



2024 JLMHC-SGR-102-09

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP(C) No. 798/2023
WP(C) No. 1166/2023
WP(C) No. 220/2024
WP(C) No. 221/2024
WP(C) No. 222/2024
WP(C) No. 223/2024
WP(C) No. 224/2024
WP(C) No. 225/2024

Reserved on: 22.07.2024
Pronounced on: 26.07.2024

WP(C) No. 798/2023
UT of J&K and others
Vs.
Muzaffar Ahmad Bhat and others

WP(C) No. 1166/2023
UT of J&K and others
Vs
Mohd. Umar Mochi and others

WP(C) No. 220/2024
UT of J&K and others
Vs
Tawseef Ahmad Mantoo and others

WP(C) No. 221/2024
UT of J&K and others
Vs
Tanveer Ahmad Wani and others

WP(C) No. 222/2024
UT of J&K and others
Vs
Syed Ahmad and others

WP(C) No. 223/2024
UT of J&K and others
Vs
Mohd Sultan Mochi and others

WP(C) No. 224/2024
UT of J&K and others
Vs
Irshad Ahmad Bhat and others

WP(C) No. 225/2024
UT of J&K and others

Petitioner(s)

Through: - Mr. Hakim Aman Ali Dy. AG.





Respondents

Through: Mr. Altaf Haqani Sr, Advocate with
Mr. Asif Advocate.

CORAM: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR JUSTICE M.A.CHOWDHARY, JUDGE

JUDGMENT

Sanjeev J

1. Impugned in these petitions are order dated 28.12.2022 passed by the Central Administrative Tribunal, Srinagar Bench [“the Tribunal”] in O.A Nos. 221/2022 titled ‘Muzaffar Ahmad Bhat and others vs. UT of Jammu and Kashmir and others’ and 409/2022 titled ‘Mohd Umar Mochi and ors vs UT of Jammu and Kashmir and others’ and order dated 02.06.2023 passed by the Tribunal in OA Nos.09/2023 titled ‘Mohd Sultan Mochi & Others v/s UT of J&K and Ors’, 10/2023 titled ‘Tanveer Ahmad Wani &Ors vs UT of J&K &Ors’, 11/2023 titled ‘Syed Ahmad & Others vs UT of J&K and Ors’, 12/ 2023 titled ‘Ghulam Nabi Sheikh &Ors vs UT of J&K &Ors’, 13/2023 titled ‘Irshad Ahmad Bhat &Ors vs UT of J&K & Ors’ and 14/2023 titled ‘Tawseef Ahmad Mantoo&Ors vs UT of J&K &Ors’ whereby the Tribunal has allowed the OAs and directed the petitioners herein to pay the salary of the respondents herein (petitioners before the Tribunal) for the work they have performed and also for the work they perform in future.

2. Before we advert to the grounds of challenge urged by Mr. Aman Ali, learned counsel for the petitioners to throw challenge to the impugned orders, we deem it appropriate to briefly notice few material facts.



3. The respondents came to be appointed by the Chief Medical Officers concerned against class-IV posts of Nursing Orderlies/Sweepers/Auxiliary Nurses/Female Nursing Orderlies etc., somewhere in the year 2008 on substantive basis. While they were performing their duties and were being paid their salary regularly, the Directorate of Audit and Inspections, J&K, Srinagar during the year 2012-2013 conducted a special audit in respect of the establishment of Offices of Health Department of Kashmir Division and Deputy Director, Audit and Inspection, Kashmir submitted his report to the Director, Audit and Inspection, Kashmir with the observation that in as many as 2274 employees had been appointed in different Districts illegally and the matter was required to be taken up with the Department of Health and Medical Education for initiating appropriate action. With a view to examine the observation of the Directorate of Audit and Inspection, the Director, Health Services constituted District and Divisional level Committees with the mandate to examine the report of Audit and Inspection teams in respect of all 2274 employees.

4. The District Level Committees constituted by the Director, upon enquiry, pointed out that there were many candidates in the list of 2274 employees who had been appointed on the recommendations of J&K SSB and in terms of SRO 43 of 1994 and regularised. In the light of the aforesaid report submitted by the District Level Committees, the concerned Chief Medical Officers were directed to release the salary of such employees who stood appointed through a proper selection mechanism. The Divisional Level Committee also examined the matter in the light of information/report provided by the District Level



Committees and came to the conclusion that in as many as 133 employees including the respondents herein stood appointed between 2002 to 2010 as Nursing Orderlies/Class-IV and Safaiwalas by the then Chief Medical Officers. The Divisional Level Committee was also of the tentative opinion that these appointments were illegal. The matter was taken up by the Directorate of Health Services, Kashmir with the Administrative Department of Health. The Administrative Department also examined the matter at its level and directed the Directorate, Health Services to release the pending salary of all the employees except 133 identified as illegal appointees with a further direction to initiate action against the illegal appointees immediately. The Directorate of Health Services vide its communication No. DHSK/Estt-II/NG/390-408 dated 26.03.2013, forwarded the instructions of Administrative Department to the Chief Medical Officers concerned for information and strict compliance.

5. Apprehending adverse action, the respondents herein along with few others amongst 133 alleged illegal appointees approached this Court and challenged the communication dated 26.03.2013 and also prayed for release of salary from the date it had been stopped by the respective Drawing and Disbursing Officers. While this development had taken place, the matter came up for consideration once again before the Administrative Department. Upon examination by the Administrative Department, the matter was referred to the General Administrative Department seeking later's advice. On the basis of some advice tendered by the GAD, the Administrative Department of Health vide its communication dated 13.10.2016



conveyed the approval of the Government to the disengagement of 133 illegal appointees including the respondents herein with a further advice that action may be taken in the matter, accordingly. This communication was also assailed by the respondents in SWP No. 1658 of 2016 and was stayed by a learned Single Judge of this Court vide order dated 27.10.2016. In this way, further action which was envisaged by the Administrative Department against the alleged illegal appointees including the respondents herein could not be initiated and taken to logical end. Because of intervention made by this Court, the respondents herein continued in service and successfully avoided adverse action against them envisaged by the Administrative Department of Health. The petitioners herein, however, stopped the salary of all the illegal 133 appointees including the respondents herein which necessitated the filing of OAs aforesaid before the Tribunal seeking a direction to the petitioners herein to release the salary withheld w.e.f 01.04.2016 on the analogy of a Division Bench Judgement dated 18.11.2020 passed by this Court in the case of **UT of Jammu and Kashmir and ors vs. Ashiq Hussain Dar and others** (LPA No. 136/2020).

6. The OAs were resisted by the petitioners before the Tribunal primarily on the ground that the appointment of the respondents having been found illegal and contrary to law, cannot enure to the benefit of the respondents. It was pleaded by the petitioners before the Tribunal that the inquiries conducted by the Directorate of Audit and Inspection, District Level Committees and Divisional Level Committee have clearly found that the appointments of the



respondents were without following any due process of selection and, therefore, had in the eye of law. It was, thus, contended that the respondents, having procured the appointments through illegitimate means, cannot claim their salary. Regarding the payment of salary up to the year 2016, the stand taken by the petitioners before the Tribunal was that the salary was released in their favour in compliance with the orders passed by this Court.

7. The Tribunal considered the rival contentions and placing strong reliance upon the judgment of Division Bench of this Court in **Ashiq Hussain Dar's** case (*supra*), allowed the OAs and directed the petitioners herein to disburse the pending and future salary of the respondents for the period they had performed their duties and would perform their duties in future respectively. It is these orders of the Tribunal which are called in question before us on multiple grounds. In support of challenge to the impugned orders, the petitioners have relied upon the following decisions:

(i) **Rita Mishra and ors vs. Director, Primary Education, Bihar and others**, AIR 1988 PATNA 26

(ii) **Ramanand Bharti vs State of UP and others**, decided on 22.05.2023; and,

(iii) **State of Bihar and ors vs. Devendra Sharma**, AIR Online 2019 SC 1226.

8. Having heard learned counsel for the parties and perused the material on record, we are of the considered opinion that the orders passed by the Tribunal impugned in this petition deserve no interference.



9. Indisputably, the respondents were appointed on different class-IV posts prior to 2010 on substantive basis. True it is that somewhere in the year 2012-13, the Directorate of Audit and Inspection pointed out that the appointments of the respondents were without adopting due procedure of selection and, therefore, illegal. Taking cognizance of the report of Audit and Inspection Wing of the Government, the Administrative Department of Health constituted District Level Committees and a Divisional Level Committee to look into the matter. The Committees constituted by the Administrative Department also pointed out that the appointments of the respondents were illegal and *de hors* the procedure. The matter was considered by the Administrative Department of Health in consultation with the GAD and it was decided to dispense with the service of the respondents and, accordingly, the approval was granted and the competent Authorities were directed to initiate action against the respondents in accordance with law. The attempt by the petitioners to take action against the respondents by holding an enquiry in accordance with law was thwarted by the petitioners by seeking intervention of this Court. The respondents, as is indicated above, succeeded in persuading the Court twice. On the intervention shown by this Court in the petitions filed by the respondents, the petitioners were virtually restrained from taking any action against the respondents. Since the petitioners were *prima facie*, convinced that the appointments of the respondents were illegal and illegitimate and, as such, they decided to stop the salary of the respondents. This is how the respondents filed the aforesaid OAs before the Tribunal which have been decided in terms of the orders impugned in this petition.



10. As is apparent from reading of orders of the Tribunal, the same are solely based upon the decision of a Division Bench Judgment of this Court rendered in Ashiq Hussain Dar's case (supra). It is pertinent to mention here that against the aforesaid judgment, a SLP was filed before the Supreme Court and the Supreme Court also dismissed the SLP. The Tribunal has observed that the case of the respondents was similar and identical to the case of the Ashiq Hussain Dar and others and, therefore, the judgment dated 18.11.2020 would cover their case. In a nutshell, the Tribunal, relying upon the Division Bench Judgement (supra) came to the conclusion that so long as the appointments of the respondents are not held to be illegal or irregular by any competent Authority, the salary cannot be denied for the period such appointees perform their duties. The plea of *fence sitter* approaching the Court belatedly has been rejected by the Tribunal.

11. We have carefully gone through the orders passed by the Tribunal and we concur with the view taken by the Tribunal. The facts projected by the respondents before the Tribunal are entirely identical to the facts of the case of Ashiq Hussain Dar and others. In the background of similar controversy raised, the Division Bench of this Court in Ashiq Hussain Dar's case has held thus:

"In the backdrop of aforesaid facts, the appellants seek to challenge the impugned judgment, primarily on the ground that the appointments of the respondents as Class-IV have been found to be without following due process of law and therefore, they are not entitled to continue in services, nor can they be paid any salary or allowed to make subscription to the GP fund. It is submitted that with regard to their appointments, the matter has already been taken up with the Crime Branch, Kashmir which is investigating the matter. It is



submitted that prima facie, the appellants have found the appointment of the respondents contrary to law and, therefore, no premium can put on such irregular and illegal appointments.

Having heard learned counsel for the parties and perused the record, we are of the view that the judgment of the learned Writ Court impugned in this letters patent appeal is, well reasoned and does not call for any interference. The learned Single Judge has rightly concluded that so long the appointment of

the respondents is intact and has not been held to be illegal or irregular by any competent authority, they cannot be denied the salary for the period they perform their duties. It is rightly held by the learned Single Judge that taking the work from the respondents without paying their due salary is tantamount to "Begar" which is constitutionally prohibited. Thus, the view taken by the learned Single Judge is unexceptionable and therefore, cannot be interfered with".

12. The Tribunal, thus, committed no illegality in relying upon the judgment of Division Bench (*supra*) and deciding the OAs in terms thereof. The plea of the petitioners that the respondents were *fence sitters* and, therefore, were not permitted to file the petitions stems out of total fallacy in understanding the doctrine that *fence sitter* cannot be permitted to knock the doors of the Court belatedly on the ground that the persons similarly situated have, after long battle in the Court, succeeded in obtaining the relief. The plea of *fence sister* can be pressed into service only in cases where the subsequent petition filed by the alleged *fence sitters* is highly belated and hit by delay and laches.

13. In the instant case, Ashiq Hussain Dar and others filed their petition in the year 2020, whereas the instant OAs was filed by the respondents before the Tribunal in the year 2022. The petition cannot be stated to be belated or hit by delay and laches. The Tribunal has



rightly turned down the plea of the petitioners that the respondents were *ex-officio* sitters and, therefore, cannot be allowed to claim the relief prayed for in the OAs after inordinate delay. That apart, the only relief claimed by the respondents in the OAs is with regard to payment of their withheld salary. Needless to say that so long as the salary remains withheld and is not paid, it gives a fresh cause of action. In other words, we can say that the cause of action on the basis of which the OAs were filed before the Tribunal was a recurring cause of action and, therefore, there is no justification to term the petitions belated and hit by delay and laches.

14. The judgments relied upon by Mr. Aman Ali, learned Dy.AG having distinguished facts would not apply in the present case as in all those cases, the Supreme Court as also the High Courts of Patna and Allahabad declined to release the salary of the appointees after having found the appointments forged, fraudulent and illegal. In the instant case, an inquiry in accordance with law is yet to be conducted and it is yet to be established as to whether the appointments of the respondents are forged, fraudulent or illegal. Till such conclusion is arrived at by the competent Authority, the salary of the respondents for the period they perform their duties cannot be stopped.

15. For the reasons given above, we find no legal infirmity in the impugned orders of the Tribunal and while upholding the same, we further provide that the salary, that shall be paid to the respondents in terms of the impugned orders of the Tribunal, is subject to the respondents submitting an undertaking that in case the respondents are ever held to be illegal appointees in an inquiry conducted by the



petitioners, they shall refund the entire amount of salary received, to the petitioners along with interest @ 6 % per annum. Nothing said herein above shall come in the way of the petitioners to proceed against the respondents in accordance with law.

These writ petitions filed by the petitioners are, accordingly, dismissed.

(M.A.CHOWDHARY)
JUDGE

(SANJEEV KUMAR)
JUDGE

Srinagar
26.07.2024
Sanjeev

Whether the order is speaking: Yes
Whether the order is reportable: Yes

