



Government of Jammu and Kashmir
Health & Medical Education Department
Civil Secretariat, Srinagar/Jammu

Subject: Implementation of judgment dated 18.03.2009 passed by the Hon'ble High Court in SWP No. 329/1996 titled Gh. Mohammad Mir v/s State and Ors read with judgment dated 16.08.2009 passed in SWP No. 864/2013 and Order dated 31.08.2015 read with Order 28.03.2022 passed in CPSW No. 275/2014 titled Gh. Mohammad Mir v/s Mr. M.K Banday and Others.

Government Order No. 455 - JK(HME) of 2023
Dated: 02.06.2023

WHEREAS, the petitioner namely Mr. Gh. Mohammad Mir was initially engaged by the then BMO, Sopore as Part Time Sweeper at Sub Centre, Brath-Kalan Sopore on 03.12.1988. Upon the appointment of regular sweeper in the year 1996, the petitioner was disengaged by the office of BMO Sopore;

AND WHEREAS, the petitioner approached the Hon'ble High Court of J&K and Ladakh through the medium of SWP No. 329/1996 titled Ghulam Mohammad Mir v/s State & others praying for his continuation in the department;

AND WHEREAS, the Hon'ble Court vide Order dated 01.08.1996 passed in aforementioned petition passed the following directions:-

"Instead of regularizing the services in terms of Govt. SRO 64/94, his services have been terminated and replaced by someone else. Prima facie, such an act action could not have been taken. Therefore, subject to ultimate decision of the case, the respondents are directed to employ the petitioner on daily wage basis provisionally and paid accordingly."

AND WHEREAS, pursuant to the aforesaid orders of the Hon'ble Court, the petitioner was provisionally allowed to continue by the then BMO, Sopore;

V. J. H.
[Signature]

AND WHEREAS, the said writ petition was finally disposed of by the Hon'ble High Court vide judgment dated 18.03.2009 as:

“Respondents have specifically pleaded that petitioner is not entitled to regularization. Learned counsel for the respondents stated at bar that petitioner is still holding position and performing job as part time sweeper right from 31st of December, 1998;

In view of the pleadings of the parties and settlement made at bar. I deem it proper to dispose of this writ petition by providing that respondents to consider the case of the petitioner for regularization as per rules applicable and till passing of the consideration order; his position be maintained.

Writ petition disposed of along with all connected CMPs.”

AND WHEREAS, while the case of the petitioner was under examination in the department, the petitioner filed another Writ Petition bearing SWP No. 864/2013 titled Ghulam Mohammad Mir v/s State & others, seeking therein regularization of his services and the Hon'ble Court vide order dated 16.08.2013 disposed of the said writ petition with the following directions:-

“Slackness on part of the respondents is not passing the appropriate orders under rules, requires intimation of contempt proceedings against the respondents, which the petitioner has not chosen to do, Instead has filed the instant petition which cannot be maintained on the same cause, as such, is disposed of with an observations that the respondents shall ensure implementation of the judgement dated 18.03.2009 in its letter and spirit. Further shall ensure that the decision is taken on the basis of the recommendation of Director Health Services, Kashmir dated 26.09.2011 within a period of four weeks from the date of copy of the order is served upon them. Meanwhile, respondents shall also consider release of the wages to which petitioner shall be legally entitled to as per the prevailing rules regulations.

Petition accordingly disposed of.”

AND WHEREAS, the petitioner then filed contempt petition (CPSW No. 275/2014 arising out of SWP No. 864/2013) before the Hon'ble High Court at Srinagar alleging violation of judgment dated

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[Signature]

16.08.2013 & 18.03.2009 passed in SWP Nos. 864/2013 & 329/1996 respectively by the respondents;

AND WHEREAS, the Health & Medical Education Department vide Govt. Order No. 508-HME of 2014 dated 22.08.2014 issued a consideration order rejecting the claim of the petitioner;

AND WHEREAS, after issuing the aforesaid Government Order, the Hon'ble Court on 31.08.2015 passed the following order in Cont. No. 275/2014 titled Ghulam Mohammad Mir v/s Gazanffer Hussain & Ors:-

".....When the petitioner is working from the year 1988 right of regularization could not be denied to him that too when he is shown to have rendered his services with dedication, which fact has been accepted, i.e. the Director Health Services has recommended his services shall be regularized.

The order of consideration appears to have been issued in deviation to the object and content of the two orders, one passed on 18.03.2009 and another on 16.08.2013 while disposing of the two writ petitions as were filed by the petitioner.

The compliance report filed in the afore-stated background is not in consonance with the requirements of law.

Learned Dy. AG would submit that now consideration order has been passed; it is for the petitioner to work out the remedies but such submission is not acceptable; in case order would have been passed while observing the judgment in its letter and spirit then such submission would have prevailed force. Then proper course was to challenge the same but it is noticed that the order has been passed while ignoring the actual direction, therefore, compliance of the judgments in its letter and spirit has remained to be a dream.

The petitioner infact has been working in the respondent- Department from the year 1988, his position of engagement as daily rated worker was not passed by the incompetent person as the same was passed in pursuance to the directions of this Court which fact has also not been taken care of by the authority concerned.

In the afore-stated circumstances compliance report as well as consideration order issued, being not in conformity with the directions has to be ignored. Respondent-authority shall afresh accord

consideration to the case of the petitioner in the light of the observations made and after observing the spirit of the two judgments.

Fresh consideration order shall be passed within a period of four weeks from the date copy of the order is served upon them. Respondent shall also ensure payment of the wages to the petitioner within the same period."

AND WHEREAS, in light of above direction, the claim of the petitioner was again rejected by the Department vide Government Order No. 816-HME of 2015 dated 21.12.2015;

AND WHEREAS, the Hon'ble Court vide Order dated 28.03.2022, passed in the instant contempt petition, directed as under:-

"On 18.12.2021, this Court had observed that the respondents despite availing number of opportunities have not passed fresh consideration order in conformity with the direction of the writ court. Even today, respondents have not filed the statement of facts/compliance report. It seems that the order passed by this Court had been taken casually by the respondents in as much as even the counsel for the respondents have not put their appearance today.

In view of the above, a notice be issued to the respondents to show cause as to why the Contempt of Court proceedings be not initiated against them."

AND WHEREAS, the matter was taken up with Finance Department for consideration of the case of the petitioner for regularization of his services in terms of these orders/ observations of the Hon'ble Court;

AND WHEREAS, the Finance Department vide their U.O. No. FD-Code/294/2021-03-Part(2)-1261 dated 18.07.2022 opined as under:-

"The department is intimated that the instant case is related to the regularization of the service of the petitioner under the provisions of SRO-64 of 1994. SRO-64 of 1994 is under the administrative scrutiny on the advice of the Law Department. Law Department has opined that SRO-64 of 1994 is violative of Article 14, 15 and 16 of the Constitution on India. In case the orders of the Hon'ble Court have assumed finality, the Department may take up the matter with General Administration Department."

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AND WHEREAS, the case was, accordingly, taken up with General Administration Department which vide U.O No. GAD-CORD/148/2022-09 dated 17.10.2022 remarked as:

"The opinion of the department of Law, Justice & Parliamentary Affairs was sought in the matter, who vide UO No. Law/Opn/140/2022-10 dated 21.09.2022 has opined as under:-

"Returned. Department is advised to examine the matter afresh and file fresh detailed Status Report by taking action in terms of all the intervening orders particularly order dated 31.08.2015 as per directions of the Hon'ble Court"

Accordingly, the Department is advised to proceed further in the matter in light of the above opinion."

AND WHEREAS, the case was further examined in the Department and it was decided to take up the matter again with the General Administration Department for further guidance in the matter in light of the Hon'ble High Court directions. The GAD, in response, opined as:

"The opinion of Department of Law, Justice & Parliamentary Affairs was sought with regard to regularization schemes and the later opined as under:-

All the engagements made illegally are void ab-initio and the same would not give any justiciable right to the illegal appointee to claim regularization. The said principle has been upheld in State of Karnataka v/s Uma Devi case and the ratio of the said case can be taken as a defense before the concerned forum to deny regularization of an illegal engagement.

Where the Hon'ble Court have passed directions, in a particular case for regularization of an engagement and contempt proceedings have been initiated, the Department may project and express the inability to implement the said directions, in view of the fact that such action would contravene and infract the express directions laid down in Uma Devi case and other similar binding precedents.

Accordingly, the Department is advised to proceed further in the matter."

V. Ahle

V. Ahle

AND WHEREAS, the petitioner has throughout sought relief under the provisions of the Jammu and Kashmir Daily Rated Workers/Work Charged Employees (Regularization) Rules, 1994 (SRO-64 of 1994). Assuming but not admitting the validity of the said SRO at this juncture, the said Rules, however, provide for regularization of services of only Daily Rated Workers and Work Charged Employees engaged in any Department. Since the petitioner was initially engaged as Part Time Sweeper upto 1996 only and has provisionally continued on the interim directions of the Hon'ble Court, as such, he does not fall within the ambit of the said SRO;

AND WHEREAS, while examining the case of the petitioner, it has been found that the petitioner has not been engaged by adopting due process of law. As such, his claim for regularization cannot be sustained when the basis of engagement in itself is de-hors law. The Hon'ble Supreme Court of India has laid the law in the case of *Umarani v/s Registrar, Coop. Societies (2004) 7 SCC 112* that:

“...when appointments were made in contravention of mandatory provisions of the Act and statutory Rules framed thereunder and by ignoring essential qualifications, the appointment would be illegal and cannot be regularized by the State. The State could not invoke its power under Article 162 of the Constitution to regularize such appointment. Regularization is not and cannot be a mode of recruitment by any State within the meaning of Article 12 of the Constitution or anybody or authority governed by a statutory Act or the rules framed thereunder. In view of the settled legal position the instant application is not maintainable and deserves to be dismissed...”

AND WHEREAS, the Hon'ble Supreme Court of India has laid a law in the case of *State of Karnataka Vs Uma Devi (3), (2006) 4 SCC 1* that:

“...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

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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 cases concerned, 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 on the post. In view of the settled legal position the instant application is not maintainable and deserves to be dismissed..."

AND WHEREAS, the Hon'ble Supreme Court in the same case also held that:

"...a daily rated or casual worker is only a temporary employee, and it is well settled that a temporary employee has no right to the post. The term "temporary employee" is a general category which has under it several sub-categories e.g. casual employee, daily-rated employee, ad hoc employee, etc. The distinction between a temporary employee and a permanent employee is well settled. Whereas a permanent employee has a right to the post, a temporary employee has no right to the post. It is only a permanent employee who has a right to continue in service till the age of superannuation (unless he is dismissed or removed after an inquiry, or his service is terminated due to some other valid reason earlier). As regards a temporary employee, there is no age of superannuation because he has no right to the post at all. Hence, it follows that no direction can be passed in the case of any temporary employee that he should be continued till the age of superannuation"

AND WHEREAS, in Tariq Ahmad Mir and Ors Vs State of J&K and Ors 2007 JKJ (HC) (2) 584, it was held that:-

" ... Regularization cannot be made to the post de-hors the Rules and an employee cannot invoke the jurisdiction of the court in order to seek appointment and that too de-hors the Rules."

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Now therefore, in compliance to Hon'ble High Court judgment dated 18.03.2009 passed in SWP No. 329/1996 read with judgment dated 16.08.2013 passed in SWP No. 864/2013, the claim of the petitioner has been considered in consultation with Finance Department, General Administration Department and Department of Law, Justice & Parliamentary Affairs, and has been found devoid of merit.

By order of the Government of Jammu and Kashmir.

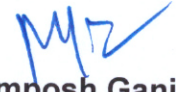
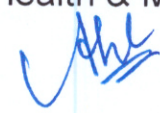

Sd/-
(Bhupinder Kumar)IAS
Secretary to Government,
Health & Medical Education Department

No. HD-Lgal/285/2022-02

Dated: 02.06.2023

Copy to the:-

1. Joint Secretary, Secretary (J&K), Ministry of Home Affairs, Government of India.
2. Commissioner/Secretary to Government, General Administration Department.
3. Secretary to Government, Department of Law, Justice & Parliamentary Affairs.
4. Secretary in the Department, Finance Department.
5. Director, Health Services, Kashmir.
6. Director Archives, Archaeology and Museums, J&K, Srinagar.
7. Chief Medical Officer Baramulla.
8. OSD with the Advisor (B).
9. Private Secretary to Secretary to Govt., Health & Medical Education Department.
10. Government Order file/Stock file (w.2 s.c)


(Pamposh Ganju)
Under Secretary to Government
Health & Medical Education Department


02/06.