

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

CJ Court

Reserved on: 11.11.2021.

Pronounced on: 17.11.2021.

Case: LPA No. 22 of 2019

State of Jammu and Kashmir and othersAppellant (s)

Through :- Sh. Adarsh Bhagat, GA.

v/s

Abdul Majid and othersRespondent(s)

Through :- Sh. Ajay Abrol, Advocate.
Sh. Anirudh Sharma, Advocate vice
Sh. Rahul Pant, Senior Advocate.
Sh. Achal Sharma, Advocate vice
Sh. Sudershan Sharma, Advocate

**CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MOHAN LAL, JUDGE**

JUDGMENT

PANKAJ MITHAL, CJ

1. The State of Jammu and Kashmir (now Union Territory), the Transport Commissioner and the Regional Transport Officer, Kathua have together preferred this letters patent appeal against the judgment and order dated 22.11.2018 passed by the writ court allowing *SWP No. 2319/2015, Abdul Majid and others v. State of J&K and others*, holding the petitioners therein entitled to regularization of services in terms of Jammu & Kashmir Civil Services (Special Provisions) Act, 2010 (for short 'the Act').

2. Learned counsel for the State appellants submits that the court is not justified in holding the petitioners/respondents to be entitled for regularization as the aforesaid Act was not applicable to them. They were being paid salary

out of the 'Contingent Fund' and employees drawing salary from contingent fund are not entitled for regularization under the Act. Moreover, the petitioners/ respondents were not engaged against any clear vacancy which is a prerequisite for seeking regularization in services. It is also submitted that in view of the *Secretary, State of Karnataka and others v. Umadevi and others*, AIR 2006 Supreme Court 1806, no appointment is permissible in law *de hors* the rules or the process of selection envisaged by constitutional scheme and as such appointment so made are not required to be regularized.

3. Learned counsel appearing for the petitioners/respondents submits that the petitioners/ respondents fulfill all the necessary conditions for the regularization of services under the aforesaid Act. The appointment of the petitioners/respondents was against the clear vacancies and as such they could not have been denied regularization on the aforesaid count. Accordingly, the writ court has rightly quashed the consideration order rejecting the claim of the petitioners/respondents. The aforesaid Act is the outcome of the decision of the Supreme Court in the case of Umadevi (*supra*) and as such any regularization within framework of the aforesaid Act is not illegal or against the constitutional mandate. The petitioners/ respondents on the date of their initial engagement were qualified and eligible for appointment and it is no one's case that their appointment was *de hors* the rules or the process prescribed.

4. The brief facts which had led to the filing of the writ petition and consequently this appeal are that that the petitioners/respondents were appointed on temporary basis as orderlies in the Transport Department in the year 1999, some in 2002 and 2003 for a period of 89 days but were allowed to continue even thereafter with intermittent break of a day or so. After the enforcement of the above Act, as the petitioners/ respondents have completed

more than seven years of continuous service and have otherwise fulfilled the essential conditions laid down for regularization therein, they claimed regularization but their claim was rejected on the ground that they were drawing salary from the contingent fund. The petitioners/respondents challenged the aforesaid rejection order and sought direction for regularization by filing SWP No. 250/2013, Abdul Majid and others v. State of J&K and others. The court allowed the aforesaid writ petition on 12.09.2014 and quashed the order refusing regularization of services of the petitioners/respondents with the direction to the official respondents to consider their cases for the purposes of regularization strictly in accordance with the aforesaid Act and that the ground that the petitioners/respondents were being paid out of the contingent fund would not be a ground for refusing regularization to them. Admittedly, the aforesaid order is final and conclusive as it was never questioned by any party in any higher forum.

5. On consideration of the cases of the petitioner/respondents for regularization, as per the direction of this court, the Empowered Committee competent to consider the cases for regularization in its meeting held on 18.05.2015 held that the petitioners/respondents have not been engaged against any clear vacancy or post and as such do not fulfill the criteria laid down under Section 5(i) of the Act for regularization.

6. In view of the above order, the only ground on which the claim for regularization of services of the petitioners/respondents has been rejected is that they were not employed against any clear vacancy or a post. It was also said that though under the Act persons getting salary out of the contingent fund are also not entitled for regularization but this ground was not invoked by the Department probably in the light of the earlier direction of the court.

7. In view of the aforesaid facts and circumstances, basically two grounds have been pressed for denying regularization of services of the petitioners/ respondents. The first is that they were being paid salary out of the contingent fund and second that they were never appointed against any clear vacancy or post and as such are not entitled for regularization within the meaning of Section 5 of the Act.

8. It is pertinent to mention here that the aforesaid Act came to be enacted and enforced pursuant to the directions of the Supreme Court in the case of *Umadevi (supra)* which directed for framing a proper one time scheme for the regularization of temporary workers who have put in over 10 years or more on a sanctioned post. The aforesaid Act envisages to regularize the services of all ad hoc or contractual employees including those appointed on consolidated pay provided they have not been appointed as part-time or seasonal employees including those whose wages are paid out of local funds or contingent grants. It further provides that such appointees ought to have been appointed against a clear vacancy or post and that they may have completed 7 years of service on the appointed date. In short, a plain reading of Section 3 and Section 5 of the Act provides for the regularization of services of ad hoc or contractual employees including those appointed on consolidated pay if they have been appointed against a clear vacancy or post and have completed 7 years of service, provided further that such benefit would not be extended to part-time or seasonal employees including those who are being paid out of the local funds or the contingent grants.

9. The issue whether the petitioners/respondents were being paid out of the contingent fund had come up for consideration in the first round of litigation i.e. in SWP No. 250/2013 and the order refusing to regularize

services on the above grounds was quashed with the direction to consider the cases of regularization of services of the petitioners/respondents afresh strictly in accordance with provisions of the Act and that payment of salary out of the contingent fund would not be a ground for refusal. As stated earlier, the aforesaid judgment and order has attained finality and, therefore, it does not lie in the mouth of the appellants at this juncture to raise again the said issue which stands settled. In fact, the said ground was not even invoked by the Department before the Empowered Committee that dealt with the matter of regularization of services of the petitioners/respondents.

10. The other issue on which the petitioner/respondents have been non suited is that their appointment was not against any clear vacancy or post. In this regard, the writ court has opined that no such objection was ever taken by the appellants at any stage in the first round of litigation and as such must be deemed to have been given up or be treated as barred by *principle of constructive res judicata*. Notwithstanding the above, the writ court on the basis of the communication of the Department dated 03.09.2009 recorded a categorical finding that according to the Transport Commissioner all the petitioners/respondents were appointed against clear vacancies and therefore, the argument has no substance.

11. We have also examined the communication dated 03.09.2009 which is part of the record. It is a letter addressed by the Transport Commissioner to the Commissioner/Secretary to the Government for the purpose of considering the cases for regularization of services of the employees of the Department in accordance with the above Act. The said communication contains a chart in the prescribed proforma 'C' giving the name of the employees, their designation, pay, date of initial appointment, the designation of the appointing authority,

whether the person is continuing in service and if his appointment was against a clear vacancy or otherwise. The said chart clearly mentions that the petitioners/ respondents were appointed against clear vacancy as orderlies on check post on a consolidated remuneration of Rs.1500/- per month by the Transport commissioner and that they are continuing in service from the date of their initial appointment.

12. The aforesaid communication clinches the issue regarding the appointment of the petitioners/respondents and establishes beyond doubt that as per the own showing of the Transport Commissioner, they were appointed against the clear vacancies.

13. In view of the aforesaid facts and circumstances, both the grounds that the appointment of the petitioners/respondents was not against clear vacancy or post, and that they were paid from the contingent fund do not stand substantiated and as such the writ court committed no error of law in holding that they are entitled for regularization of their services under the Act.

14. The order refusing regularization of services to the petitioners/respondents states that as their appointment is not against clear vacancy or post, they are not qualified for regularization in terms of Section 5 of the Act. The veracity of the said letter has to be judged on the basis of the reasoning recorded therein and that the said reasoning cannot be supplemented by means of pleadings or arguments as has been held by the Apex Court in the case of *Mohinder Singh Gill and another v. Chief Election Commissioner and others*, AIR 1978 Supreme Court 851 wherein it has been laid down that when a statutory authority makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. In view of the above dictum the

appellants in fact, cannot be permitted to take up any other ground other than refusing regularization on the account of not appointment against clear vacancy or post.

15. It may not be out of context to point out that any intermittent breaks of one or two days in service would not disrupt the continuance in service as such breaks are artificially created. The fact remains that the services continued from day one till the appointed day resulting in completion of seven years of service. The Act contemplates seven years of completed service rather than continuous service and in such a situation intermittent breaks of a day or two or such artificial breaks are meaningless and would not be sufficient to hold that the petitioners/ respondents do not have seven years of service to their credit.

16. In view of the above decision, the submission that the writ court acted contrary to *Umadevi's case (supra)* and against the constitutional mandate is of no consequence. In fact in holding the petitioners/respondents entitled to regularization in accordance with the statutory provisions, there seems to be no violation of the constitutional mandate or even the decision of the Apex Court in *Umadevi (supra)* which itself provides for framing of a scheme for one time regularization.

17. The recent decision of the Supreme Court in *State of Jammu and Kashmir and others v. District Bar Association, Bandipora, AIR 2017 Supreme Court 11* that the scheme for regularization framed by the government must be for validating certain irregular appointments and cannot be used to validate illegal appointments and that the court cannot issue direction for regularization without considering the mandate of the Supreme Court and the prevailing rules and regulations on the subject, is of no help to the appellants in the present case inasmuch as no illegality has been pointed out at any stage in the appointment

of the petitioners /respondents. They may have been irregularly appointed and it is for this reason their cases fell for consideration of regularization in accordance with the statutory provisions of the above Act. The writ court has considered their cases for regularization in the light of the provisions of the Act without impinging upon the mandate of the Apex Court. The petitioners/respondents have been found entitled for regularization of services in accordance with the prevailing rules and regulations.

18. In view of all that has been said above, we find no illegality in the judgment and order passed by the writ court. The appeal as such is bereft of merits and is dismissed with no order as to costs.

JAMMU
17.11.2021
Raj Kumar



Whether the judgment is reportable?:

Yes