

(2018) 11 J&K CK 0036

In the Jammu And Kashmir High Court

Case No : Service Writ Petition No. 2319 Of 2015, IA Nos. 2 Of 2015, 1 Of 2016

**Abdul Majid And Others @APPELLANT@Hash State Of Jammu & Kashmir
And Others**

Date of Decision : 22-11-2018

Acts Referred:

Jammu & Kashmir Civil Services (Special Provisions) Act, 2010 — Section 5(1)

Citation : (2018) 11 J&K CK 0036

Hon'ble Judges : Dhiraj Singh Thakur, J

Bench : Single Bench

Advocate : Ajay Abrol, Suneel Malhotra

Final Decision : Allowed

Judgement

1. This is the second round of litigation filed by the petitioners. They challenge the order dated 18.05.2015, whereby the case of the petitioners for regularization in terms of Jammu & Kashmir Civil Services (Special Provisions) Act, 2010 (for short "Act") have been rejected. A further mandamus is also sought, directing the respondents to regularize their services as Orderlies/Class-IV, with effect from the date they had completed seven years of service in terms of the aforesaid Act of 2010.

2. Learned counsel for the petitioners at the very outset stated that during the pendency of the instant writ petition, petitioner No. 5, namely, Sunny Sawhney has expired.

3. According to the order impugned, the petitioners are not entitled to regularization, inasmuch as, they were not engaged against any clear vacancies or posts and, therefore, did not satisfy the criteria as laid down in terms of Section 5(1) of the Act.

4. In the first round of litigation, the petitioner had filed SWP No. 250/2013, wherein similar prayer for a mandamus for consideration for regularization in terms of the aforesaid Act was made. In the objections filed by the official respondents in that petition, it was stated that the petitioners were not entitled

to regularization, inasmuch as, they were being paid out of "Contingent Funds". No objection at all was taken that the petitioners were not working against clear vacancies. This Court while allowing the said writ petition, set aside the order impugned in that petition, rejected the plea of the official respondents and disposed of the petition by holding thus:-

"7. This petition along with connected CMA(s) is, accordingly, disposed of in the following manner-

a. "Respondents are directed to consider the cases of the petitioners for the purposes of regularization strictly in accordance with J&K Civil Services Special Provisions Act, 2010

b. The ground that the petitioners were being paid out of the contingent funds would not be a ground for refusal of consideration for regularization nor would they be considered as disqualified for such regularization.

c. The case of the petitioners will be considered for grant of minimum wages under the Minimum Wages Act, 1948 w.e.f., the date of their initial appointment as such consolidated workers and arrears shall be paid accordingly.

d. The order of consideration would be passed in respect of the petitioners within a period of two months from the date of copy of this order is served upon them."

5. It appears that pursuant to the directions issued, order impugned has been issued, rejecting the case of the petitioners on the ground that they were not working against clear vacancies. On a perusal of the record, it appears that no such objection was ever taken in the first round of litigation in SWP No.250/2013 that the petitioners were not working against clear vacancies. In fact, there was a specific finding recorded in favour of the petitioners that "they would not to be considered as disqualified for such a regularization". This judgment and order dated 12.09.2014 according to the learned counsel for the petitioners has not been appealed against.

The finding that they were not to be treated as disqualified for such a regularization is a finding, which holds good even today. In any case, the objection that the petitioners were not working against clear vacancies not having been taken in the earlier round of litigation must be deemed to have been barred on the principle of constructive res judicata.

6. Notwithstanding the above, with a view to support the order of rejection, the official respondents filed their response, reiterating that the petitioners had not been engaged against the clear vacancies.

7. An affidavit has also been filed by the Additional Transport Commissioner, J&K, wherein a stand is taken that between the year 1999 to 2000 there were no vacancies of Class-IV cadre in the Motor Vehicle Department and that 38 vacancies became available in the Department from the year 2007 to 2011, out of which 31 posts were advertized vide notification dated 06.06.2013 and 07

posts were reserved, as per the directions passed by this Court in the present petition

The affidavit so filed does not inspire confidence for the reason that the same is telegraphic and does not give the details of the cadre strength in regard to Class-IV posts and the actual dates when the posts fell vacant. It is difficult to comprehend a case where the vacancies do not fall vacant in any cadre for years on end.

8. On the contrary, a reference to communication dated 03.09.2009 shows that according to the Transport Commissioner, all the petitioners had been appointed against clear vacancies. This is an important communication, which cannot be ignored when juxtaposed with the affidavit filed by the Additional Transport Commissioner, which appears to be without the requisite details with regard to the cadre strength and the precise dates on which the vacancies fall vacant.

9. In any case, even according to the affidavit, 07 vacancies are still unfilled, assuming the same were available from 2007 and onwards. The petitioners would be eligible for being considered for regularization having completed seven years of continuous service, in terms of the Act.

10. Be that as it may, this petition is allowed. Order impugned dated 18.05.2015 is hereby quashed. The petitioners are held entitled to regularization in terms of Jammu & Kashmir Civil Services (Special Provisions) Act, 2010. An appropriate order in this regard shall be passed by the respondents within a period of six weeks" from today.

11. Disposed of accordingly.