HIGH COURT OF JAMMU AND KASHMIR

AT JAMMU

LPASW no. 180/2009
CMA no. 234/2009

Date of order: 23.11.2012

State of J&K and ors v Naresh Kumar

Coram:

Hon'ble Mr. Justice M. M. Kumar, Chief Justice.
Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge.

Appearing counsel:

For the Appellant(s) : Mr. Gagan Basotra, Sr. AAG with
Mr. G. S. Thakur, GA.
For the respondent(s) : Mr. N. A. Choudhary, Advocate.
Mr. Raghu Mehta, Advocate.

M. M. Kumar, CJ

1. The instant appeal under Clause 12 of the Letters Patent is directed against judgment and order dated 13.02.2009 rendered by the learned Single Judge, allowing the writ petition filed by the writ petitioner-respondent, holding that the appellant-State committed illegality by passing the order of termination on 07.04.2005 in respect of the writ petitioner-respondent. A direction has also been issued to the appellant to re-engage the writ petitioner-respondent and take a decision of his regularization under SRO 64 of 1994 within a period of three months.

2. The writ petitioner-respondent was engaged as a cook on 04.08.1997 on a consolidated pay of Rs. 35/-per day in the respondent-Police Department. He continued working as such till 07.04.2005 when he was disengaged. The appellant-State

has framed rules under proviso to Section 124 of Constitution of J&K which are known as J&K daily rated workers work charged employees (Regularization) Rules, 1994 vide SRO 64 of 1994 (for brevity 'Regularization Rules') to regularize the services of daily rated workers. Rule 4 of Regularization Rules provides for eligibility of a daily rated worker or work charged employee. The aforesaid Rule would read as under:-

> "4. Eligibility for regularization:- A Daily Rated Worker/Work Charged Employee shall be eligible for regularization on fulfillment of the following conditions, namely:-
> (a) that he is a permanent resident of the State;
> (b) that on the date of his initial appointment his age was within the minimum and maximum age limit as prescribed for appointment in Government Service;
> (c) that he possesses the prescribed academic and/or technical qualification for the post against which he is required to be regularized.
> Provided that in case of eligible Daily Rated Workers to be regularized against Class IV posts, relaxation of qualification and/or age shall be considered on merit by the concerned Administrative Department.
> (d) that he is not a retiree from any State or Central government service or any Local Body, Public Sector Undertaking or Autonomous Body in or outside the State.
> (e) that his work and conduct has remained satisfactory during the period he worded as Daily Rated Worker or work Charged Employee and no disciplinary proceedings are pending against him; and
> (f) that he has completed seven years continuous period of working as Daily Rated Workers or Work Charged Employee or partly as Daily Rated Worker and partly as Work Charged Employee."

3. A perusal of the aforesaid Rule would show that a daily rated worker has to be a permanent resident of appellant-State, on the date of his initial appointment he was required to be

within the minimum and maximum age limit as prescribed for appointment in Government Service and he must be in possession of prescribed academic qualification for the post against which he was required to be regularized. Although the daily rated worker to be regularized against a Class IV post would also be entitled for consideration for relaxation of qualification and/ or age but such a person should not be a retiree from any State or Central Government Service or any Local Body etc., his work and conduct should have remained satisfactory and no disciplinary proceedings should be pending against him. The most important clause is that such an employee must have completed seven years continuous period of working as a daily rated worker. According to Rule 5 all daily rated workers who on 31.03.1994 were eligible and fulfilled conditions specified in Rule 4 for regularization were to be appointed with effect from 01.04.1994 on regular pay scale of Class IV prescribed in the concerned Department. In other words, those employees who have been appointed later were not eligible for regularization. As the writ petitioner-respondent was engaged as a cook on 04.08.1997, the appellant took the view that he failed to satisfy the conditions of Rule 4 and, therefore, was not entitled to regularization.

4. The learned Single Judge made a reference to Rule 8 which deals with such Daily Rated Workers, who may not have

completed seven years service on 31.01.1994 but may do so by the end of subsequent financial year. The absorption of such person was to be reckoned in that financial year. Reading the Rules co-jointly the learned Single Judge interpreted the Rules and held that the power of regularization was not one time measure but it was a continuous process by virtue of Rule 8 of the Rules. Rule 6 dealt with the worker charged employees and provided all such employees would be brought on regular temporary establishment with effect from 01.04.1994, if they fulfilled all the conditions laid down in Rule 4. Imputing the intention to the rule maker the learned Single Judge concluded that Rule would apply even to those who have not completed seven years service as on 31.03.1994 or who were appointed after 31.03.1994. The aforesaid view of the learned Single Judge is discernible from the following observations, which reads thus:-

> "This in my view is not aim and object of the Act. The plain reading of the provision does not by its language restrict the regularization of those persons who are appointed after 31.3.1994. All that is sought to be stated is that persons who are appointed before 31.3.1994 but have not completed seven years of service would alone be eligible. If the intention was to confirm the regularization of the services of those persons, who have completed seven year as on 31.3.1994, one can safely state that it is one time exception. It is not intend and purpose of the rules. It permits regularization of those persons also, who have not completed seven years of service on 31.3.1994, but are also eligible for regularization on completion of seven years. Intend and purpose of the rule is to provide permanent status to the Daily Rated Workers who are working continuously for more than seven years.
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> The rule of reading down a provision of law is well recognized. It is a rule of harmonious construction in a different name. It is resorted to smoothen the crudities or ironing out the creases found in a statute to make it workable. The rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. It is to be

> used keeping in view the scheme of the statute and to fulfill its purposes. I fortify my view with the judgment of Supreme Court reported in B.R. Enterprises Vs State of U.P SCC 764-66.
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> Applying these observations to the case in hand, it can safely be stated that any person who has not completed seven years of service as on 31.3.1994 would be entitled for regularization will also apply to those persons who got appointed after March, 1994. This interpretation will achieve the object and purpose of SRO, which came into force for providing permanent status to the Daily Rated Workers under SRO 64 of 1994. The mischief, which is sought to be achieved, if any, in the rules will get eliminated. I, therefore, hold that all those persons who were appointed after 31.3.1994 would be also eligible for regularization under SRO 64 of 1994.
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> In view of the above, I allow this writ petition and set aside the order of termination dated 7.4.2005 so far as it pertains to the petitioner-Naresh Kumar and direct the respondents to re-engage him and take decision for regularization of his services under SRO 64 of 1994 within a period of three months from the date a copy of this order is received by them."

4. Mr. Gagan Basotra, learned Sr. AAG, has argued that the learned Single Judge committed grave error in law by expanding the area of application of SRO 64 by bringing in its fold all daily rated workers and work charged employees. Such a blanket direction issued by the learned Single Judge is not rooted in Regularization Rules. He has further submitted that engagement of the writ petitioner-respondent on 04.08.1997 is patently against the provisions of Regularization Rules which specifically prohibits engagement of any Daily Rated after 31.03.1994. In that regard he has drawn our attention to Rule 7 of the Regularization Rules, which creates a complete bar on the field/Subordinate Officers to engage a daily rated worker/ work charged employee in the department and all subordinate officers were denuded of all such powers. The delegations, if any, also stood withdrawn with effect from the commencement of the Regularization Rules. Mr. Basotra has also placed

reliance on a 5-Judge Constitution Bench judgment rendered in **Secretary, State of Karnataka v. Uma Devi, (2006) 4 SCC 1**. According to Mr. Basotra the view of the learned Single Judge, that it is a continuous process without confining the same to the four corners of the Rules, impliedly permitted an authority to engage a daily rated worker. The creation of a post would involve huge financial consequences and no such decision can be viewed in isolation. Therefore, the policy was a one time measure and cannot be extended to cover all employees who have completed seven years any time either before the cut off date or after the cut off date, irrespective of any other requirement.

5. On the other hand learned counsel for the writ petitioner-respondent, Mr. Choudhary has argued that once the writ petitioner-respondent was engaged on daily rated basis then for no fault of his he could be made to suffer because such Class IV employees are totally illiterate and are not even aware of their rights. It has further been submitted that Rule 8 itself expands the period of seven years to apply on such other employees who may complete the same by the subsequent financial years. Therefore, the interpretation, imputing the intention to the rule maker by the learned Single Judge is well based and sustainable in the eyes of law and principles applicable for construing the statutes.

6. Having heard the learned counsel for the parties, we are of the considered view that the learned Single Judge has committed a grave error in law by extending the Rules to such daily rated employees who do not fall within the four corners of Regularization Rules. The matter is no longer *res integra*. It is pertinent to mention that Hon'ble the Supreme Court in case of **State of Haryana v. Piara Singh, AIR 1992 SC 2130** had set aside a similar view taken by a Division Bench of Punjab and Haryana High Court in a large number of cases and in the concluding para it has been observed by their Lordships of Hon'ble the Supreme Court that the normal rule of course is recruitment through the prescribed agency. If adhoc employment was necessitated then it should be replaced by a regular selected employee as early as possible where such a daily rated/adhoc or temporary employee is always entitled to compete along with others for regular appointment. However, even the aforesaid judgment has been overruled in Uma Devi's case (supra).

7. We also find that no direction against the mandate of Rule 7 of the Rules of 1994 could have been issued which creates a complete bar on the subordinate officers to have the power to engage a daily rated worker in the department after 01.04.1994. The engagement of the writ petitioner-respondent on 04.08.1997 itself contravenes Rule 7.

8. We also find merit in the contention of Mr. Basotra that regularization cannot be regarded as a continuous process. Such an interpretation would result in engagement of a daily rated worker or a work charged employee at any time who may seek regularization on completion of seven years. It would encourage the engagement of Daily Rated Workers after 01.04.1994 and frustrate the efforts of the State to resort to regular appointment consistent with the provisions of Article 14 and 16 (1) of the Constitution of India. It must be an understood that creation of a post in an unplanned manner have great financial implications which might impact the financial planning of the State. We need not emphasize the principles which have already been laid down by the Constitution Bench judgment of Hon'ble the Supreme Court in Uma Devi's case. We are tempted to quote the following extract from paragraphs nos. 43 and 45 of the judgment rendered in Uma Devi's case (supra), which reads thus:-

> 43. Thus, it is clear that adherence to the rule of *equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the*

> *contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued*. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right……"
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> 45. 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……."

9. The Hon'ble Supreme Court in para 54 has also observed that all those decisions which runs counter to the principles settled in Uma Devi's case (supra) or in which directions have been issued which run counter to that decision were to be denuded of their status as precedents. Therefore, we are of the

view that the learned Single Judge could not have issued any such directions.

10. All policies and statutory rules framed by the state for regularization of daily rated or work charged employees must seek guidance from para 53 of the judgment in Uma Devi's case (supra). It envisages that such a policy should be only one time measure to regularize an irregular appointment as explained in R. N. Nanjundappa vs T. Thimmiah (1972) 1 SCC 409 and State of Mysore vs S. V. Narayanappa AIR 1967 SC 1071. Para 53 clarifies all doubts concerning one time policy of regularization and same is set out below *in extenso*:-

> "One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA (supra), R.N. NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

11. It is clearly laid down that an employee should have been appointed against a duly sanctioned vacant post. Any irregularity like e.g a procedural lapse could be cured. A policy of regularization cannot be a door to heaven for all back door entrants. It obviously cannot be a continuous process and therefore must be a one time measure. Therefore, the view of learned Single Judge would not be sustainable.

12. As a sequel to the above discussion this appeal succeeds. The judgment and order passed by the learned Single Judge is set aside. The writ petition of the writ petitioner-respondent is dismissed. However, there shall be no order as to costs.

(Mohammad Yaqoob Mir) **(M. M. Kumar)**
Judge **Chief Justice**

Jammu,
23.11.2012
Anil Raina, Secy