

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

Reserved on: 17.05.2024
Pronounced on:24.05.2024

WP(C) No.774/2023

c/w

WP(C) No.611/2023

WP(C) No.768/2023

WP(C) No.823/2023

WP(C) No.1150/2023

WP(C) No.774/2023

Mohammad Shafi Malik

S/o Fateh Mohammad Malik

R/o Trehgam District Kupwara

And others

...PETITIONER(S)

Vs.

**1.UT of J&K through
Commissioner/Secretary to Govt.
Department of Rural Development
and Panchayati Raj
And others**

...RESPONDENT(S)

WP(C) No.611/2023

Ali Mohammad Sofi

S/o Gh. Mohammad Sofi

R/o Saloor Ganderbal

...PETITIONER(S)

Vs.

**1.UT of J&K through
Commissioner/Secretary to Govt.
Home Department
And others**

...RESPONDENT(S)

WP(C) No.768/2023

Suhail Ahmad Khan

S/o Ab. Qayoom Khan

R/o Kawari Laderwan Tehsil

Trehgam Distt. Kupwara

...PETITIONER(S)

Vs.

WP(C) No.774/2023 & clubbed matters

**1.UT of J&K through Chief
Secretary and others**

...RESPONDENT(S)

WP(C) No.823/2023

**Ghulam Mohammad Ganie
S/o Mohammad Mukhtar Ganie
R/o Kalaroos District Kupwara**

...PETITIONER(S)

Vs.

**1. Govt. of J&K through
Commissioner/Secretary to Govt.
Rural Development & PR Department
And others**

...RESPONDENT(S)

WP(C) No.1150/2023

**Tawheed Ahmad Lone
S/o Mohammad Abdullah Lone
R/o Kaandipora Kalaroos
District Kupwara and another**

...PETITIONER(S)

Vs.

**1.UT of J&K through
Commr/Secretary to Govt.
Rural Development Department
And others**

...RESPONDENT(S)

For the Petitioner(s): - Mr. Mir Umar, Advocate

For the Respondent(s): - Ms. Maha Majeed, Assisting Counsel, vice
Mr. Mohsin Qadiri, Sr. AAG.
Mr. Alla-ud-din Ganai, AAG.

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

JUDGMENT

1) The petitioners are contractors of different classes registered by the competent authority under J&K Registration of Contractors Rules, 1969 and engaged in the execution of public works allotted to them by the Government Departments from time to time. They are aggrieved of

communication bearing No.PS/Commr/Secy/RDD-J/79/2023 dated 15th March, 2023, issued by Commissioner/Secretary to Government, Department of Rural Development and Panchayati Raj, whereby Director, Rural Development Department, Jammu/Srinagar, have been called upon to initiate action against the petitioners and also to ensure that no contract from Rural Development Department is allotted to them in future. The basis of the aforesaid communication is a report dated 15.02.2023 received from Criminal Investigation Department (CID), Jammu and Kashmir, wherein petitioners along with some other contractors have been found to have failed the security test. The list of such contractors including the petitioners herein is enclosed with the impugned communication dated 15th Marc, 2023. The petitioners have also placed on record character and antecedent verification reports of the petitioners submitted by CID, J&K, Srinagar, to the Executive Engineer, R&B Division, Kupwara, a perusal whereof shows that there is nothing adverse against the petitioners. However, in the remarks column of the reports, CID has indicated that close relatives of the petitioners i.e. brother, cousin, uncle, nephew, maternal uncle, father's maternal uncle, father etc. had in the past remained involved in subversive activities. Some of the relatives indicated in the remarks column of the verification reports are dead for the last couple of decades.

2) The short grievance projected by the petitioners in these petitions is that they being registered contractors are entitled to do their trade

and business of executing government contractors to make their livelihood and, therefore, no authority of the government, howsoever high it may be, can take away the right to livelihood and right to do business or trade from the petitioners. It is argued on behalf of the petitioners that the impugned communication issued by the Commissioner/Secretary to Government Department of Rural Development and Panchayati Raj has taken away and infringed the fundamental rights guaranteed to the petitioners under Article 19(1)(g) and Article 21 of the Constitution of India.

3) In the reply affidavit filed by CID, J&K, Srinagar, the simple stand taken is that pursuant to the request received from the Executive Engineer, R&B Division, Kupwara, the character/antecedents of the petitioners were verified and final report was forwarded to the Execution Engineer concerned vide different communications which are appended by the petitioners with their petitions. It is submitted that the role of the CID is to conduct the verification of character and antecedents of the individuals and the follow-up action on the basis of such reports, if any required, is taken by the Government Department concerned. The CID, it is contended, has only an assistive and not decisive role in such matters.

4) So far as the Department of Rural Development is concerned, the impugned communication is sought to be justified by contending that with a view to bringing fairness and transparency in the allotment of government contracts, the Government decided to ensure that the

persons involved in anti-national activities and those having criminal antecedents are kept out of such allotments. It is not disputed by the Department of Rural Development and Panchayati Raj that there is no direct involvement of any of the petitioners in any anti-national activity. It is, however, submitted that as per the CID verification report, the relatives of the petitioners have remained active militants in the past and some of them have even crossed LOC illegally for obtaining training in arms and ammunition. It is, with a view to preventing such persons from entering into contract with the department, the impugned communication was thought necessary.

5) Having heard learned counsel for the parties and perused the material on record, I am of the considered opinion that the impugned communication not only violates the fundamental right of the petitioners guaranteed under Article 19(1)(g) of the Constitution but it has also the effect of depriving the petitioners of their right to livelihood implicit in Article 21 of the Constitution. The relevant extract of Article 19 i.e. 19(1)(g) and 19(6) reads thus:

19(1)(g) to practise any profession, or to carry on any occupation, trade or business.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

6) From reading of Article 19(1) (g) of the Constitution, reproduced hereinabove, it is abundantly clear that the citizens of this country have been guaranteed the right to practice any profession or to carry on any occupation, trade or business and is one of the fundamental freedoms granted under Article 19 of the Constitution of India. This fundamental right to practice any profession or to carry on any occupation, trade or business is only subject to the provisions of clause (6) of Article 19 which clearly lays down and provides that the State is empowered and would be well within its powers to make any law imposing in the interests of general public, reasonable restrictions on the exercise of such right.

7) With a view to regulating the trade/occupation of executing public works of the Government Departments, we have Jammu and Kashmir Registration of Contracts Act, 1956 [“the Act of 1956”] enacted by the then State Legislature which is applicable to the Union Territory of Jammu and Kashmir even after promulgation of J&K Reorganization Act, 2019 with some modifications. In the exercise of powers conferred by Section 10 of the Act of 1956, the Government of Jammu and

Kashmir has issued the Jammu and Kashmir Registration of Contractors Rules, 1991 vide SRO 122 dated 26th May, 1992 [“ the Rules of 1991”].

8) Section 3 of the Act of 1956 prescribes the eligibility of registered contractor to undertake or offer to undertake to carry out a work on behalf of a Government Department. Section 4 deals with registration of contractors and issuance of certificate of registration to such registered contractors. Similarly, Section 5 deals with removal of name of the contractor from the register. For facility of reference, Sections 3 to 6 of the Act of 1956 are reproduced hereunder:

3. Eligibility of registered contractor to undertake or offer to undertake to carry out a work. No person shall be eligible to undertake or offer to undertake to carry out a work on behalf of a Department unless he is a registered contractor of that Department and holds a valid registration certificate as provided hereinafter.

4. Registration of contractors, certificate of registration. (1) Application for registration as contractor shall be made to the Head of the Department in writing in the prescribed form.

(2)The Head of the Department or any officer authorised by the Government of the Union territory of Jammu and Kashmir in this behalf may, after taking into consideration the financial position of the applicant, his capacity to undertake work and such other matters as he may deem fit, enter the name of the applicant in the register maintained for the purpose and issue certificate of registration as contractor for the Department under his control for the current financial year in such form and under such conditions and on payment of such fees as may be prescribed.

(3) For the purpose of this section and section 6, the rates of fee for different classes of contractors shall be determined in accordance with the rules made under this Act.

5. Removal of name from Register. (1) The Head of the Department may, for reasons to be recorded, direct the removal altogether or for a specified period from the register of the name of any registered contractor. On the issue of such an order the certificate of registration issued in favour of the contractor shall be deemed to be cancelled.

(2) An appeal shall lie to the Minister-in-Charge of the Department against an order of the Head of the Department directing the removal of the name of a registered contractor from the register. Such appeal shall be preferred within thirty days from the date of the order.

(3) The Minister-in-Charge of the Department may authorise the Deputy Minister-in-Charge of the Department to hear and dispose of all or any of such appeals.

6. Renewal of certificate of registration. A contractor who is registered and obtains a certificate of registration under section 4 may apply for renewal of his certificate on or before the expiry of the financial year for which the certificate is issued and the Head of the Department or any officer authorised by him may issue order for its renewal for the next financial year subject to such conditions and on payment of such fees as may be prescribed.

9) As is apparent from the reading of Section 3, no person is entitled to execute any work on behalf of the department unless he is a registered contractor of that department and holds a valid registration certificate. For obtaining registration, a contractor is required to make an application to the Head of the Department in writing in the prescribed form. The Head of the Department or any officer authorised by the Government in this behalf may enter the name of the applicant in the register maintained for the purpose and issue certificate of registration as contractor after having considered the following aspects:

(I) The financial position of the applicant;

- (II) His capacity to undertake the work;
- (III) Such other matters as he may deem fit;

The Head of the Department, who is competent to enter the name of the contractor in the register and issue certificate of registration, is also competent in terms of Section 5 to direct removal of name of a contractor altogether or for a specified period from the register. The removal of name of the contractor from the register would entail an automatic cancellation of his certificate of registration.

10) Rule 5 of the Rules of 1991 lays down the procedure for making an application for registration as contractor of a particular class. Rule 5 reads thus:

(5) Application for Registration:-(1) An application for registration by a person or firm intending to carry on business as a contractor of a particular class shall be submitted to the Head of the Department in Form I, along with following certificates affidavits, namely:

- (i) Solvency certificate from a scheduled Bank (for all classes except Class D).
- (ii) Income tax clearance certificate pertaining to preceding assessment year (for all classes except class D)
- (iii) Legal bond to the effect that machinery and immoveable property declared by him/them is free from all encumbrance except the mortgage of the lending bank/public sector financial institution and will not be transferred or disposed of by him/them without specific authorization of the Registration Authority (for all classes).
- (iv) Legal bond authorizing the department to recover any money due from him/them on any account by sale auction of his/their money able property (for all classes).
- (v) Character certificate to be issued by an officer being not below the rank of

Superintending of Police of the District concerned after verification from CID

- (vi) Certificate Chief Engineer of different Wings or District Superintending Engineers that the applicant(s) has not/have no backed out from any contract and the work and conduct in relation to works of any of the Department have been satisfactorily executed.
- (vii) An affidavit (for all classes) to the effect:-
- (a) That the applicant is not been enlisted earlier or refused enlistment or blacklisted.
 - (b) That the applicant is not already in service in any Government Department/ Corporation or Undertaking or member of either House of the Parliament or Legislative. District Development Board or a student of any Educational Institute or in receipt of any stipend from the Government.
 - (c) That the applicant(s) if a retired employee(s) or Government or Undertaking is not disallowed under Service Conduct Rules of the Government/Corporation/Undertaking from where he has retired.
 - (d) That the applicant has not been declared insolvent by a court of competent jurisdiction.
 - (e) That the applicant has not been convicted of an offence under Chapter XVII and XVIII of Ranbir Penal Code. Samvat 1989 or under the Hoarding and Profiteering Prevention Ordinance (XIX) Samvat 2000.
 - (f) That the applicant(s) has not/have backed out from any contract in Public Works Department.

(2) On receipt of applicant accompanied by certificates and affidavits indicated in sub-rule (1) the applicant or authorized representative of the firm seeking enlistment may be called upon for personal attendance before the Head of the Department.

(3) The head of the department to whom application has been made shall thereupon scrutinize the application and unless the applicant is found ineligible, he shall enter the contents of the application in a register maintained by him for the purpose and inform the applicant accordingly for payment of reiteration fee, prescribed here under:-

- (i) Class Special Rs. Twenty thousands
- (ii) Class "A" Rs. Ten thousands
- (iii) Class "B" Rs. Five thousands
- (iv) Class "C" Rs. Two thousands
- (v) Class "D" Rs. One thousands

(4) The applicant may be registered even for a Class lower than applied for.

Note: - A Central Register of Contractors so enlisted shall be maintained by the Public Works Department as per format specified in form No IV. Head of Department shall furnish information in the prescribed format to the department for purpose of maintaining a consolidated record of contractors.

11) As can be seen, the applicant is required to produce along with application, *inter alia*, a character certificate to be issued by an officer not below the rank of Superintendent of Police of the District concerned after verification from CID. The certificate once issued under the rules shall be valid for one financial year and would require its renewal for continuation. Rule 6 of the Rules of 1991 enumerates grounds for refusal of registration. The registration or renewal of registration can be refused by the competent authority, *inter-alia*, on the ground that the contractor seeking registration or renewal of his registration is convicted of an offence punishable under Chapters XVII and XVIII of Ranbir Penal Code. Samvat 1989 or under the Hoarding and Profiteering Prevention Ordinance (XIX) Samvat 2000.

12) Rule 11 of the Rules of 1991 deals with suspension or blacklisting and reads thus:

11. Suspension or black listing: - (I) if at any time, after a person is registered as contractor the Head of Department is satisfied that such contractor has incurred any of the duplications in these rules He shall serve a notice upon the contractor, indicating the ground on which it is proposed to suspend or black list or remove his name from. the register to show cause why such order should not be issued.

(2) If the Head of Department is of the opinion that the explanation tendered by the contractor is not satisfactory he shall pass order of suspension or black listing or renewal of the name of the contractor from the register and such order shall be communicated to the contractor.

Explanation: - Norms for suspension or black-listing or removal shall be as under:-

- (i) One time backing out from the contract shall invoke suspension of registration for one year.
- (ii) For 2nd time backing out from the contract the suspension of registration for two years shall be invoked.
- (iii) Third time backing out from the contract shall cause black-listing for five years.

Provided that no such order of suspension or black-listing or removal shall prevent the contractor from executing and completing the works or effort his rights and obligations in respect of any contract sanctioned to him that Department or any other Department while the registration was in force.

13) A perusal of Rule 11 (supra) would show that the competent authority i.e. Head of the Department, if he is satisfied that such contractor has incurred any of the disqualifications under these rules, shall suspend or blacklist or remove his name from the register after serving a show cause notice and considering the explanation, if any tendered by the contractor.

14) These are some of the salient provisions of the Act of 1956 and the Rules framed thereunder which are in vogue and regulate the contractors' business of executing works of the Government Departments.

15) In the instant case, as is evident from the stand of the respondents, the petitioners have not incurred any of the disqualifications under the Act and the Rules framed thereunder and, therefore, hold valid certificates of registration issued by the competent authority. These certificates were issued by the competent authority after recording satisfaction about the eligibility and fulfilment of requisite conditions by the petitioners. As is provided under Rule 6 (supra), the character/antecedents of the petitioners were got verified from the concerned quarters by the competent authority before entering their names in the register and issuing them the certificates of registration as contractors of various classes. Evidently, the competent authority has not proposed the cancellation or refusal to renew the certificates of registration issued in favour of the petitioners. Simply, because one or more relatives of the petitioners were involved in anti-national activities in early 90's or thereafter cannot be a ground to deprive the petitioners of their right to enter into contracts with Government for execution of various public works of the Government Departments. The certificates of registration granted to the petitioners by the competent authority make them eligible to enter into contract with the Government for execution of

public works. The Commissioner/Secretary to Government in his capacity as an administrative head or even the Government is not competent to impose any restriction on the right of a citizen to practice any profession or carry on any trader business. The restrictions on the fundamental right to practise any profession or to carry on any occupation, trade or business guaranteed by Article 19(1)(g) of the Constitution of India cannot be imposed otherwise than in accordance clause (6) of Article 19. Such restriction must be reasonable, in general public interest and imposed by law. The restriction on the fundamental right to carry on trade or business guaranteed under Article 19(1)(g) of the Constitution, even if it is reasonable, cannot be imposed by the Government through executive fiat.

16) That apart, in the instant case, there is nothing adverse noticed by the CID against the petitioners while verifying their character/antecedents. The petitioners can, by no stretch of reasoning, be penalized and deprived of their right to livelihood on the ground that one or more relatives of the petitioners had, in the past, indulged in anti-national activities. The competent authority under the Act and the Rules framed thereunder can refuse to renew the registration of the petitioners as contractor only if such contractor is convicted of specified offences. The cancellation of certificate of registration as contractor and its renewal is regulated by the Act of 1956 and the Rules framed thereunder.

17) In a democracy, as we are, governed by rule of law and no authority, howsoever high and mighty it may be, cannot be permitted to subvert the constitutional provisions. The fundamental rights, which form the bedrock of rule of law, cannot be permitted to be tampered with in the manner it has been done by the Commissioner/Secretary to Government, Department of Rural Development and Panchayati Raj. The right to life and liberty guaranteed under Article 21 and the right to carry on trade or business guaranteed under Article 19(1)(g) of the Constitution of India essentially form the basic structure of the Constitution and cannot be tinkered with even by amending the Constitution by the Parliament. Such is the sanctity of the fundamental rights, particularly the right to life and liberty and right to carry on trade or business and, therefore, the action envisaged under the impugned communication is totally unacceptable. Such action of the respondents, whatever be the intention behind it, cannot be countenanced in law.

18) To conclude, I deem it relevant to point out that the impugned communication, which is in clear violation of Article 19(1)(g) and Article 21 of the Constitution of India, has put the petitioners to serious prejudice as they have been deprived of their right to participate in the process of allotment of contracts by the Department of Rural Development. It is not clear as to whether similar communications have also been issued by the other government departments.

19) Be that as it may, to such a blatant violation of fundamental rights of the citizens, this Court cannot remain a mute spectator. It may not be out of sync to point out that with a view to rehabilitating ex-militants/surrendered militants, the Government of Jammu and Kashmir has been promulgating rehabilitation policies. I am reminded of issuance of Government Order No.Home-1376(IAS) of 2010 dated 23.11.2010 laying down the policy and procedure for return of ex-militants to Jammu and Kashmir State. As the preamble of the policy suggests, the policy was intended to facilitate return of ex-militants who belonged to the J&K State and had crossed over to POK/Pakistan for training in insurgency but later gave up insurgent activities due to change of heart. Similar policy was also promulgated by the Government for rehabilitation of surrendered militants. They were not only provided cash assistance but were also given vocational training. Reference in this regard can be made to Government Order No.Home-55/H of 2004 dated 31.01.2004.

20) The intent and objective of the aforesaid rehabilitation policies issued by the Government from time to time was to bring the misguided youth and others, who had strayed into militancy but had realized their mistake, into mainstream. The impugned communication issued by the then Commissioner/Secretary to Government Rural Development Department and Panchayati Raj is clear onslaught on the well thought after and wise decisions taken by the Government to bring peace and

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normalcy in the then State of Jammu and Kashmir, now Union Territory of Jammu and Kashmir. I have not been able to discern the thought process that might have gone into the mind of the then Commissioner/Secretary to issue such communication. Was it intended to make the petitioners to starve or take up activities prohibited by law. They were debarred from executing works of the Rural Development Department on a flimsy ground that their uncle or even father's uncle 10/20 years back were involved in anti-national activities. As is evident from the CID report, most of the relatives of the petitioners named therein have either died or surrendered to make a new beginning as law abiding citizens of this Country.

21) Having said that, I find merit in these petitions and the same are, accordingly, allowed. The impugned communication bearing No.PS/Commr/Secy/RDD-J/79/2023 dated 15th March, 2023, issued by Commissioner/Secretary to Government, Department of Rural Development and Panchayati Raj, is quashed. The respondents shall permit the petitioners to participate in the tendering process, if they are otherwise eligible, the impugned communication dated 15th March, 2023, notwithstanding.

22) This Court finds it a matter of very serious nature and is of the considered opinion that the then Commissioner/Secretary to Government, Department of Rural Development and Panchayati Raj, who has issued the impugned communication, showing complete

