

A ASHOK KUMAR UPPAL AND ORS.

v.

STATE OF J&K AND ORS.

JANUARY 14, 1998

B [S. SAGHIR AHMAD, D.P. WADHWA, JJ.]

Service Law :

C *J. & K. Secretariat (Subordinate) Services Recruitment Rules, 1972-Rules 5(1)(B), Substituted by SRO 76 read with SRO 177-Promotion-Power of Government to relax standard prescribed for promotion-Validity-Candidates nearest to prescribed standard and topping merit list were promoted by relaxing standard prescribed for promotion—Relaxation of Rules made to obviate genuine hardships caused to class of employees-Held, act of the Government neither arbitrary nor capricious-Hence, promotion by relaxing rules is proper-J. & K. Civil Services (Decentralisation of and Recruitment to Non-Gazetted Cadres) Rules, 1969, Rules 1(2), 14-Constitution of Jammu and Kashmir, proviso to Sec. 124-Constitution of India, Art. 309*

E **The appellants and respondents no. 2 to 7 were permanent Junior Scale Stenographers in Government Departments. Vacancies were available in the cadre of Senior Stenographer. For the selection of suitable candidates for such appointments a test was contemplated under J. & K. Secretariat (Subordinate) Services Recruitment Rules, 1972. The test was conducted by the Recruitment Board constituted under the Rules. Only six candidates however qualified the test and were recommended for appointment. Since the vacancies were still available the Board suggested 26 more candidates whose performance were found to be nearest to the prescribed standard for their appointment as Senior Scale Stenographer by relaxing the standard prescribed under the Rules.**

G **The State Government although appointed the six persons, took no decision with regard to those 26 candidates. Those candidates filed a Writ Petition, praying for direction to the State Government for their appointment. The High Court dismissed the writ petition with the observation that the Government can reject the recommendation of the Recruitment Board for the reasons to be recorded otherwise if the appointments are made, the select**
H **list in accordance with the rules should be adhered to.**

The State Government in the meanwhile amended the rule and made promotion on the posts of Senior Scale stenographer on the basis of seniority, but promotion in this manner could be made only if there are more vacancies then the name recommended by the State Recruitment Board, with the result that additional vacancies after accommodating those who had qualified in the test, could be filled up on the basis of seniority alone. The amended rule was given retrospective effect from 4-12-84.

Five of the 26 candidates made a representation to the State Government and on their representation they were promoted to the post of Senior Scale Stenographer by the State Government by relaxing the Rules vide its order dated 19th December 1986.

The retrospective effect of the amended rule and the promotion of the five candidates were challenged in Writ Petitions. The Writ Petition challenging the retrospective effect of the amended rule was dismissed on the ground that the Government could exercise such power, conferred upon it by the virtue of Proviso to Section 124 of the Constitution of Jammu and Kashmir.

The writ petition challenging the appointment of the 5 persons was allowed and the appointment by relaxing the rules was set aside on the finding that such a recommendation could not have been legally made by the State Recruitment Board nor could those persons be treated as persons selected for appointment, the Government had no power to relax the prescribed standard particularly as no Rule, empowered the State Government to relax the prescribed standard. The Letter Patent Appeal against the order was dismissed in limine. Hence, this appeal.

Allowing the appeal, this Court

HELD : 1.1. Power to relax the Recruitment Rules or any other Rule made by the State Government, under Art. 309 of the Constitution of which the corresponding provision is contained in Sec. 124 of the Constitution of Jammu and Kashmir, is conferred upon the Government to meet any emergent situation where injustice might have been caused or is likely to be caused to any individual employee or class of employees or where the working of the Rule might have become impossible. Under service jurisprudence as also the Administrative Law, such a power has necessarily to be conceded to the employer particularly the State Government or the Central Government who

A have to deal with hundreds of employees working under them in different departments including the Central or the State Secretariat.

[174 G-H; 175-A]

1.2. When test for promotion to post of senior scale stenographers was held and the candidates who were far below in merit list and even failed in the test were promoted on the basis of their seniority by amending recruitment Rules providing for appointment on basis of the merit and suitability, retrospectively, the subsequent action of Government in promoting candidates who were nearest to the prescribed standard and topping the merit list by relaxing the standard prescribed for promotion would be proper when there were vacancies available. Relaxation of Rules under such circumstances was made to obviate genuine hardship caused to a class of employees and the act of Government would be neither arbitrary not capricious.

[173-F; 174 D-G]

D *State of Maharashtra v. Jagannath Achyut Karandikar*, AIR (1989) SC 1133, [1989] 1 SCR 947 = [1989] Supp. 1 SCC 393; *J.C. Yadav and others v. State of Haryana and others*, [1990] 2 SCC 189 *Sandeep Kumar Sharma v. State of Punjab and others*, [1997] 10 SCC 298, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4950 of 1991.

E From the Judgment and Order dated 1.3.91 of the Jammu & Kashmir High Court in L.P.A. No. 79 of 1990.

D.D. Thakur, E.C. Agarwala, Mahesh Agrawal, Atul Sharma, N.N. Bhat and D.K. Garg for the Appellants.

F Ashok Mathur for State of J & K and D.K. Garg for the Respondents.

The Judgment of the Court was delivered by

G S. SAGHIR AHMAD, J. The appellants as also respondents 2 to 7 were permanent Junior Scale Stenographers in the Secretariat and other Government Departments. For promotion to the post of Senior Scale Stenographer, they were required to possess a speed of 80 words per minute in shorthand and 40 words per minute in typewriting. They could not attain that standard, but the spate of litigation filed by them against each other in quick succession, did really match their speed, whatever it be, in shorthand and typewriting.

H Without showing signs of fatigue and breathlessness, they started the litigation

in 1984 and now in 1998 they seem to be, today, at the end of the litigative race. A

2. Promotion from Junior Scale Stenographers to the Senior Scale Stenographers are made in terms of the Rules known as "J&K Secretariat (Subordinate) Service Recruitment Rules, 1972" made by the State Government in exercise of its power under the Proviso to Section 124 of the Constitution of Jammu & Kashmir. Rule 5(1)(B) thereof, relating to the method of appointment/recruitment to the post of Senior Scale Stenographers, originally provided as under : B

"Senior Scale Stenographers (340-700) :

- (i) 75% by selection from class II category 'B' having not less than 3 years service in that category and on the basis of a test in shorthand and typewriting for which minimum speed should be 80 and 40 words per minute respectively : C

Provided that in the case of such Junior Scale Stenographers of the Civil Secretariat as have attained the age of fifty years or above, the Government may consider, on individual basis and with due regard to merit, seniority and suitability, their appointment to the posts of Senior Scale Stenographers without appearing in the prescribed test. D

- (ii) 25% by direct recruitment from the in-service candidates having not less than 5 years service in the category of Junior Stenographers and on the basis of a test in shorthand and typewriting for which the minimum speed should be 80 and 40 words per minute respectively. E

3. In 1984, a number of vacancies in the cadre of Senior Scale Stenographer were available. Since the Rule contemplated a test for the selection of suitable candidates for appointment as Senior Scale Stenographer, a requisition was sent by the State Government to the State Recruitment Board constituted under the J&K Civil Services (Decentralised & Recruitment to Non-Gazetted Cadres) Rules, 1969 to hold the test. F

4. Out of 100 candidates drawn from Secretariat and other Government departments, who were called for the test held on 4.12.1984, only 78 appeared in the test of which the result was communicated to the Government by the Secretary of the State Recruitment Board on 2.1.1985, indicating that only six H

A had qualified in the test as they alone were found to possess a speed of 80 words per minute in shorthand and 40 words per minute in typewriting. The names of those six candidates were consequently recommended for appointment as Senior Scale Stenographer. The Recruitment Board, however, made a further recommendation as under:

B “Since the number of available vacancies in the discussions held with the Deputy Secretary General Department is far greater than the number intimated earlier by the General Department, the State Recruitment Board would suggest that 26 candidates (listed in annexure to this letter in order of merit) who are nearer to the prescribed standard may also be considered for appointment as Senior Scale Stenographers in relaxation prescribed standard against the available vacancies.”

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5. The Board suggested the names of 26 more candidates whose performance (Between 71 to 79 words per minute in shorthand) was found to be nearest to the proscribed standard for their appointment as Senior Scale Stenographers by relaxing the standard prescribed under the Rules.

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6. The State Government considered the matter, but, although it appointed the six persons who had qualified in the test as Senior Scale Stenographers, it took no decision with regard to those twenty six other candidates who then represented to the Government and prayed that in terms of the recommendation of the State Recruitment Board, they may be also promoted to the post of Senior Scale Stenographers. When their representation remained undisposed of, they approached the High Court and filed Writ Petition No. 193 of 1985 praying for a direction to the State Government to appoint them as Senior Scale Stenographers. They also prayed for the interim relief that no promotions on the post of Senior Scale Stenographers be made during the pendency of the Writ Petition which relief, incidentally, was granted by the High Court by order dated 23.2.1985. This order was, however, vacated on 23.4.1985 when the Writ Petition itself was dismissed by the High Court with the following observations:

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G “Having considered the arguments advanced in the facts and circumstances of the present case we find that the authority of their Lordships of the Supreme Court is distinguishable on facts in the present case, although the principle cannot be denied that once the selection is made by the Recruitment Board in accordance with the Rules prescribed, the qualification and the result of the test for selection, Government can reject the recommendation for the reasons to be

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recorded otherwise if the appointments are made, the select list in accordance with the rules shall have to be adhered to. In the present case in accordance with the letter Annexure-R-I of the Recruitment Board, it is pertinent to note that the list of 26 candidates suggested by the Recruitment Board the respondents shall take into account the list, which has been recommended by the Recruitment Board otherwise in future selection they will adhere to the rules subject to which the selections are made.

With the above said observations, we don't find any merit in the present writ petition, the petition is, therefore, dismissed as premature and also the connected CMPs. The stay order passed by this court on February 2, 1985 CMP NO. 365 of 1985 stands vacated."

7. It may be stated that the State Government, during the pendency of the above Writ Petition, and, significantly, just two days after the interim order dated 23.2.1985 was passed, amended the Rules by SRO 76 dated 25.2.1985 by substituting the following in place of existing Rule 5(1) (B) :

"B - Senior Scale Stenographers (825-1240):

By selection form Class I Category 'B' having not less than three years service in that category and on the basis of a qualifying test in shorthand and type-writing for which the minimum speed should be 80 and 40 words respectively :

Provided that in case the number of available vacancies exceeds the number of qualified officials recommended by the test holding agency, the remaining vacancies after accommodating those who have qualified in the test should be filled up by promotion on the basis of seniority."

8. The amended Rule, specially its Proviso, thus opened the door to promotion on the posts of Senior Scale Stenographer merely on the basis of seniority irrespective of the speed in shorthand and typewriting, but promotion in this manner could be made only if there were more vacancies than the names recommended by the State Recruitment Board with the result that additional vacancies, after accommodating those who had qualified in the test, could be filled up on the basis of seniority alone.

9. On 13.5.1985, the State Government issued SRO 177 by which the amendments introduced by SRO 76 were given retrospective effect by providing that the Rule shall be deemed to have been amended with effect

A from 4.12.84. This date is the date on which the test was held by the State Recruitment Board. On the same day, namely, on 13th May, 1985, the State Government promoted 33 Junior Scale Stenographers to the posts of Senior Scale Stenographers on the basis of their seniority. These 33 Stenographers did not include any of the 26 Stenographers regarding whom the State Recruitment Board had suggested that they may be promoted by relaxing the Rules.

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D 10. Five of these 26 Stenographers made a representation to the State Government that they, having been recommended by the State Recruitment Board for promotion to the posts of Senior Scale Stenographers, may be promoted on those posts by accepting the suggestion of the Board that the Rules in their cases may be relaxed. The Government accepted their representation and promoted them to the posts of Senior Scale Stenographers, by order dated 19th December, 1986 by relaxing the requirement of possessing the speed of 80 words per minute in shorthand and 40 words per minute in typewriting. This order was challenged by G.R. Sharma and others in W.P. No. 101 of 1987 on the ground that they being the next into the seniority list, should have been promoted as Senior Scale Stenographers on the basis of their seniority, in place of those 5 persons who were promoted by relaxing the Rules.

E 11. SRO 177 of 1985, which gave retrospective effect to SRO 76, was challenged in Writ Petition No. 1341 of 1986 on the ground that the Government was not competent to give retrospective operation to SRO 76 of 1985.

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H 12. Both the Writ Petitions, namely, Writ Petition NO, 1341 of 1986 and 101 of 1987, were heard by a Single Judge (Chief Justice, S.S. Kang) and by judgment dated December 21, 1990, Writ Petition No, 1341 of 1986 was dismissed with the finding that the Government could give retrospective effect to the Service Rules made by it in exercise of the power conferred upon it by the Proviso to Section 124 of the Constitution of Jammu and Kashmir. Writ Petition No. 101 of 1987 was, however, allowed and the appointment of 5 persons on the basis of the recommendation of the State Recruitment Board that they may be promoted by relaxing the Rules, was set aside with the finding that such a recommendation could not have been legally made by the State Recruitment Board nor could those persons be treated as persons selected for appointment. It was also held that the Government had no power to relax the prescribed standard particularly as no Rule, empowering the State Government to relax the prescribed standard, was brought to the notice of the court.

13. The Letters Patent Appeal, filed against the above judgment, was dismissed in limine by the Division Bench on 1st March, 1991. It is in these circumstances that the matter is now before us. A

14. We are informed by D.D. Thakur, that during the pendency of this appeal, Gobind Ram Sharma, who had filed Writ Petition No. 101 of 1987, had already been promoted as Senior Scale Stenographer. We are also informed that the Rule of promotion was again amended in 1995 and the requirement of a qualifying test, prescribed under the Rule for making promotion to the post of Senior Scale Stenographer, has been completely dispensed with and it has been provided that promotion shall be made only on the basis of seniority. Thereafter, all the appellants were promoted as Senior Scale Stenographers and are working as such. B C

15. Normally, since all the appellants have already been promoted as Senior Scale Stenographers, we would have dismissed the appeal as infructuous but Mr. D.D. Thakur, Senior Counsel appearing on behalf of the appellants, has contended that it is not a matter of mere promotion to the posts of Senior Scale Stenographers but it is the question of seniority of the appellants, a matter of prime importance, which is involved as an important factor in this appeal. It is contended by him that if it is held ultimately by this Court that their appointment as Senior Scale Stenographers by the State Government on 19th December, 1986 by relaxing the prescribed standard, as recommended by the State Recruitment Board was properly made, they shall be treated to have been promoted as Senior Scale Stenographers with effect from that date and will, in that even, rank senior to all those who were promoted to that cadre subsequent to their promotion. This is a question which is not directly in issue in this petition as the only question with which we are concerned in this appeal is whether the Government could, in the particular circumstances of this case, specially when there was already a suggestion of the State Recruitment Board, relax the prescribed standard and promote the appellants to the posts of Senior Scale Stenographers. If that promotion is upheld, what would be its effect on the question of seniority and further whether any person, senior to the appellants, who was promoted subsequent to the promotion of the appellants, would regain his original seniority, are questions which cannot be decided by us in this appeal. However, as contended by Mr. D.D. Thakur, we would definitely examine the validity of the order of promotion, concerning the appellants, made by the State Government on 19th December, 1986 by relaxing the prescribed standard. D E F G

16. As pointed out above, the service conditions of all the H

A Stenographers, Senior Scale as also Junior Scale, are regulated by J&K Secretariat (Subordinate) Service Recruitment Rules, 1972. Rule 12 of these Rules provides as under:-

B “12. *Residuary matters*.—In regard to matters not specifically covered by these rules or by regulations or orders issued thereunder or by a special order, the members of the service shall be governed by the rules, regulations and order applicable to the State Civil Service in general.”

C 17. Power to relax the Rules or any requirement thereof is not contained in these Rules and, therefore, it become a “Residuary matter” within the meaning of Rule 12 above compelling us to look to other Rules applicable to the State Civil Services in general.

D 18. Our attention has been drawn to the J&K Civil Service (Decentralization of and Recruitment to Non-Gazetted Cadres) Rules, 1969, Specially Rule 1 (2) thereof, which is quoted below:-

E “1. (1).....

(2) Unless otherwise expressly provided in any law for the time being in force, these rules shall apply to all non-gazetted posts under the Government except such posts in the Police Department.”

F 19. These Rules are thus applicable to all the Non-Gazetted posts which will obviously include the posts of Senior Scale Stenographers as the applicability of these Rules has not been expressly excluded by the J&K Secretariat (Subordinate) Service Recruitment Rules, 1972.

G 20. Rule 14 of the 1969 Rules provides as under :

H “14. *Power to issue instructions*.—The Government may from time to time, issue such directives or instructions, as may be necessary, for the purpose of carrying out the provisions of these rules.

The Government may, where it is satisfied that the operation of any provision of these rules causes undue hardship in any particular case or class of cases, by order, dispense with or relax the requirements of that rule as it may consider necessary.”

I 21. This Rule gives specific power to the Government to relax the Rules

in cases of undue hardship, either in a particular case or class of cases. A

22. The next question is whether the power to relax the Rules was exercised by the Government for justifiable reasons or was it exercised arbitrarily only to give appointment on higher posts to the appellants.

23. Our attention has been drawn to an affidavit dated 17.12.91 filed in this appeal. The affidavit has been submitted by appellant No.1. A copy of the Note of Secretary to the Government, General Department, submitted for the consideration of the Chief Minister has been annexed with that affidavit. This Note reads as under:- B

"350 - In the year 1984-85, there were 32 vacancies of Sr. Scale C
Stenographers available to be filled up. These vacancies were referred to the erstwhile State Recruitment Board. The Board conducted the test and recommended 32 candidates for their appointment in the manner as indicated below :-

- (a) Number of candidates having speed of 80 words per minute in D
Shorthand and 40, words per minute in Typing -6
- (b) Number of Candidates having speed of 70 to 79 words per
minute in Shorthand and 40 words per minute in Typing. -26

(351) Appointment orders in favour of six candidates at (a) above were E
issued in accordance with their *inter-se* merit. But the select list of 26 candidates at (b) above was not followed strictly in accordance with their *inter-se* merit as determined by the Board. The first five candidates, who were topping in the merit list of 26 candidates were left out and the candidates who were in lower merit and even failed in the test were picked up and promoted as Sr. Scale Stenographers. This course F
of action was taken by amending retrospectively the existing recruitment rules. The Recruitment Rules provide for appointment to the cadre of Sr. Scale Stenographers on the basis of merit and suitability to be determined by written test. This rule was changed retrospectively to provide for appointment to Senior Scale G
Stenographers on the basis of seniority alone. This course of action was taken when the panel of candidates approved by the Board was available.

(352) The case has been examined by the General Department and H
considering the matter in totality of the circumstances it is felt that

A retrospective amendment of the rules has caused hardship to the candidates, who were having higher merit resulting in denial of promotion to them in comparison to those, who have lesser merit but promoted as Senior Scale Stenographers. These candidates have been persistently making representations for redressal of their grievance and have even filed a writ petition, which is still pending. Five vacancies are at present available in the Secretariat. It would be fair, if without disturbing the order issued in the past, the first five candidates in merit are given appointment in relaxation of rules against the available vacancies. Before issuing orders, they will be asked to withdraw the writ

C (353) Chief Minister may be pleased to approve the appointment of the aforementioned five candidates against the available posts.

D 24. The above Note clearly spells out a case of genuine hardship inasmuch as the first five candidates, mentioned in the list of 26 candidates, were not promoted while candidates much lower in merit including even those who had filled in that test, were promoted as Senior Scale Stenographer. These promotions were made by taking advantage of the retrospective operation given to SRO 76 by SRO 177 with effect from 4.12.84 (date of test). It was also indicated in the Note that there were five vacancies available in the Secretariat and on those vacancies, first five candidates, out of the list of 26 candidates, who were most meritorious, may be appointed in relaxation of the Rules as suggested by the State Recruitment Board. It was in these circumstances that the Chief Minister agreed with the suggestion and directed that those five candidates, namely, the present appellants, may be promoted as Senior Scale Stenographers in relaxation of the Rule.

F 25 We are, therefore, clearly of the opinion that it was a case in which Government had not acted arbitrarily or capriciously but had proceeded to relax the Rules to obviate genuine hardship caused to a class of employees, namely, the appellants and directed their promotion in relaxation of the Rules.

G 26. Power to relax the Recruitment Rules or any other Rule made by the State Government, under Article 309 of the Constitution of which the corresponding provision is contained in Section 124 of the Constitution of Jammu and Kashmir, is conferred upon the Government to meet any emergent situation where injustice might have been caused or is likely to be caused to any individual employee or class of employees or where the working of the H Rule might have become impossible. Under service jurisprudence as also the

Administrative Law, such a power has necessarily to be conceded to the employer particularly the State Government or the Central Government who have to deal with the hundreds of employees working under them in different departments including the Central or the State Secretariat.

27. In *State of Maharashtra v. Jagannath Achyut Karandikar*, AIR (1989) SC 1133 = [1989] 1 SCR 947 = [1989] Supp. 1 SCC 393, it was held as under:-

“The power to relax the conditions of the rules to avoid undue hardship in any case or class of cases cannot now be gainsaid. It would be, therefore, futile for the respondents to make any grievance.”

28. In *J.C. Yadav and others v. State of Haryana and others*, [1990] 2 SCC 189, it was held as under :-

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

29. This decision was followed in *Sandeep Kumar Sharma v. State of Punjab and others*, [1997] 10 SCC 298. In which Hon'ble Punchhi, J. (as His Lordship then was), observed as under :-

“The power of relaxation even if generally included in the service rules could either be for the purpose of mitigating hardships or to meet special and deserving situations. Such rule must be construed

A liberally, according to the learned Judges. Of course arbitrary exercise of such power must be guarded against. But a narrow construction is likely to deny benefit to the really deserving cases. We too are of the view that the rule of relaxation must get a pragmatic construction so as to achieve effective implementation of a good policy of the Government.”

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30. In view of the above, the Government can exercise the power to relax the Rules in all those cases in which hardship is caused in the implementation of those Rules to meet a particular situation or where injustice has been caused to either individual employee or class of employees. Of course, this power cannot be exercised capriciously or arbitrarily to give undue advantage or favour to an individual employee.

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31. Since power to relax the Rule was available to the Government and since, on a scrutiny of facts of this case, we are satisfied that the power to relax the standard prescribed for promotion to the post of Senior Scale Stenographer was properly exercised so that the appellants, who topped the list of 26 candidates, recommended by the State Recruitment Board for promotion by relaxing the Rules as they were nearest to the prescribed standard, may be promoted to the posts on which persons who were far below in merit, and even those who had failed in the test, had already been promoted as Senior Scale Stenographers, the order dated 19.12.86 by which appellants were promoted has to be upheld as valid and properly passed by the State Government.

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32. The appeal is consequently allowed and the judgments of the Single Judge as also of the Division Bench are set aside and Writ Petition NO. 101 of 1987 is dismissed with the observation that the appellants shall be treated to have been promoted to the posts of Senior Scale Stenographers on the basis of the order of the State Government dated 19.12.86. There will be no order as to costs.

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B.K.S.

Appeal allowed.