

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

Reserved on 07.12.2023

Pronounced on 21.12.2023

**WP(C) No.2364/2021
c/w Caveat No.1494/2021
WP(C) No.2282/2021
WP(C) No.1721/2022**

1. UT of J&K and others
2. UT of J&K and others
3. UT of J&K and others

.....Petitioners

Through: Mrs. Monika Kohli, Sr. AAG with Ms.
Priyanka Bhat, Advocate

versus

1. Ashwani Kumar & others
2. Ashaq Hussain & others
3. Javaid Ahmad Wagay & others

.....Respondent(s)

Through: Mr. Anuj Dewan Raina, Advocate.
Mr. Rajiv Gorkha, Advocate
Mr. Mohd. Salim Malik, Advocate
Mr. Mazher Ali Khan, Advocate

**Coram: HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE**

JUDGMENT

Tashi Rabstan - J

1. These three petitions have been filed against a common judgment dated 26.03.2021 delivered by the Central Administrative Tribunal, Jammu Bench, Jammu in three petitions being TA Nos.61/2149/2020, 62/2964/2020 and 61/2124/2020, whereby Order No.134-Home of 2019 dated 06.02.2019 issued by the Principal Secretary to Government, Home Department, Government of J&K cancelling the entire process of selection initiated for the post of Warder

in the Prisons Department pursuant to Advertisement Notification No.539 of 2005 dated 25.08.2005 came to be set aside and quashed, thereby directing the petitioners-authorities herein to go ahead with the selection process further and take appropriate decision as per the scheme of recruitment rules and advertisement notification within a period of three months from the date a copy of the order is delivered to them.

2. Since common question of law and facts are involved in all these petitions, as such same were considered and heard together and are being disposed of by this common judgment.

3. The facts-in-brief are that pursuant to Advertisement Notification No.539 of 2005 dated 25.08.2005 issued by the Prisons Department for filling up 73 posts of Warders, the respondents herein being eligible also applied for the same. Thereafter, after a gap of almost five years, the Inspector General of Police, Prisons Department issued notification dated 03.08.2010 and another notification dated 01.09.2010 in the local newspapers directing all the applicants to appear for physical/outdoor test on the scheduled dates as prescribed in the notification(s). The respondents-candidates successfully completed the physical/outdoor tests and were, accordingly, declared successful by the petitioners-authorities. Thereafter, the authorities issued notice dated 18.12.2010 in the Daily Excelsior Newspaper specifically mentioning the roll numbers of selected candidates including the respondents herein. Not only this, the authorities also sent registered letters individually to each of the successful candidate through postal department, whereby all such successful candidates were directed to appear before the Selection Board along with their original testimonials on the scheduled dates, where they were to also

undergo literacy test/filling of the forms. It is stated the respondents appeared before the interview board on the dates so provided, submitted their original documents and also participated in the literacy test from 04.01.2011 to 06.01.2011. When the authorities failed to disclose the result, the respondents herein submitted a complaint to the grievance cell of the Chief Minister Secretariat and also submitted an application under Right to Information Act. In response thereto, the authorities vide communication dated 05.03.2013 intimated that the selection process for the post of Warder has been pending. Again vide communication dated 14.05.2013 the authorities intimated that 150 posts of Warder were lying vacant and that the selection process for these posts was pending consideration before the Home Department. It is stated that the authorities while replying to a query raised in the assembly of the State of Jammu & Kashmir have categorically stated that the total number of vacant posts in the Prison Department is 416.

4. It is averred that the similarly circumstanced candidates filed SWP No.1953/2013 before the High Court and the High Court vide order dated 17.09.2013 directed the petitioners-authorities herein to finalize the selection process in accordance with rules within a period of one month from the date copy of the order is served upon them. When nothing happened, the respondents herein also filed SWP No.1599/2017.

5. In the said petition the authority concerned filed an affidavit deposing therein that the Department of Law, Justice and Parliamentary Affairs on the desirability of withdrawing the selection process had advised that since the selection agency has already initiated the selection process and conducted various tests including the short listing of candidates and the outdoor test, as

such the posts referred for selection cannot be withdrawn at this stage in view of the law declared by the Apex Court. It is stated that the Administrative Department of the State Government again referred the matter to the Department of Law on the same issue and the Department of Law opined that the legal position on the issue is still same and no further different interpretation is possible.

6. Ultimately, this Court vide judgment dated 30.11.2018 disposed of the writ petition with a direction to the petitioners-authorities herein to take appropriate decision with regard to whether the process of selection as initiated vide advertisement dated 25.08.2005 is to be abandoned and a decision to the effect be taken positively by 15.02.2019 by passing a speaking order giving details.

7. Thereafter, the Principal Secretary to Government, Home Department, Government of J&K issued Government Order No.134-Home of 2019 dated 06.02.2019 thereby cancelling the entire process of selection initiated for the post of Warders in the Prisons Department pursuant to Advertisement Notification No.539 of 2005 dated 25.08.2005.

8. Feeling aggrieved, the candidates-respondents herein filed three petitions being TA Nos.61/2149/2020, 62/2964/2020 and 61/2124/2020 before the Central Administrative Tribunal, Jammu Bench, Jammu. The learned Tribunal vide common judgment dated 26.03.2021 set aside and quashed Order No.134-Home of 2019 dated 06.02.2019 issued by the Principal Secretary to Government, Home Department, Government of J&K, thereby directing the petitioners-authorities herein to go ahead with the selection process further and take appropriate decision as per the scheme of recruitment rules and

advertisement notification within a period of three months from the date a copy of the order is delivered to them. Hence, the present petitions on behalf of petitioners-authorities.

9. Learned counsel appearing for petitioners-authorities argued that the order dated 06.02.2019 cancelling the entire selection process of Warders was based on cogent reasons, whereas the learned Tribunal has passed the order impugned 26.03.2021 in a mechanical manner as the learned Tribunal has failed to appreciate the objections as well as pleadings of petitioners-authorities in its right perspective. She further argued that since the entire process of selection for the post of Warders was marred with procedural irregularities, as such the petitioners-authorities were right in cancelling the same vide order dated 06.02.2019.

10. Learned counsel appearing for the candidates-respondents herein argued that the petitioners-authorities have failed to accord consideration to the legal advice tendered by the Department of Law on two different occasions while issuing the order for cancellation of entire selection process. Further, the reasons given in the cancellation order are not factually correct and that the cancellation order has been issued without application of mind. Further, the cancellation order of entire selection process is not in legal consonance with the judgment dated 17.09.2013 passed in SWP No.1953/2013.

11. Heard learned counsel appearing for the parties at length, considered their rival contentions and perused the petitions as also files of SWP No.1953/2013 and SWP No.1878/2017 and other connected matters, which were called from the Registry.

12. It is not in dispute that pursuant to notification dated 25.08.2005 for filling up 73 posts of Warders, the petitioners-authorities conducted the physical/outdoor tests of aspiring candidates in the years 2010, i.e., the authorities took five years in conducting the physical/outdoor tests. It is also not in dispute that 2146 candidates had appeared out of which 1247 were shortlisted and declared successful by the authorities vide notification dated 18.12.2010. Petitioners-authorities have also not disputed that the aspiring candidates-respondents herein appeared before the Interview Board on the dates so provided, submitted their original documents and also participated in the literacy test from 04.01.2011 to 06.01.2011. Further, the petitioners-authorities have themselves admitted that the Department of Law, Justice and Parliamentary Affairs on two different occasions on the desirability of withdrawing the selection process had advised that since the selection agency has already initiated the selection process and conducted various tests including the short listing of candidates and the outdoor tests, as such the posts referred for selection cannot be withdrawn at this stage.

13. Thus, when the selection process has already been concluded, the petitioners-authorities kept the matter lingering on for more than thirteen years and ultimately, taking the shelter of judgment dated 30.11.2018 delivered in SWP No.1878/2017 along with clubbed matters, cancelled the entire process of selection initiated for the post of Warders vide Order No.134-Home of 2019 dated 06.02.2019.

14. A perusal of file of SWP No.1878/2017 reveals that it was averred on behalf of petitioners-authorities that the issue of finalization of selection process with regard to the Jail Warders was to be taken in the light of the

decision already taken by the Department of Law, Justice & Parliamentary Affairs; meaning thereby as per their own version, the authorities were to take decision in the light of the decision already taken by the Law Department. Whereas, the Department of Law had specifically opined twice that since the selection agency has already initiated the selection process and conducted various tests including the short listing of candidates and the outdoor tests, as such the posts referred for selection cannot be withdrawn at this stage in view of the law declared by the Apex Court. Accordingly, the learned Single Judge vide order dated 23.04.2018 in SWP No.1878/2017 and other connected matters had directed the Principal Secretary to Government, Home Department to take an appropriate decision before 11.05.2018; meaning thereby as per the said order the Government had to take a decision as per the advice of Department of Law. When the authorities failed to comply the order dated 23.04.2018, the learned Single Judge directed the Principal Secretary, Home Department to appear in person on the next date of hearing. Even the Principal Secretary, Home Department filed affidavit on 18.09.2018 seeking two months time to file the compliance report in terms of order dated 23.04.2018 (supra).

15. However, the learned Single Judge without waiting for the compliance report of Principal Secretary to Government, Home Department and even without calling for detailed objections to the writ petition in SWP No.1878/2017 and other connected matters from the authorities concerned and also without admitting the petition to hearing, vide judgment dated 30.11.2018 directed the authorities to take appropriate decision with regard as to whether the process of selection as initiated vide advertisement dated 25.08.2005 is to be abandoned and a decision to the effect be taken positively by 15.02.2019 by passing a speaking order giving details. The Principal Secretary to

Government, Home Department taking shelter of order dated 30.11.2018 cancelled the entire process of selection for the post of Warders vide order dated 06.02.2019 contrary to his stand which he had taken in affidavit dated 18.09.2018 (supra), whereby he had sought two months time to comply with the order dated 23.04.2018 (supra), i.e., he was to take a decision in the light of advise of the Department of Law, which had opined that the selection process cannot be cancelled at this advanced stage.

16. Against the said order the candidates-respondents herein went to the Central Administrative Tribunal by filing three petitions and the learned Tribunal vide common judgment dated 26.03.2021 set aside and quashed the order dated 06.02.2019 issued by the Principal Secretary to Government, Home Department, thereby directing the petitioners-authorities herein to go ahead with the selection process. Hence, the authorities have filed the present petition.

17. It is to be seen here that the petitioners-authorities cancelled the entire process of selection only on the ground that there were certain procedural irregularities while the selection process was going on. Though the Prisons Department vide letter dated 29.12.2015, submitted to the Home Department, stated that the Prisons Department is ready to complete the process and requested the Government to take appropriate decision, but the Home Department instead of allowing the Prisons Department to conclude the selection process, issued order dated 06.02.2019 cancelling the entire selection process.

18. It seems the reasons given in the cancellation order are not factually correct. One of the grounds in cancelling the selection process was that the

District Level Screening Committees performed the functions of Selection Board/Apex Committee, but the Home Department failed to point out such functions. Whereas, the Selection Board/Apex Committee had decided that the Board constituted by the Government in 2004 would take a final decision with regard to the selection of candidates for the posts of Warders. Further, one of the grounds in cancelling the selection process was that the Selection Board had failed to intimate the applicants to appear in the test by way of individual call letters. However, it is apparent that the advertisement notice of 2005 does not contain any such condition. Further, the cancellation order reveals that the Selection Board published notice dated 02.09.2010 regarding initiation of selection process in the leading dailies of the State, besides intimation was also given to the candidates through Doordarshan, Radio Kashmir and local/private TV Channels. Further, it is the specific stand of candidates-respondents herein that the authorities concerned sent registered letters individually to each of the successful candidate through postal department, whereby all such successful candidates were directed to appear before the Selection Board along with their original testimonials on the scheduled dates.

19. In short, it is not the case of petitioners-authorities that the Selection Board committed illegalities while carrying out the selection process or the appearing candidates committed malpractices or used unfair means, rather their case is that since there were procedural irregularities in carrying out the selection process, as such the same came to be cancelled vide order dated 06.02.2019. The petitioners-authorities were well within their powers to rectify the irregularity, if any, without cancelling the entire process of selection and the advertisement notice of 2005.

20. What is held by the Apex Court in case, titled as, *State of Punjab vs Bahadur Singh & others*, Civil Appeal No.7347/2008, decided on 17.12.2008, it would be appropriate to reproduce paragraph 9 and relevant portion of paragraph 10 hereunder:

“This Court in B.N. Nagarajan clearly stated that whereas any irregularity can be regularized but an illegality cannot be. It was furthermore stated that regularization would not mean permanency. This aspect of the matter has been highlighted in a number of decisions.

9. In *State of M.P. & Ors. v. Lalit Kumar Verma*, [(2007) 1 SCC 575], this Court stated :

“12. The question which, thus, arises for consideration, would be: Is there any distinction between ‘irregular appointment’ and ‘illegal appointment’? The distinction between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is ‘State’ within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance with the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of some rules might not have been strictly adhered to.”

10. In relation to almost similar orders, it was noticed in Post Master General, Kolkata & Ors. v. Tutu Das (Dutta) [(2007) 5 SCC 317], it was noticed :

“20. The statement of law contained in para 53 of Uma Devi (supra) cannot also be invoked in this case. The question has been considered by this Court in a large number of decisions. We would, however, refer to only a few of them.

21. In Punjab Water Supply and Sewerage Board v. Ranjodh Singh and Ors. [(2007) 2 SCC 491] referring to paragraphs 15, 16 and 53 of Uma Devi (supra), this Court :

‘A combined reading of the aforementioned paragraphs would clearly indicate that what the Constitution Bench had in mind in directing regularization was in relation to such

appointments, which were irregular in nature and not illegal ones.’

Distinction between irregularity and illegality is explicit. It has been so pointed out in *National Fertilizers Ltd. and Ors. v. Somvir Singh* [(2006) 5 SCC 493] in the following terms:

‘The contention of the learned Counsel appearing on behalf of the respondents that the appointments were irregular and not illegal, cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the Page 2419 ban on employment, no recruitment was permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities had not been given due consideration.’

The Constitution Bench thought of directing regularization of the services only of those employees whose appointments were irregular as explained in *State of Mysore v. S.V. Narayanappa, R.N. Nanjundappa v. T. Thimmiah and B.N. Nagarajan v. State of Karnataka* wherein this Court observed:

‘16. In *B.N. Nagarajan v. State of Karnataka* this Court clearly held that the words 'regular' or 'regularization' do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments.’”

21. Otherwise too, we do not find any valid and justifiable reason in the order cancelling the entire selection process. Once the selection process has almost been completed, the petitioners-authorities were not expected to act arbitrarily in cancelling the same, that too after such a too long period when the posts are still lying vacant since the year 2005. Although discretion is with the Government, but such discretion is not untrammelled and unfettered. Exercise

of discretion must stand the test of reasonability. If the discretion exercised suffers from arbitrariness and unreasonableness, such type of discretion, if exercised, has to be set at naught. Therefore, it is not at the whims and fancies of the State to keep the advertised posts vacant for such a long period as the same would run counter to the mandate of Article 14 of the Constitution.

22. In the matter of East Coast Railway vs Mahadev Appa Rao, Civil Appeal No.4964/2010, decided on 7th July, 2010, the Hon'ble Supreme Court has held that though a candidate who has passed an examination or whose name appeared in the select list does not have any indefeasible right to be appointed, yet appointment cannot be denied arbitrarily and the select list also cannot be cancelled without giving proper justification. While holding so, Hon'ble Supreme Court has placed reliance upon the Constitution Bench judgment of the Supreme Court in the matter Shankarsan Dash vs. Union of India reported in (1991) 3 SCC 47, wherein it is held that-

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha and Others, [1974] 1 SCR 165; Miss Neelima Shangla v. State of Haryana and Others, [1986] 4 SCC 268 and Jatendra WP. No.4792/2020 and

others Kumar and Others v. State of Punjab and Others, [1985] 1 SCR 899."

23. It is also to be seen here that when advertisement for the post of Warders was issued in August, 2005 by the Prisons Department, 28 adhoc male Warders were already working in the Department, out of which only 4 adhoc Warders had applied against the said post; meaning thereby 24 adhoc male Warders had not applied against the advertisement of 2005. Order dated 06.02.2019, whereby the selection process came to be cancelled, reveals that in the meeting of the Recruitment Board held on 23.08.2010 it was decided that the list of such adhoc Warders, who had not applied, would be submitted by the Jail Superintendents to the Screening Committee before the recruitment process starts. However, the recruitment process started without considering any such lists or deciding about the fate of these adhoc employees who had not applied. On one hand the petitioners-authorities are talking about the procedural irregularities in cancelling the selection process of Warders and, on the other hand, they were allowing 24 such adhoc Warders or their blue eyed persons to participate in the very same selection process that too in the year 2010, when advertisement for such posts was issued in the year 2005 against which these 24 adhoc Warders had never applied.

24. On one hand the petitioners-authorities were not concluding the selection process of Warders on one or the other pretext and by taking evasive stands and, on the other hand, they vide Government Order No.867-Home of 2017 dated 14.07.2017 regularized the services of 36 adhoc employees including 28 adhoc Warders working in the Prisons Department in relaxation of upper age limit. In some cases the relaxation in upper age limit was more than 10 years, 9 years, 8 years, 7 years, 6 years and 5 years. Further, the

petitioners-authorities have not denied that in the said regularization order there were those four adhoc Warders too who had applied pursuant to Advertisement Notification No.539 of 2005 dated 25.08.2005, which selection process came to be cancelled by the petitioners-authorities vide order dated 06.02.2019. Thus, one thing is clear that without going through the selection process of appearing in the physical/outdoor tests, literacy test etc., the services of all these adhoc Warders came to be regularized without following the mandate of law. Further, the four adhoc Warders, who had applied pursuant to advertisement notice of August 2005 (supra), their services too came to be regularized or, in other words, came to be appointed against the 4 posts out of 73 advertised posts without concluding the selection process, then what was the fault of other candidates-respondents herein who are hankering for getting justice for the last more than eighteen years. Even one of the adhoc Warders, whose services came to be regularized without appearing in any of the tests, was more than 50 years as on 01.01.2017.

25. There is another aspect of the matter, that, in another SWP No.1953/2013 a learned Single Judge of this Court vide order dated 17.09.2013, though exparte, i.e., without issuing notice to the other side, had directed the petitioners-authorities herein to finalize the selection process in accordance with rules within a period of one month from the date copy of the order is served upon them. If the petitioners-authorities were aggrieved of the said order, they had the option to go for appeal against the said order. However, they did not opt for the same, which leads to the conclusion that they accepted the order dated 17.09.2013. Since the petitioners-authorities did not challenge the order dated 17.09.2013 in appeal, the same has attained finality; thus were bound to finalize the selection process in terms of the directions

passed in SWP No.1953/2013. Instead, they kept lingering on the matter on one or the other pretext. Once the authorities had accepted the order dated 17.09.2013 and the same has attained finality, later on it was not open to the petitioners-authorities to argue that the entire process of selection for the post of Warders was marred with procedural irregularities, thus the same cannot be a ground for non-compliance of the order. In paragraph 14 of SWP No.1878/2017 and other connected matters, there is a reference of SWP No.1953/2013, but the petitioners-authorities did not deny the same nor filed objections to SWP No.1878/2017 or other connected matters.

26. Further, looking to the plight of candidates-respondents herein, one cannot expect such an apathy from the Government or the Police Department or the petitioners-authorities herein that the 73 posts of Warders advertised in August 2005 have still not been filled up even after a lapse of more than eighteen years, least bothering that all the candidates-respondents herein must have crossed the age bar as of now and are still running from pillar to post, still with a fading hope and advancing age that they would be selected and appointed against those posts to meet both ends needs of their families. It is stated that the said posts have now risen to more than 416 and all are still lying vacant. Further, before concluding, it is to be seen here that the learned Tribunal has not determined the rights of the parties and the only direction was to conclude the process of selection.

27. The judgments cited by the learned counsel for petitioners-authorities have no direct bearing as regards the controversy-in-hand in view of the facts involved in this case, thus are distinguishable in nature.

28. Therefore, in view of what has been discussed above, we do not find any merit in the petitions and the same are, accordingly, dismissed along with connected CMs. The petitioners-authorities herein are directed to go ahead with the selection process further and conclude the same positively within a period of three months from the date a certified copy of this judgment is made available to them against proper receipt. In the event of selection/appointment of candidates-respondents herein, they shall be entitled to all consequential benefits minus the monetary benefit with effect from 16.09.2013, i.e., when SWP No.1953/2013 came to be filed. They, however, shall be entitled to monetary benefits with effect from 1st April, 2024. While concluding the selection process, the petitioners-authorities are expected to take a sympathetic view as the candidates-respondents herein must have crossed the age bar and have no scope to get another job as the posts were advertised in the year 2005 as also that the adhoc Warders have already been regularized by the authorities, besides the posts have also been increased to many fold. Caveat No.1494/2021 is also discharged.

Jammu
21.12.2023
 (Anil Sanhotra)

(Rajesh Sekhri)
Judge

(Tashi Rabstan)
Judge

Whether the order is reportable ?
 Whether the order is speaking ?

Yes/No
 Yes/No