

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.08.2017

CORAM :

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

WRIT PETITION Nos.21464 & 21465 of 2017
and
W.M.P.Nos.22451 & 22452 of 2017

A.Selvaraju ... Petitioner in W.P.No.21464 of 2017
B.Balaji ... Petitioner in W.P.No.21465 of 2017

Vs.

1. The Principal Secretary to Government,
Animal Husbandry, Dairying &
Fisheries(FS2) Department,
Secretariat,
Chennai - 600 009.

2. The Director of Fisheries,
Tsunami Project Implementation Unit,
Nandanam,
Chennai - 600 035.

3. The Commissioner of Fisheries,
Fisheries Department,
DMS Campus,
Teynampet,
Chennai - 600 006.

4. The Chief Engineer,
O/o. the Commissioner of Fisheries,
Fisheries Department,
DMS Campus,
Teynampet,
Chennai - 600 006. ...Respondents in both W.Ps

Common Prayer : Petitions filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the proceedings of the 1st respondent in Letter No.12792/FS-2/2016-8, and Letter No.12792/FS-2/2016-9 dated 15.06.2017 and quash the same as illegal, incompetent and ultravires and to absorb the petitioners in the post of Technical Assistant pursuant in accordance to the notification issued by the 4th respondent in notification No.01/2017 dated 16.06.2017.

For Petitioner : Mr.V.Stalin
for Mr.R.Jayaprakash
in both W.Ps

For Respondents: Mr.S.Gunasekaran
Additional Government Pleader
in both W.Ps

COMMON O R D E R

The order of rejection dated 15.06.2017 issued by the 1st respondent, rejecting the claim of the writ petitioners for permanent absorption in the Post of Technical Assistant is under challenge in this writ petition.

2. The learned counsel appearing for the writ petitioners contended that the writ petitioners are working on contract basis for about four years. The appointment order was issued on 11.01.2013 by the Director of Fisheries. On perusal of the appointment order, it is stated that "the service of Thiru.A.Selvaraju, is ordered to be engaged as Technical Assistant on contract basis in Tsunami project, Divisional Implementation Unit, Nagapattinam in the existing vacancy on the following terms and conditions at the consolidated pay of Rs.6,000/- (Rupees Six Thousand Only) per month". The terms and conditions are narrated as hereunder:

Terms and Conditions

1. This assignment is purely temporary and on contract basis for a maximum period of one year.
2. The individual can not claim any rights for extension, preference or permanency in Government Service based on Government rules and regulations, since the assignment is purely on contract basis only.
3. The individual is eligible to avail leave in terms of one day per month.
4. Consolidated pay will be paid on monthly basis only as noticed in the advertisement.
5. The service of the individual may be considered for extension based on his/her performance and requirement for the project as and when required.
6. Either party shall give one month notice to resignation of the post or pay one month salary in lieu there of.
7. The medical fitness certificate should be produced at the time of joining.

8. An agreement should be executed with the department in stamp paper for the value of Rs.20/-
9. T.A.claims are applicable as per the existing rules in force.

3. The writ petitioners accepting the terms and conditions of the contract appointment, joined in the post of Technical Assistant and served for about four years. They made a representation to the authorities and that representations dated 17.08.2016, 31.10.2016 and 29.11.2016 were disposed of, pursuant to the orders of this Honb'le Court dated 26.09.2016 in W.P.No.33038 of 2016. The reasons stated in the impugned order is that the Government Order cited by the writ petitioners passed by the Government in G.O.Ms.No.96 dated 06.06.2008, is not applicable to them and further the writ petitioners had been engaged on contract basis on certain terms and conditions. This Court finds no infirmity in the orders passed, in view of the fact that contract employees cannot claim any legal right for permanent absorption and the terms and conditions stipulated in the order of appointment itself was agreed upon by the parties.

4. All appointment to the public employment is to be made only under the Constitutional schemes, by following the recruitment rules in force. Any temporary/casual/consolidated pay employees cannot claim permanent absorption or recruitment based on their temporary services without undergoing the process of regular selection under the relevant recruitment rules in force. Equal opportunity of employment is a Constitutional perspective and all the citizens of this great Nation should be provided an equal opportunity to participate in the selection for appointment to the public posts. The writ petitioners should also participate in the open competitive process at the time of issuing notification by the respondents and not otherwise. The Courts encouraging such permanent absorption of the employees appointed on contract/temporary basis will certainly cause infringement of the right of all other citizens to participate in the open competitive process and the right of equality also will be affected in respect of all other citizen. Every youth of this Country aspiring for a public post is to be given a chance and opportunity to compete for the public post on merits and in accordance with law and by following the rules of reservation in this regard. Backdoor absorption or regularization through Court orders/Government orders is certainly not preferable and will affect the basic rights of all other candidates aspiring for such public posts. In this view of the matter, the very claim of the writ petitioners that they will have to be absorbed in the post of Technical Assistant on regular basis deserves to be rejected.

5. This Court has to remind the legal principles settled by the Constitutional Bench of the Supreme Court of India, in the case of the State of Karnataka Vs Umadevi, reported in 2006 4 SCC Page No.1 and the following paragraphs are relevant to understand the legal principles settled by the Hon'ble Constitution Bench.

"33. In the earlier decision in Indra Sawhney Vs. Union of India [1992 Supp. (2) S.C.R. 454), B.P. Jeevan Reddy, J. speaking for the majority, while acknowledging that equality and equal opportunity is a basic feature of our Constitution, has explained the exultant position of Articles 14 and 16 of the Constitution of India in the scheme of things. His Lordship stated:-

"6. The significance attached by the founding fathers to the right to equality is evident not only from the fact that they employed both the expressions 'equality before the law' and 'equal protection of the laws' in Article 14 but proceeded further to state the same rule in positive and affirmative terms in Articles 15 to 18

7. Inasmuch as public employment always gave a certain status and power --- it has always been the repository of State power ---besides the means of livelihood, special care was taken to declare equality of opportunity in the matter of public employment by Article 16. Clause (1), expressly declares that in the matter of public employment or appointment to any office under the state, citizens of this country shall have equal opportunity while clause (2) declares that no citizen shall be discriminated in the said matter on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. At the same time, care was taken to, declare in clause (4) that nothing in the said Article shall prevent the state from making any provision for reservation of appointments or posts in favour of any backward class of citizen which in the opinion of the state, is not adequately represented in the services under the state.."

(See paragraphs 6 and 7 at pages 544 and 545) These binding decisions are clear imperatives that adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment.

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.

45. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

49. In the result, Civil Appeal Nos. 3595-3612 of 1999, Civil Appeal No. 3849 of 2001, Civil Appeal Nos. 3520-3524 of 2002 and Civil appeal arising out of Special Leave Petition (Civil) Nos. 9103-9105 of 2001 are allowed subject to the direction issued under Article 142 of the Constitution in paragraph 46 and the general directions contained in paragraph 44 of the judgment and Civil Appeal Nos. 1861-2063 of 2001 are dismissed. There will be no order as to costs."

6. The principles laid down by the Constitution Bench was re-instated and re-emphasized once again by the Hon'ble Supreme Court in the case of SECRETARY TO GOVERNMENT, SCHOOL EDUCATION DEPARTMENT, CHENNAI v. R. GOVINDASWAMY AND ORS. [(2014) 4 SCC 769]. In paragraph No.8 of the judgment is very much relevant for the purpose of the case on hand.

"8. this Court in State of Rajasthan & Ors. v. Daya Lal & Ors., AIR 2011 SC 1193, has considered the scope of regularisation of irregular or part-time appointments in all possible eventualities and laid down well-settled principles relating to

regularisation and parity in pay relevant in the context of the issues involved therein. The same are as under:

"(i) The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularisation, absorption or permanent continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularisation of services of an employee which would be violative of the constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularised, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.

(ii) Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working against a sanctioned post. Sympathy and sentiment 5 Page 6 cannot be grounds for passing any order of regularisation in the absence of a legal right.

(iii) Even where a scheme is formulated for regularisation with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(iv) Part-time employees are not entitled to seek regularisation as they are not working against any sanctioned posts. There cannot be a

direction for absorption, regularisation or permanent continuance of part-time temporary employees.

(v) Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute." (Emphasis added)

7. The Hon'ble Supreme Court, in fact directed the High Courts, in exercising the powers under Article 226 of the Constitution of India, will not issue a direction for absorption/permanent continuance, unless the employees claim a regularization on being appointed, in pursuance of the regular recruitment in a open competitive process against sanctioned vacant posts. This being the authoritative direction given by the Hon'ble Supreme Court of India, it becomes the law of the land and this Court is bound by the principles issued by the Hon'ble Supreme Court in this regard. Accordingly, the facts and circumstances and grounds set out in the writ petition deserve no merit consideration.

8. Accordingly, the writ petitions stands dismissed. However, there is no order as to costs. Consequently, connected miscellaneous petitions are also closed.

Sd/-

Assistant Registrar(CS VIII)

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Sub Assistant Registrar

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To

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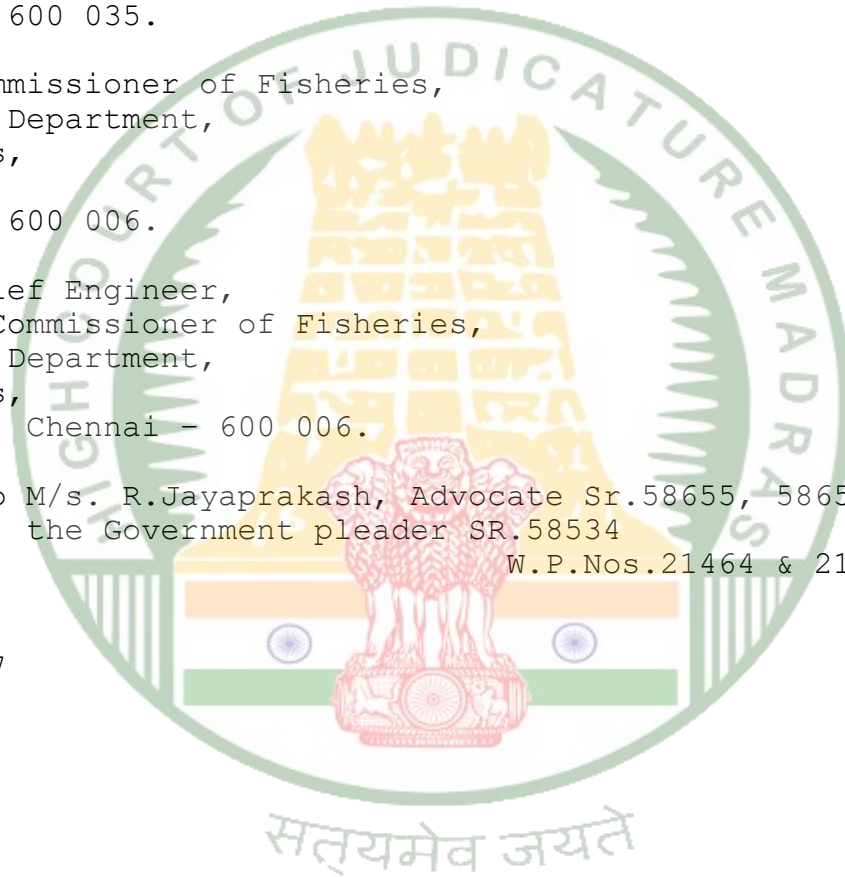
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O/o. the Commissioner of Fisheries,
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DMS Campus,
Teynampet, Chennai - 600 006.

+ 2 ccs to M/s. R.Jayaprakash, Advocate Sr.58655, 58654

+ 1 cc to the Government pleader SR.58534

W.P.Nos.21464 & 21465 of 2017

RR(CO)
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