

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment delivered on: November 11, 2014

+ **W.P.(C) 2314/2011 & CM. Nos. 4947/2011 and 4948/2011**

UOI AND ANR.

..... Petitioners

Represented by: Mr. Jayendra, Advocate.

Versus

BAHGWAN SHAHAI AND ORS

..... Respondents

Represented by: Ms. Amita Kalkal
Chaudhary and Ms. Aditi
Gupta, Advocates.

AND

+ **W.P.(C) 2315/2011**

UOI AND ANR.

..... Petitioners

Represented by: Mr. Jayendra, Advocate.

Versus

MAHAVIR SINGH AND ORS

..... Respondents

Represented by: Ms. Amita Kalkal
Chaudhary and Ms. Aditi
Gupta, Advocates.

AND

+ **W.P.(C) 2830/2011 & CM. Nos. 6013/2011 and 15009/2013**

UOI

..... Petitioner

Represented by: Mr. Jayendra, Advocate.

Versus

JITENDER

..... Respondent

Represented by: Ms. Amita Kalkal
Chaudhary and Ms. Aditi
Gupta, Advocates.

AND

+ **W.P.(C) 7002/2011**

THE SUPERINTENDING ENGINEER & ANR. Petitioners
Represented by: Mr. Saqib, Advocate.

Versus

AMAR SINGH Respondent
Represented by: Ms. Amita Kalkal
Chaudhary and Ms. Aditi
Gupta, Advocates.

AND

+ **W.P.(C) 7003/2011**

THE SUPERINTENDING ENGINEER & ANR. Petitioners
Represented by: Mr. Saqib, Advocate.

Versus

GIRISH CHAND Respondent
Represented by: Ms. Amita Kalkal
Chaudhary and Ms. Aditi
Gupta, Advocates.

AND

+ **W.P.(C) 7738/2011 & CM. NO. 17532/2011**

UNION OF INDIA (CPWD) Petitioner
Represented by: Mr. Anuj Aggarwal and
Mr. Gaurav Khanna,
Advocates.

Versus

KHACHERU KHAN Respondent

Represented by: Ms. Amita Kalkal
Chaudhary and Ms. Aditi
Gupta, Advocates.

AND

+ **W.P.(C) 3229/2012**

THE EXECUTIVE ENGINEER Petitioner
Represented by: Mr. Saqib, Advocate.

Versus

SH. HARI HAR PRASAD Respondent
Represented by: Ms. Amita Kalkal
Chaudhary and Ms. Aditi
Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

CM No. 4948 & 4950 of 2011 (for delay) in W.P.(C) Nos. 2314 & 2315 of 2011

1. Vide the instant applications; the applicants/petitioners are seeking condonation of delay of 546 days in filing the same.
2. Notice was issued in these applications vide order dated 06.04.2011, however, till date no reply has been filed by the respondents.
3. It is stated in the instant applications that after the award dated 30.10.2009, the Director General of Works CPWD, requested the respective field units to obtain the legal opinion of the Government Counsel and furnish the same to them. The legal opinion received

from separate Government Counsels revealed divergent views on the feasibility of challenging the award. In a similar case of Subhash Ranjeet Chauhan and Ram Chandra Malviya for counting the service of the MR period for the purpose of the pensionary benefit etc. was with CA Section (Ministry of Law) in which the learned ASG had advised filing of SLP against the order of the Madhya Pradesh High Court. Accordingly, on 24.05.2010, it was decided to wait for the return of the file and prepare the grounds of appeal in the meantime.

4. The said files were received on 09.06.2010 and 10.06.2010, wherein it was advised that the case is fit for challenging the order in the Apex Court. For the said purpose, a draft SLP was prepared and it was decided that on the same ground, the impugned order may be challenged. Thereafter, the file was transferred to the Ministry of Urban Development for onward transmission to the Department of Legal Affairs, Ministry of Law & Justice to obtain their view.

5. Finally, on 21.12.2010 the matter was handed over to the counsel for filing the writ petition, who requested the CPWD to provide the files in this regard, accordingly, the record was provided to him on 24.12.2010.

6. Mr. Jayendra, learned counsel appearing on behalf of the applicants/petitioners submitted that delay has been caused due to the reasons mentioned above and the same was neither intentional nor wilful. He prayed that keeping in view the issue involved in these petitions, the delay may be condoned.

7. As noted above, reply has not been filed by the respondents to the applications seeking condonation of delay. Thus, it can be safely presumed that the respondents have nothing to say on these applications.

8. Keeping in view the averments made in the instant applications and the submissions made by the learned counsel for the applicants; and considering the issue involved in these writ petitions, the delay in filing these applications is condoned.

9. Consequently, these applications are allowed.

W.P.(C) Nos. 2314, 2315, 2830, 7002, 7003, 7738 of 2011 and 3229 of 2012

1. Vide these petitions, the petitioner C.P.W.D., a Central Government Department, has assailed order dated 30.10.2009 passed by the Central Government Industrial Tribunal-cum-Labour Court No.I in I.D. No.15/2007.

2. In W.P.(C) No. 2314/2011, there are thirty respondents/workmen, the details of whom are as under:

Sl. No.	Name of workman	Date of joining of service	Date of regularization
1.	Bhagwan Sahai	07.09.1979	04.03.1980
2.	Satish Kumar	22.12.1980	20.06.1988
3.	Tirpal	01.12.1981	15.04.1991
4.	Raj Pal	21.04.1981	05.07.1991

5.	Babu Lal	09.11.1982	24.12.1992
6.	Shiv Kumar	16.06.1983	16.02.1993
7.	Gangesh Chand Tiwari	02.05.1982	12.02.1993
8.	Bihari Lal	22.08.1982	16.01.1993
9.	Mohan	03.12.1979	05.02.1993
10.	Bishamber	22.07.1983	16.02.1993
11.	Kalicharan	21.09.1983	16.02.1993
12.	Suresh Chand	25.01.1986	01.06.1996
13.	Ram Pal	21.10.1984	10.06.1993
14.	Birpal	12.10.1981	01.05.1991
15.	Tejpal	01.01.1981	04.07.1989
16.	Manohar Lal	21.09.1983	02.04.1993
17.	Batan Singh	03.12.1979	17.06.1987
18.	Nanak Chand	01.10.1979	05.03.1986
19.	Shanti	08.04.1976	05.01.1985
20.	Om Prakash	13.01.1983	10.12.1992
21.	Hari Singh	01.06.1981	18.06.1991
22.	Kanwar Pal Singh	22.03.1979	19.04.1991
23.	Jai Kishan	29.05.1984	21.04.1991
24.	Bhogi Ram	25.10.1979	18.03.1986
25.	Dayal Singh	19.09.1979	01.03.1986
26.	Jagpal	02.07.1982	07.01.1993
27.	Krishan Pal	22.06.1978	13.05.1982

28.	Vinod Kumar	23.02.1982	23.09.1986
29.	Chet Ram	24.06.1981	09.02.1987
30.	Baleshwar Mishra	16.06.1982	11.12.1992

3. In W.P.(C) No. 2315/2011, there are six respondents/workmen, the details of whom are as under:

Sl. No.	Name of workman	Date of joining of service	Date of regularization
1.	Mahavir Singh	01.01.1979	31.03.1986
2.	Jeet Singh	05.06.1979	15.11.1984
3.	Rajvir Singh	04.01.1983	20.11.1992
4.	Sohan Lal	20.09.1981	26.02.1986
5.	Surender Singh	15.01.1983	18.12.1992
6.	Chander Bhan	12.10.1982	01.12.1992

4. However, W.P.(C) Nos. 2830/2011, 7002/2011, 7003/2011, 7738/2011 and 3229/2012 have been filed individually, the respective details of the respondents/workmen are as under: -

Sl. No.	Name of workman	Date of joining of service	Date of regularization
1.	Jitender	20.04.1982	02.04.1993
2.	Amar Singh	20.01.1981	06.01.1986
3.	Girish Chand	14.06.1984	25.04.1995
4.	Khacheru Khan	17.02.1982	26.05.1990

5.	Hari Har Prasad	03.09.1979	11.08.1996
----	-----------------	------------	------------

5. The question of law involved to be considered in these writ petitions, is whether the period of services rendered by the workmen, which was paid from contingency, can be counted towards pension?

6. Accordingly, all the petitions noted above are being decided by this common judgment.

7. The respondents/workmen claimed regularization of their services from the date of their initial employment. When their demand was not accepted by the Management, they raised an industrial dispute before the Conciliation Officer. Since conciliation proceedings came to an end as a failure, the appropriate Government referred the dispute to the Tribunal vide its order dated 19.02.2007 with following terms:-

“Whether the demand of All India CPWD (M.R.M.) Karamchari Sangathan for regularization of services of the respondents workmen from the date of their initial employment of muster roll is legal and justified? If yes, to what relief the concerned workmen are entitled to?”

8. The respondents/workmen pleaded in their statement of claims that they were employed as daily rated workmen from the dates as mentioned above. Their services were regularized from the aforementioned dates. They rendered 240 days continuous service in every calendar year with the Management from the date of their employment till the date of their regularization. There are three Wings

under CPWD, viz., Electrical, Civil and Horticulture, where several daily rated workmen are employed by the Management.

9. To strengthen their claims, the respondents/workmen have taken the shelter of a Supreme Court judgment delivered in ***Surinder Singh and Anr. Vs. Engineer-in-chief, C.P.W.D. and Ors., 1986 (1) SCC 639***, whereby the Apex Court directed the Management to regularize the services of its daily rated workmen, from the date of their initial appointment, who have put in six months of continuous service. Accordingly, the Director General (Works), CPWD, issued order dated 25.08.1988 for regularization of muster roll employees. The Horticulture Wing of the Management regularized services of its daily rated workmen with effect from 07.12.1988, while Electrical and Civil Wings did not take any action in this behalf.

10. The, claim of the workmen is that they are covered under the provisions of The Payment of Gratuity Act, 1972 (in short 'the Act') and orders were issued in that regard by the Management on 26.06.2006. One Shri Ram Khilari, a similarly situated workman, raised an industrial dispute and the Industrial Tribunal, Government of NCT, Delhi, gave an award for regularization of his services from the date of his initial appointment. Thus, workmen in the present petitions are also eligible for regularization of services from the date of their initial appointment.

11. The case of the petitioner Management was that the workmen were working on muster roll and their services were regularized from the dates mentioned above. Their contention before the Tribunal, that

they were eligible for regularization of their services from the date of their initial engagement, is false.

12. To strengthen the stand taken by the petitioner Management, while relying upon the case of Surender Singh's (supra), learned counsel submitted that by the aforesaid case, the Apex Court never directed the Management to regularize the services of muster roll employees from the date of the initial appointment. In compliance of order of the Apex Court, posts in number 8982, were created in September, 1992, and thereafter, all workers were regularized in service from respective dates and not from the date of their initial engagement. The employees selected on daily wages do not automatically become regular from the date of their initial employment, even if they perform duties similar to the regular employees. Thus, the workmen cannot claim regularization from the back date.

13. It is pertinent to mention here that during course of adjudication before the Tribunal, Shri Satish Kumar Sharma, General Secretary of All India CPWD (M.R.M.) Karamchari Sangathan, who was Authorised Representative of the workmen, made a statement on their behalf that the workmen do not press their claim for regularization in the services from the date of their initial employment. Consequently, the workmen gave up the contest of their demand for regularization of their services from the date of their initial employment.

14. Issue to be considered before this Court is that whether services rendered by the workmen on muster roll, which was paid from contingencies, can be counted towards pension?

15. While dealing with the aforesaid issue, the learned Tribunal considered the provisions of The Central Civil Services Pension Rules, 1972, (in short 'the Pension Rules'). Rule 14 of the said Pension Rules prescribes that period of service paid from contingency do not count as qualifying service for pension. However, relied upon a Government of India decision taken in May, 1968, whereby an Office Memorandum was issued on 14.05.1968, wherein detailed that in some cases, employees paid from contingencies; employed in types of work requiring services of whole time workers and; are paid on monthly rates of pay or daily rates computed and; paid on monthly basis and on being found fit brought on to regular establishment. Accordingly, decided that half of the service paid from contingencies will be allowed to count towards pension at the time of absorption in regular employment subject to the following conditions:-

“(a) Service paid from contingencies should have been, in a job involving whole time employment (and not part-time for a portion of the day).

(b) Service paid from contingencies in a type of work or job for which regular posts could have been sanctioned, e.g., Malis, Chowkidars, Khalasis etc.

(c) The services should have been one for which the payment is made either on monthly or daily rates computed and paid on a monthly basis and which though not analogues to the regular scale of pay should bear

some relation in the matter of pay to those being paid for similar jobs being performed by staffs in regular establishments.

(d) The services paid from contingencies should have been continuous and fallen by absorption in regular employment without a break.

(e) Subject to the above conditions being fulfilled, the weightage for past service paid from contingencies will be limited to the period after 01.01.1961 for which authentic records of service may be available. Reference can be made to Office Memorandum No.G.I.,M.F., O.M.No.12(1)-EV/68 dated the 14th May,1968.”

16. The learned Tribunal relied upon the aforesaid Office Memorandum dated 14.05.1968 and opined that the respondent/workmen performed functions analogous to regular employees till the date of their regularization. Their services with the Management were continuous without any break. Thus, they satisfied all the conditions laid down in the aforesaid Memorandum issued by the Government of India. Hence, the petitioner Management is under an obligation to comply with the aforesaid Office Memorandum and count services of the workmen for the purpose of pension.

17. Mr. Jayendra, learned counsel appearing on behalf of the petitioner Management submitted that the respondents/workmen were appointed on muster roll from 1979 onwards. The Pension Rules came into force with effect from 01.04.1972. Since the respondents/workmen were appointed on the muster roll after enforcement of the aforesaid Pension Rules, thus, the said Rules are applicable on the respondents whereas, the learned Tribunal has ignored these Rules.

18. Rule 2 of the Pension Rules prescribes as under:-

“Save as otherwise provided in these rules, these rules shall apply to Government servants appointed on or before the 31st day of December, 2003 including civilian Government servants in the Defence Services, appointed substantively to civil services and posts in connection with the affairs of the Union which are borne on pensionable establishments, but shall not apply to:-

- (a)
- (b) *persons in casual and daily-rated employment.*
- (c)
- (d)
- (e)
- (f)
- (g)
- (h)

19. Rule 14 of the Pension Rules prescribes as under:-

“14. Conditions subject to which service qualifies:-

(1) The service of a Government servant shall not qualify unless his duties and pay are regulated by the Government, or under conditions determined by the Government.

(2) For the purposes of sub-rule (1), the expression “Service” means service under the Government and paid by that Government from the Consolidated Fund of India or a Local Fund administered by that Government but does not include service in a non-pensionable establishment unless such service is treated as qualifying service by that government.

(3).....”

20. Learned counsel for the petitioner further submitted that Rule 89 (1) of the Pension Rules prescribes as under:-

“89. *Repeal and Saving:-*

(1) On the commencement of these rules, every rule, regulation or order including Office Memorandum (hereinafter referred to in this rule as the old rule) in force immediately before such commencement shall, in so far as it provides for any of the matters contained in these rules, ceased to operate.”

21. Learned counsel for the petitioner submitted that the Office Memorandum of 1968 has become redundant and the Pension Rules, 1972 prevails over any previous Rule or Office Memorandum, whereas the learned Tribunal wrongly relied upon the Memorandum of 1968 which was not in force when the respondents/workmen were born in the employment.

22. Further submitted, that the Apex Court decided in case of ***Secretary, State of Karnataka and Ors. v. Umadevi (3) and Ors (2006) 4 SCC 1***, that no one can claim regularization from his initial appointment. However, in these petitions, the respondents/workmen had given up their case for regularization.

23. Mr. Jayendra and Mr. Saqib, Ltd. counsels for petitioners, submitted the work charge employees and the employees paid from contingencies are different. The General Clauses Act is applicable only where there is an ambiguity in the Rules. If any Department of the petitioner has illegally complied with the Office Memorandum of

1968, in that eventuality, illegality crept in is not to be perpetuated. Once the Pension Rules, 1972, came into force, then Office Memorandum of 1968 stands superseded for all purposes unless stated, therein, otherwise. Therefore, reasoning given by the learned Tribunal in para-7 of the impugned award is perverse and without application of mind.

24. To strengthen his arguments, learned counsel for the petitioner relied upon case of ***Mahadeo Bhau Khilare (Mane) and Others Vs. State of Maharashtra and Others, 2007 (5) SCC 524***, whereby the Apex Court has held as under:-

“7. Indisputably, the State of Maharashtra has framed recruitment rules. Any scheme by way of an executive instruction in terms of Article 162 of the Constitution of India, if violative of such statutory rules would not be legally sustainable. [See A. Umarani v. Registrar, Cooperative Societies and Ors. (2004) 7 SCC 112].

8. The question in regard to the existence of any vested legal right, inter alia is such by above appointees and/or daily wagers, to be absorbed / regularized in the State Services came up for consideration before a Constitution Bench of this Court in Secretary, State of Karnataka and Ors. v. Umadevi (3) and Ors (2006) 4 SCC 1.

9. It was categorically held therein that regularisation in service, in cases where the appointments were void ab initio, having been made in utter disregard of the existing recruitment rules and/or constitutional scheme adumbrated under Article 14 and 16 of the Constitution of India would be wholly illegal and thus the direction in this behalf can be issued. [See also Punjab Water Supply & Sewerage Board v. Ranjodh

Singh and Ors. (2007) 2 SCC 491 and Punjab State Warehousing Corporation Chandigarh v. Manmohan Singh and Anr. (2007) 9 SCC 337.”

25. Also relied upon case of *State of Orissa and Others Vs. Prasana Kumar Sahoo, AIR 2007 Supreme Court 2588*, whereby the Apex Court has held as under:-

“14. Even a policy decision taken by the State in exercise of its jurisdiction under Article 162 of the Constitution of India would be subservient to the recruitment rules framed by the State either in terms of a legislative act or the proviso appended to Article 309 of the Constitution of India. A purported policy decision issued by way of an executive instruction cannot override the statute or statutory rules far less the constitutional provisions.

15.....

16.....

17.....

18.....

19. Regularization as is well known is not a mode of recruitment. A policy decision to absorb a person who is not in employment of the State without following the recruitment rules, would not confer any legal right on him. A Constitution Bench of this Court in Secretary, State of Karnataka and Others v. Umadevi (3) and Others (2006) 4 SCC 11, categorically held that any appointment made in violation of the constitutional provisions would be a nullity.

See also Gurbachan Lal v. Regional Engineering College, Kurukshetra & Ors. [2007 (4) Scale 1]

20.....

21.....

22. *It may be that some other persons similarly situated have been appointed. But Article 14 as is well known contains a positive concept. A Writ of Mandamus can be issued by the High Court only when there exists a legal right in the Writ Petitioner and corresponding legal obligation in the State. Only because an illegality has been committed, the same cannot be directed to be perpetuated by a court of law.”*

26. On the other hand, Ms.Amita Kalkal Chaudhary, Advocate appearing on behalf of the respondents/workmen submitted that the respondents/workmen were casual workers but thereafter regularized on different dates as mentioned above. As per Rule 14(2) of the Pension Rules, half of the service rendered on muster roll has to be counted for pension purposes. The respondents being Government servants are governed by the Pension Rules as on date.

27. I have heard Ld. Counsels for the parties.

28. Article 368 of Civil Service Regulations and The Liberalized Pension Rules of 1950 describes as under:-

“368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.

Provided that in the case of an officer retiring from service on or after the 22nd April, 1960; if he was holding a substantive office on a permanent establishment on the date of his retirement, temporary or officiating service under the Government of India, followed without interruption by confirmation in the

same or another post, shall count in full as qualifying service except in respect of-

- (i) Periods of temporary or officiating service in non-pensionable establishment;*
- (ii) Periods of casual or daily rated service and*
- (iii) Periods of service paid from contingencies.”*

29. The petitioners have heavily relied upon Rule 14 of the Pension Rules, which is reproduced as under:-

“14. Conditions subject to which service qualifies

- (1) The service of a Government servant shall not qualify, unless his duties and pay are regulated by the Government, or under conditions determined by the Government.*
- (2) For the purposes of sub-rule (1), the expression "Service" means service under the Government and paid by that Government from the Consolidated Fund of India or a Local Fund administered by that Government but does not include service in a non-pensionable establishment unless such service is treated as qualifying service by that Government.*
- (3) In the case of a Government servant belonging to a State Government, who is permanently transferred to a service or post to which these rules apply, the continuous service rendered under the State Government in an officiating or temporary capacity, if any, followed without interruption by substantive appointment, or the continuous service rendered under that Government in an officiating or temporary capacity, as the case may be, shall qualify:*

Provided that nothing contained in this sub-rule shall apply to any such Government servant who is appointed otherwise than by deputation to a service or post to which these rules apply.”

30. Aforenoted Rule 14 of the Pension Rules is para materia to Article 368 of Civil Service Regulations and The Liberalized Pension Rules of 1950, whereby it is specifically prescribes that period of service paid from contingencies do not count as qualifying service for pension. In some cases, employees paid from contingencies are employed in types of work requiring services of whole-time workers and are paid on monthly rates of pay or daily rates computed and paid on monthly basis and on being found fit brought on to regular establishment.

31. As per Rule 2 of the Pension Rules, these rules are applicable to the Government servants appointed on or before the 31st Day of December, 2003, but shall not apply to persons in casual and daily rated employment and persons paid from contingencies. The respondents/workmen in these petitions were in Central Government Departments and also regularized on different dates as mentioned above. They performed functions analogous to regular employees till the date of their regularization. They were performing whole-time job with the petitioner management and their services with the management were continued without any break. It is not the case of the petitioners that the respondents/workmen are still on muster roll or are being paid from contingencies. Thus, they satisfied all the

conditions laid down in the Office Memorandum dated 14.05.1968 and Rule 14 of the Pension Rules, 1972.

32. In addition, the workmen were paid from the contingency fund; therefore, the question arises for the consideration whether such period can be taken into account for the purposes of granting pension. The contingency fund has been established under Article 267 of the Constitution of India in order to meet the unforeseen expenditure. The advances from the fund are made for the purposes of meeting unforeseen expenditure which are resumed to the Fund to the full extent as soon as Parliament authorizes additional expenditure. Thus, this fund acts more or less like an imprest account of Government of India. In the present case, the petitioner does not have a case that the expenditure incurred on account of the payment made to the workmen had not authorised by the parliament. Therefore, it is clear that the workmen were paid from the consolidated fund of India.

33. Accordingly, the petitions are dismissed with no order as to costs.

**SURESH KAIT
(JUDGE)**

NOVEMBER 11, 2014
Sb/RS