

(2007) 02 J&K CK 0007
In the Jammu And Kashmir High Court

State of Jammu & Kashmir and Others	Vs	APPELLANT
Prithvi Raj and Others		RESPONDENT

Date of Decision : 07-02-2007

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2007) 2 JKJ 401 : (2007) 3 LLJ 992

Hon'ble Judges : B.A. Khan, C.J.;J.P. Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

J.P. Singh, J.—These original side appeals preferred under the Letters Patent, by the State of Jammu and Kashmir, question a common

judgment of a learned Single Judge of this Court delivered on 26th of July 2002 allowing respondents' SWP Nos. 1531/2000, 1653/2000 and

1900/2000, directing the appellants to take notice of the observations made in a Division Bench Judgment of this Court in LPA(SW)-D-21/2000

titled Ashok Kumar and Ors. v. State and Ors. decided on 26th of July 2002 and to consider the claims of respondents for regularization in

service besides directing release of their salary within a period of one month failing which the respondents would become entitled to interest @

12% And quashing Chief Conservator of Forest (Project Director SF Project) Jammu and Kashmir, Jammu's Order No. 2-4/SFP/A/HQ dated

30th of June 2000 and Divisional Forest Officer Social Forestry Division Doda's Order dated 3rd of July 2000.

2. Facts necessary for the disposal of these appeals may be stated thus:

The respondents in these appeals had filed writ petitions in their earlier round of

litigation in this Court which were disposed of with a direction to the appellants to treat their writ petitions as 'representation' for consideration of their cases in terms of various standing orders and policy decisions as also decision given by Supreme Court of India in case reported as State of Haryana and others Vs. Piara Singh and others etc. etc., , These respondents had filed contempt petitions as well to seek compliance of the directions of the writ court. The Chief Conservator of Forests Project Director SF Project Jammu and Kashmir, Jammu and Divisional Forest Officer Social Forestry Division, Doda issued speaking orders in compliance to the directions passed by the writ court rejecting the claim of the respondents to regularization in Government service. The order of the Chief Conservator of Forest reads thus:

Sub:- SWP1410/98 titled Shiv Kumar v. State and Ors..

In compliance to the orders of the Hon'ble High Court J&K issued in the above petition dated 13-08-98, the case was re-examined for settling the issue. The factual position is described as under:

- i. The instant case pertains to the DPAP, a scheme executed in the districts under the control of District Development Commissioners, executed through various development agencies. Social Forestry was one of these agencies that undertook plantations under DPAP since 1990 in Doda district. District Development Commissioner Doda is the chairman of the DPAP. Project Officer DPAP is the nodal officer for the Project.
- ii. Social Forestry Project received funds from DPAP up to 1995 for wages & works, and later on up to 1998-99 only for works and not for wages and after that Social Forestry Project did not receive any funds from DPAP. Casual daily labour (CDL) were engaged to look after the plantations raised under the scheme.
- iii. That CDL was engaged only against the demand of the DPAP agency required for carrying out their works and were not engaged for any works of the Social Forestry Project.
- iv. That the CDLs so engaged continued to work as such even after 1995 but the DPAP agency did not release the funds for paying wages to these CDLs so engaged despite reminders.
- v. That Social Forestry Project was only executing agency for the DPAP project.

The funds for meeting out the wages had to be released by the DPAP agency and after the wages were paid to the concerned CDLs, the bills were again sent to DPAP agency who would then send their account to the A.G.

vi. That the DPAP agency released the wages of the CDLs so engaged up to 09/95 and there after neither released the wages nor informed the

project to discontinue their engagements. However, the CDLs continued and this project was time and again requesting the DPAP agency vide

DFO, SF Div. Doda's No:-938-41 Dated 08-10-98 and 862-63 Dated 22-07-99 for releasing the payment but there was no response from

DPAP agency and it is now after a lapse of five years the DPAP agency has shown their reluctance to release the amount for paying wages to the

CDLs so engaged for carrying out their work under DPAP. It is pertinent to mention that in the District Development Board meetings also this

issue was raised by the u/s and I was hopeful that the DPAP shall continue to provide funds.

vii. Meanwhile some of the CDLs so engaged filed Writ Petition in the Hon'ble High Court at Jammu for their regularization, continuation and release of wages etc. etc.

viii. That one Shiv Kumar S/o Surb Chand was engaged in year 1993 as CDL for carrying out the works of DPAP agency. The works were

carried out under scheme of Rehabilitation of Degraded areas and Village wood lots under DPAP scheme.

ix. That Sh. Shiv Kumar S/o Surb Chand filed a writ petition in the Hon'ble High court which was registered as SWP 1410/98 and came to be

disposed of by Hon'ble High Court on 13-08-98 and that while disposing of the writ petition, the Hon'ble High court issued the following

directions:

1. that the writ petition be treated as a representation.
2. that the claim of the petitioner be considered in terms of the various standing orders and the policy decision.
3. Respondents would also take notice of the decision given by the Supreme Court of India in the case reported as State of Haryana and others

Vs. Piara Singh and others etc. etc., let the appropriate steps be taken as early as possible preferably with in a period of 3 months. The period of 3

months would begin from the date a copy of order passed by this Court along with writ petition and annexures thereof is made available by the

petitioner to the concerned authorities. If for any practical reasons it is not possible to take the decision respondent authority would be in liberty to

seek extension of time. But in that eventuality they would have to explain each and every days delay.

4. that the claim of the petitioner for monetary benefits be also considered with in the aforementioned period. In case the monetary claims are due

and there are not settled within the stipulated period then the petitioner would be entitled to the interest. The rate of interest would be 12%.

5. during the period the matter is under consideration with the respondent authorities, they would maintain status quo with regard to the service

conditions of the petitioner. In case any adverse order is passed that be kept in abeyance for a period of four weeks. Disposed of accordingly'

x. That the case of the petitioner was examined and considered in the light of the directions issued by Hon'ble High court and this project has to

come to the following conclusions.

a. Since the petitioner Sh. Shiv Kumar S/o Srib Chand was not engaged as Daily wager by this project but was engaged as CDL only for carrying

out the work of DPAP agency, the wages were to be released by DPAP agency and this project was only an executing agency for DPAP works.

b. That the petitioner Sh. Shiv Kumar is not entitled to the benefits of SRO 64 of 1994 which pertains to the regularization of Daily wagers

because the petitioner was not engaged for any post of the project but was engaged in the time bound scheme started by DPAP agency.

c. That the claim of Sh. Shiv Kumar for wages from 10/95 till date has been taken with DPAP agency. The moment funds are released the same

shall be paid to him without any delay as per the directions of the Hon'ble High Court, and this issue has already been taken up with the DDC.

d. That since the DPAP agency has replied vide No: DPAP/99/503-07 Dated 17-11-99 that the project has lot of funds (clause 9 of No:-

DPAP/99/503-07 Dated:-17-11-99) is totally out of context and this does not absolve the DPAP from clearing their liabilities. As a matter of fact

the Social Forestry is faced with acute financial crunch and S.F.P. is put to hardship due to non receipt funds from DPAP agency. This project is

not in a position to continue the engagement of Sh. Shiv Kumar any more and as such his engagement is dispensed with, with effect from 30-06-

2000.

e. That at present the policy of the Govt. pertaining to regularization of daily rated worker is engaged under SRO-64 of 1994 and petitioner Sh.

Shiv Kumar S/o Sh. Surb Chand does not fall in the ambit of aforementioned SRO because petitioner was engaged in the time bound scheme of

DPAP agency which is not in existence with DPAP agency any more.

f. However the order is kept in abeyance for four weeks in terms of directions of the Hon'ble High court.

Sd/-

Chief Conservator of Forests,

Project Director, S.F. Project,

Jammu & Kashmir, Jammu.

4. Similar order was passed by Divisional Forest Officer Social Forestry Division Doda.

5. Aggrieved by these orders, the respondents filed three petitions SWP Nos. 1531/00,1900/00 and 1653/00 seeking quashing of these orders

besides further directions for their regularization in service and payment of salary.

6. Respondents' case, as projected in their writ petitions, in nutshell was that they had been appointed as ""closures"" in Social Forestry Department

from 1990 onwards. Whereas some of the respondents were stated to have been appointed in 1990, the others had been appointed in 1992,1993

and 1995 as casual labourers and that their cases were fully covered by SRO 64 of 1994 which had notified the Jammu and Kashmir Daily Rated

Workers/Work Charged Employees (Regularization) Rules 1994 (hereinafter referred to as ""Regularization Rules""). They had stated that they

were engaged as casual daily labourer for project works against clear vacant posts and not under a time bound scheme. Orders passed by Chief

Conservator of Forest and Divisional Forest Officer were assailed as unjustified and illegal, passed on wrong statement of facts. Appellants, in their

reply to the writ petitions, had questioned the maintainability of the writ petition in the absence of Drought Prone Area Project Agency as party-

respondent besides saying that the case of the respondents did not fall within the

purview of 'Regularization Rules'. On facts, the appellants had projected in their reply that the respondents had been engaged for carrying out the work of Drought Prone Area Project Agency which was a time bound project and since the agency was not releasing the wages of the petitioners so they had no option but to disengage the respondents. The appellants had specifically stated that the respondents had neither been engaged against any of the posts of the Social Forestry Project and nor were they working.

7. Learned Dy. Advocate General, Mr. Vinod Bakshi, while questioning the judgment impugned in the appeals referred to State of Himachal Pradesh, through the Secretary, Agriculture to the Govt. of Himachal Pradesh Vs. Nodha Ram and others, to urge that the respondents did not have any right to seek regularization because their engagement and payment by the project would not entitle them to regularization in State service under the 'Regularization Rules' which were applicable only to those who had been engaged by a Department of the State Government to render casual services to a Department of the State Government. Engagement of respondents by Drought Prone Area Project Agency, which was not a Government Department, would not clothe the respondents with any right to seek regularization in Government service.

8. Learned Counsel for respondents Mr. M. P. Sharma while supporting the view and findings of learned Single Judge and reiterating the case set-up by the respondents in their writ petitions to seek regularization in Government Service urged that long spell of engagement of the respondents by the appellants under Drought Prone Area Project Agency Scheme entitles the respondents to regularization in Government service both in equity as also under the Regularization Rules.

9. The case set-up by the respondents in the three writ petitions and the reply of the appellants to the writ petitions raised following questions for adjudication viz:

(1) Whether the respondents had been engaged by any Department of the State Government for rendering services to the Department or their engagement was under the Drought Prone Area Project Agency and whether their engagement as such would entitle them to seek regularization in service?

(2) Whether long spell of engagement of the respondents by the appellants under Drought Prone Area Project Agency Scheme creates any equity

in the respondents to seek regularization in Government service?

(3) Whether the respondents were entitled to regularization under the Regularization Rules (SRO 64 of 1994)?

10. The learned Single Judge did not examine any of these questions and instead proceeded on the premise that the appellants had not denied in

the reply that the respondents had been engaged as casual daily labourers in the Social Forestry Department, And proceeding on this premise had

held that the plea of the appellants that the scheme had come to an end was not acceptable. Learned Single Judge had taken the view that once the

trees had been planted, someone was supposed to look after the planted trees and in that view of the matter, the scheme could not be said to have

come to an end.

11. This finding of learned Single Judge, is not sustainable because of the reason that the appellants had specifically denied the engagement of the

respondents by the Social Forestry Project, Paragraph 4 (c) and (d) of the reply of the appellant in SWP No. 1653/2000 demonstrates this

position. These paragraphs read thus:

(c). Averments made in ground (c) needs no reply in view of the detailed submissions made hereinabove. As already made clear above, the

answering respondents were only the executing agency for the works of the DPAP Project of which Dy. Commissioner, Doda is the Chairman.

The DPAP Agency released the wages of the labourers after 1995 for the period the labourers were working with the answering respondents as

an executing agency of the DPAP from time to time. Even the Annexures 'E' and 'F' do not disclose that the petitioner was not working under

DPAP Scheme.

(d) Averments made in ground (d) are denied. The petitioner is not entitled to SRO 64 of 1994, neither the petitioner was engaged in the Social

Forestry Project as already made clear hereinabove was engaged for carrying out the works of the DPAP Project. Moreover, the averments made

in the paras are also vague as the petitioner has alleged that he is continuously working against a clear vacant post, but has not disclosed against

which post he was working, which also falsifies the stand of the petitioner.

12. The learned Single Judge was thus not right in proceeding on the premise that the appellants had not denied the engagement of the respondents

by the Social Forestry Project. Learned Single Judge without dealing with appellants' specific plea that the respondents were not entitled to

regularization under SRO 64 of 1994, had proceeded to direct the regularization of the respondents in Government Service. This direction of

learned Single Judge, without considering the plea of the appellants may not thus be sustainable.

13. Public employment in a sovereign, socialist, secular, democratic republic, like ours, has to be, as envisaged by the Constitution and laws made

thereunder. Equality of opportunity being the hallmark, every effort is required to be made by all constitutional functionaries and those functioning

under various laws and statutes to ensure that unequals were not treated equals. The courts are thus required to consider claims for regularization in

public service in this background.

14. True it is that the State and its functionaries have been resorting to make interim, adhoc or temporary arrangements to tide-over situations and

at times emergent one, in engaging persons for doing casual duties and that too, at times for longer spells of time without following the regular

procedure prescribed for public employment, and the courts have been, at times, liberal in issuing directions for engagement of such persons on

regular basis adopting humanitarian approach. Such directions issued by the courts of the Country directing engagement of persons on regular basis

has been viewed by Hon'ble Supreme Court of India as phoenix 'litigious employment' seriously impairing the constitutional scheme. Such

regularization of service, tends to defeat the very constitutional scheme of public employment, says Hon'ble Supreme Court of India. It would be

profitable to refer to few paragraphs of the Constitutional Bench Decision of Hon'ble Supreme Court of India in case titled Secretary State of

Karnataka and Ors. v. Uma Devi and Ors. reported as 2006 AIR Supreme Court Weekly 1991 to discern the true concept of public employment

and regularization in service of those engaged as daily rated, temporary, ad-hoc or casual workers:

4. This Court has also on occasions issued directions which could not be said to be consistent with the constitutional scheme of public employment.

Such directions are issued presumably on the basis of equitable consideration or individualization of justice. The question arises, equity to whom?

Equity for the handful of people who have approached the court with a claim or equity for the teeming millions of this Country seeking

employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin has

also to be considered and the way open to the court of law or justice is to adhere to the law as laid down by the Constitution of India to make

directions which at times, even if do not run counter to the constitutional scheme, certainly tend to water down the requirements. It is this conflict

that is reflected in these cases referred to the Constitutional Bench.

36. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned

person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either

temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is

not in a position to bargain-not at arms length-since he might have been searching for some employment so as to eke out his livelihood and accepts

whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view

that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating

another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that

the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on

such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people

who at least get employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast

country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such

an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the

consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It

is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the

interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular

appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be

just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the

jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and

equality of opportunity enshrined in Article 14 of the Constitution of India.

43. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the

employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue, In this context, the question arises

whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the constitution Bench

of this Court in *Dr. Rai Shivendra Bahadur v. The Governing body of the Nalanda College* (1962) Supp 2 SCR 144. That case arose out of a

refusal to promote the writ petitioner therein as the principal of a college. This Court held that in order that a mandamus may issue to compel the

authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under

the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the

Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or

that the State has a legal duty to make them permanent.

15. The undisputed facts of this case are that the respondents, as is evident from the official communications relied upon by the respondents and

annexed with their writ petitions, were aware that they had been engaged under the Drought Prone Area Project Agency Scheme. They thus, in

view of the judgment of Hon'ble Supreme Court of India, referred to

hereinabove, cannot be heard to say that they had been engaged by the Social Forestry Project of the Forest Department for doing departmental work. Specific denial of the appellants that the respondents had not been engaged by the Government department of the State of Jammu and Kashmir for doing departmental work, in the absence of any proof furnished by the respondents to the contrary indicating their engagement by the Forest Department, cannot be ignored. We thus do not subscribe to the view taken by learned Single Judge that the respondents had been engaged by the Social Forestry Project of the State Government.

16. Long spell of respondents' engagement under the Drought Prone Area Project Agency Scheme does neither create any equity nor an enforceable right in the respondents to seek regularization in Government service. Regularization in Government service, in view of the existing rules in force in State of Jammu and Kashmir may be claimed by daily rated workers/work charged employees only if they would bring their case within the parameters prescribed by the Regularization Rules.

17. The plea of equity based on long spell of their engagement entitling them to regularization in service, urged by the respondents in their writ petitions is thus mis-conceived. It is accordingly rejected.

18. All that now remains to be seen in the present case is as to whether or not the case of the respondents was covered by the Regularization Rules.

19. The first and foremost thing which a daily rated worker is required to project, to seek regularization under the Regularization Rules, is that he had been engaged for rendering casual services continuously for the period prescribed under the Regularization Rules, for rendering casual services to a Government Department. The material placed on records, by the respondents does not satisfy this requirement, as had been held by us in the preceding paragraphs. The records, on the other hand, demonstrate that the respondents had been engaged under Drought Prone Area Project Scheme, which had since come to an end.

20. In this view of the matter, we do not find the respondents to have established that they had been engaged by a Government Department of the State Government to render casual services to the department and were entitled to regularization under the Regularization Rules.

21. We do not find the view of learned Single Judge sustainable when he proceeds to say that as some one was required to look-after the

plantation so the Drought Prone Area Project Agency Scheme could not be said to have come to an end.

22. Respondents' having not been engaged by the Government Department to render services to the Government department thus ousts the

application of ""Regularisation Rules"" to the case of the respondents. Plea of the respondents that they were entitled to regularization in service and

payment of salary by the State Government is thus rejected as untenable.

23. On facts of the present case, we find the appellants' case squarely covered by judgment of Hon'ble Supreme Court of India in case titled State

of Himachal Pradesh, through the Secretary, Agriculture to the Govt. of Himachal Pradesh Vs. Nodha Ram and others, , where the Hon'ble

Supreme Court of India had proceeded to say as follows;-

3. The facts are that the respondents were engaged on daily wages on muster roll basis in Central Scheme and were paid out of the funds provided

by the Central Government. It is stated that after the scheme was closed their services were dispensed with. When the respondents filed the writ

petitions in the High Court, the High court gave interim direction on November 18, 1992 and directed their re-engagement elsewhere. Against the

aforesaid direction this appeal by special leave has been filed.

4. It is seen that when the project is completed and closed due to non-availability of funds, the employees have to go along with its closure. The

High court was not right in giving the direction to regularize them or to continue them in other places. No vested right is created in temporary

employment. Directions cannot be given to regularize their services in the absence of any existing vacancies nor can directions be given to the State

to create posts in a non-existent establishment. The Court would adopt pragmatic approach in giving directions. The directions would amount to

creating of posts and continuing them despite non-availability of the work. We are of the considered view that the directions issued by the High

Court are absolutely illegal warranting our interference. The order of the High Court is, therefore, set-aside.

24. The upshot of the above discussion leads us to the conclusion that Drought Prone Area Project Agency Scheme had ceased to operate and

the respondents having not been engaged by the Forest Department of the State of Jammu and Kashmir for doing any departmental work, the writ

petitions of the respondents were mis-conceived and were liable to be rejected. Learned Single Judge has erred in allowing the writ petitions and

issuing directions which have been impugned in these appeals.

25. We accordingly, while allowing these appeals set-aside the impugned judgment dated 26th of July 2002 of learned Single Judge and dismiss

writ petition Nos. 1531/2000, 1653/2000 and 1900/2000 without any order as to costs.

A copy of this judgment shall be placed on each file.