extend the promotional benefit to a junior on ad hoc basis at his whim or caprice. That is not permissible.”

Thus the vested rights conferred on the writ petitioners cannot be changed. Thus on facts, altering the final seniority assigned to the writ petitioners, which was set aside by the learned Single Judge, is bound to be up held and accordingly upheld.

Conclusion:

34. Issue no.1, namely, 'whether the Prosecuting Officers are Police Officers, namely, whether they are a separate wing in the police force'.

It is held that the Prosecution Officers are governed by the Police Act and Police Rules and the contentions raised by the writ petitioners/ private respondents in these appeals, are unsustainable.

Issue no.2:

There is no inconsistency between Rule 24 of the CCA Rules, 1956 and Police Rules 1960 as Rule 111(2) of the Police Rules operates only in certain contingencies.

The decision of the learned Single Judge in declaring Rule 111 of the Police Rules as *ultra vires* is set aside.

Issue No.3 and 4.

Non-issuance of notice to the writ petitioners whose seniority was finally determined after calling for objections with regard to the provisional seniority list after giving temporary promotion to some of them that too after several years, on the facts and circumstances of these cases has vitiated the orders re-fixing the seniority.

35. In fine, the writ appeals are disposed of and the order of the learned Single Judge is affirmed insofar as allowing the writ petitions and quashing the re-fixation of seniority. The finding given by the learned Single Judge in declaring Rule 111 of the Police Rules as *ultra vires* stands set aside.

36. No costs.

(Tashi Rabstan)
Judge

(N. Paul Vasanthakumar)
Chief Justice

Jammu,
31.12. 2015
Anil Raina, Secy.