

A.F.R.

Reserved on 24.03.2021

Delivered on 05.05.2021

Case :- SERVICE SINGLE No. - 14930 of 2017

Petitioner :- Km. Kalyani Mehrotra

Respondent :- State Of U.P. Thru Prin.Secy.Rural Development
Lucknow &Ors.

Counsel for Petitioner :- Vijay Kumar Srivastava,Upendra Nath
Mishra

Counsel for Respondent :- C.S.C.,Sultan Akhtar

Hon'ble Ramesh Sinha, J.

Hon'ble Chandra Dhari Singh, J.

Hon'ble Manish Mathur, J.

1. This Full Bench has been constituted upon orders of Hon'ble the Chief Justice pursuant to order dated 28.08.2017 passed by learned Single Judge in Writ Petition No.14930(S/S) of 2017 whereby the following two questions have been referred to this Bench:-

(i) Whether in view of the provisions of Government Order dated 17.3.1994, particularly clause 9 thereof, the provisions of the Rules of 1974 would be application upon the employees of DRDA?

(ii) Whether the judgment of Division Bench in State of U.P. vs. Ajeet Kumar Shahi, Special Appeal No.714 of 2015, requires reconsideration in light of the Government Orders dated 17.3.1994 and 18.7.2016?

2. The writ petitioner had challenged an order dated 22.05.2017 whereby claim for grant of compassionate appointment under the

U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 (hereinafter referred to as '1974 Rules') was rejected on the ground that the same are inapplicable in the case of employees, such as mother of the writ petitioner, who was employed in the District Rural Development Agency (hereinafter referred to as DRDA) since the same is a Society registered under the Societies Registration Act, 1860.

3. The learned Single Judge has noticed that a Division Bench of this Court in **State of U.P. & others v. Pitamber** [Special Appeal (Defective) No.687 of 2010] had by its judgment and order dated 19.8.2010 held the DRDA to be 'State' within meaning of Article 12 of the Constitution of India but at the same time has also held that the employees of DRDA do not hold any civil post either under the State or the Central Government and do not, therefore, come within purview of the definition 'government employees'.

4. In the referral order, it has also been noticed that another Division Bench of this Court in **State of U.P. & others v. Ajeet Kumar Shahi** [Special Appeal No.714 of 2015] while following the judgment in **Pitamber** (supra), rejected the claim for compassionate appointment on the ground that the 1974 Rules are inapplicable upon

employees of DRDA since they do not come within definition of 'government employees'.

5. However, learned Single Judge thereafter referred the matter to a larger Bench while posing the question whether the judgment rendered in **Ajeet Kumar Shahi** (Supra) required reconsideration.

6. The reference was made upon consideration by the learned Single Judge that the Division Bench in the case of **Ajeet Kumar Shahi** (Supra) was apparently not made aware with regard to Government Order dated 17.3.1994, which provided that in respect of matters of employment of DRDA employees, for which there is no specific provision in the said Government Order, such employees would ordinarily be governed by provisions as are applicable upon employees of the State Government. The relevant portion of the order dated 28.08.2017 by learned Single Judge is as follows:-

"7. The reason assigned to hold that Rules of 1974 would not apply upon employees of DRDA is that employee of DRDA are not the Government Servant. However, while holding the provision of 1974 Rules to be inapplicable upon the employees of DRDA, attention of the Division Bench apparently was not invited to the Government Order dated 17.3.1994, which clearly records that in respect of matters of employment of DRDA employees, which are not covered by the Government Order dated 17.3.1994, the persons employed in DRDA would ordinarily be governed by such provisions, as are applicable upon the employees of the State Government. The provisions contained in para 6 to 13 of the Government Order dated 17.3.1994 clearly contemplates that in the matter of such employees, relevant provisions relating to determination of seniority, application of reservation rules, transfer etc. would all be applicable as are applicable upon the employees of the State Government. Once such is the position, the Rules of 1974, which are applicable upon the employees of the State Government, would also be applicable upon the employees of DRDA. Moreover, by a subsequent Government Order dated 18.7.2016 employees of DRDA have now been absorbed in the department of Rural Development of the State."

“8. For the aforesaid reasons, I am of the opinion that the question as to whether provision of 1974 Rules would apply upon an employee of DRDA needs to be considered by a Larger Bench.”

7. We have heard Mr. Upendra Nath Mishra, Senior Advocate assisted by Mr. Neel Kamal Mishra, learned counsel for writ petitioner and Mr. Kuldeep Pati Tripathi learned Additional Advocate General assisted by Mr. Vivek Kumar Shukla learned Standing Counsel for the State of U.P. and learned counsel for DRDA who has adopted submissions of learned State Counsel.

8. Learned counsel appearing on behalf of petitioner has submitted that the DRDA was created by various office memorandums of Government of India and consequent Government Orders by the State Government. The DRDA is fully funded by the Central and State Governments and has already been held to be an instrumentality of State under Article 12 of the Constitution of India. As such, power of the Central and State Governments to issue directions and policy guidelines to the DRDA including service conditions of the employees has been recognised and accepted not only by the opposite parties but by judgments of this Court as well. It is submitted that upon creation of DRDA, draft service rules were made but were never notified. Due to the said fact, although the DRDAs were set up for different Districts and were separately registered as Societies under the Societies Registration Act, 1860 but

all the conditions of service of employees of DRDA are governed by various Government Orders issued by the Government and departmental orders issued by the Commissioner, Rural Development for maintaining uniformity in DRDA set up. It is submitted that the State Government has the power to issue Government Orders with regard to policy guidelines to the DRDAs as provided in the bye-laws.

9. Learned counsel for petitioner has submitted that in view of the fact that no Service Regulations were notified for employees of DRDA, the State Government, exercising its powers of superintendence, issued the Government Order dated 17.03.1994 in which guidelines for conditions of service of the employees were laid down. It is submitted that paragraph 9 of the said Government Order clearly provided that the service conditions which are not specifically provided for in the Government Order would be made applicable upon employees of the DRDA as they are ordinarily applicable upon State Government employees. Attention has been drawn to the fact that subsequently, the employees of the DRDA have been absorbed in the department of Rural Development of the State Government vide Government Order dated 18.07.2016 thereby recognising the fact that not only was the DRDA established as a

permanent department but that the employees thereof were also functioning on behalf of the State Government.

10. Learned counsel for petitioner has also submitted that the condition indicated in paragraph 9 of Government Order dated 17.03.1994 thereafter stood ratified in view of the fact that the same was adopted by the DRDA , Raebareli vide Resolution dated 02.06.1994. In view of aforesaid, learned counsel appearing for the petitioner has submitted that the said Government Order dated 17.03.1994 and the resolution dated 02.06.1994 were very relevant for the purposes of determination of applicability of the 1974 Rules upon employees of the DRDA but the same were not brought to the attention of the Division Bench in **Ajeet Kumar Shahi** (Supra), which therefore requires to be reconsidered. Learned counsel has further submitted that the Government Order dated 17.03.1994 and the resolution dated 02.06.1994 are clearly in the nature of legislation by reference. He has further submitted that except for the provisions of compassionate appointment, rest of the service conditions indicated in the Government Order dated 17.03.1994 have been implemented in the DRDAs throughout the State irrespective of the fact whether the same was adopted or not. As such, it is submitted that the State Government cannot approbate and reprobate at the same time. Learned counsel has relied upon various

judgments in order to buttress his submissions, which shall be considered subsequently.

11. Learned counsel appearing on behalf of the State has refuted the submissions of learned counsel for petitioner on the ground that the petitioner has misconstrued the Government Order dated 17.03.1994 which clearly provides that it would be inapplicable in case of Rules pertaining to Government Servants made and notified under Article 309 of the Constitution of India and since the 1974 Rules have been made under Article 309 of the Constitution of India, the same are exempt from applicability upon employees of DRDAs by virtue of Government Order dated 17.03.1994 itself. It has been further submitted that a reading of the 1974 Rules clearly indicates that it is applicable only upon Government servants and since it has already been held and is undisputed that the employees of the DRDAs employed prior to issuance of Government Order dated 18.07.2016 would not come within the purview of Government servants, therefore, there is no question of the 1974 Rules being applicable upon them.

12. Learned counsel appearing on behalf of the State has further submitted that paragraph 9 of the Government order dated 17.03.1994 is only an enabling provision and would be applicable

only once it is adopted by each and every DRDA in all the Districts. That having not been done, the same would not automatically apply throughout the State of U.P. It has been further submitted that **Ajeet Kumar Shahi** (Supra) indicates the correct position of law while following the Division Bench judgment in the case of **Pitamber** (supra). It is submitted that the position has thereafter been made clear by the Government Order dated 10.06.2013 in which also it has been stated that the 1974 Rules are inapplicable upon employees of DRDAs.

13. We have considered the submissions advanced by learned counsel for the parties and perused the record as well as written arguments submitted by learned counsel on behalf of petitioner as well as the State.

Creation and background of DRDA

14. For the purpose of answering the reference, it would be worthwhile to examine the creation, establishment and nature of DRDA.

15. DRDAs have been created in each district of the State under the directions of the Government of India for ensuring effective and speedy implementation of all the Central and State Government programmes pertaining to rural development. Before the

establishment of DRDA in its present form in 1980, the Government of India issued instructions in the year 1971 for creation of Small Farmers Development Agency (SFDA) in each district, which was registered as a Society for implementation of the Central Government programmes like IRDP etc.

16. Later on, when the IRDP was extended to all the districts of the State throughout the Country, the Government of India vide notification dated 4.10.80, decided to set up a single execution agency at the district level for ensuring effective implementation of Rural Development Programmes. Formal creation of the DRDA was contemplated under the office memorandum of the Government of India dated 24.10.80, which provided that DRDA will be created as a Society in each district. It was further provided that the DRDA shall be controlled and governed by the State Government and it will be headed by the Collector/Deputy Commissioner in each district. Apart from that, DRDAs were to have full time Executive Officer preferably a senior scale IAS officer. In the State of U.P., Chief Development Officer is currently the Executive Director of DRDA.

17. The State Government vide government order dated 24.11.80 created DRDAs in each district. In order to maintain uniformity in the constitution of all the DRDAs existing in various districts, the

Central Government issued an O.M. dated 10.3.81, whereby guidelines were issued regarding uniform structure of DRDA. Consequently, the State Government issued the Government order dated 10.7.81, whereby a uniform structure of the Governing Body of the DRDA was provided. Thus, each DRDA is headed by the District Magistrate, who is the Chairman of the DRDA. The Deputy Development Commissioner is to be the Vice Chairman of the DRDA and thereafter eight members were provided, which include Deputy Registrar, Cooperative Societies, Deputy Director Agriculture, Deputy Director Animal Husbandary, ADM/DDO, Assistant Registrar, Cooperative Societies, District Agriculture Officer, District Animal Husbandry Officer and Assistant Engineer, Minor Irrigation. Since the earlier District Officers did not have the provisions for a Governing Body, hence directions were issued by the State Government to all the DRDAs to incorporate the aforesaid uniform Governing Body in their Articles of Association. In this regard, the Office Memorandum dated 10.3.81 of the Government of India and the Government order dated 10.7.81 are relevant.

18. In compliance of the aforesaid instructions of the Government of India dated 10.3.81 as well as the directions issued by the State Government vide Government order dated 10.7.81, all the DRDAs prepared almost identical bye-laws. One of such bye-laws which has

been placed before us relating to DRDA, Auraiya, in Rule 5 prescribe establishment and appointment etc., wherein sub-rule (2) of Rule 5 provides that subject to the approval or under the directions of the Government of India or State Government from time to time, the Agency will create new post. Sub-rule (4) of Rule 5 further says that the directions of the Government orders providing for duties, responsibilities and powers etc. will be final and if required will have an overriding effect on the old and existing rule.

19. Rule 14 of the bye-laws provide that every employee of Agency, whether directly recruited or on deputation from department of State Government or local body shall be governed by Service Conduct Rules of the State Government. Rule 15 further clarifies that service conditions and service rules not covered under Rules 4 to 13 shall be the same as those applicable on State Government employees.

20. From the aforesaid directions issued by the Government of India and the State Government and the object for which the DRDAs have been established in each district with present structure, it is clear that the State Government has all pervasive control over the administration of the DRDA and all the DRDAs existing in various districts of the State have a uniform administrative set up, created by the State Government under the directions of Central Government.

21. The status of DRDAs was considered by a Division Bench of this Court in the case of **Anoop Rai Jain and others v. State of U.P. and others** [Writ Petition No.458 (S/B) of 2000 and other connected matters]. The same formed the basis of another Division Bench judgment in **Pitamber** (supra) whereunder it was held that the DRDA is 'State' within meaning of Article 12 of the Constitution of India. The said fact is undisputed between the parties and has been followed in various subsequent judgments of this Court as well. However, the said judgment also held that the employees of DRDA do not hold any civil post under the Government and consequently are not Government employees.

22. It is on this latter reasoning that the Division Bench in **Ajeet Kumar Shahi** (Supra) rejected the claim for compassionate appointment to dependent of an employee of DRDA holding that the 1974 Rules are applicable only upon Government employees.

23. Since the status of DRDA as 'State' under Article 12 of the Constitution of India is neither being disputed by the parties nor is a subject matter of reference, as such, it is not being deliberated upon by this bench.

Litigational background regarding DRDA employees.

24. Prior to the judgment of Division Bench in **Pitamber** (supra), a learned Single Judge in the case of **Smt. Reeta Mishra v. State of U.P.** [Writ Petition No.2205(S/S) of 2006] had directed the DRDA to consider appointment of the writ petitioner therein on compassionate basis in terms of the 1974 Rules in view of the fact that in an earlier judgment rendered in Writ Petition No.2280 (S/S) of 2006, the DRDAs had been declared an instrumentality of State. The learned Single Judge vide order dated 26.07.2006 quashed the Government Order dated 22.04.2004 whereunder the benefit of the 1974 Rules to the employees of DRDA had been denied.

25. Subsequently, another case of **Surya Bhan Singh v. State of U.P.** [Writ Petition No.6411(S/S) of 2005] was decided vide order dated 08.12.2006 in terms of the judgment rendered in **Reeta Mishra** (supra). After Surya Bhan Singh was granted appointment under the 1974 Rules, he was terminated from service, which was challenged in Writ Petition No.5332 (S/S) of 2007 and was allowed vide judgment and order dated 27.09.2013. Special Appeal No.33 of 2014 (D) filed by the State of U.P. against the said order was dismissed vide judgment and order dated 21.07.2014 on the ground that once the petitioner therein had been appointed on compassionate basis, it was not open for the authority to terminate his services after a lapse of six months. Apparently, neither the Government Order

dated 17.03.1994 nor the judgment of Division Bench in **Pitamber** (supra) was considered in the matter pertaining to Surya Bhan Singh since in the meantime judgment in the case of **Pitamber** (supra) came to be rendered vide judgment and order dated 19.08.2010. However, consequent upon judgment rendered in the case of **Reeta Mishra** (supra), the cases of dependents of employees of DRDA continued to be entertained since the Government Order dated 22.04.2004 had been set aside and the judgment in **Reeta Mishra** (supra) had become final as no appeal had been preferred by either party.

26. The situation underwent a change in 2010 with the advent of Division Bench judgment in the case of **Pitamber** (supra).

Consideration of the case of Pitamber (supra)

27. In the aforesaid case, Special Appeal had been filed by the State of U.P. against the judgment and order dated 23.03.2010 passed by a learned Single Judge in Writ Petition No.10464 of 2009. The issue in the said case was regarding applicability of Fundamental Rule 56 of the Financial Handbook pertaining to Government servants with regard to age of superannuation of employees of DRDA. The learned Single Judge in his judgment had quashed the notice dated 29.12.2008 holding that the writ petitioner therein would be entitled

to continue up to the age of 60 years as in the case of Government Servants since the Fundamental Rules would be applicable upon the employees of DRDA in pursuance of paragraph 9 of the Government Order dated 17.03.1994.

28. While noticing the background of DRDA regarding its creation, status and the deep and pervasive control of the State Government, the Division Bench reached a conclusion that the DRDA would be 'State' within the meaning of Article 12 of the Constitution of India despite being a Society registered under the Societies Registration Act, 1860. However, the Division Bench relying upon the Supreme Court Judgment in **State of Assam v. Kanank Chandra Dutta** reported in AIR 1967 SC 884 held that the employees of DRDA do not answer the tests for coming within the purview of a Government servant since they do not hold any civil post either under the Central Government or the State Government. It was held that merely because an Association falls under the expression 'instrumentality of State' within the meaning of Article 12 of the Constitution, it would not make its employees come within the definition of government employees. It was held that the employees of DRDA are for all practical purposes employees of the Society who are not holding any civil post in the services of the State and therefore Rule 56 of the Fundamental Rules would be inapplicable in their case. The Single

Judge judgment in the case of **Kalika Prasad v. State of U.P. & others** [Writ Petition No.45(S/S) of 2005] holding Rule 56 of the Fundamental Rules to be applicable upon DRDA employees, was overruled.

29. The Division Bench held that if the Government Order dated 17.03.1994 was applicable upon the employees of DRDA being within competence of the State Government to issue the same, it was also within competence of the State Government to issue the Government Order dated 09.03.2004 restricting the age of superannuation. The relevant portion of the judgment is as follows:-

“The learned Judge in Kalika Prasad (supra), has not discussed the reason as to why F.R. 56 is applicable. If F.R. 56 was applicable because of Guideline No. 2 (10) of Government Notification dated 17th March, 1994, then it was within the competence of the State Government to also have issued the Government Order dated 09.03.2004. In these circumstances, considering the Government Notification dated 09.03.2004, the age of superannuation of employees of DRDA would be 58 years from that date. Question (1) is answered in the affirmative.”

Consideration of the case of Ajeet Kumar Shahi (Supra)

30. The said Special Appeal in the case of **Ajeet Kumar Shahi** (Supra) arose from judgment and order of a learned Single Judge dated 24.04.2015 and was particularly with regard to claim for compassionate appointment under the 1974 Rules. The claim for compassionate appointment of the writ petitioner therein was rejected by authorities on the basis of Government Order dated 22.04.2004 whereunder it was provided that the DRDA being a

society registered under the Societies Registration Act, 1860, its employees would not come within the purview of the 1974 Rules. Writ Petition against rejection order was allowed. The Division Bench noticed the judgment rendered in the case of **Reeta Mishra** (supra) and the fact that the said Government Order dated 22.04.2004 had been quashed, which was thereafter followed in other cases as well. It also noticed the judgment rendered by another Division Bench in the case of **Pitamber** (supra) and the fact that the employees of the DRDA did not hold any civil post in the services of State and continued to be employees of DRDA which was a society. In such circumstances, it was held that provisions of Rule 2(a) of the 1974 Rules would not be attracted in the case of employees of DRDA. The relevant portion of the judgment is as follows:-

“In view of the law which has been laid down by the Division Bench in its judgment dated 19 August 2010 in Pitamber (supra), it is now a settled principle of law that the employees of DRDA are not holding civil posts in the services of the State. They continue to be the employees of DRDA which is a society registered under the Societies Registration Act, 1860. That being the position, the provisions of Rule 2 (a) of the Rules of 1974 would not be attracted.”

31. The case of **Reeta Mishra** (supra) was distinguished on the ground that it was rendered prior to judgment in **Pitamber** (supra) and therefore cannot be considered as laying down any principle of law as such. The judgment of Division Bench in **Surya Bhan Singh** (supra) was also distinguished on the ground that the issue of applicability of the 1974 Rules was not being considered by the

Division Bench, which was considering only the fact that once the writ petitioner therein had been appointed on compassionate basis then whether his services could be terminated after a lapse of six months, without complying with the principles of natural justice. However, a reading of the judgment indicates that neither the Government Order dated 17.03.1994 nor the resolution dated 02.06.1994 was placed before the Division Bench and as such do not find any mention therein.

Consideration of Question No.1 :- (i) Whether in view of the provisions of Government Order dated 17.3.1994, particularly clause 9 thereof, the provisions of the Rules of 1974 would be application upon the employees of DRDA?

32. It is undisputed that :-

(a) the DRDA is a Society registered under the Societies Registration Act, 1860 but has nonetheless been held to be 'State' under Article 12 of the Constitution of India, which is an accepted position.

(b) there are no service regulations in any of the DRDAs pertaining to its employees throughout the State of U.P.

(c) in the absence of service rules, the State Government had issued notification dated 17.03.1994 indicating the conditions of service which were to be applicable upon all the employees of DRDA in uniformity throughout the State of U.P.

(d) consequent upon their establishment, almost identical bye-laws were framed by the DRDA in all the Districts in which the State Government has been empowered to issue policy directions and guidelines for the proper functioning of DRDA throughout the State of U.P. including conditions of service of its employees.

(e) employees of the DRDA throughout the State of U.P. has been absorbed in the department of Rural Development of the State Government vide Government Order dated 18.07.2016.

33. Considering the aforesaid factors, the reference has to be answered regarding applicability of the 1974 Rules upon employees of DRDA appointed or working prior to issuance of Government Order dated 18.07.2016 since the said employees after absorption already have the status of State Government employee upon whom the 1974 Rules are automatically applicable now.

34. It is an accepted fact that subsequent to creation and establishment of DRDA, all the DRDAs prepared almost identical bye-laws pursuant to instructions of the Government of India dated 10.03.1981 and of the State Government dated 10.07.1981. An exemplar bye-law relating to DRDA, Auraiyya has been placed before us in which Rule 14 of the bye-laws provides that every employee of DRDA whether directly recruited or on deputation from

a department of State Government or a local body would be governed by the service conduct rules of the State Government. Rule 15 further clarifies that service conditions and service rules not covered under Rules 4 to 13 of the bye-laws would be the same as those applicable upon the State Government employees. The bye-laws of DRDA have already been considered in **Pitamber** (supra) in the following manner :-

“11. There is no dispute that the DRDAs are registered as Societies under the Societies Registration Act. DRDAs are registered for each District. The Bye-laws provide for a Governing Body. The powers of the Governing Body has been set out under Bye-law 19 of the Bye-laws. Bye-law 20 provides for other powers conferred on the Governing Body. Bye-law 35 provides the manner in which the Society can sue or be sued. The Memorandum of Association of DRDA provides for Working Committee of the Governing Body, which consists of officers, who hold office in the Working Committee, by virtue of their posts in Government service. The members of the Society hold the post of Chairman or Members or the Executive Director by virtue of the posts they hold in Government service. By virtue of these Bye-laws, the Governing Body can appoint staff subject to the directions issued by the Central Government/State Government. The State Government issued Notification dated 17th March, 1994 which provided for the conditions of service of the employees in respect of employees of DRDA. Once the State Government has issued directions in exercise of its power, the Governing Body is bound by the said directions in the matter of appointment of staff. The power to appoint also includes the power to terminate and/or superannuate.”

35. Similarly bye-law 20 of the bye-laws provides as follows:-

“20. In particular and without prejudice to the generality of the foregoing provisions, the Governing Body may :

(a)

(b)

....

(h) *Subject to the direction, if any, of the Government of India/State Government appoint such staff as may from time to time be necessary for carrying out day to day affairs of the Society.”*

36. From a perusal of the bye-laws, it is apparent that although the governing body of the DRDA is the appointing authority of its

employees but the same would be subject to the directions issued by the Central or the State Government. It is pursuant to the said power of the State Government, which is undisputed, that the notification dated 17.03.1994 was issued particularly to fill in the void created due to the fact that no service rules were notified with regard to employees of the DRDA.

37. The opening paragraphs of Government Order dated 17.03.1994 states that with regard to employees of DRDA, no service rules have been notified and the DRDA being a registered society, rules framed for Government employees under Article 309 of the Constitution of India would be inapplicable. It is further stated that in view of the said lacuna, directions are being issued by the State Government for regulating and bringing about uniformity of service conditions of the DRDA employees since all the DRDAs are registered separately as a Society in every District. The relevant paragraphs of the Government Order dated 17.03.1994 are as follows:-

“उपर्युक्त विषय पर मुझे यह कहने का निर्देश हुआ है कि उत्तर प्रदेश के समस्त जनपदों में जिला ग्राम्य विकास अभिकरण रजिस्ट्रेशन आफ सोसाइटीज एक्ट की धारा 18 के अधीन पंजीकृत सोसाइटी के रूप में स्थापित है जिसके अध्यक्ष सम्बन्धित जनपद के जिला मजिस्ट्रेट होते हैं। प्रत्येक अभिकरण सोसाइटीज रजिस्ट्रेशन एक्ट के अधीन रजिस्टर्ड सोसाइटीज है और उसमें स्वीकृत स्टाफ भारत के संविधान के तहत अनुच्छेद 309 में बनने वाली सेवा नियमावलियों से आच्छादित नहीं होते हैं। ऐसी स्थिति में जिला ग्राम्य विकास अभिकरणों में विभिन्न पदों पर कार्मिकों की भर्ती

किये जाने हेतु स्टेट लेवेल, तथा डिस्ट्रिक्ट लेवेल कैंडर्स बनाये जाने और उनमें नियुक्त व्यक्तियों की सेवा शर्तों को विनियमित करने तथा अन्य शर्तों को जारी करने के सम्बन्ध में सामान्य सेवा नियमावली बनाये जाने का प्रस्ताव वर्ष 1989 से शासन के विचाराधीन था और इसके लिए कतिपय अन्य प्रदेशों में विद्यमान व्यवस्था का भी अध्ययन किया गया।

2. चूँकि जिला ग्राम्य विकास अभिकरण में कार्यरत एवं भविष्य में नियुक्त होने वाले कार्मिकों के वेतनादि पर होने वाला सम्पूर्ण व्यय भारत सरकार तथा राज्य सरकार द्वारा वहन किया जाता है और चूँकि इनके बारे में कोई सेवा नियमावली गठन किया जाना सम्भव नहीं हो सका है अतः प्रदेश के समस्त जिला ग्राम्य विकास अभिकरणों में एक्यपता बनाये रखने के उद्देश्य से यह निर्णय लिया गया है कि प्रश्नगत अभिकरणों में कार्मिकों की नियुक्ति की प्रक्रिया श्रोत शैक्षिक योग्यता आदि के निर्धारण तथा सेवा शर्तों को लागू किये जाने के बारे में एक सामान्य दिशा निर्देश शासन सतर से समस्त अभिकरणों के लिए जारी कर दिये जाये ताकि सम्बन्धित अभिकरण अपनी अपनी अधिकारित में तदनुसार नियम अथवा उपनियम बनाकर उसे अंगीकृत कर सकें।.....”

38. In terms of bye-laws of the DRDA as noticed herein above and the pronouncement regarding the authority of State Government to issue such directions as already noticed in the case of **Pitamber** (supra), it is evident that Government Order dated 17.03.1994 would be binding upon all the DRDAs in the State particularly since the field pertaining to service conditions of the employees of the DRDA was unoccupied.

39. It is well settled that the doctrine of ‘occupied field’ would be applicable in case of subordinate legislation and issuance of administrative instructions where no rules have been made in terms of Article 309 of the Constitution of India pertaining to service

conditions. Hon'ble the Supreme Court in **A.B. Krishna v. State of Karnataka**, reported in (1998) 3 SCC 495 has held as follows:-

“8. The Fire Services under the State Government were created and established under the Fire Force Act, 1964 made by the State Legislature. It was in exercise of the power conferred under Section 39 of the Act that the State Government made Service Rules regulating the conditions of the Fire Services. Since the Fire Services had been specially established under an Act of the legislature and the Government, in pursuance of the power conferred upon it under that Act, has already made Service Rules, any amendment in the Karnataka Civil Services (General Recruitment) Rules, 1977 would not affect the special provisions Validly made for the Fire Services. As a matter of fact, under the scheme of Article 309 of the Constitution, once a legislature intervenes to enact a law regulating the conditions of service, the power of the Executive, including the President or the Governor, as the case may be, is totally displaced on the principle of “doctrine of occupied field”. If, however, any matter is not touched by that enactment, it will be competent for the Executive to either issue executive instructions or to make a rule under Article 309 in respect of that matter.”

“9. It is no doubt true that the rule-making authority under Article 309 of the Constitution and Section 39 of the Act is the same, namely, the Government (to be precise, the Governor, under Article 309 and the Government under Section 39), but the two jurisdictions are different. As has been seen above, power under Article 309 cannot be exercised by the Governor, if the legislature has already made a law and the field is occupied. In that situation, rules can be made under the law so made by the legislature and not under Article 309. It has also to be noticed that rules made in exercise of the rule-making power given under an Act constitute delegated or subordinate legislation, but the rules under Article 309 cannot be treated to fall in that category and, therefore, on the principle of “occupied field”, the rules under Article 309 cannot supersede the rules made by the legislature.”

40. In terms of aforesaid, it is clear that the field pertaining to conditions of service of employees of the DRDA being unoccupied, the said void was filled by issuance of Government Order dated 17.03.1994. The provisions pertaining to applicability of service rules of Government employees upon the employees of the DRDA have been indicated in sub-paragraphs (6) to (13) of paragraph 2 of the Government Order, which are as follows : -

"2. (6). सीधी भर्ती द्वारा नियुक्त कर्मचारियों की ज्येष्ठता का निर्धारण समय समय पर यथा संशोधित उ0प्र0 सरकारी सेवक ज्येष्ठता नियमावली, 1991 के अनुसार किया जायेगा।

2. (7). विभिन्न श्रेणी के पदों पर सीधी भर्ती द्वारा नियुक्त व्यक्तियों के अनुमन्य वेतनमान ऐसा होगा जैसा सरकार द्वारा समय समय पर अवधारित किया जाये। इस मार्ग निर्देश के प्रारम्भ होने के समय के वेतनमान परिशिष्ट क में दिये गये है।

2. (8). दशतारोक पार करने की अनुमति तब तक नही दी जायेगी, तब तक कि उसका कार्य और आरचण संतोषजनक न पाया जाये और उसकी सत्यनिष्ठा प्रमाणित न कर दी जाये।

2. (9). अन्य विषयों का विनियमन—उन विषयों के सम्बन्ध में, जो विनिर्दिष्ट रूप से इस मार्ग निर्देश या विशेष आदेशों के अन्तर्गत न आते हो, जिला ग्राम्य विकास अभिकरणों में नियुक्त व्यक्ति ऐसे नियमों, विनियमों और आदेशों द्वारा नियंत्रित होंगे जो राज्य के कार्यकलाप के सम्बन्ध में सेवारात सरकारी सेवकों पर सामान्यतया: लागू होते हैं।

2. (10). अनुसूचित जाति, अनुसूचित जनजाति, पिछड़े वर्ग तथा अन्य श्रेणी के व्यक्तियों के लिए सेवा में आरक्षण से सम्बन्धित भर्ती के समय प्रवृत्त सरकार के आदेशों के अनुसार आरक्षण किया जायेगा।

2. (11). जहाँ राज्य सरकार का यह समाधान हो जाये कि सीधी भर्ती द्वारा नियुक्त व्यक्तियों की सेवा की शर्तों को विनियमित करने वाले किसी नियम के प्रवर्तन से किसी विशिष्ट मामले में अनुचित कठिनाई होती है, यहाँ यह उस मामले में लागू होने वाले नियमों/उपनियमों में किसी बात के होते हुए भी, आदेश द्वारा उस नियम की अपेक्षाओं का उस सीमा तक और ऐसी शर्तों के अधीन रहते हुए जिन्हें यह मामले में न्यायसंगत और साम्यपूर्ण रीति से कार्यवाही करने के लिए आवश्यक समझे, अभिमुक्ति या शिथिल कर सकती है।

2. (12). उत्तरांचल के सभी 08 जिला ग्राम्य विकास अभिकरणों में सीधी भर्ती के समस्त पदों को उत्तरांचल क्षेत्र के अभ्यर्थियों में से उपयुक्त अभ्यर्थियों द्वारा ही भरा जायेगा और इस प्रयोजन हेतु उन पदों के पदधारको का अपने अपने सम्बन्ध में पृथक उपसम्बन्ध होगा, परन्तु इसका प्रभाव अनुसूचित जातियों, अनुसूचित जनजातियों और

व्यक्तियों की अन्य विशेष श्रेणियों के अभ्युर्थियों के लिए प्राविधानित आरक्षण पर नहीं पड़ेगा।

2. (13). जिन पदों के सम्बन्ध में नियुक्ति का प्राधिकार श्री राज्यपाल या आयुक्त, ग्राम्य विकास विभाग में निहित है, उन पदों के पदधारकों को उत्तर प्रदेश के किसी भी जिला ग्राम्य विकास अभिकरण में स्थानान्तरित किया जा सकेगा।”

41. From the aforesaid provisions, it is apparent that no specific service condition has been indicated pertaining to compassionate appointment but a reading of paragraph 2 (9) of the Government Order indicates that other matters which are not covered specifically with the Government Order or any other special order pertaining to employees of the DRDA would be regulated by such rules, regulations and orders which generally apply to Government servants serving with regard to affairs of the State.

42. A reading of the aforesaid paragraph 2(9) of the Government Order makes it evident that there is no specific exclusion of compassionate appointment being granted to employees of the DRDA in terms of the 1974 Rules. On the contrary, the said provision clearly indicates that matters which are not specifically covered in the Government Order would be regulated and applicable as per the rules, regulations and orders generally applicable upon Government servants serving with regard to State affairs. As such, it is clear that compassionate appointment under the 1974 Rules would be covered under the said paragraph 2(9) of the Government Order.

43. There is no dispute between the parties that compassionate appointment under the 1974 Rules constitutes a condition of service. The expression ‘conditions of service’ means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his superannuation and even beyond it particularly with regard to matters like post-retiral benefits etc. Hon’ble the Supreme Court in **State of Madhya Pradesh and others v. Shardul Singh** reported in 1970 (1) SCC 108 has defined the said expression in the following terms:-

“9. The expression “conditions of service” means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like pension, etc.”

44. Similarly, in **Vimal Kanwar and others v. Kishore Dan and others** reported in (2013) 7 SCC 476, Hon’ble the Supreme Court has held as follows:-

“21. “Compassionate appointment” can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case, the employee dies in harness i.e. while in service leaving behind the dependants, one of the dependants may request for compassionate appointment to maintain the family of the deceased employee who dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one’s death and have no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependants may be entitled for compassionate appointment but that cannot be termed as “pecuniary advantage” that comes under the periphery of the Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act.”

45. From the aforesaid, it is clear that matters pertaining to compassionate appointment of employees of the DRDA would constitute a condition of service as envisaged under Government Order dated 17.03.1994.

46. Learned counsel for petitioner has drawn attention to the Government Order with the submission that the same provides applicability of various rules of service applicable upon Government servants to be applicable upon employees of the DRDA. Such rules pertained to appointment, promotion, seniority, reservation etc. It has been submitted that once the said rules have been made applicable upon employees of the DRDA pursuant to the Government Order, then applicability of the 1974 Rules cannot be denied since the State cannot approbate and reprobate at the same time.

47. A perusal of the Government Order does make it evident that the service rules applicable upon Government servants with regard to appointment, seniority, promotion, reservation etc. have been made applicable upon employees of the DRDA. Although, the said rules are specifically mentioned in the Government Order while omitting any such specific mention with regard to the 1974 Rules but in view of paragraph 2(9), denial of applicability of the 1974 Rules would

come within the purview of the said doctrine. Once the opposite parties have provided certain benefits to employees of the DRDA in terms of the Government Order then it would be impermissible to permit them to deny the benefits of other service conditions covered under paragraph 2(9).

48. The phrase ‘approve and reprobate’ is borrowed from the Scottish law where it is used to express common law principles of election that no party can accept and reject the same instrument.

Hon’ble the Supreme Court in **Karam Kapahi and others v. Lal Chand Public Charitable Trust and another**, reported in (2010) 4

SCC 753 has held as follows:-

“53. In the old equity case of *Streatfield v. Streatfield* [*Wh & TLC*, 9th Edn., Vol. I, 1928] this principle has been discussed in words which are so apt and elegant that I better quote them:

“Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both [Story, 3rd Edn., p. 452; Dillon v. Parker, (1818) 1 Swans 359 : 36 ER 422; Thellusson v. Woodford, (1806) 13 Ves 209 : 33 ER 273.] . The principle is stated thus in Jarman on Wills [6th Edn., p. 532; and Farwell on Powers, 3rd Edn., p. 429.] : ‘That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it’ [See Walpole v. Conway (Lord), 1740 Barn C 153 : 27 ER 593; Kirkham v. Smith, (1749) 1 Ves Sen 258 : 27 ER 1018; Macnamara v. Jones, 1 Bro CC 481 : 28 ER 1251; Blake v. Bunbury, (1792) 4 Bro CC 21 : 29 ER 758; Wintour v. Clifton, 8 De GM & G 641 : 44 ER 537; Codrington v. Codrington, (1876) LR 7 HL 854 at p. 861; Pitman v. Crum Ewing, 1911 AC 217 at pp. 228, 233 (HL); Brown v. Gregson, 1920 AC 860 at p. 868 : 1920 All ER Rep 730 (HL).] . The principle of the doctrine of election is now well settled.”

“54. This principle has also been explained by this Court in Nagubai Ammal v. B. Shama Rao [AIR 1956 SC 593] . Speaking for a three-Judge Bench of this Court, Venkatarama Ayyar, J. stated in the Report : (AIR p. 602, para 23)

“23. ... The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election....”

49. Similarly, in M/s New Bihar Biri Leaves Co. and others v. State of Bihar and others, reported in (1981) 1 SCC 537, the principle has been explained as follows:-

“48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobatur (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. [(1921) 2 KB 608] ; see Douglas Menzies v. Umphelby [1908 AC 224, 232] ; see also Stroud's judicial dictionary, Vol. I, p. 169, 3rd Edn.).”

50. In view of the discussions made herein above, it is clear that the principle of approbate and reprobate would be applicable in the present circumstance and the opposite parties cannot be permitted to repudiate the conditions of service which are beneficial to the employees of the DRDA while applying other similar such service conditions.

51. Learned Additional Advocate General appearing on behalf of the State has submitted that the Government Order dated 17.03.1994 has

been misconstrued by the petitioner since it states that service rules made under Article 309 of the Constitution of India would not be applicable upon employees of the DRDA and since the 1974 Rules have been made under Article 309 of the Constitution of India, the same thus cannot be made applicable upon employees of the DRDA.

52. With regard to aforesaid submission, the opening paragraphs of Government Order dated 17.03.1994 would be referable in which the purpose of issuance of Government Order has been indicated. The Government Order clearly states that directions are being issued to regulate and bring about uniformity in service conditions of the employees of the DRDA because no service conditions for such employees have been notified as yet and since the DRDA is a registered Society, the rules made under Article 309 of the Constitution of India would be inapplicable. It is evident that the inapplicability of Rules made under Article 309 of the Constitution of India upon the employees of the DRDA clearly means that Rules made under Article 309 of the Constitution of India would not automatically be applicable upon the employees of the DRDA since it is a registered society. However, there is no legal bar in either Article 309 of the Constitution of India or under the said Government Order that beneficial conditions of service pertaining to Government employees made under Article 309 of the Constitution

of India cannot be extended to a registered society such as DRDA, which is 'State' under Article 12 of the Constitution of India. As such, the submission of learned counsel for the State is clearly misconceived.

53. The second submission of the learned State counsel is that the employees of the DRDA have already been held not to be government servants since they are not holding any civil posts under either the Central or the State Governments and, therefore, providing benefit of the 1974 Rules to employees of the DRDA would amount to giving them the status of Government servants.

54. The said submission of the learned State Counsel at the very outset is clearly misconceived. By extending the benefit of 1974 Rules upon employees of the DRDA, it cannot be said by any stretch of imagination that it would confer the status of Government employees upon them. Incorporation of the said Rules by reference merely amounts to providing the benefit of a beneficial legislation. As such, extending the benefit of compassionate appointment under the 1974 Rules upon the employees of the DRDA would only have the effect of providing the said beneficial benefit and not granting them the status of Government servants.

55. It has been further submitted by the learned State Counsel that paragraph 2(9) of the Government Order is merely an enabling provision and would be inapplicable unless it is adopted in all the DRDAs of the State, which has not been done. With regard to aforesaid submission, it is seen from the record that the present matter pertains to District Raebareli where the DRDA vide resolution dated 02.06.1994 has already adopted the Government Order dated 17.03.1994 in its entirety.

56. Apart from the aforesaid factor, it is also to be noticed that paragraph 2 of the Government Order clearly indicates that the State Government has taken a decision to issue guidelines with regard to service conditions of the employees of the DRDA in order to regulate and bring about uniformity for the employees in various DRDAs of the State. It has also been stated that the order is being issued so that the various DRDAs are able to make rules pertaining to the same in terms of the directions that are being issued.

57. The aforesaid statement in the Government Order clearly specifies that the directions issued vide the Government Order would be applicable across all the DRDAs without exception and would not be dependent upon its adoption by individual DRDAs. The provision enabling the various DRDAs to make rules or sub-rules in

terms of the directions is merely consequential and the directions issued by the Government Order are not at all dependent upon the DRDAs adopting the same or making rules in terms thereof. As such, the submission of learned State Counsel that the provisions of the Government Order are only enabling does not appear to be a correct position, particularly when it is undisputed that other service rules regarding Government employees are already being enforced upon the employees of the DRDAs throughout the State without any specific adoption or Rule having been made thereunder.

58. The last submission of learned State Counsel pertains to the fact that the DRDA was set up as a temporary organisation as indicated in Government Order dated 17.03.1994 itself and the staff also being temporary in nature. Regarding the aforesaid provision, it is also to be noticed that subsequently, vide Government Order dated 18.07.2016, the employees of the DRDA throughout the State of U.P. have been absorbed in the Department of Rural Development of the State Government. Even prior to such absorption, the department is existing for more than 35 years with its staff having been employed since then. Such a long period of not only the organisation but its employees as well cannot be said to be temporary in nature, which is a fact recognised by the State Government itself by issuance of the

Government Order dated 18.07.2016. As such, the said submission lacks merit.

59. Another submission of learned State Counsel although not having been taken in the counter affidavit filed in the writ petition is being considered since the same has been raised in the written submissions and is that the State Government subsequently has issued a Government Order dated 10.06.2013 denying the applicability of the 1974 Rules upon the employees of the DRDA and the same has not been challenged.

60. A perusal of the order dated 10.06.2013 filed along with the written submissions clearly indicates that it is not in the nature of a Government Order and has merely rejected the representation of one Smt. Meera Awasthi, wife of late Vijay Kant Awasthi for compassionate appointment under the 1974 Rules. The rejection of her claim is merely on the ground that the 1974 Rules are inapplicable upon the employees of the DRDA. The same cannot be termed to be a Government Order and is merely in the nature of decision upon a representation pertaining to one Smt. Meera Awasthi and was, therefore, not required to be challenged by the present petitioner. Even otherwise, the ground of rejection indicated in the order dated 10.06.2013 has already been considered herein above.

61. In view of the aforesaid facts that undisputedly, the State Government has the power to issue orders such as the Government Order dated 17.03.1994 in order to fill in the void pertaining to service conditions of employees of Government Order and also in view of paragraph 2(9) of the Government Order, it is clear that the Rules of 1974 would be applicable upon the employees of the DRDA.

Consideration of Question No.2 :- (ii) Whether the judgment of Division Bench in State of U.P. vs. Ajeet Kumar Shahi, Special Appeal No.714 of 2015, requires reconsideration in light of the Government Orders dated 17.3.1994 and 18.7.2016?

62. In view of the discussions made herein above, particularly with regard to the importance and applicability of Government Orders dated 17.03.1994 and 18.07.2016, and the same having escaped attention of the Division Bench in the case of **Ajeet Kumar Shahi** (Supra), it is clear that the aforesaid case required reconsideration.

63. Consequently, the questions referred to this Bench are answered as follows:-

Question No.1 : In view of the provisions of Government Order dated 17.03.1994, particularly clause 2(9), the provisions of the U.P. Recruitment of Dependents of Government Servant Dying in

Harness Rules, 1974 would be applicable upon employees of the District Rural Development Agency:

Question No.2: The judgment of Division Bench in **Ajeet Kumar Shahi** (Supra) having been passed in ignorance of Government Order dated 17.03.1994 is held not to be a good law and is, therefore, overruled.

64. The reference is answered accordingly.

65. Registry is directed to place the matter before the appropriate court dealing with the matter.

(Manish Mathur,J.) (Chandra Dhari Singh,J.) (Ramesh Sinha,J.)

Order Date :- 05.05.2021
kvg/-