

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

SWP No. 1714/2016

Reserved on: **14.12.2023**

Pronounced on: **30.12.2023**

1. Mehrun Nisa D/O Ab. Rehman Bhat
R/O Nunner Ganderbal.
2. Shajarat Sheikh D/O Mohd Yousef
R/O Sazgaripora Hawal.
3. Zubaida Soil, W/o Imtiyaz Shaida
R/O Nesbal Sumbal Bandipora.
4. Masooda Shaheen, W/O Nisar Ahmad
R/O Lar Ganderbal.
5. Shameem Akhter, D/O Gh. Rasool Bhat
R/O Makerpora Kawdara Srinagar.
6. Humera Bashir, D/O Bashir Ahmad Lone
R/O Nuner Ganderbal
7. Mudasira Hayat, D/O Gh. Mohd Waza
R/O Hnajwera Pattan Baramulla.
8. Shams- u- Nisa, D/O Gh. Mohi-ud-din Khan
R/O Wadoora Sopore.
9. Amina Bano, D/O Jalal Din Nuiar
R/O Dobipora Ganderbal.
10. Asiya Gul, D/O Gh. Mohd Shah
R/O Kanlibagh Baramullah.
11. Misra Bano, D/O Ab. Rehman
R/O Kralcheck Shopain.
12. Rahina Tabasum, D/O Ghulam Mohi-ud-Din
R/O Dumhal, Anantnag,
13. Muzamil Jan. D/O Ghulam Muhammad Narwari,
R/O Rathpora, Eidgah, Srinagar.
14. Tahira Akhter, D/O Ab Rehman
R/O Nunner Ganderbal.
15. Parveena Jan, D/O Ab. Aziz Mir
R/O Pulwama.

16. Nahida, D/O Ifftiqar Ahmad
R/O Yaripora Kulgam.
17. Nighat Nazir, D/O Nazir Ahmad
R/O Gul bagh Srinagar.
18. Khaleeda Parveen, D/O Mohd Sabir Mir
R/O Samboora Pampore.
19. Mumtaza Bano D/O Mohd Shaban Taploo
R/O Samboora Pampore.
20. Shahida Parven, D/O Sannullah
R/O Shopain.
21. Dilshada Dilkash D/O Gh. Nabi Mir
R/O Barsoo Ganderbal.
22. Tahira Akhter, D/O Gh. Rasool
R/O Ganderbal
23. Fahmeeda Bano, W/O Muneer Ahmad
R/O Pulwama.
24. Abida Jan, D/O Ali Mohd Shah
R/O Illahibagh Buchpora.
25. Shazia Mohi-ul-Din, W/O Sajad Iqbal
R/O Wayil Ganderbal.
26. Rubeena Parveen, D/O Gh. Ahmad Bhat
R/O Kulgam.
27. Nusrat Mehraj, D/O Mehraj-i-din Masoodi
R/O Beeru Budgam.
28. Gulzara Akhtar, D/O Zahoor Ahmad Bhat
R/O Kulgam
29. Nighat Jabeen, W/O Zahoor Ahmad Bhat
R/O New Thead Harwan Srinagar.
30. Shazia Qasim D/O Syed Mohd Qasim
R/O Chattabagh Budgam
31. Urfana Majid, D/O Ab. Majid Bhat
R/O H.C. Bernina Srinagar.
32. Hafiza Abida, D/O Ab. Rashid Sheikh,
R/O Azadbasti Natipora Srinagar.
33. Naseema Sulam, D/O Salam Koul
R/O Barsoo Ganderbal.
34. Parveena Akhtar, D/O Mohd Suhhan
R/O Kunzar.

35. Shahida Tabasum, W/O Mohd Tahirltoo
R/O Qazigund.
36. Jameela, D/O Abdul Rehman Dar
R/O LelharKakporaPulwama.
37. Tasleema Akhtar, D/O Muhammad Abdullah
R/O NazneenPora, Shopian.
38. AurisahBano, D/O Ali Muhammad Wani,
R/O Pulwama.
39. Jawahira Akhtar, , D/O Abdul Ahad Bhat,
R/O Pulwama.
40. Ruksana Akhter, D/O Ab. Rehman Wagay,
R/O Anantnag.
41. SurinderKour, W/O Surjeet Singh
R/O Budgam
42. Dilshada Bano, ,D/O Mohd Munawar Rather
R/O FrasiPora Pulwama
43. Neelolar Jan, D/O Abdul AhadAhanger,.
R/O Serch Ganderbal,
44. Shakeela Akhter, D/O Kh. Ghulam Nabi Dar
R/O Ganderbal.
45. Shaheena Parveen, D/O Abdul Gaffar Padder,
R/O Mirhama, Kulgam, Anantnag

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

Through: Mr. Z.A.Shah, Sr. Advocate with
Mr. Asif Feroz Bhat, Advocate.

Vs.

1. Sheri Kashmir Institute of Medical Sciences,
Soura, Srinagar Through its Director.
2. Director/ Ex Officio Secretary to Government,
Sheri Kashmir Institute of Medical Sciences,
Soura, Srinagar.

...Respondent(s)

Through: Mr. Furqan Yaqub Sofi, GA.

CORAM:**HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE****JUDGMENT**

1. The petitioners, 45 in number, are aggrieved of the Government Order No. 15-SKIMS of 2013 dated 19.03.2013 (hereinafter referred as 'impugned order' for short) whereby the services of the petitioners, who were initially engaged on contractual basis as Staff Nurses, were regularized with effect from 19.03.2013 i.e., from the date of issuance of the said Government Order. The grievance of the petitioners is that their regularization was not given effect from the date of their initial appointment under SRO 255 dated 05.08.2003 against migrant vacancies, as has been done in case of other similarly situated contractual employees.
2. Through the medium of the instant Service Writ Petition, the petitioners have challenged the impugned Order No. 15-SKIMS of 2013 dated 19.03.2013 to the extent that the regularization of the petitioners was to be given effect from the date they were initially appointed under SRO 255, and also sought direction to the respondents to grant them all consequential benefits, consequent to their regularization from retrospective date.
3. Brief facts of the instant case are that the petitioners, who had been initially appointed as Staff Nurses Grade-II on contractual basis in terms of SRO 255 dated 05.08.2003 against the migrant vacancies, claimed that their services be regularized but the respondents took no action, as such, they

filed writ petition bearing SWP No. 363/2021, which was allowed vide judgment dated 18.07.2012, directing the respondents to consider the claim of the petitioners for regularization of their service and provide 'other service benefits in accordance with the rules' to them; that consequent to the judgment so delivered, the services of the petitioners came to be regularized vide the impugned order but from the date of issuance of the order i.e. 19.03.2013; that the petitioners are entitled to regularization from the dates of their initial engagement.

4. It was alleged that another group of Staff Nurses Grade-II were also appointed vide Government Order No. 59-SKIMS of 2007 dated 23.10.2007, and subsequently this group of Staff Nurses, who were similarly placed as the petitioners came to be regularized vide Government Order No. 31-SKIMS of 2008 dated 10.03.2008 with effect from 13.09.2007; that the Government Order No. 610-GAD of 2006 dated 16.05.2006 provides for regularization against the migrant posts without waiting for the post to get vacated due to retirement or promotion of migrant employees and the said Government Order does not provide the date from which a person holding migrant post has to be regularized; that the petitioners continued in the service uninterruptedly and the services, so rendered by the petitioners, under the provisions of Classification Control and Appeal Rules, have to be regularized after formal orders of regularization are issued; that the services rendered by the petitioners between

2007/2008 till 2013 cannot go without recognition under Rules; that the petitioners shall be deemed to be on probation as from the date they were initially appointed under SRO 255; that this position has been accepted by the respondents themselves while dealing with the case of similarly situated Staff Nurses who were also appointed under SRO 255 and against migrant vacancies, and the petitioners cannot be discriminated.

5. The petitioners have challenged the impugned order on the following grounds:-

- I) That, the petitioners under Service Rules governing the service are entitled to regularization from the date of their initial appointment;
- II) That the petitioners in the matter of regularization cannot be discriminated under Articles 14 and 16 of the Constitution of India;
- III) That the petitioners are entitled to regularization on the basis of the judgment delivered by this Court from the date of their initial appointment;
- IV) That the petitioners, therefore, question Government Order No. 15-SKIMS of 2013 dated 19.03.2013 only to the limited extent that the said order grants regularization to the petitioners only from 19.03.2013 and not from the dates when the petitioners were initially appointed under SRO 255.

6. Pursuant to notice, respondents have filed the response, stating therein that the grievance of the petitioners that their

regularization should relate to the date from which the petitioners were appointed is not maintainable as per the standing instructions of Government Order No.610-GAD of 2006, which clearly depicts that migrant substitutes working in various departments against the migrant vacant posts shall be regularized against these posts without waiting for the post to get vacant due to the retirement or promotion of migrant employees or due to any other reason, therefore, there are no standing instructions of the Government to regularize such migrant substitutes from the date of their initial engagement.

7. Mr. Z.A.Shah, learned senior counsel appearing for the petitioners, argued that the petitioners have been subjected to invidious discrimination with regard to their right to regularization, inasmuch as, the petitioners were engaged as Staff Nurses-II in terms of SRO 255 dated 05.08.2003 along-with other group of employees, however, the case for regularizing the services of the petitioners was delayed willfully and intentionally by the respondents, whereas the cases of another group of similarly situated employees were considered and finalized w.e.f., 01.10.2007 on probation for a period of two years against the migrant vacancies held by them in terms of Government Order No. 610-GAD of 2006 dated 16.05.2006; that when two groups of 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. Learned counsel for the petitioners further submits that the Government Order No. 610-GAD of 2006 dated 16.05.2006 provides for regularization against the migrant posts without waiting for the post to get vacated due to retirement or promotion of migrant employees and the said Government Order does not provide the date from which a person holding migrant post has to be regularized. He urged that the petitioners' petition be allowed, with a direction to the respondent-Institute to regularize the services of the petitioners with effect from the dates of their initial engagements/appointments on contractual basis.
9. Mr. Furqan Yaqub, GA, ex-adversus, contended that it is well settled law that contractual appointments cannot be regularized retrospectively, and by doing so the seniority of regular employees shall get disturbed. He further contends that one wrong cannot be justified by another wrong. It is the further argument of learned GA that even the J&K Civil Services (Special Provisions) Act 2010, is also not applicable to the instant case, which makes provision for regularization of adhoc or contractual or consolidated appointees, as they had not been appointed against clear vacancies but against those temporary vacancies, whose holders due to unfortunate developments, had to migrate and services of petitioners were taken with the sole purpose to provide health care services to the people. He finally urged at the bar, that the petition, filed by the petitioners, being misconceived, be dismissed. Section-5 of the J&K Civil

Services (Special Provisions) Act 2010 is reproduced as under:-

“5. Regularization of adhoc or contractual or consolidated appointees. - Notwithstanding anything to the contrary contained in any law for the time being in force or any judgment or order of any court or tribunal, the adhoc or contractual or consolidated appointees referred to in section 3 shall be regularized on fulfillment of the following conditions, namely : -

(i) that he has been appointed against a clear vacancy or post ;

(ii) that he continues as such on the appointed day ;

(iii) that he possessed the requisite qualification and eligibility for the post on the date of his initial appointment on ad hoc or contractual or consolidated basis as prescribed under the recruitment rules governing the service or post ;

(iv) that no disciplinary or criminal proceedings are pending against him on the appointed day ; and

(v) that he has completed seven years of service as such on the appointed day :

Provided that the regularization of the eligible adhoc or contractual or consolidated appointees under this Act shall have effect only 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.

Provided further that any ad hoc or contractual or consolidated appointee who has not completed seven years service on the appointed day shall continue as such till completion of seven years and shall thereafter be entitled to regularization under this Act.”

10. Learned senior counsel for the petitioners, in rebuttal, submits that the employer cannot decide at its own about the date of regularization, as such, the respondents cannot take a different views with regard to date of regularization of different groups of employees, who are similarly circumstanced. He further argued that respondents have not mentioned anywhere that parity is not available to the petitioners herein, in view of regularization orders of other group of similar employees.
11. Heard, perused and considered.
12. 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.

13. 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...”

14. 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.”

15. The petitioners working in the respondent-Institute as Staff Nurses-II on contractual basis from the year 2007, due to their satisfactory work and conduct were also granted the extension; that the petitioners were entitled to be regularized

from the date of their initial appointment and keeping in view that the department has regularized the services of other similarly situated persons; that the petitioners were subjected to invidious discrimination which is violative of Article 14 and 16 of the Constitution of India.

16. The orders impugned are bad in law, inasmuch as, regularization of services of petitioners must relate to the date of their initial appointment; that due to the delay caused in regularizing the services of the petitioners, the petitioners have suffered a lot; that the petitioners were entitled to be regularized from the date they were initially appointed, however, their cases have been willfully delayed.

17. 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 group of similarly situated persons; that the petitioners are seeking parity with the other group of similarly situated persons, whose services have been regularized by the department, who were also contractual appointees and whose cases for regularization were considered and finalized in the year 2007, however, the cases of the petitioners were deferred for unknown reasons.

18. The petitioners have also placed on record the regularization orders of some contractual employees, whose services have been regularized by the respondent-Institute in the year 2007 in terms of the approval of Hon'ble Chief Minister (Chairman Governing Body), conveyed vide No. 2212 dated

28.08.2007, and alleged that the petitioners' regularization was delayed willfully and intentionally by the respondents when the case of similarly situated group of employees were considered and finalized.

19. Petitioners have placed on record Government Order No.59-SKIMS of 2007 dated 23.10.2007 (Annexure-D), whereby 18 Staff Nurses (already working against migrant vacancies) in terms of SRO 255 dated 05.08.2003 on contractual basis on consolidated salary, were regulated w.e.f. 01.10.2007 and vide Government Order No. 31-SKIMS of 2008 dated 10.03.2008 (Annexure-E), their services were regularized w.e.f. 13.09.2007 in terms of Government Order No. 610-GAD of 2006 dated 16.05.2006.

20. Government Order No. 610-GAD of 2006 dated 16.05.2006 on the subject of Regularization of Migrant Substitutes, is extracted for convenient reference as follows:

“In suppression of all the previous orders on the subject, it is hereby ordered that the migrant substitutes working in various Departments (detail of number of post mentioned in the annexure to this order) against the migrant vacant posts shall be regularized against these posts without waiting for the post to get vacated due to retirement or promotion of Migrant Employee or due to any other reason.

It is further ordered that in the eventuality of a migrant employee returning to the Valley, a post shall be deemed to have been created automatically. Such posts shall exist only till

migrant employee remains in Government service. The other vacancies available in different departments in the Valley shall be filled up as per the normal procedure.

A committee comprising the following shall be constituted to consider the proposal of the Administrative Departments regarding the regularization of migrant substitutes on a case-to-case basis after ascertaining the eligibility of such substitutes as per the Recruitment Rules governing the post...”

21. The respondents have neither denied specifically that similarly situated contractual Staff Nurses, engaged against migrant vacancies, had not been regularized retrospectively nor could point out anything in the Government Order, governing the subject, to provide as to from what date regularization is to be made.

22. 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 groups of similarly situated employees were considered and one group of them was accorded benefit of regularization, whereas the other group i.e. petitioners were discriminated, which amounts to contravention of Articles 14 and 16 of the Constitution of India.

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 Alopil 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 [Articles 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.

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. Thus, in view of the aforementioned legal position and the discussions made hereinabove, the impugned order, is, hereby, quashed, to the extent that the regularization of the petitioners shall be given effect from the date of their initial appointment under SRO 255 dated 05.08.2003, with further direction to the respondents to grant them all consequential benefits, consequent to their regularization from retrospective date.

28. Disposed of, as indicated above.

(M. A. CHOWDHARY)
JUDGE

Srinagar
30.12.2023
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>