

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR
LPA No. 111/2019

Reserved on: 19-07-2022
Pronounced on: 28-07-2022

State of JK and Ors.

...Appellant/Petitioner(s)

Through: Mr. Usman Gani, GA

Vs.

Mushtaq Ahmad Naik and Ors.

...Respondent(s)

Through: Mr. S. A. Makroo, Sr. Advocate with
Mr. Mohd Amin Bhat, Advocate

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

JUDGMENT

Per Javed Iqbal J'

1. The instant appeal is directed against Judgment and order dated 15th November, 2017 passed in SWP No. 963/2017 titled as “*Mushtaq Ahmad Naik and Ors. vs. State of JK and Anr.*” (hereinafter for short the impugned judgment).
2. Before advertng to the grounds of challenge urged in the appeal against the impugned Judgment, it would be appropriate to give a brief background of the case. The petitioners/respondents herein filed the aforesaid SWP with the following reliefs:

“Writ of mandamus commanding the respondents to count the service of the petitioners from 01-04-2001 to 30-12-2009 for all service benefits viz. promotion, seniority, pensionary benefits and other monetary benefits.

Writ of mandamus commanding the respondents to give retrospective effect to the order of regularization of the petitioners bearing Horticulture Order No. 412/E of 2009 dated 30-12-2009 and give effect to the order of regularization from 01-04-2001.

Writ of mandamus commanding the respondents to pay all the monetary benefits to the petitioners after counting their service for all service benefits w.e.f. 01-04-2001 and make the payments to the petitioners in the grade of Rs. 4440-7440 and also promote the petitioners to the next higher post and also reckon their seniority accordingly.”

The reliefs aforesaid had been claimed by the writ petitioners on the premise that they came to be engaged as daily wagers in the respondents department (appellants herein) in March, 1994 and became entitled, as such, to regularization in terms of SRO 64 of 1994. The petitioners contended that they were entitled to such regularization from 01-04-2001 on which date the petitioners completed seven years of their daily wage service.

3. It had been further stated in the petition that the petitioners' case for regularization was processed in the year 2001 by the respondents however, was not finalized for unknown reason and finally petitioners came to be regularized against Class IV posts of Chowkidar in the pay scale of 4440-7440 in terms of order dated 412/E of 2009 dated 30-12-2009 with prospective effect.
4. It had been further stated in the petition that respondents before regulating the services of the petitioners had obtained affidavits from them to the extent that the petitioners will not press for previous service either for the purpose of seniority or for any monetary benefit taking undue advantage of their hardship and because of unequal bargaining power despite the fact that the respondents had retrospectively regularized the services of one Ms. Rashida Akhtar also having been engaged as a daily wager in the year 1994 along with the petitioners upon a representation filed by the said Rashida Akhtar before the respondents/appellants herein.

5. The petitioners have had further contended in the petition that they approached the respondents and sought extension of all service benefits like seniority, promotion, pensionary benefits and all monetary benefits as had been extended in favour of similarly situated Ms. Rashida Akhtar granted to her in terms of order No. 361/E of 2016 dated 3rd January, 2017, but their requests and representations made in this regard did not evoke any response from the respondents compelling them to file the writ petition seeking therein the reliefs aforesaid.
6. The respondents in the writ petition being appellants herein had filed objections to the petition resisting and opposing the claim of the petitioners on the grounds that the petitioners' services were regularized vide order dated 30th December, 2009, and though being satisfied, yet the petitioners challenged the conditions therein after more-than eight years and that the petitioners have no parity with Ms. Rashida Akhtar as in her case the post was identified in the year 2001 and, as such, she had been regularized w.e.f 2001 and that the case of the petitioners was not been covered under the policy invoked and that the petitioners after having accepted prospective regularization of their services with all terms and conditions could not turn around in the year 2001 and seek regularization of their service in 2017 when they were not otherwise entitled to the same as per the rules.
7. The writ petition came to be disposed of in terms of the impugned Judgment/order by the writ court firstly, overruling the plea of delay and laches urged by the respondents/appellants herein on the premise that a fundamental right cannot be negated by any amount of delay or laches and secondly, has allowed the claim of the petitioners for

retrospective regularization of their services on the basis of the case of Ms. Rashida Akhtar who had been regularized retrospectively w.e.f 01-04-2001 though her regularization was ordered in the year 2010. The writ court summed up the impugned Judgment/order as follows;

“This petition is disposed of with a direction to the respondents to settle the case of the petitioners for giving effect to their regularization with effect from the date they have completed seven years of continuous daily-wager ship, in the manner it has been given to Ms. Rashida Akhtar vide Horticulture order No. 361/E dated 03-01-2017. This exercise shall be undertaken and completed within a period of four weeks from today.”

Heard learned counsel for the parties and perused the record.

8. According to counsel for the appellants, writ petitioners/respondents were lacking eligibility for regularization after having completed seven years of daily wage services as they were not possessed of qualification and the prescribed age for considering the writ petitioners/respondents herein for regularization it was imperative for extending relaxation in their case in respect of qualification and age, as such, as a consequence thereof, the writ petitioners/respondents herein after relaxation of their qualification and age came to be accorded regularization in terms of the order dated 30th December, 2009 prospectively.
9. It is further contended by the counsel for the appellants that the writ petitioners/respondents' case have had been distinct and different than that of Ms. Rashida Akhtar and had no similarity with her in the matter of regularization as in her case no relaxation was required to be accorded and that the said Rashida Akhtar even though was regularized in the year 2010 yet was ordered to be regularized

retrospectively owing to the fact that her case had not been appropriately considered. Learned counsel for the appellants would thus contend that the writ petitioners/respondents, as such, had no case against the appellants herein for claiming retrospective regularization on any grounds much less in terms of the provisions of SRO 64 inasmuch as on the ground of parity with Ms. Rashida Akhtar more so when the writ petitioners/respondents had consented to their prospective regularization by submitting affidavits foregoing their claims therein for claiming regularization from back date.

10. **Per contra**, learned counsel for the writ petitioners/respondents would however, controvert the submissions made by the counsel for the appellants and would contend that the writ petitioners/respondents have had to be regularized retrospectively after having put in seven years of continuous daily wage service with the respondents and that the appellants herein ought to have considered their case for regularization immediately after completion of their seven years daily wage service which the respondents failed to consider and that the case of the writ petitioners/respondents had been similar and identical to that of Ms. Rashida Akhtar, as such, different treatment could not have been given to the writ petitioners/respondents in the matter of regularization and also that the swearing of an affidavit by them for not claiming regularization from back date in law is in-significant in view of law laid down by the Apex Court in case titled as “*Somesh Thapliyal and Anr. vs. Vice Chancellor, H. N. B. Garhwal University and Anr.*” reported in (2021) 10 SCC 116 wherein it had been provided that the employer is always in a dominating position and it is open to the employer to dictate the terms of the employment and a court can take judicial notice of the fact, if an employee takes initiation

in questioning the terms and conditions of employment that would cost his/her job itself and that the bargaining power is vested with the employer itself and the employee is left with no option but to accept the conditions dictated by the authority.

11. In the first instance, it becomes imperative to refer to the eligibility conditions provided under Rule 4 of the provisions of SRO 64 which is extracted and reproduced hereunder:

4. Eligibility for regularisation

“A Daily Rated Worker/Work Charged Employee shall be eligible for regularisation on fulfilment 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 merits by the concerned Administrative Department;
- (d) that he is not 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 worked as Daily Rated Worker or Work-charge Employee and no disciplinary proceedings are pending against him; and
- (f) that he has completed seven years continuous period of working as Daily Rated Worker or Work-charged Employee or partly as Daily Rated Worker and partly as Work-charged Employee.”

12. A plain reading of the aforesaid provision would manifestly suggest that a Daily Rated Worker would become eligible for regularisation on fulfilment of all the conditions as contained therein. All the conditions are inter-dependent and have to be fulfilled by a daily wager whose case is to be considered for regularisation. Completion of seven years of continuous period of daily wage service alone thus would not entitle a daily wager for regularisation unless such daily wager fulfills other eligibility conditions. Since the writ petitioners/ respondents

admittedly had been lacking the qualification and age conditions, as such, the appellants initiated a process for the relaxation of the same and upon concluding and finalizing the same accorded regularization to the writ petitioners/respondents in terms of the order of regularisation, in that, the writ petitioners/respondents herein acquired and got possessed of the complete eligibility only after such relaxation in the year 2009, therefore, came to be regularized rightly from said date by the appellants herein. The writ petitioners/respondents in this regard have submitted an affidavit undertaking that they shall not claim regularization from the back date which affidavits however, are being contended to have been submitted under compelling circumstances by the writ petitioners/respondents. It is not in dispute that the writ petitioners/respondents while submitting the said affidavits have neither reserved any right thereupon for enforcement of any of the rights or else expressed any protest thereof. The writ petitioner/respondents herein admittedly have consented to abide by the conditions imposed by the appellants qua the filing of affidavits in the year 2009 and then turned around and filed the petition in the year 2017. The Judgment of the Apex Court supra relied upon by the counsel for the writ petitioners/respondents thus has no application to the facts and circumstances of the case and does not lend any support to the case of the writ petitioners/respondents.

13. In so far as the case set up by the writ petitioners/ respondents herein before the writ court on the ground of parity with Ms. Rashida Akhtar in respect of their regularisation is concerned, the perusal of the record manifestly demonstrate that the case of the said Rashida Akhtar and that of the writ petitioners/respondents is quite distinct and different with no parity between them except that the said Rashida Akhtar and

the writ petitioners/respondents came to be initially engaged as daily wagers by the respondents.

14. Admittedly there has been no relaxation required either in the matter of age or qualification in the case of the said Ms. Rashida Akhtar while appellants herein considered her case for regularisation. The distinction between the cases of the writ petitioners/respondents herein and that of the said Ms. Rashida Akhtar is writ large on the face of the record. The writ petitioners/respondents herein and the said Rashida Akhtar in fact have had been unequally circumstanced, as such, could not have been treated on a par, as unequals in law cannot be treated as equals.
15. For what has been observed, considered and analyzed herein above, the appeal merits to be allowed. Accordingly, appeal is allowed, the impugned Judgment and order dated 15th November, 2017 of the writ court is set aside, as a consequence whereof the writ petition of the writ petitioners/respondents herein is dismissed.

(JAVED IQBAL WANI)
JUDGE

(PANKAJ MITHAL)
CHIEF JUSTICE

SRINAGAR
28.07.2022
Sakeena

Whether the order is reportable: Yes/No