HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

WP(C) No.1816/2021 c/w
WP(C) No. 1892/2021

Reserved on : 27.06.2022
Pronounced on: 07.07.2022

Jaffar Hajam
Mohd Abbas and ors.

.....petitioner(s)

Through :- Mr. M.A.Qaoom Advocate
Mr. Syed Manzoor Advocate.

V/s

Chairman and Managing Director, FCI .....Respondent(s)
& ors.

Through :- Mr. Sheikh Umar Farooq Advocate
Mr. Manzoor A Dar Advocate
Ms. Sahila Nisar Advocate vice
Mr. T.M.Shamsi ASGI.

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1 These two writ petitions involve identical issues, and are, therefore, disposed of by this common judgment.

2 The petitioners are aggrieved of and have challenged the order of Area Manager, Food Corporation of India issued vide order No.Estt/Casual/DOS/2016 dated 24.11.2016 ['the impugned order'] whereby and whereunder the petitioners along with proforma respondents herein, who were working as casual labourers in FSDs Leh and Kargil have been accorded temporary status subject to certain terms and conditions laid down in the impugned order. The petitioners claim that they are entitled to be brought on permanent establishment in the same manner in which the

petitioners of SWP Nos. 1549/1998 have been regularized and brought on the permanent establishment of Food Corporation of India [‘FCI’].

3 With a view to appreciate the claim of the petitioners and the challenge thrown to the impugned order on various grounds, it is necessary to set out the material facts.

The FSDs Leh and Kargil were made operational by the FCI in the year 1992-93. Due to cold climatic conditions and the difficult terrain of Ladakh region, no officers/officials from Jammu or Srinagar region were willing to work and, accordingly, the petitioners along with proforma respondents herein were voluntarily engaged as casual workers to perform the duties of watch and ward and some other ancillary work of the Depots. It is submitted that the casual workers similarly situated with the petitioners herein, who were also engaged in the year 1992-93 in the Srinagar region, filed SWP No. 1549/1998 before this Court which was disposed of vide judgment dated 28.12.2002 directing the Food Corporation of India to accord wholesome and due consideration to the petitioners’ case for regularization under law after keeping in view the observations made in the said judgment. In compliance to the said judgment passed by this Court, the writ petitioners of SWP No. 1549/1998, who were working as casual workers like the petitioners and proforma respondents herein, were regularized and brought on permanent establishment of FCI. Relying strongly on the aforesaid judgment passed in the case of counterparts of the petitioners working in Srinagar region, the petitioners along with proforma respondents filed a representation before the officers of FCI.

Hearing no response from the respondents and feeling aggrieved, the petitioners along with proforma respondents (respondent Nos 6 to 11) filed SWP Nos. 1276.2004, 1545/2004 and 1605/2004 before this Court seeking, *inter alia*, a direction to the respondents to regularize their services in the same manner in which other similarly situated casual labourers working in Kashmir region had been regularized. The said writ petitions came to be disposed of by this Court vide judgment dated 24.05.2007 with a direction to the official respondents to accord consideration to the case of the petitioners and proforma respondents for

their regularization in accordance with rules, norms and policy governing the field. The Court also directed that while according consideration to the claim of the petitioners and proforma respondents herein, the judgment passed by the Court in SWP No. 1549/1998 should also be taken into consideration.

4 It is submitted by the petitioners that when the judgment dated 24.05.2007 was not complied with by the official respondents, they along with proforma respondents filed SWP Nos. 333/2010 and 09/2011. The said writ petitions were clubbed together and disposed of by a Single Bench of this Court vide its judgment dated 11.03.2015. The learned Single Judge in its judgment noted that though the formal consideration order in terms of the judgment dated 24.05.2007 was yet to be passed by the official respondents, yet their reply filed in the writ petitions divulged that the respondents had taken a decision on 05.01.2009 in 314th meeting of Board of Directors and the case of the petitioners and proforma respondents had been rejected. The Single Bench also found that though the official respondents had not given specific reasons for rejecting the proposal including the proposal to regularize the services of the petitioners and proforma respondents, yet it was discernible that the Board's decision was influenced by the judgment of Hon'ble Supreme Court rendered in the case of **State of Karnataka vs. Uma Devi and ors**. The Court after considering the rival contentions came to the conclusion that the Board of Directors had misdirected in applying the ratio of judgment of **Uma Devi's** case (supra) which, in the given facts and circumstances, was not applicable to the case of the petitioners and the proforma respondents. Accordingly, the Single Bench allowed the petition vide its judgment dated 11.03.2015, but without specifically issuing any directions to the respondents.

5 Be that as it may, the aforesaid judgment was not accepted by the official respondents, who assailed it before the Division Bench by filing LPASW Nos. 164/2015 and 192/2015. The Division Bench of this Court vide its judgment dated 14.09.2015 disposed of both the appeals directing the Board of Directors of FCI to reconsider its earlier decision and pass a fresh order bearing in mind the scheme framed in 176th Board meeting held on 24.02.1987 providing regularization of casual labourers/daily wagers working for more than 3 years. The observations of the Division Bench, which are to some extent relevant for determining the controversy on hand, are contained in para (9) of the judgment and are produced hereunder:

> *"9.In the light of the said judgments, we are of the view that though regularization cannot be claimed as a matter of right, the private respondents having been engaged in the year 1998 in a most difficult area, namely Kargil Depot of FCI and they having been allowed to work for 17 years and posts being available for regularization and services of similarly placed persons having been regularized as admitted by the appellants may be on special reasons, the Board is bound to reconsider its decision already taken and pass a fresh order bearing in mind the scheme framed in 176th Board meeting held on 24.02.1987 providing regularization of casual labourers/daily wagers working for more than three years, within a period of three months from the date of receipt of copy of this order. The Board while making the decision shall also keep in mind that the Food Corporation of India is an Industry and workers employed have a right to get fair treatment. The watchmen posts are also required permanently for FCI godowns. The FCI is an industry and it is bound to follow the provisions of Industrial Disputes Act in terms of the decision of the Hon'ble Supreme Court reported in 1985 (2) SCC 136 (Workmen of the Food Corporation of India vs. M/S Food Corporation of India). In the said judgment no following Section 9-A of the Industrial Disputes Act 1947, while changing the conditions of service was held illegal and the same was held ineffective. The FCI Board while considering all aspects shall also consider the judgment of the Hon'ble Supreme Court reported in AIR 2015 SC 2210 (ONGC Ltd vs. Petroleum Coal Labour Union and ors) wherein while dealing with a similar claim of a*

> *workman appointed by the ONGC it is held that keeping an employee appointed on a temporary basis and continuing in such status for number of years is unfair labour practice."*

6. It appears that when the judgment of the Division bench dated 14.09.2015 too was not complied with even after the review petition moved by the FCI stood dismissed by the Division Bench vide its order dated 10.05.2016, the petitioner and proforma respondents filed a contempt petition No.79/2016 alleging non-compliance of the judgment dated 14.09.2015 (supra). Before the Division Bench hearing the contempt petition, the respondents made a statement that in compliance to the judgment of the Division Bench, the FCI had taken a decision in terms of its order dated 24.10.2016 to grant temporary status to the petitioners and the proforma respondents, who were writ petitioners in SWP No. 09/2011 and SWP No. 333/2010 w.e.f 03.06.2016 and that the consequential order would be given to the petitioners within a period of two weeks. On the basis of this statement made before the Division Bench, the contempt petition was closed vide order dated 25.10.2016. As deposed before the Division Bench in the contempt proceedings, the respondents passed the consequential order on 24.11.2016 i.e the order impugned conferring upon the petitioners and the proforma respondents working as casual labourers in FSDs Leh and Kargil the status of temporary employees subject to terms and conditions given in the impugned order itself. With a view to better appreciate the controversy, the terms and conditions of the impugned order are reproduced hereunder:

> (i) the casual workers who has completed 10 years of services as on 01.07.2012 are eligible for the benefits of the scheme;
>
> (ii). The services of the casual workers who do not fulfil the criteria fixed for the benefit of the scheme may only be allowed to continue in the services in case there is any

pending Court case/award/orders of the Court(s) otherwise the services of the casual workers be dispensed by giving them the notice as per rules;

(iii). *A written undertaking is to be submitted by the worker before grant of the benefit of the scheme that no claim for regularization and arrears for the work done prior to 03.06.2016 be filed in any legal forum/FCI. Any court case which is pending in the any court is to be withdrawn before extending the benefit of the schem to the casual labour;*

(iv). Casual workers extended the benefit of the scheme shall continue to do the same duties or duties ordered by the superiors as per the need of the time;

(v). casual workers who acquire the benefit of the scheme will not be brought on to the permanent pay roll/employee unless the future policy for regularization/permanent absorption if any come into force;

(vi). Casual workers who already are getting the benefits beyond the scheme due to court orders/.direction may be allowed to continue on the same status;

(vii) wages at daily rates with reference to the minimum of the pay scale(IDA) for corresponding regular class-IV employees including DA, HRA, Lunch subsidy and conveyance allowance at par with the regular class IV employees as per FCI rules;

(viii) benefits of increment at the same rate as applicable to regular IV employees as per FCI rules.

7. It is not disputed before me that the petitioners as well as the proforma respondents accepted the impugned order and the temporary status conferred upon them w.e.f 03.06.2016 with all the benefits envisaged therein. The petitioners and the proforma respondents, total 15 casual labourers working in the FSDs Leh and Kargil, while accepting the impugned order also submitted a written undertaking to the respondents that they shall not claim any regularization, arrears for the work done prior to 03.06.2016 in any legal forum or before FCI. The undertaking also envisaged that the beneficiaries of the impugned order shall also withdraw any case filed by them, if any, and pending before any competent court of

law. The undertaking was *sine quo non* for extending the benefits of Government Order aforeasid. The petitioners and proforma respondents accepted the order and got the benefits as envisaged therein. It is not discernible from the writ petitions as to what provoked them to approach this Court after five years of the acceptance of the impugned order by filing the instant petitions. The petitioners have not only raised their objections to some of the terms and conditions envisaged in the impugned order, but also reiterate their claim for regularization on a par with the petitioners of SWP No. 1549/1998.

8 The respondents have filed their objections and have taken a categoric objection to the maintainability of the petitioner on the ground of delay and laches, acquiescence and estoppel.

9 Having heard learned counsel for the parties and perused the material on record, I am of the considered view that this petition is hit by delay and laches and acquiescence.

10. Indisputably, the judgment in the case of the petitioners and the proforma respondents was passed by the Division Bench in LPASW No. 164/2015 and LPASW No. 192/2015 on 14.09.2015 and the review petition filed by the FCI against the said judgment was dismissed by the Division Bench of this Court on 10.05.2016. After dismissal of the review petition and in compliance to the judgment passed by the Division Bench, the impugned order was passed by the FCI on 24.11.2016. It is pertinent to note that with the allegation of non-compliance of the judgment passed by the Division Bench, the petitioners along with proforma respondents had moved a contempt petition before the Division Bench. Before the Division Bench, as noted above, the FCI made a statement that they had issued an order on 24.10.2016 granting temporary status to the petitioners of SWP

No. 9/2011 and 33./2010 w.e.f 03.06.2016 and that the consequential order to give benefit to the petitioners and others would be passed within two weeks. The statement of FCI was accepted by the Division Bench which was incidentally headed by the Chief Justice, who had presided over the Bench which had heard and decided the LPAs.

11 It is true that on the date, the contempt proceedings were closed, the learned counsel appearing for the appellants (petitioners as well as proforma respondents herein) was not present before the Division Bench, but the appellants in person were present there. It is, thus, evident that the appellants, who appeared in person before the Division Bench too had shown their satisfaction with the order passed and proposed to be passed by the FCI conferring temporary status on them. Had the appellants appearing in person objected to the disposal of the contempt petition, the Division Bench would have surely taken note of such submission and perhaps passed some appropriate orders. However, it clearly transpires that the appellants, who had filed the contempt petition, too felt satisfied.

12 The present petition has been filed after five years of passing of the impugned order.

13 The petitioners as well as the proforma respondents, who were engaged as casual workers in FSDs Leh and Kargil were given the temporary status which entitled them to have the minimum of the pay scale of regular class IV employees working in FCI including DA, HRA, Lunch subsidy and conveyance allowance on par with regular class-IV employees of FCI. The impugned order, however, provided that the casual workers including the petitioners, who were conferred temporary status shall not be brought on permanent pay roll and shall not become employees of the FCI unless policy of regularization/permanent absorption is issued by the FCI in

future. The order did contain some conditions which cannot be said to be in consequence with Article 14 of the Constitution of India.

14 I have already reproduced the terms and conditions of the impugned order above and find condition No.(iii) debarring the petitioners and other beneficiaries of the impugned order from taking recourse to litigation for seeking their regularization and arrears etc., is not sustainable in law. The employer cannot impose conditions of employment which have the effect of taking away the right of its employees to seek judicial review of the actions of the employer. Right to seek judicial review is a vital right conferred by the Constitution and any terms and conditions of employment taking away this right, which restrain a person to seek legal remedies for enforcement of his rights are, null and void. Rest of the conditions do not offend Article 14 of the Constitution in any manner and, therefore, cannot be termed as irrational or arbitrary.

15 Indisputably, the petitioners and proforma respondents accepted the impugned order wholeheartedly and submitted an undertaking as sought for by the official respondents in terms of clause (iii) of the impugned order. Apart from submitting the undertaking, the petitioners and proforma respondents also communicated their acceptance of offer in writing in terms of clause (ii) of the impugned order. A quick reference to clause (ii) is also necessary and the same is reproduced hereunder:

> "(ii). The services of the casual workers who do not fulfill the criteria fixed for the benefit of the scheme may only be allowed to continue in the services in case there is any pending Court case/award/orders of the Court(s) otherwise the services of the casual workers be dispensed by giving them the notice as per rules"

16. The petitioners along with proforma respondents got the benefits envisaged under the impugned order and worked in that capacity for almost 5 years without any objection or demur. The petitioners have not been able to bring to my notice any representation or protest petition filed by them against the impugned order. It was only in the year 2021, the petitioners and proforma respondents woke up from the slumber and issued a legal notice through their counsel to the FCI on 26th July 2021. This notice was obviously issued as a run up to the filing of instant petition and to come out of the delay and laches. As is rightly pointed out by learned counsel appearing for the official respondents that the petitioners after having accepted the order with their eyes wide open and without making any rue or protest cannot be permitted to come to this Court after availing all the benefits envisaged under the impugned order and that too after a long period of 5 years. The petitioners as also the proforma respondents are estopped by their conduct and acquiescence to come to this Court to challenge the order which they wholeheartedly accepted in the year 2016.

17. That apart, the Division Bench which considered the contempt petition filed by the petitioners and others alleging non-compliance of the judgment of the Division Bench also felt satisfied with the impugned order passed by the official respondents and, therefore, in the presence of the petitioners and others closed the contempt proceedings. The reliance by Mr. Qayoom, learned counsel appearing for the petitioners on a Constitution Bench Judgment of the Supreme Court in **Olga Tellis & Ors vs Bombay Municipal Corporation and ors**, **1985 (3) SCC 545** to contend that there could be no waiver of the fundamental rights and, therefore, the plea of estoppel and acquiescence cannot be pressed into service against the petitioners, is totally misplaced. The aforesaid

Constitution Bench Judgment of the Supreme Court is decided in entirely different context and set of facts. In the aforesaid matter before the Supreme Court, the petitioners had conceded before the High Court that they would not claim any fundamental right, in case, their eviction from their pavement or slum dwellings are effected. Despite having conceded before the High Court, they filed petitions under Article 32 of the Constitution of India before the Supreme Court and a plea of estoppel was taken by State of Maharashtra.

18 Repelling the plea of State of Maharashtra, the Supreme Court held that there could be no estoppel against the enforcement of fundamental rights and even if the petitioners had conceded before the High Court that they would not claim any fundamental right in case of their eviction from their pavement or slum dwellings, they would not be estopped from claiming the same before the Supreme Court in the writ petition.

19 The doctrine of estoppels, insofar as it relates to waiver of fundamental rights is concerned, has been discussed by the Supreme Court in paras (28) and (29) of the judgment supra which, for facility of reference, are reproduced hereunder:

> *"28. It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and substance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must*

make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democratic Republic. It is in order to fulfill the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15,16,19,21 and 29, and some on citizens and non-citizens alike, like those guaranteed by Articles 14,21,22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful state could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well- founded is another matter. But, the argument has to be examined despite the concession.

29.The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-today transactions. In Basheshar Nath v. The Commissioner of Income Tax Delhi, [1959] Supp. 1 S.C.R. 528 a Constitution Bench of this Court considered the question

> *whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das C.J. and Kapoor J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H.Bhagwati and Subba Rao,JJ.) held that not only could there be no waiver of the right conferred by Article 14, but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy".*

20. The legal position with regard to estoppel and waiver against the fundamental rights is clearly settled by the Supreme Court in the aforesaid judgment, but, as stated above, the judgment does not apply in the instant case. The petitioners before me are not claiming any fundamental right which is objected to by FCI as having been waived off by acquiescence.

21 From the narration of events given above, it is evident and also as is held by the Division Bench of this Court in its judgment dated 14.09.2015 passed in LPASW Nos. 164/2011 and 192/201, the regularization of services by a casual labour/temporary employee cannot be claimed as a mater of right, nor the Division Bench in its judgment dated 14.09.2015 has given any finding to the effect that the petitioners and the proforma respondents were entirely similarly situated with the writ petitioners of SWP No. 1549/1998 who were regularized under special circumstances and in compliance to the judgment passed in SWP No. 1549/1998. That apart, it is clear that the petitioners as well as the proforma respondents had showed their satisfaction with the impugned order before the Bench hearing the contempt petition. It is because of this reason that the petitioners and proforma respondents did not raise their grievance before

any authority of the respondents whatsoever till issuance of legal notice in July 2021 which too was by way of run up to the filing of writ petition.

22 For the reasons aforementioned and in the facts and circumstances of this case, I am of the view that the judgment of the Constitution Bench rendered in **Olga Tellis's** case **(**supra) is not attracted or applicable to the case on hand. These petitions suffer from huge delay and laches. The petitioners, by their conduct and having acquiesced in the impugned order are estopped from challenging the same on the ground that it does not reflect complete compliance of the judgment passed by the Division Bench on 14.09.2015. **Accordingly, both the petitions are dismissed.** However, as held above, this Court finds one of the conditions i.e condition No. (iii) of the impugned order, bad in the eyes of law and the same shall be deemed to have been deleted from the impugned order. Other wise also, the aforesaid condition has outlived its utility and has not been pressed into service by the respondent-FCI to deny the petitioners any right, nor shall the petitioners be liable for any action for filing the instant petitions or in future to enforce their rights in breach of offending clause i.e condition No.(iii) of the impugned order.

23. Before parting, I would like to observe that the petitioners may have lost the battle for the present, but nothing stops them to come to this Court seeking regularization of their services on the ground of long officiation independently of the judgments earned by them in the past. It is also noteworthy that the nature of appointment (temporary status with several service benefits) offered to the petitioners has all the trappings of permanent/regular appointment. This Court is sure that the respondent-Corporation (PSU), being a model employer, is alive to its duty towards its employees particularly those working at the lowest rung and would not

indulge in any labour practice which is unfair and is tantamount to exploitation. This Court hopes and trusts that the respondent-Corporation will, sooner than later, come up with appropriate policy of regularization to erase the scars that are left after healing of wounds (grant of temporary status) of the petitioners.

(**SANJEEV KUMAR)**
JUDGE

Srinagar
07.07.2022
Sanjeev PS

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