HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 16.11.2022
Pronounced on: 22.11.2022

WP (C) 2229/2022
CM 5604/2022

Masrat Yousuf

… Petitioner/Appellant(s)

Through: Mr. Salih Pirzada, Advocate

V/s

UT of J&K and others

… Respondent(s)

Through: Mr. Mohsin Qadri, Sr. AAG with Mr. Faheem Shah, GA

CORAM: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

J U D G M E N T

1. In the instant petition filed under Article 226 of the Constitution, the petitioner prays for grant of following reliefs:

   I. *By a writ of certiorari order no. 1197 of 2022 dated 09.9.2022 may be quashed;*

   II. *By a writ of mandamus the respondents be directed to regularize the services of the petitioner from the date of entitlement as recommended by the Empowered Committee and approved by the Executive Committee in terms of the Srinagar Municipal Corporation Class-IV Services (Special Provision) Regulations, 2014;*

   III. *Allow the petitioner to continue as Media Officer along with all consequential benefits till settlement of the case for regularization;*

   IV. *To grant all the service benefits including seniority, monetary dues etc. retrospectively from the date of entitlement;*

   V. *To produce the record pertaining to the service case of the petitioner;*

   VI. *The respondents be burdened and directed to pay exemplary damages/compensation of Rs. 50 lakhs to the petitioner for loss, inconvenience, harassment and metal agony suffered by the petitioner.*

2. The case set up by the petitioner on the basis of which the reliefs

aforesaid are being prayed would reveal that the petitioner being Post-Graduate in Mass Communication with specialization in Electronic Media & Public Relations came to be engaged in the respondent- Srinagar Municipal Corporation (hereinafter for short 'the Corporation') as Media Assistant on consolidated wages for a period of six months with one day break vide order no. 1451 of 2011 dated 26.7.2011 after responding to an advertisement notification no. SMC/PS/JCA/595-99 dated 16.6.2011 issued by the Corporation.

3. A post-facto sanction is stated to have been granted by the Corporation to the date of engagement of the petitioner with effect from 6.7.2011 in terms of order no. Estt. (G) 5026-28 dated 3.10.2011.

4. The initial engagement of the petitioner is stated to have been extended by the Corporation with periodical enhancement in the monthly remuneration by issuance of various office orders from time to time up till the year 2012.

5. It is being stated that on account of continuous service rendered by the petitioner in the Corporation for a period of seven years, the petitioner acquired a right of regularisation in terms of Regulation 5 of the **Srinagar Municipal Corporation Class-IV Service (Special Provision) Regulations, 2014** (hereinafter for short the Regulations of 2014), as a consequence whereof the Commissioner of the corporation is stated to have addressed a communication to respondent no. 1 vide endorsement no. SMC/PS/Com/190 dated 10.1.2019 elucidating the right to regularization of the petitioner on account of her continuous service rendered against the post of a **Librarian**.

6. It is being next stated that the case of the petitioner for regularisation came to be recommended by the *Empowered Committee* under rules, and consequently approved by the *Executive Committee* of the Corporation as reflected in the minutes of meeting of the Executive Committee held on 20.11.2021.

7. It is being further stated that the Corporation has been regularising the services of similarly situated eligible employees under the Regulation of 2014 against various class IV posts, including some similarly situated employees working as computer personnel in the Corporation who had filed SWP no. 1974/2016 before this court and earned judgment thereof on 10.7.2017 from this court.

8. It is being next stated that the service of the petitioner have been recurring in nature being continuously utilised by the Corporation, entitling the petitioner to regularization on account of her having attained eligibility in terms of Regulation 5 of Regulations 2014, for which the petitioner have had represented before the Corporation.

9. It is being further stated that the Corporation instead of regularising the services of the petitioner, issued order bearing no. 1197 of 2022 dated 9.9.2022 impugned in the instant petition terminating the engagement of the petitioner.

10. The instant petition is being maintained by the petitioner *inter alia* on the grounds that the order impugned is veiled and punitive in substance, inflicted on the petitioner only to dilute her right to regularisation of her services; and that the said action has been taken by the respondents in aberration of the procedure established by law while circumventing the

principles of natural justice.

It is also urged that there has been no disciplinary action pending or initiated against the petitioner and that the petitioner has been subjected to disengagement in absence of the same on the pretext of temporary nature of service and that the procedural safeguards enshrined under the Constitution against illegal action of termination or disengagement is conferred to the employees pursuant to the holding of a civil post and that in the presence of recommendations of the Empowered Committee recommending the services of the petitioner for regularization, the petitioner has guaranteed right which could not have been neutralized by the respondents by resort to the disengagement of the service without ascribing any reasonable explanation.

It is further urged that the impugned order operates clandestinely, in a punitive manner and in effect is dismissal without issuing a show cause notice to the petitioner while resorting to vindictive action, stigmatizing the career of the petitioner and that the impugned order is bereft of any justification or reasoning, and same is reckless and colourable in its form and content.

It is being further urged that the Commissioner of the Corporation had no jurisdiction to neutralize the functions of the Governing Council of the Corporation and to disengage the services of the petitioner in violation of constitutional, legal and procedural safeguards and the principles of natural justice.

It is further urged that the petitioner has been subjected to victimization and demoralization though having been inducted in the corporation on the basis of academic and tactical proficiency and, as

such, the respondents were estopped from disengaging the petitioner in absence of any plausible reason.

It is further urged that the petitioner had a right to hold the post which could not have been abridged arbitrarily and in contravention of due course of law. It is further urged that the impugned order has visited the petitioner with civil consequences causing severe breach and a likely persisting loss. It is also urged that the petitioner had a legitimate expectation with regard to confirmation of her service for having acted on the representation of the respondents in response to offer for engagement.

It is lastly urged that the respondents had no right or authority to dispense with the service of the petitioner unilaterally on any pretext including the professed performance indicated in the impugned order having violated Articles 14, 16 and 21 of the Constitution.

11. **Per contra**, in their objections filed by the respondents to the petition, it is averred that the petitioner was engaged on consolidated wages as Media Assistant in the Corporation initially for a period of six months with one day break after every 89 days subject to the condition that the engagement was purely on temporary basis and **terminable at any time.**

12. It is being further stated in the objections that the services of the petitioner were extended for a period of six months with effect from 27.1.2022 on the same terms and conditions as envisaged in the initial engagement order and that a permanent employee of the Corporation namely Idrees Aqail came to be posted as incharge Public Relations Officer to deal with the media related matters, thus no longer requiring

the services of the petitioner.

13. It has been further averred in the objection that no post of Media Assistant had been advertised in pursuance whereof the petitioner came to be engaged, instead the advertisement notice in question was issued for hiring the services of the expert to launch awareness campaign.

14. It is further stated that the petitioner was not eligible as per the terms of the advertisement notice not being possessed of the requisite qualification and experience, yet came to be engaged *de hors* the terms and conditions of the advertisement notice.

15. It is being further stated in the objection that in terms of Regulations of 2014, for an appointee to be considered for regularization the initial engagement has to be against a post in the Corporation and since the engagement of the petitioner was not against a post borne on the cadre of the Corporation, as such, the case of the petitioner for regularization recommended by the Empowered Committee /Executive Committee, came to be rejected the said recommendation being subject to the rules and regulations.

Heard learned counsel for the parties and perused the record.

16. Mr. Salih Pirzada, learned counsel for the petitioner, while reiterating the contentions raised and grounds urged in the petition would forcefully contend that the petitioner was entitled to protection under Article 311 of Constitution before disengagement of her services. Learned counsel would also insist that the petitioner was entitled for regularization of her services upon completion of seven years of service in the corporation in terms of Regulations of 2014 but in order to deprive the petitioner of said guaranteed right, the respondents disengaged her services.

17. Mr. Mohsin Qadiri, senior counsel, appearing for the respondents while controverting and resisting the submissions made by the counsel for the petitioner, would contend that the initial engagement of the petitioner was illegal and in essence was backdoor in nature. Mr. Qadri would submit that the petitioner was not holding any post in the corporation notwithstanding her illegal appointment but had been offered an assignment of an expert in pursuance of the advertisement notice though having been labelled as Media Assistant, **a non-existent post** nor either sanctioned or borne on the establishment of the Corporation. Mr. Qadri, would thus, contend that the provisions of Article 311 of the Constriction were not applicable to the petitioner and that the petitioner was not entitled to regularization of her services under any law, rules and regulations much less under the Regulations of 2014.

18. Having regard to the nature of controversy involved in the matter coupled with the submissions made by appearing counsel for the parties, following two issues emerge for the consideration and adjudication of this court;

Issue no. 1:

Whether the petitioner was holding a post in the Corporation upon her engagement in pursuance of advertisement notice dated 16.06.2011 read with her initial order of engagement dated 26.7.2011 or any other subsequent order thereto, and as such before disengaging her engagement, the petitioner was entitled to protection/constitutional safeguard enshrined under Article 311 of the Constitution

Issue no. 2:

Whether the petitioner on the basis of her engagement in

the Corporation in pursuance of advertisement notice dated 16.06.2011 read with her initial order of engagement dated 26.7.2011 or any other subsequent orders thereto as also on the basis of the recommendations made by the Empowered Committee/Executive Committee became entitled to regularization of her service under any law including the Regulations of 2014.

Analysis

Issue No. 1

Article 311 of the Constitution being relevant and germane herein, a reference here under to the same becomes imperative:

> **Article 311:** Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State
>
> (1) No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed
>
> (2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed: Provided further that this clause shall not apply
>
> (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
>
> (b) where the authority Empowered to dismiss or remove a person or to reduce him in rank ins satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

> (c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry
>
> (3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority Empowered to dismiss or remove such person or to reduce him in rank shall be final

A plain reading of the aforesaid provision would reveal that it affords a safeguard to an employee against arbitrary dismissal, removal or reduction in rank. It provides a protection against dismissal, or removal by an authority subordinate to the appointing authority and against such a penalty being imposed without giving the delinquent official an opportunity defending himself. It also emanates from the provision supra that it extends to all persons holding a **civil post** under the Union or a State, including members of all India services and State services. Thus, the expression **civil post** appearing in the Article is significant. As has been held by the Apex Court, in "**State of Assam Vs. Kanak Chandra Dutta, (AIR 1967 SC 884)", "Mathura Dass Mohan Lal Kedia Vs. S.D, (AIR 1980 SCC 653)", "Gurjeewan Garewal (Dr) Vs. Dr. Sumitra Dash (AIR 2004 SC 2530)"**. a "post" in this context has been held to denote an **"office"** and a post under the State has been held to be an office or position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which exists apart from and independent of the holder of the post. **Thus, unless there is a post (civil post) against which a person is appointed, provisions of Article 311 cannot said to be attracted.**

19. It is settled and significant to mention here that though a statutory Corporation being a juristic entity separate from the State, its employee may not said to be holding a civil post under the State so as to attract Article 311. The fact that a statutory Corporation, exercising statutory powers may be a **"State"** within the purview of Article 12 of the Constitution, however, would not necessarily lead to the conclusion that its employees hold a civil post under the State as the questions under the two provisions i.e. Article 311 and Article 12 being different. The Apex Court in case titled as "**Satish Chandra vs. Union of India, reported in AIR 1953 SC 250"** has held that where a person is engaged in a statutory corporation on the basis of a special contract upon certain terms and conditions, Article 311 has no application as the engagement of the person would be an ordinary case of a contract terminated under its stipulated terms and conditions.

20. Keeping in mind the aforesaid legal position and reverting back to the case in hand it is not in dispute that the petitioner herein came to be engaged as an expert in pursuance to advertisement notice dated 16.06.2011 though the engagement had been named as of a Media Assistant, however, not being admitted by the respondents to be a sanctioned post borne on the establishment of the Corporation and not having being denied by the petitioner.

Perusal of the advertisement notice as also the initial order of the engagement of the petitioner dated 26.07.2011 would lend support to the aforesaid position that the petitioner came to be hired as an awareness campaign expert regarding importance of maintenance of sanitation, avoiding use of polythene and other related matters to save

environment and consequently got engaged thereto on consolidated and temporary basis **terminable at any time.** The said engagement of the petitioner as an expert cannot *per-se* said to be her engagement against a post in absence of any material produced by the petitioner as also in presence of the specific stand taken by the respondents in this regard that the engagement was never ever against any post. The said contention of the respondents in this behalf also lends support in view of the case setup by the petitioner herself asserting in the petition that her case for regularization came to be considered, recommended and approved by the Empowered Committee/ Executive Committee against available class IV vacancy and prior to that against the post of **Librarian**. The engagement of the petitioner seemingly is an ordinary case of a service contract terminable at any time under the terms provided therein the engagement order. Thus, the case setup by the petitioner and the contention of the counsel for the petitioner urged in this regard in general and the applicability of the provisions of Article 311 of the Constitution in particular therefore, is not entertainable in law. The judgements of the Apex Court reported in **AIR 1984 SC 636, AIR 1958 SC 36 and AIR 1967 SC 884,** relied upon by the counsel for the petitioner in view of aforesaid analysis do not lend any support to the case of the petitioner. **The issue no. 1 supra is accordingly decided.**

It is pertinent to mention here that the petitioner besides raising aforesaid issue also alleged violation of principle of natural justice by the respondents while disengaging her services, as such, it becomes imperative to deal herewith the said issue as well. It is settled law that

principles of natural justice is one of the basic pillars of justice which means that no one should be condemned unheard and that wherever possible principles of natural justice have to be followed. It is also well settled that the principles of natural justice cannot be put in any straitjacket formula. The principles may not be applicable in a given case depending upon the fact situation obtaining in a case. The principles of natural justice cannot be applied in a vacuum. It is significant to mention here that as per the record made available by the respondents with their objections, the petitioner has been engaged though in pursuance of advertisement notice dated 16.06.2011 yet in the selection list has been figuring at serial no. 6 having been **found not qualified scoring 20 points out of 100 as against 5 other qualified candidates having much more merit than the petitioner with 50.5, 78.4, 45.4, 60.4 and 48.5 points**. The said engagement of the petitioner seemingly has been tainted, faulty and illegal and in essence a backdoor therefore, not attracting the principles of natural justice as has been held by the Apex Court in case titled as "**Ashok Kumar Sonkar Vs. Union of India and Ors. Reported in 2007 (4) SCC 54"**.

Issue no. 2

While dealing with the instant issue a reference to the relevant clauses of the Regulation of 2014 supra become necessary here under:-

> **2(h)** ***Post:*** - means a post borne on the establishment of the Corporation in the cadre of Class-IV categories like peons, orderlies, farash, safaiwallas, mushkies, summon server, sampler, workshop helper, chowkidar, gardener, boatmen, slaughter house worker, cattle catcher, cleaner and similar posts created by the Competent Authority from time to time on need basis;
>
> **(d) Consolidated appointee,**: - means a person who has been appointed against any post under the Corporation on consolidated monthly salary/wages;
>
> **(e) Contractual appointee**: - means a person who has been appointed on

contract basis against any post under the Corporation;

(f) Ad hoc appointee: - means a person appointed on ad hoc basis against any post on need basis;

3. Application of the Regulation. - These Regulations shall apply to Safaiwallas and Class-IV posts under (Sic) Corporation as are held by any person having been appointed on *ad hoc* contractual basis including those appointed on consolidated salary/wages; provided that such appointments have been made by the Competent Authority on need basis but shall not apply to-

(a) Persons appointed on tenure posts co-terminus with the life of the project or scheme of the State or Central Government, as the case may be ;

(b) Part-time or seasonal employees.

Explanation to Rule (3). - Provided that only Safaiwalla and Class-IV posts shall be utilized for purpose of adjustment/regularization of the consolidated workers engaged from time to time and having completed seven years of continuous service.

5. Regularization of contractual, consolidated and *ad hoc* appointee. - Notwithstanding anything to the contrary contained in any rule/regulations for the time being in force, the *ad hoc*, contractual or consolidated appointees shall be regularized on the fulfillment of the following conditions:-

(i) That he has been appointed/engaged as consolidated tad hod contractual worker by the Competent Authority on need basis;

(ii) That he continues as such on the appointed day;

(iii) That he possessed the requisite qualifications and eligibility for the post on the day of his initial appointment on contractual, or consolidated basis as prescribed under the recruitment rules governing the service or post;

(iv) That no disciplinary or criminal proceedings are pending against him on the appointed day ; and

(v) That he has completed seven years of continuous service as such on the appointed day;

(vi) Regularization shall be done against clear vacant post:

Provided that the regularization of the eligible *ad hoc*, contractual or consolidated employees under these regulations shall have effect only from the date of such regularization irrespective of the fact that such appointees have completed more than seven years of service on the appointed day or thereafter but before such regularization :

Provided further that any contractual or consolidated appointee who is in-service but who has not completed seven years of service on the appointed day shall continue as such till completion of seven years and shall thereafter be entitled to regularization under these regulations.

A bare perusal of Regulations supra would manifestly tend to show that same are applicable to and for regularization of eligible *consolidated, contractual and ad hoc* employees eligible for regularization against the post of Safaiwala, class-IV post and other class IV posts upon having completed seven years of continuous service as per the eligibility prescribe in Regulation supra. Therefore, in order to be eligible for regularization, a *consolidated, contractual* or *ad hoc* appointee ought to have been engaged against a **post** in the Corporation borne on the cadre of the corporation and also possessed of requisite qualification and eligibility as provided therein the Regulations.

21. Risking repetition, indisputably, the services of the petitioner came to be hired as an expert on consolidated wages for launching awareness and not against any post borne on the establishment of the Corporation notwithstanding the styling of the expert as Media Assistant. In presence of the explicit and specific stand taken by the respondents that the petitioner was not engaged against a post as also the non-existence of the post of Media Assistant in the corporation having admittedly not been controverted or denied by the petitioner, the claim for regularization lodged by the petitioner (notwithstanding, the disengagement of her services in terms of the impugned order) under and in terms of Regulations of 2014 cannot said but to be grossly misconceived solely on the premise that the Regulations of 2014 *prima facie* are not applicable to the petitioner for not holding any post as envisaged in the Regulations of 2014, even though the case of the petitioner was recommended/approved by the Empowered Committee/Executive Committee respectively as the

said recommendation, approval in law would pale into insignificance. It is pertinent to note here that the claim of the petitioner for her regularization as per the stand taken by the respondents in their objections stands rejected in terms of order dated 7.11.2022.

Even otherwise as well, the claim of the petitioner for regularization of services is not worth consideration in view of the settled position of law laid down by the Apex court in case titled as **Secretary, State of Karnataka and others vs. Umadevi and others reported in 2006 (4) SCC 1,** and in **CIVIL APPEAL Nos. 5689 - 5690 of 2021,** titled as **"Union of India and Ors. Vs. Ilmo and Anr." dated 07.10.2021** wherein at paras 36 and 43 and 8.5 respectively following has been laid down as under:

> "36. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not

be getting even that employment when securing of such employment brings at least some succor to them. 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 and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India."

"43. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in Dr. Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College [(1962) Supp. 2 SCR 144]. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent."

> "8.5 Even the regularization policy to regularize the services of the employees working on temporary status and/or casual labourers is a policy decision and in judicial review the Court cannot issue Mandamus and/or issue mandatory directions to do so. In the case of R. S. Bhonde and Ors. (supra), it is observed and held by this Court that the status of permanency cannot be granted when there is no post.----------".

It is also significant to mention here that the petitioner in the petition has also pressed into service the doctrine of legitimate expectation on the premise that the said doctrine is applicable to her case in view of the representation made by the respondents while engaging her and recommending her case for regularization. The said plea being connected with issue no. 2 supra is, as such, dealt with here. So far as the said plea of application of doctrine of legitimate expectation urged by the petitioner in the petition to her case is concerned, same as well having regard to the facts and circumstances of the case is not attracted as it is settled that legitimate expectation does not mean illegitimate flight of fancy. The said plea raised by the petitioner is misdirected and non sustainable in law.

22. Thus the claim of the petitioner for regularization as lodged in the petition in view of the aforesaid analysis is held to be legally not tenable. Accordingly, issue no. 2 supra shall stand settled.

23. For what has been observed, considered and analyzed hereinabove, the petition entails dismissal. Accordingly petition is dismissed.

(JAVED IQBAL WANI)
JUDGE

Srinagar
22-11-2022
N Ahmad

Whether the order is reportable: Yes/No