HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

SWP no.321/2012

Date of order:27.02.2017

Ghulam Mohammad Dar and others

Versus

State of J&K and others

Coram:

Hon'ble Mr Justice Ali Mohammad Magrey, Judge

Appearing Counsel:

For Petitioner(s): Mr AltafHaqani, Advocate
For Respondent(s): Mr R.A.Khan, Additional Advocate General

Whether to be reported in Digest/Journal: Yes/No

1. Petitioners seek regularisation of their services in terms of mandate contained in Work Charged Employees Rules, 1972 and their continuation in engagement and release of their unpaid wages. They also seek quashment of order no.GTDII/610-30 dated 24.11.2006, passed by Executive Engineer, Gas Turbine Division-II, Pompore – respondent no.6 herein, with further prayer to extend the benefit of judgement of the Supreme Court in case titled *State of Haryana v. Piara Singh* and Division Bench of this Court in *Ashok Kumar v. State of J&K* for purposes of their regularisation and continuation.

2. Briefly put, petitioners' case is that they were initially engaged by M/s Bharat Heavy Electrical

Limited (for short “*BHEL*”)on daily wage basis for rendering their skill labour in construction and setting up of Gas Turbine Station at Pampore during the period prior to 1992-93. Respondent State is said to have taken over Gas Turbine Unit in the year 1994 along with petitioners and employed them for running and maintenance of machinery etc. and that petitioners were styled as Daily Rated Workers.Petitioners, as their contention is, were engaged on taking over of Gas Turbine Station from BHEL and various functionaries of respondent department recommended their cases for regularisation. It is pleaded that respondents treated petitioners to have been engaged after imposition of ban by SRO 64 of 1994. This according to petitioners forced them to knock at doors of this Court with writ petition, SWP no.1132/1999, which was, however, dismissed in default on 07.09.2005. They filed another writ petition, being SWP no.159/2006, which was disposed of vide order dated 21.02.2006 with a direction to respondents to accord consideration to petitioners’ case in pursuance to the Cabinet Decision No.59/5 dated

04.04.2003. Respondents are said to have not implemented the said order, forcing petitioners to seek initiation of contempt proceedings, vide Contempt No.316/2006. During its pendency, respondents produced order no.GTDII/610-30 dated 24.11.2006, which was followed by disposal of contempt petition vide order dated 24.04.2007, leaving it open to petitioners to invoke appropriate remedy in accordance with law. It is as a consequence thereof that petitioners have come up with writ petition on hand.

3. Respondents filed reply in opposition to writ petition on 09.10.2012. It is insisted that instant petition is fourth writ petition in a row filed by petitioners and in all these petitions subject-matter was almost same. It is averred that in pursuance of order passed in SWP no.159/2006, the matter was considered by competent authority, which resulted in passing of order, impugned herein. Respondents' contention is that petitioners' services were engaged and utilized in connection with BHEL in Gas Turbine Division, which project was completed and commissioned in the year 1995, but due to extreme financial

constraints in the beginning of the year 1999, the project was stopped and in the meanwhile government issued instructions to discontinue casual labour services of petitioners, who accordingly were discontinued after 19.01.1999. Respondents maintain that petitioners undoubtedly were working with BHEL in Gas Turbine Division from their initial engagement and the Gas Turbine Project was completed and commissioned in 1995, but petitioners continued to work as casual labourers till the project was stopped in 1999 due to financial crunch and petitioners, after getting their wages, were discontinued from 19.01.1999.

4. Petitioners on 28.12.2002 filed Supplementary Affidavit, stating therein that respondent-Power Development Department has made engagementsof daily wagers/casual labourers after imposition of ban, with effect from 31.01.1994 in terms of SRO 64 of 2004, and that their case was considered by the State Cabinet vide Cabinet Decision No.151/23/2012 dated 30.09.2012. Petitioners have also annexed regularisation orders of persons, who, according to

petitioners are similarly situated and, whose services have been regularised by respondent department.

5. Respondent no.3 filed Response to Supplementary Affidavit on 20.12.2013. Respondent no.3 states therein that petitioners have pleaded disputed questions of fact in the supplementary affidavit inasmuch as petitioners have different cause of action, given that the benefits of the Cabinet Decision have been extended to those Daily Rated Workers who are physically and actually working in different projects and that petitioners are no longer on the pay rolls of JKSPDC since 19.01.999. It is also asserted that communication referred to in supplementary affidavit does not create a right in favour of petitioners to claim regularisation as they are not physically working with the Corporation since 1999 and the contention in this behalf, as such, is misconceived. Further averment of respondent no.3 in supplementary affidavit is that petitioners' services were utilized in connection with BHEL in Gas Turbine Division, which project was completed and commissioned in the year 1995, and due to non-viability of the

project in the beginning of the year 1999, the project was stopped and in the meanwhile, the Government issued instructions to discontinue the casual labour services of petitioners, who accordingly got discontinued after 19.01.1999. The case of petitioners, according to respondent, is totally different from those whose case has been considered by the Cabinet inasmuch as they are actually and physically working on different projects whereas petitioners are no longer on the rolls of the Corporation after 19.01.1999. Respondent no.3, in compliance of this Court order dated 11.12.2013, also submitted Compliance Report, with which he has enclosed the list of daily wagers/consolidated and contractual employees.

6. Petitioners on 24.12.2013 filed Response to Supplementary Affidavit of respondent no.3, averring therein that respondent no.3 has not disclosed the details of daily rated workers/casual workers engaged since 1999 but has given the details thereof from 2002 onwards and that compliance report as well does not disclose as to why petitioners were not considered for continuation/re-continuation at the time of

engagement of casual labourers mentioned in the list.

7. Writ petition was admitted on 18.04.2014 and respondents sought time to file counter. The counter was filed on 23.05.2014. The contents contained therein are not different from one taken by respondents in their reply at pre-admission stage and they dispute the claim of petitioners.

8. I have heard learned counsel for parties at length. I have gone through the pleadings and considered the matter.

9. Learned counsel for petitioners, in support of his arguments, places reliance on judgement of the Supreme Court in ***State of Haryanav. Piara Singh AIR 1992 SC 2130*** and certain other judgements of the Apex Court as also judgement of this Court, to suggest that this Court has power to issue directions as sought for by petitioners in their writ petition, including directing respondents to regularise the services of petitioners. Per contra learned counsel for respondents refers to judgment passed by the Supreme Court in ***Surinder Prasad Tiwari v.***

U.P.RajyaKrishiUtpadanMandiParishad and others (2006) 7 SCC 684.

10. I do not deem it absolutely necessary to refer to the judgements, relied upon by learned counsel for petitioners, sequentially, owing to the fact that the controversy is no longer *res integra* with regard to the issue at hand after what has been stated by a Constitution Bench of the Apex Court in case of ***Secretary, State of Karnakata v. Umadevi (2006) 4 SCC 1***. In the said case, the Supreme Court highlighted that the role of the courts was not to encourage, ignore or approve appointment made or engagement given outside the constitutional scheme, which would result in depriving many of their opportunities to compete for public employment and that by ordering regularisation of daily wagers, casual employees or employees on contract *en mass* otherwise than by regular process of selection would defeat the concept of 'equality' as recognised by Article 16 of the Constitution. Furthermore, only because the petitioners have worked for some time, the same by itself would not be a ground for directing regularisation of their services in view of the

decision of the Supreme Court in ***Umadevi's*** case (supra).

11. The principles will have to be formulated bearing in mind the position set out in the Supreme Court in catena of judgements on the subject-matter. Regularisation is not a source of recruitment nor is it intended to confer permanency upon appointment which have been made without following the due process envisaged by Articles 14 and 16 of the Constitution.

12. The Constitution Bench of the Supreme Court in above *Umadevi's* case has observed that adherence to the rule of equality in public employment is a basic feature of our Constitution. It was observed:

> "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. High Courts acting under Article 226of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

13. The submission that petitioners have been working in Gas Turbine and thereafter in respondent department for a particular period of time and as such, are entitled for regularisation;this aspect of the matter has also been specifically taken care of by the said Constitution Bench in *Umadevi's* case. It was observed:

> "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."

14. It may not be out of place to mention here that 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 or for that matter ordering his continuance or regularisation on permanent basis, and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in the Constitution of India.

15. Learned counsel for petitioners argues that the action of respondent department in not regularising services of the petitioners is not fair within the framework of the rule of law. In connection with said submission the Supreme Court has observed that if the appointments, which have not been made according to the constitutional scheme, are regularised, that would amount to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by the people of this country.The Apex Court has further held that the mere fact that a person, who has

worked on temporary or casual basis, does not warrant regularisation on that account alone as he accepts the employment with open eyes so as to earn his livelihood and accepts whatever he gets and that it does not by itself justify to abandonthe constitutional scheme of employment, by ordering his continuance or regularisation on a permanent basis. In paragraph 47 of the judgment in *Umadevi's* case the Supreme Court proceeded to hold:

> "When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post."

16. The Full Bench of this Court in LPA no.126/2013 titled ***Basharat Ahmad Parray and another v. State of J&K and others***, has dealt with the issue as to whether casual employees would have any right to seek continuance in their engagement

or their regularisation in service. In the said case, an appeal (LPA no.126/2013) was directed against the order of Writ Court. The Division Bench, however, while, considering the appeal against the order of writ court was not inclined to accept the contention of counsel for appellants based upon the earlier judgement and was of the opinion that the judgment rendered by Division Bench in LPA (SW)-D No.21/2002 and LPA No.69/2002, which placed reliance upon the Apex Court judgement in *Piara Singh's* case, as has been relied upon by petitioners in the present case, was *per incurium* inasmuch as the observations of the Division Bench were not in accordance with the ratio of the said judgement. The Full Bench vide judgment dated 30.12.2016 has held that appellants do not have any right to claim either continuance of their engagement as casual workers nor have they any right to seek regularisation.

17. Recently the Supreme Court in ***State of Jammu and Kashmir v. District Bar Association, Bandipora(AIR 2017 SC 11)***, while placing reliance on the decision of ***Umadevi's*** case, pointed out that "*It is true that the respondents*

had been working for a long time. It may also be true that they had not been paid wages on a regular scale of pay. But, they did not hold any post. They were, therefore, not entitled to be paid salary on a regular scale of pay. Furthermore, only because the respondents have worked for some time, the same by itself would not be a ground for directing regularisation of their services in view of the decision of this Court in Umadevi".

18. Regularisation, as held in above *District Bar Association, Bandipora's* case, is not a source of recruitment nor is it intended to confer permanency upon appointments, which have been made without following the due process envisaged by Articles 14 and 16 of the Constitution.

19. The ratio of aforementioned judgements is that the courts cannot encourage appointments which are made outside the constitutional scheme and it is improper for the courts to give any direction for regularisation of a person who has not been appointed by following the procedure laid down in Articles, 14 and 16 of the Constitution.

20. Apart from above discussion, in the present case petitioners, as maintained by respondents, have

been discontinued way back in the year 1999; they, therefore, are not in the establishment of respondent department since then.Petitioners,in their Response to supplementary affidavit of respondent no.3, have asserted that the report,filed by respondent, "*does not disclose as to why the petitioners were not considered for continuation/re-continuation at the time of engagement of the casual labourers mentioned in the list*" after 2002.Thus, it is petitioners' casethat they are not working continuously and uninterruptedly in respondent department right from their initial engagement. Petitioners, though in the year 1999, knocked at doors of this Court, but they did not succeed in their bid as the writ petition filed by them, as averred by petitioners, was dismissed in default. Thereafter they again approached this Court with SWP no.159/2006. The said writ petition as well did not yield what petitioners projected. The writ petition was disposed of with an observation that respondents may consider petitioners' case in pursuance of the decision dated 04.04.2003, if in tact till date, provided their cases are covered thereby on their

own merit and other rules governing the matter. The order dated 24.11.2006, impugned in this petition, furnishestotally contrast picture, controverting and disputingpetitioners' case. Impugned order and the stand, all through, taken by respondents is that petitioners are not on rolls of respondent department since 1999 whereas petitioners' side of story is on different footing. In that view of matter, certain serious disputed questions of fact have arisen for determination. Such disputed questions of facts ordinarily cannot be entertained by this Court in exercise of its power of writ jurisdiction.

21. The claims and counter claims of the parties take this Court to the conclusion that the disputedquestions of fact and issues, that emerge from the above discussion, cannot be decided in writ proceeding but in a full-fledged trial, where both parties would be able to adduce evidence in support of their respective claims.

22. The analysis of the above discussions makes it clear that if the issues relate to disputed questions of fact, the writ court cannot go into those factual

details and give either specific finding or positive direction to the authority.

23. In view of what has been stated above, the writ petition is, **dismissed**. I, however, leave it open to petitioners to take recourse to the other remedy which is available in law. In the facts and circumstances of the case, there shall be no order as to costs.

(Ali Mohammad Magrey)
Judge

Srinagar
27th February, 2017
Ajaz Ahmad