

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

SWP No. 303/2019

Reserved on: **14.12.2023**

Pronounced on: **22.12.2023**

1. **Kawsar Ahmad Bhat**
S/O Abdul Aziz Bhat
R/O Yakerbaroo Gawass Kapran Anantnag
2. **Mohammad Abdullah Shah**
S/O Ghulam Mohammad Shah
R/O Hall Mughalpora Shopian.

...Petitioner(s)/Appellant(s)

Through: Mr. S.A.Makroo, Sr. Advocate with
Mr. Basharat Ahmad Wani, Advocate.

Vs.

1. **State of J&K through**
Commissioner/Secretary to Government
Industries & Commerce Department Civil Sectt. Jammu/Srinagar
2. **Chairman, J&K Khadi & Village Industries Board**
Civil Sectt. Jammu/Srinagar
3. **Secretary/Chief Executive Officer**
J&K Khadi & Village Industries Board
Sanat Ghar Bemina Srinagar/Udhyog Bhawan Jammu
4. **Deputy Chief Executive Officer(Adm.)**
Sanat Ghar Bemina Srinagar/Udhyog Bhawan Jammu

...Respondent(s)

Through: Mr. Zahid Qais Noor, GA.

CORAM:

HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE

JUDGMENT

1. Through the medium of the instant Service Writ Petition, filed under Article 226 of the Constitution of India, the petitioners have challenged Order No. KVIB 169 of 2017 dated 11.08.2017, whereby prospective effect to the regularization of the contractual services of the petitioners as Orderlies in terms of SRO 400 of 2009 dated 24.12.2009, in

J&K Khadi and Villages Industries Board (for short 'Board') and sought direction to quash the same alongwith communication No. KVIB/Adm/PF-503/7240-46 dated 29.01.2019, whereby petitioners' representation was rejected.

2. Before proceeding in the matter, it would be profitable to give brief resume of the case set up by the petitioners.

A) Petitioner No.1, a matriculate, was engaged as Orderly in the respondent Board on contractual basis on 26.08.2004 in terms of Order No. KVIB/300 of 2004 and this engagement was extended till further orders by virtue of Order No. KVIB/574 of 2005 dated 13.01.2005; that similarly, petitioner No.2, having qualification of 10+2, also came to be engaged as Orderly on contractual basis in terms of Order No. KVIB/428 of 2004 dated 10.11.2004, which order was subsequently extended till further orders by virtue of Order No. KVIB/645 of 2005 dated 21.02.2005; that in view of satisfactory performance of the petitioners, sanction was accorded to the extension of benefits of Government Order No.1661-GAD of 2009 dated 26.11.2009 in their favour, entitling them to consolidated salary equivalent to the minimum of the pay band plus applicable grade pay to the post of Orderly.

B) Petitioners made several representations before the respondents from 2004 i.e., from the date of their initial engagement till 2008, for regularizing their services on

the analogy of similarly situated persons having been regularized; that the respondents advertised various posts which were lying vacant in the Board including the posts of Orderlies vide Advertisement Notice No. KVIB/02 of 2008 dated 17.11.2008; that since the petitioners were eligible, as such, they also applied for the posts of Orderlies; that the process in respect of the said advertisement, was not taken to its logical conclusion and instead, in the 100th meeting of the Board of Directors of J&K Khadi & Village Industries Board, the regularization cases of the petitioners and other contractual appointees was taken on board; that in violation of the principles of equal opportunity in the matter of public employment, the respondent Board regularized the services of Shri Prithvi Raj Sharma (Driver) and Shri Manzoor Hussain Bhat (Stenographer), who were also working on contractual basis; that the petitioners filed representation on 31.05.2013, pleading therein that they were similarly situated with the afore-stated Shri Prithvi Raj Sharma and Shri Manzoor Hussain Bhat, however, they were subjected to invidious discrimination and their cases for regularization was not considered.

C) After coming into force J&K Civil Services (Special Provisions) Act 2010, and adopting the same by the respondent department and naming it as “Special Provisions of Contractual Appointees 2013”, the

petitioners were finally regularized by the respondent Board, vide Order No. KVIB 169 of 2017 dated 11.08.2017, however, the respondents by virtue of the said order, granted the benefit of regularization to the petitioners, from the date of passing of the order and have also brought them under the provisions of SRO 400 of 2009 dated 24.12.2009.

3. It was alleged that as a result of delayed regularization, petitioners were made ineligible to earn the pension under the old pension scheme and finally the petitioners seek quashment of the impugned Order No. KVIB 169 of 2017 dated 11.08.2017 and communication No. KVIB/Adm/PF-503/7240-46 dated 29.01.2019.
4. The petitioners have challenged the impugned order/communication on the following grounds:-
 - I) Writ of certiorari for quashing the impugned communication No. KVIB/Adm/PF-503/7240-46 dated 29.01.2019 and Order No. KVIB 169 of 2017 dated 11.08.2017, to the extent of giving it prospective effect and governing the appointment of the petitioners under the provisions of SRO 400 of 2009 dated 24.12.2009;
 - II) Writ of mandamus commanding the respondents to give the petitioners same and similar treatment as has been given in case of Shri Prithvi Raj Sharma (Driver) and Shri Manzoor Hussain Bhat (Stenographer) and regularize the services of the petitioners from the date

of completion of seven years of contractual service.

Or in the alternative, this Hon'ble Court may be pleased to direct the respondents to count 50% of services rendered by the petitioners on contractual basis for purposes of pensionary benefits as has been done in case of other employees;

III) Writ of mandamus commanding the respondents to consider the case of the petitioners for promotion to the next higher post of Junior Assistant on the same and similar analogy as has been done in case of other similarly situated employees in terms of Annexure-XII.

5. To controvert the pleadings of the petitioners, respondents, pursuant to notice issued to them, have filed the objections stating therein that the services of the petitioners were regularized prospectively and submits that sub-rule (v) of Rule 5 of the Jammu and Kashmir Khadi and Village Industries Board SPECIAL PROVISIONS FOR REGULARIZATION OF CONTRACTUAL APPOINTEES 2013, provides as under:-

“Provided that the regularization of the eligible adhoc or contractual or consolidated appointees under these provisions shall have effect from the date of such regularization, irrespective of the fact that such appointees have completed more than seven years of service on the appointed date or thereafter but before such regularization”.

6. Therefore, according to the respondents, the petitioners were regularized prospectively and not retrospectively in view of the aforesaid provisions.
7. Mr. S.A.Makroo, learned senior counsel appearing for the petitioners, argued that the petitioners have been subjected to invidious discrimination vis-à-vis their right to regularization, inasmuch as, the petitioners were engaged as Orderlies along-with other employees, however, the case for regularizing the services of the petitioners was delayed willfully and intentionally by the respondents, whereas the cases of similarly situated employees were considered and finalized in terms of Section 12 of Jammu & Kashmir Khadi and Village Industries Board Act, 1965; that when two employees are similarly situated and a benefit is given to only one, the same will amount to violation of Articles 14 and 16 of the Constitution of India.
8. Another limb of argument of learned counsel for the petitioners is that since the employer being in higher bargaining power and while issuing appointment letter, an employee cannot join any issue on the conditions of appointment order. An employee at the most can challenge the conditions of appointment order even at a later stage when he/she finds any condition of appointment order is detrimental to his/her interests.
9. Reliance has been placed by Mr. Makroo, learned counsel for the petitioners, on the judgments rendered in **Raman Kumar & Ors. Vs. Union of India & Ors.**, reported as

2023 Legal Eagle (SC) 685; Purnendu Mukhopadhyay & Ors. Vs. V.K.Kapoor & Anr., reported as **2007 Legal Eagle (SC) 1179** and **Imtiyaz Ahmed Malik Vs. State & Ors.,** reported as **2009 Legal Eagle (J&K) 658,** to substantiate his submissions.

10. On the contrary, Mr. Zahid Noor, GA, contended that the provisions contained in sub-rule (v) of Rule 5 of the Jammu & Kashmir Khadi and Village Industries Board SPECIAL PROVISIONS FOR REGULARIZATION OF CONTRACTUAL APPOINTEES 2013, does not provide for giving retrospective effect to the regularization of contractual appointees. So far as the contention of the petitioners that the respondents have not counted 50% of service rendered by the petitioners from the date of their initial appointment, learned GA contended that the same is not covered under the rules as the provisions of Article 177-A of Jammu & Kashmir Civil Services Regulations Vol.1 provides that :-

“177-A. Notwithstanding anything contained in Art. 177, a work charged employee/whole time contingent paid staff including daily rated worker(s) [excluding casual/seasonal worker(s)] who is/are brought on regular establishment and retires/retire without having been declared substantive or quasi-permanent, shall be allowed to count 50% of his/her work

charged/contingent paid service as qualifying for pension together with the period of service rendered in regular establishment. If the total of two spells is 20 years or more, he will be eligible for pension under the preceding proviso.”

11. It is the further argument of learned GA that the other contractual employees were regularized as per approval accorded by the Board of Directors in its 100th meeting held on 09.01.2013. With regard to consideration of the petitioners for next higher promotion, learned GA submits that the petitioners shall be considered for next higher promotion to the post of Junior Assistant when they become eligible for such promotion as per the provisions of Recruitment Rules of respondent J&K KVIB.

12. Next argument of learned GA is with regard to SRO 400 of 2009 and on this issue he submits that same is applicable to J&K Khadi and Village Industries Board, as its adoption has been approved by the Board of Directors of J&K KVIB in its 97th meeting held on 13.10.2010 vide Supplementary Agenda item No. 97.02 in terms of J&K Khadi and Village Industries Board Act 1965. He further argued that the regularization of the petitioners have been strictly made in accordance with the provisions of Jammu & Kashmir Khadi and Village Industries Board SPECIAL PROVISIONS FOR REGULARIZATION OF CONTRACTUAL APPOINTEES 2013.

13. Heard, perused and considered.

14. It is trite that a person can be considered in cadre only from the date of regularization and not prior to the said date. Appointment with retrospective effect is normally not permissible. One of the reasons being that it will adversely affect others, who have been appointed as per Service Rules in the interregnum, in matters of seniority, promotion etc. In a case of regularization of service retrospectively, same will adversely affect rights of others who have already been regularly appointed in the regular cadre as per the Service Rules and are better placed.

15. The Supreme Court in a case '**Registrar General of India & Anr. Vs. V. Thippa Setty & Ors**', reported as (1998) 8 SCC 690, has held:-

“...that the regularization should be prospective and not retrospective so that seniority of those, who are already in service, is not affected...”

16. The Madras High Court in a case '**S.Mariappan vs The State Of Tamil Nadu**', decided on 25.06.2019, has observed that:-

“This apart, admittedly, the writ petitioners were engaged as daily wage employees and were continuing in the services. As such, the Government by way of a policy decision extended concession to these daily wage employees and on completion of 10 years of

service, they were brought under the regular employees and their services were regularised. Granting regularisation itself was a concession extended by the Government. When the writ petitioners had already enjoyed the concession, they cannot seek retrospective regularisation with effect from the date on which they were engaged as daily wage employees. In the event of allowing such claims, the Government may not be in a position to sanction the posts with retrospective effect. The same would have huge financial implications also.”

17. The petitioners working in the respondent Board as Orderlies on contractual basis from the year 2004, due to their satisfactory work and conduct were also granted the grade pay in the year 2009; that the petitioners were entitled to be regularized after completing seven years of their service and keeping in view that the department had regularized the services of other similarly situated persons, however, the respondents without considering the case of the petitioner and without giving them the effect or for that matter without counting 50% of their contractual service for the purpose of pensionary benefits passed the impugned orders; that in the 100th Board meeting the case of the petitioners was considered for regularization, with other similarly situated candidates who were also contractual

appointees, however, the cases of the petitioners were not finalized, instead the cases of two similarly situated employees namely Prithvi Raj Sharma and Manzoor Hussain Bhat were approved and regularized; that the petitioners were subjected to invidious discrimination which is violative of Article 14 and 16 of the Constitution of India.

18. The orders impugned are bad in law inasmuch as the order is not a speaking order to the extent of making SRO-400 of 2009 applicable to the petitioners, is unwarranted; that due to the delay caused in regularizing the services of the petitioners, the petitioners would not only suffer vis-à-vis the grant of pensionary benefits but have also equally suffered vis-à-vis their right to be considered for next higher promotion; that the petitioners were entitled to be regularized prior to 2010, however, their cases have been willfully delayed, which fact can be seen that in 2013 when 100th Board meeting was convened petitioners' cases were taken up, however, same were not finalized and thereafter again in 2013 when the department adopted the Act known as J&K Civil Services (Special Provisions) Act 2010, their cases were delayed for more than four years.

19. The respondents have discriminated the petitioners vis-à-vis similar treatment and that they have not been given equal opportunities in the matter of public employment, as has been given in the case of other similarly situated persons; that in case of similarly situated persons, 50% of their services rendered by them have been counted for pensionary

benefits while regularizing their services; that the petitioners are seeking parity with the other similarly situated persons, whose services have been regularized by the Board and, especially with two employees namely Prithvi Raj Sharma and Manzoor Hussain Bhat, who were also contractual appointees and whose cases for regularization were considered and finalized in 2013 in 100th Board of Directors meeting of the Board, however, the cases of the petitioners were deferred for unknown reasons.

20. The respondent Board is governed by the Jammu & Kashmir Khadi and Village Industries Board Act, 1965 and in terms of the said Act, particularly Section 4, there is a procedure for constitution of the Board, as such, Board, in terms of Section 12 of the Act has powers to appoint officers/officials and regulate their service conditions; that making applicable SRO 400 of 2009 without being adopted by the Board is unwarranted and against the Jammu & Kashmir Khadi and Village Industries Board Act, 1965.

21. The petitioners have also placed on record the regularization orders of some contractual employees namely Nirayan Dass, Ghulam Qadir ul Din, Prithvi Raj Sharma and Manzoor Hussain Bhat, whose services have been regularized by the respondent Board in the year 2005 and 2013 in terms of rules in vogue in 2005 and alleged that the petitioners' regularization was delayed willfully and intentionally by the respondents when the case of similarly situated employees

were considered and finalized in terms of Section 12 of J&K Khadi and Village Industries Board Act 1965.

22. The orders with regard to appointment of those persons have been placed on record by the petitioners through a Miscellaneous Application bearing No. 6931/2022 which was not disputed by the respondents. Hon'ble Supreme Court in a case titled '**M.Venkataramana Hebbar (D) By L.Rs Vs. M.Rajagopal Hebbar & Ors.**' reported as **2007(6) SCC 401**, has held as under:-

"The contract between the parties, moreover was a contingent contract. It was to have its effect only on payment of the said sum of Rs. 15,000/- by the plaintiff and other respondents by the defendant Nos. 1 to 3. It has been noticed hereinbefore by us that as of fact, it was found that no such payment had been made. Even there had been no denial of the assertions made by the appellant in their written statement in that behalf. The said averments would, therefore, be deemed to be admitted. Order VIII Rule 3 and Order VIII Rule 5 of the Civil Procedure Code read thus:-

"3. Denial to be specific. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

5. Specific denial. [(1)] Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against person under disability.

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

[(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub- rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.]"

Thus, if a plea which was relevant for the purpose of maintaining a suit had not been specifically traversed, the Court was entitled to draw an inference that the same had been admitted. A fact admitted in terms

of Section 58 of the Evidence Act need not be proved.

23. It emerges from the facts of the case that, two sets of similarly situated employees were considered and one set of them was accorded benefit of regularization, whereas the other set i.e. petitioners were discriminated, which amounts to contravention of Articles 14 and 16 of the Constitution of India. Petitioner No.1 was contractually engaged on 26.08.2004, whereas petitioner No.2 was engaged on 10.11.2004, as Orderlies and both of them were regularized on 11.08.2017. The details of the other persons, who had also been engaged on contractual basis and regularized, discriminating the petitioners is as follows:-

- a) Ghulam Qadir ul Din, engaged on 26.08.2004 as Orderly on contractual basis and regularized on 06.06.2005*
- b) Narayan Das, engaged on 26.08.2004 as Orderly on contractual basis and regularized on 06.06.2005.*
- c) Prithvi Raj Sharma, engaged on contractual basis as Driver and regularized on 25.04.2013;*
- d) Manzoor Hussain Bhat, engaged on contractual basis as Stenographer and regularized on 07.05.2013.*

24. The Supreme Court of India in ‘**Purnendu Mukhopadhyay & Ors. Vs. V.K.Kapoor & Anr.**’ reported as **2008 (14) SCC 403**, has observed and held that :-

“...As we have noticed hereinbefore that S.K. Ganguli and others had been given the

benefit of the order passed by the Tribunal. We do not appreciate the stand of the respondents in this behalf inasmuch as whereas one set of order involving employees who were similarly situated to those of the appellants, benefits have been given but the same are being denied to them. Such an action on the part of the respondents in our opinion is wholly unjustifiable. The judgment of a court, as is well known, should not be read as a statute. It has to be read in its entirety. So read, the appellants had become entitled to the grant of benefits contemplated thereby. There is no reason why the same shall be denied to them. Our attention has also been drawn to the fact that apart from S.K. Ganguly and others some other persons who were similarly situated, namely - Prem Kumar Saha; S.K. Majumdar and Alopi Lal, have also been granted the same benefits.

In a case of this nature, in particular having regard to the fact that the respondents have granted similar benefits to others, we fail to understand as to how the decision of this Court in J.S. Parihar (supra) and Mittanlal (supra) could be applicable. The State cannot treat employees similarly situated differently. It cannot implement the orders in relation to one and refuse to do so in relation to others. It is also not a case like J.S. Parihar (supra) where while implementing the orders, a particular stand has been taken by the employer giving rise to a subsequent

cause of action. It is also not a case where the order of this Court is capable to two interpretations....”

25. Our own High Court had also dealt with a similar matter in a case titled ‘**Imtiyaz Ahmed Malik Vs. State & Ors.**’ reported as **2010 (2) SriLJ 658**, and has held that:-

“..Once it is pleaded and alleged in the writ petition that petitioner has been subjected to invidious discrimination which is infringement of constitutional guarantees as contained in [Article 14](#) and [16](#) of the Constitution, the burden shifts on the respondent-state/authorities to satisfy the court that none of the rights guaranteed under said Articles of Constitution have been infringed in respect of petitioner...”

26. Supreme Court in another case rendered in ‘**Raman Kumar & Ors. Vs. Union of India & Ors.**’ reported as **2023 Legal Eagle (SC) 685**, has enunciated as under:-

“Indisputably, the appellants herein have completed service of more than ten years. Even this Court in the case of Ravi Verma and Others v. Union of India and Others (Civil Appeal No(s).2795-2796 of 2018) decided on 13.03.2018 found that the act of regularizing the services of some employees and not regularizing the services of the others is discriminatory and violative of Article 14 of the Constitution of India. 9.

Mrs. Aishwarya Bhati, learned Additional Solicitor General of India appearing on

behalf of the respondents, has vehemently opposed the petition. She submits that since posts were not available, and, thereafter, Group 'D' posts have been abolished, the appellants could not have been regularized.

The services of the appellants are directed to be regularized from the date on which the services of other 35 employees were regularized and the backwages and other consequential benefits etc., to which the appellants would be entitled to, shall be paid to them within a period of six months from today."

27. Learned counsel for the respondents has lastly contended that when the petitioners had accepted the orders of their regularization and joined on their positions, they cannot question the order, of which they have derived the benefit, and challenge the same through this Writ Petition. This contention of learned counsel for the respondents is not tenable, as since the employer is having higher power and the employee cannot join any issue on the conditions of the appointment order, as such, the employee can challenge the condition of appointment order even at later stage where he finds appointment order detrimental to his interests.

28. In this regard, I am supported to hold this view, in view of the law laid down by the Apex Court in a case '**Somesh Thapliyal & Anr. Vs. Vice Chancellor, H.N.B. Garhwal University & Anr.**' reported as **AIR 2021 SC 4158**. Relevant portion of the judgment is extracted as under:-

“The submissions of the learned counsel for the respondents that the appellants have accepted the terms and conditions contained in the letter of appointment deserves rejection for the reason that it is not open for a person appointed in public employment to ordinary choose the terms and conditions of which he is required to serve. It goes without saying that employer is always in a dominating position and it is open to the employer to dictate the terms of employment. The employee who is at the receiving end can hardly complain of arbitrariness in the terms and conditions of employment. This Court can take judicial notice of the fact that if an employee takes initiation in questioning the terms and conditions of employment, that would cost his/her job itself.

The bargaining power is vested with the employer itself and the employee is left with no option but to accept the conditions dictated by the authority. If that being the reason, it is open for the employee to challenge the conditions if it is not being in conformity with the statutory requirement under the law and he is not estopped from questioning at a stage where he finds himself aggrieved.”

29. In view of the aforementioned legal position and the discussions made hereinabove, the Writ Petition is allowed with the following directions :-

- I) Impugned Order No. KVIB 169 of 2017 dated 11.08.2017 and communication No. KVIB/Adm/PF-503/7240-46 dated 29.01.2019, to

the extent of giving it prospective effect and governing the appointment of the petitioners under the provisions of SRO 400 of 2009 dated 24.12.2009, are hereby quashed.

- II) The respondents are directed to give the petitioners same and similar treatment as has been given in case of Shri Prithvi Raj Sharma (Driver) and Shri Manzoor Hussain Bhat (Stenographer) to regularize their services, or in the alternative to count 50% of services rendered by the petitioners on contractual basis for purposes of pensionary benefits as has been done in case of other employees.
- III) The respondents are directed to consider the case of the petitioners for promotion to the next higher post of Junior Assistant on the same and similar analogy as has been done in case of other similarly situated employees.

30. Disposed of, as indicated above.

(M. A. CHOWDHARY)
JUDGE

Srinagar
22.12.2023
Muzammil. Q

<i>Whether the Judgment / Order is Reportable:</i>	<i>Yes / No</i>
<i>Whether the Judgment / Order is Speaking:</i>	<i>Yes / No</i>