

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.11.2017

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.22378 of 2014

1.C.Arumugam
2.R.Kailas Shankar
3.M.Muzthaba
4.K.Murugesan
5.N.Santhanam
6.C.Mahadevan

...Petitioners

Vs.

1.The Secretary to Government,
Municipal Administration and Water Supply Department,
Chennai -109.

2.The Commissioner,
Coimbatore Municipal Corporation,
Coimbatore.

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, to direct the respondents to implement the order passed in W.P.No.19267 of 1998, dated 28.1.2009 by this Court.

For Petitioners : Mr.J.Prakasam

For Respondents : Mr.A.Rajaperumal,
Additional Government Pleader, for

R1

Mr.J.Sathyanarayanaprasad, for R2

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O R D E R

The relief sought for in this writ petition is for a direction to the respondents to implement the order passed by this Court in W.P.No.19267 of 1998, dated 28.1.2009.

2. The learned Counsel appearing for the writ petitioners

made a submission that all the writ petitioners were initially appointed as R.N.M.R's and N.M.R's employees in the second respondent Municipal Corporation. The writ petitioners were appointed in between 1981 and 1985. The writ petitioners are serving as Cleaners and Drivers on deputation basis in the second respondent Municipal Corporation. It is contended that at the time of appointing the writ petitioners the educational qualification prescribed for the Cleaners as per the Tamil Nadu Municipal Last Grade Service Rules 1975 was pass in III Form or VIII standard. However, for the post of Drivers, the prescribed qualification was pass in 8th standard. During the relevant point of time the Government issued an order in G.O.Ms.No.1096, R.D & L.A., dated 11.6.1981, stating that the Cleaners and other categories working in the Engineering Branch in various Municipalities and Township Committees, if they possess

- (i) Good physique
- (ii) Ability to read and write Tamil and
- (iii) Possession of driving license for heavy transport vehicles, shall be appointed as drivers.

3. However, the writ petitioners made a representation to the respondents on 24.8.1987 with a request to relax the educational qualification prescribed for the post of Lorry Cleaners on par with that of the Drivers attached to the Tamil Nadu Municipal Service as per G.O.Ms.No.1096, Rural Development and Local Administration Department, dated 11.6.1981, so that, all the petitioners will get opportunity of promotion to the post of regular Drivers. Accordingly, the Government issued G.O.Ms.No.92, dated 01.02.1989, relaxing the educational qualification prescribed for the post of Lorry Cleaners on par with that of the Drivers attached to the Tamil Nadu Municipal Service based on G.O.Ms.No.1096, Rural Development and Local Administration Department, dated 11.6.1981. Accordingly, the second respondent Municipal Corporation recommended the case of the writ petitioners to the first respondent to appoint them in the regular post of Cleaners. The learned counsel appearing for the writ petitioners states that the Examiner of Local Fund Accounts also recommended the case of the petitioner to the first respondent to appoint them in the regular post of Cleaners in the second respondent Municipal Corporation. Accepting these recommendations, the first respondent Government issued G.O.Ms.No.89, dated 24.4.1995, appointing the writ petitioners as Cleaners in the regular post in the time scale of pay by relaxing the necessary educational qualification prescribed in G.O.Ms.No.1859, R.D.& L.A., dated 5.11.1975. By, virtue of the Government order the second respondent Municipal Corporation appointed and in some cases promoted the petitioners as Cleaners in the regular time scale of pay in proceedings dated 20.8.1995. The services of the writ petitioners were also regularised in the post of Cleaners in proceedings dated 14.12.1995. After the

regularisation of the services of the writ petitioners, the writ petitioners have submitted further claim to the respondents to promote them as Drivers from the post of Cleaners by relaxing the necessary educational qualifications prescribed for the post of Drivers. The second respondent Municipal Corporation in this regard passed a resolution and recommended the cases of the writ petitioners to the first respondent for promotions to the post of Lorry Drivers in proceedings dated 26.5.1997. In this regard the Government issued G.O.Ms.No.237, dated 26.9.1996 to consider the cases of the Lorry Cleaners for promotion to the post of Drivers, provided the persons passed 10th standard. In the circumstances, the second respondent again recommended the cases of the writ petitioners to the first respondent for promotion to the post of regular drivers by granting relaxation in respect of the educational qualifications.

4. Under these circumstances, the writ petitioners earlier filed W.P.No.19267 of 1998 and this Court passed final orders on 28.01.2009 as under :

"It is admitted by youth sides that the subject matter of this writ petition is covered by the order passed by this Hon'ble Court in W.P.No.19317 of 1998 dated 30.7.2008 (A Ganesan Vs State of Tamil Nadu and another paragraphs 6 and 7 of the said order of respondent below

"Para 6 it is seen from G.O.No.21, Municipal Administration and Water Supply department dated liberty to absorb the existing drivers by granting necessary relaxation from the conditions of employment exchange for getting their name registered with the employment exchange and appoint them. The petitioners were already regular workers in the service of the corporation and since the government had granted liberty to recruit them provided they have qualification there is no impediment for the corporation in recruitment these employees.

Para 7 in Fact, the by G.O.Ms.No.22 Municipal Administration and Water Supply department, dated 13.04.1938, the state government had relaxed the qualification in respect of one driver Gurunathan in the Tirunelveli corporation. Hence, there is no reason why the petitioners qualification cannot be relaxed in the light of the earlier government order, therefore, the corporation is here directed to consider the case of driver which post they are already holding by virtue of the option given by the corporation. This is all the more so as the earlier work of collecting garbage through bullock

carts was abolished and the petitioner are doing the said work after purchase of autorickshaws for the said purpose. This exercise by the corporation shall be undertaken within a period of eight weeks from the date of receipt of a copy of this order and the petitioner should be informed accordingly.

3. In the light of the same this writ petition will also stand allowed in terms of the order passed by this earlier. There is will be no order as to costs."

5. The learned counsel appearing for the writ petitioners made a submission that subsequent to the orders passed by this Court in W.P.No.19267/1998, the petitioners jointly made a representation on 11.7.2013 but no further action has been taken by the respondents in this regard in respect of the grant of regularisation to the writ petitioners for relaxing their educational qualification to enable them to get promotion to the post of Drivers on regular basis.

6. The learned counsel appearing for the writ petitioners also cited the Government Order in G.O.(2P) No.30, Municipal Administration and Water Supply Department, dated 14.6.2017, wherein the services of the temporary Drivers were regularised by granting relaxation of Rules. By, citing the above Government Order also the learned counsel is of the opinion that in many number of cases the Government granted relaxation and therefore, the benefit of relaxation has to be extended to these writ petitioners also.

7. The learned counsel appearing for the second respondent Municipal Corporation vehemently opposed the contentions of the learned counsel appearing for the writ petitioners by stating that the present writ petition is filed by suppressing the vital material facts. The writ petitioners have not approached this Court with clean hands. The learned counsel proceeded by stating that pursuant to the orders passed by this Court in W.P.No.19267/1998, dated 28.1.2009, the second respondent Municipal Corporation considered the case of the writ petitioners and passed orders in proceedings dated 29.8.2010.

8. At this juncture, this Court asked the learned counsel appearing for the writ petitioners, as to whether the statement made by the counsel for the respondents is true or not?

9. The learned counsel appearing for the writ petitioners made a submission that he had no knowledge about any such order passed pursuant to the order passed in the writ petition. In order to verify the truth behind this as to the order passed by

the second respondent Municipal Corporation, this Court has directed the learned counsel appearing for the respondents to submit the original copy of the order passed by the Corporation in proceeding dated 29.8.2010. Accordingly, the learned counsel appearing for the respondents produced the same. This Court found that all the writ petitioners had signed and received the copy of the order from the second respondent Municipal Corporation issued in proceedings dated 29.8.2010. The writ petitioners have acknowledged the receipt of the copy of the order dated 29.8.2010. However, the writ petitioners have conveniently suppressed the facts in respect of the rejection order passed by the second respondent Municipal Corporation in proceedings dated 29.8.2010. Without stating the fact regarding the rejection order the present writ petition was filed on the ground, the respondents have not implemented the order passed by this Court in W.P.No.19267/1998, dated 28.1.2009.

10. Thus, this Court has to draw an adverse inference with regard to ill motives of the writ petitioners at the time of filing of the writ petition. The writ petitioners had made an attempt to create an image that the recommendations made has not been considered and in large number of cases relaxation was given by the Government and their cases also to be considered on par with other similar persons. The intention of the writ petitioners for suppressing the fact regarding rejection order passed by the second respondent Municipal Corporation in proceedings dated 29.8.2010 is clear that by citing the Government order the petitioners can impress the Court in order to get a direction. Thus, this Court has to come to a conclusion that the writ petitioners intentionally suppressed the facts and they have also approached this Court with unclean hands.

11. The learned counsel appearing for the writ petitioners made a submission that the earlier order passed by this Court in W.P.No.19267/1998, dated 28.1.2009, has not been implemented. In this regard, this Court is of the opinion that even, if the earlier order passed by this Court has not been implemented, it will not be a ground to file a fresh writ petition with the same prayer. To implement the orders passed by this Court in W.P.No.19267/1998, dated 28.1.2009, another writ petition cannot be entertained for the same remedy. So also no writ can be entertained and maintainable in such circumstances under Article 226 of the Constitution of India.

12. Under these circumstances, this Court directed the writ petitioners to be present before this Court to explain, why they have suppressed the facts regarding the earlier rejection order. Two of the writ petitioners were present before this Court and they have filed an affidavit by stating that the petitioners have studied only 3rd and 5th standards and they are

semiliterate persons. Further, it is stated that they have acknowledged the order issued by the second respondent Municipal Corporation in proceeding dated 29.8.2010 and inadvertently they have not produced the same before this Court and their conduct in not producing the same is neither willful nor wanton.

13. However, in respect of the merits of the case, this Court is of the opinion that the writ petitioners were initially engaged as N.M.Rs in between 1981 to 1985 and they are working as Cleaners in permanent post. The services of the Cleaners are regularised and they are working in time scale of pay. However, the claim regarding their promotion in the regular post of driver was not considered in appropriate time. The learned counsel made submissions that during the relevant point of time the writ petitioners had not possessed required qualification for absorption to the post of Driver. However, the Commissioner of Municipal Administration in proceedings dated 7.9.2017, absorbed the writ petitioners in the regular post of Cleaners. In this regard, it is pertinent to note that the Government issued G.O.Ms.No.30 Municipal Administration and Water Supply Department, dated 14.6.2017 granting relaxation in respect of nine Cleaners for regular absorption to the post of Drivers.

14. In view of this matter, this Court is of the view that relaxation can never be claimed as a matter of right and the power of relaxation is to be exercised cautiously without infringing the regular recruitment Rules. In respect of the merits to be considered is that, the writ petitioners were initially engaged as N.M.Rs in between 1981 and 1985, subsequently their services were regularised in the post of Cleaners by relaxing the Rules and they were appointed in the regular time scale of pay. The services of the writ petitioners were regularised and now they are working as permanent employees in the cadre of Cleaners.

15. Now, the writ petitioners claim that they should be promoted to the post of Drivers by relaxing the necessary educational qualifications prescribed to the post of Drivers as per the Rules. The only ground raised is that the cases of similarly placed persons were considered by the respondents and it should be granted to the writ petitioners also. In this regard, earlier the learned counsel appearing for the writ petitioners emphasised the Government Order issued in G.O.Ms.No. 30 of Municipal Administration Water Supply Department, dated 14.6.2017 granting relaxation in respect of 9 Cleaners and absorbing them to the post of Drivers.

16. The power of Rule of relaxation is available under the Rule 48 of the Tamil Nadu State and Subordinate Service Rules.

17. The power of relaxation provided to the Government shall be exercised only on exceptional circumstances in order to

redress the grievances, where there is an injustice caused to the employees. Rule of relaxation cannot be exercised in a routine manner and so also the regularization cannot be granted in a mechanical manner in all the cases.

18. The object of the power of relaxing the rules is obviously to neutralise an injustice as a result of operation of any rule. It has been described to be the reserve power to deal with the unforeseen situations or circumstances and it is to be exercised in the public interest with a view to maintain integrity and efficiency in service. It is conferred upon the Government to meet any emergent situations where injustice might have been caused to any individual employee or class of employees or where the working of the rule might have become impossible. Where the power of relaxation is conferred upon the Government (or the Governor), the Court cannot usurp the power and directly or indirectly effect a relaxation.

19. In interpreting provisions for relaxation, it has been pointed out that the power of relaxation even if generally included in the Service Rules could either be for the purpose of mitigating hardship or to meet a special and deserving situation. Any arbitrary exercise of such power must be guarded against and that the rule of relaxation must get pragmatic construction, so as to achieve effective implementation of good policy.

20. The Hon'ble Supreme Court of India, in the case of Suraj Prakash Gupta and Others vs. State of J&K and Others [(2000) 7 SCC 561], reiterated the principles, in paragraph-32, as under:-

"32. On facts, the reasons given in the Cabinet note for granting relaxation are hopelessly insufficient. In fact, the letter of the Commission dated 25-11-1997, shows that the Commission was prepared to give its opinion in regard to regularisation of each promotee but the Government backed out when the Commission called for the records relevant for considering suitability for regular promotion. In our view, there can be no hardship for a person seeking appointment or promotion to go by the procedure prescribed therefor. The relevant Recruitment Rule for promotion cannot itself be treated as one producing hardship. Narender Chadha case [(1986) 2 SCC 157 : 1986 SCC (L&S) 226] must be treated as an exception and not as a rule. In fact, if such relaxation is permitted in favour of the promotees then the

same yardstick may have to be applied for direct recruits. In fact the J&K Government has already started to do so and this has not been accepted by this Court in Narinder Mohan case [(1994) 2 SCC 630 : 1994 SCC (L&S) 723 : (1994) 27 ATC 56] and Dr Surinder Singh Jamwal case [(1996) 9 SCC 619 : 1996 SCC (L&S) 1296] referred to above. If it is to be held that direct recruitment can also be permitted without consulting the Service Commission (in case it is required to be consulted there will, in our opinion, be total chaos in the recruitment process and it will lead to backdoor recruitment at the whims and fancies of the Government). Such a blanket power of relaxation of Recruitment Rules cannot be implied in favour of the Government."

21. The Hon'ble Supreme Court of India, in the case of Shri Amrik Singh and Others vs. Union of India and Others [(1980) 3 SCC 393], discussed the principles regarding the rule of relaxation, His Lordship Hon'ble Mr. Justice V.R.Krishna Iyer, speaking for the Bench, emphatically ruled the legal principles as under:-

"Government must be satisfied, not subjectively but objectively, that any rule or regulation affecting the conditions of service of a member of the All India Services causes undue hardship, then the iniquitous consequence thereof may be relieved against by relaxation of the concerned Rule or Regulation. There must be undue hardship and, further the relaxation must promote the dealing with the case "in a just and equitable manner". These are perfectly sensible guidelines. What is more, there is implicit in the Rule, the compliance with natural justice so that nobody may be adversely affected even by administrative action without a hearing. We are unable to see anything unreasonable, capricious or deprivatory of the rights of anyone in this residuary power vested in the Central Government. Indeed, the present case is an excellent illustration of the proper exercise of the power. We are, therefore, satisfied that the Central Government was right in invoking its power to relax and regularize the spell of officiation, which was impugned

as irregular or illegal. The consequence inevitably follows that the officer Ahluwalia was rightly assigned 1961 as the year of allotment."

22. Thus, this Court is also of the opinion that the power to grant and exemption, cannot be exercised in a manner to destroy the general provision from which the exemption is granted. For example, where the number of exemptees is far in excess of vacancies and render the chances of qualifiers illusory.

23. This Court is of the firm opinion that if a rule of relaxation is invoked in a routine manner it will amount to neutralizing and degrading the recruitment rules in force. A striking balance in between has to be adopted while exercising the powers of relaxation by the Competent Authorities. The process of recruitment and appointment shall be made only by following the recruitment rules in fore. In other words all appointments are to be made strictly by adhering the recruitment rules in force. Thus, the rule of relaxation is an exception and such an exception is to be exercised cautiously and sparingly in order to rectify the injustice caused to a particular case. Thus, the relaxation cannot be claimed as a matter of right by the candidates.

24. Rule of relaxation is a discretion granted to the Government and such a discretionary power has to be exercised judiciously and not in a routine manner. Relaxation being a discretionary power has to be exercised by the competent authorities by applying the facts in a particular case and not in a mechanical way to grant certain service benefits to the similarly placed persons. Granting relaxation in one case by the Government cannot be cited as a precedent in other cases. In view of the fact that the relaxation is an exception and cannot be followed in a routine affair. Thus, this Court is of the firm view that all the appointments and regularizations are to be made only by following the recruitment rules in force strictly and no relaxation can be granted by citing other cases and the Government also to be cautious while exercising the powers of relaxation under Rule 48 in certain cases.

25. The consequences of exercising the power of relaxation under Rule 48 in a routine manner will affect the right of the employees who were appointed regularly in accordance with the recruitment rules in force. In other words, there are large number of employees who are working in the Departments, were fully qualified and who were appointed in accordance with the recruitment and service rules in force. Any relaxation granted

under Rule 48 should not have an impact of depriving those candidates, who were appointed regularly in accordance with the rules in force, specifically in the matter of promotions.

26. Thus, the Court has to adopt a balancing approach in this kind of cases, where the relaxation is sought for as a prayer in the writ petition. Now let us look into the case of a regular employee in verge of promotion for a particular cadre after satisfying the regular recruitment rules in force. If a relaxation is granted to an unqualified person, then he will supersede the candidates who were otherwise qualified and it will create a discrimination amongst the employees and it is the constitutional perspective that an equal opportunity in employment as well as in the promotion to be ensured to the qualified persons. The constitutional perspective in this regard is that the equality class provided to all the citizens, who were equally placed and no person can be deprived of his right of promotion to the higher cadre. In the event of granting relaxation under Rule 48, the right of the employees, who were appointed in accordance with the rules will also get affected. Such a regularization granted in a routine manner will affect the equality clause and the constitutional directives in this issue.

27. Regularization or Relaxation cannot be granted contrary to the service rules in force. The Hon'ble Supreme Court of India in the case of State of Karnataka Vs. Umadevi also stated that the appointment of regularization cannot be granted in violation of the service rules in force and the Constitutional Bench emphasis the principles in this regard to be followed strictly. The following paragraphs are relevant to be cited:

"5. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That Article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of

recruitment for services is controlled by detailed procedure which specify the necessary qualifications, the mode of appointment etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognized that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the Constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed.

10. In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment. Buttressing these fundamental rights, Article 309 provides that subject to the provisions of the Constitution, Acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the

instrumentalities that come within the purview of Article 12 of the Constitution. With a view to make the procedure for selection fair, the Constitution by Article 315 has also created a Public Service Commission for the Union and Public Service Commissions for the States. Article 320 deals with the functions of Public Service Commissions and mandates consultation with the Commission on all matters relating to methods of recruitment to civil services and for civil posts and other related matters. As a part of the affirmative action recognized by Article 16 of the Constitution, Article 335 provides for special consideration in the matter of claims of the members of the scheduled castes and scheduled tribes for employment. The States have made Acts, Rules or Regulations for implementing the above constitutional guarantees and any recruitment to the service in the State or in the Union is governed by such Acts, Rules and Regulations. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

12. What is sought to be pitted against this approach, is the so called equity arising out of giving of temporary employment or engagement on daily wages and the continuance of such persons in the engaged work for a certain length of time. Such considerations can have only a limited role to play, when every qualified citizen has a right to apply for appointment, the adoption of the concept of rule of law and the scheme of the Constitution for appointment to posts. It cannot also be forgotten that it is not the role of courts to ignore, encourage or approve appointments made or engagements given outside the constitutional scheme. In effect, orders based on such sentiments or approach would result in perpetuating illegalities and in the jettisoning of the scheme of public employment adopted by us while adopting the Constitution. The approving of such acts also results in depriving many of their opportunity to compete for public

employment. We have, therefore, to consider the question objectively and based on the constitutional and statutory provisions. In this context, we have also to bear in mind the exposition of law by a Constitution Bench in State of Punjab Vs. Jagdip Singh & Ors. (1964 (4) SCR 964). It was held therein, "In our opinion, where a Government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give, he will not in law be deemed to have been validly appointed to the post or given the particular status."

13. During the course of the arguments, various orders of courts either interim or final were brought to our notice. The purport of those orders more or less was the issue of directions for continuation or absorption without referring to the legal position obtaining. Learned counsel for the State of Karnataka submitted that chaos has been created by such orders without reference to legal principles and it is time that this Court settled the law once for all so that in case the court finds that such orders should not be made, the courts, especially, the High Courts would be precluded from issuing such directions or passing such orders. The submission of learned counsel for the respondents based on the various orders passed by the High Court or by the Government pursuant to the directions of Court also highlights the need for settling the law by this Court. The bypassing of the constitutional scheme cannot be perpetuated by the passing of orders without dealing with and deciding the validity of such orders on the touchstone of constitutionality. While approaching the questions falling for our decision, it is necessary to bear this in mind and to bring about certainty in the matter of public employment. The argument on behalf of some of the respondents is that this Court having once directed regularization in the Dharwad case (supra), all those appointed temporarily at any point of time would be

entitled to be regularized since otherwise it would be discrimination between those similarly situated and in that view, all appointments made on daily wages, temporarily or contractually, must be directed to be regularized. Acceptance of this argument would mean that appointments made otherwise than by a regular process of selection would become the order of the day completely jettisoning the constitutional scheme of appointment. This argument also highlights the need for this Court to formally lay down the law on the question and ensure certainty in dealings relating to public employment. The very divergence in approach in this Court, the so-called equitable approach made in some, as against those decisions which have insisted on the rules being followed, also justifies a firm decision by this Court one way or the other. It is necessary to put an end to uncertainty and clarify the legal position emerging from the constitutional scheme, leaving the High Courts to follow necessarily, the law thus laid down.

14. Even at the threshold, it is necessary to keep in mind the distinction between regularization and conferment of permanence in service jurisprudence. In *STATE OF MYSORE Vs. S.V. NARAYANAPPA* [1967 (1) S.C.R. 128], this Court stated that it was a mis-conception to consider that regularization meant permanence. In *R.N. NANJUNDAPPA Vs T. THIMMIAH & ANR.* [(1972) 2 S.C.R. 799], this Court dealt with an argument that regularization would mean conferring the quality of permanence on the appointment. This Court stated:- "Counsel on behalf of the respondent contended that regularization would mean conferring the quality of permanence on the appointment, whereas counsel on behalf of the State contended that regularization did not mean permanence but that it was a case of regularization of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized. Ratification or

regularization is possible of an act which is within the power and province of the authority, but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

In B.N. Nagarajan & Ors. Vs. State of Karnataka & Ors. [(1979) 3 SCR 937], this court clearly held that the words "regular" or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This court emphasized that when rules framed under Article 309 of the Constitution of India are in force, no regularization is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognized therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only 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 regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization.

20. We may now consider, State of Haryana Vs. Piara Singh and Others [1992) 3 SCR 826]. There, the court was considering the sustainability of certain directions issued by the High Court in the light of various orders passed by the State for the

absorption of its ad hoc or temporary employees and daily wagers or casual labour. This Court started by saying: "Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making rules under the proviso to Article 309 of the Constitution or (in the absence of such rules) by issued rules/instructions in exercise of its executive power. The court comes into the picture only to ensure observance of fundamental rights, statutory provisions, rules and other instructions, if any governing the conditions of service" This Court then referred to some of the earlier decisions of this Court while stating: "The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the directive principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. Where a temporary or ad hoc appointment is continued for long the court presumes that there is need and warrant for a regular post and accordingly directs regularization. While all the situations in which the court may act to ensure fairness cannot be detailed here, it is sufficient to indicate that the guiding principles are the ones stated above."

This Court then concluded in paragraphs 45 to 50:

"The normal rule, of course, is regular

recruitment through the prescribed agency but exigencies of administration may sometimes call for an ad hoc or temporary appointment to be made. In such a situation, effort should always be to replace such an ad hoc/temporary employee by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an adhoc/temporary employee.

Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words, there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. An unqualified person ought to be appointed only when qualified persons are not available through the above processes. If for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularization provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State "

With respect, why should the State be

allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent -- the distinction between regularization and making permanent, was not emphasized here -- can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in paragraph 50 of *Piara Singh (supra)* are to some extent inconsistent with the conclusion in paragraph 45 therein.

With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognized in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent.

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.

44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA (supra), R.N. NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

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.

46. In cases relating to service in the commercial taxes department, the High Court has directed that those engaged on daily wages, be paid wages equal to the salary and allowances that are being paid to the regular employees of their cadre in government service, with effect from the dates from which they were respectively appointed. The objection taken was to the direction for payment from the dates of engagement. We find that the High Court had clearly gone wrong in directing that these employees be paid salary equal to the salary and allowances that are being paid to the regular employees of their cadre in government service, with effect from the dates from which they were respectively engaged or appointed. It was not open to the High Court to impose such an obligation on the State when the very question before the High Court in the case was whether these employees were entitled to have equal pay for equal work so called and were entitled to any other benefit. They had also been engaged in the teeth of directions not to do so. We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that are being paid to regular employees be paid to these daily wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily wage earners, there would be no question of other allowances being paid to them. In view of our conclusion, that Courts are not expected to issue directions for making such persons permanent in service, we set aside that part of the direction of the High Court directing the Government to consider their cases for regularization. We also notice that the High

Court has not adverted to the aspect as to whether it was regularization or it was giving permanency that was being directed by the High Court. In such a situation, the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent. If sanctioned posts are vacant (they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. But when regular recruitment is undertaken, the respondents in C.A. No. 3595-3612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their having been engaged for work in the Department for a significant period of time. That would be the extent of the exercise of power by this Court under Article 142 of the Constitution to do justice to them.

47. Coming to Civil Appeal Nos. 1861-2063 of 2001, in view of our conclusion on the questions referred to, no relief can be granted, that too to an indeterminate number of members of the association. These appointments or engagements were also made in the teeth of directions of the Government not to make such appointments and it is impermissible to recognize such appointments made in the teeth of directions issued by the Government in that regard. We have also held that they are not legally entitled to any such relief. Granting of the relief claimed would mean paying a premium for defiance and insubordination by those concerned who engaged these persons against the interdict in that behalf. Thus, on the whole, the appellants in these appeals are found to be not entitled to any relief. These appeals have, therefore, to be dismissed.

48. C.A. Nos. 3520-24 of 2002 have also to be allowed since the decision of the Zilla Parishads to make permanent the employees cannot be accepted as legal. Nor can the employees be directed to be treated as employees of the Government, in the circumstances. The direction of the High

Court is found unsustainable.

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."

28. The Hon'ble Apex Court by following the earlier Judgment issued directions to the High Courts in the case of Secretary to Government Vs. R.Govindasamy and others reported in [(2014) 4 SCC 769]. and it is relevant to extract Paragraph No.8 of the same:

"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 post".

29. Considering the above judgments and legal principles settled by the Supreme Court of India and considering the fact that the writ petitioners were initially appointed as N.M.Rs on daily wages and subsequently one relaxation was granted so as, to regularise all the writ petitioners in the post of Cleaners, this Court is of the view that one concession had been already extended in favour of the writ petitioners. Thus, the question of granting another concession for further promotion will certainly affect the employment opportunity of all the qualified persons who are either awaiting for promotion or aspiring for direct recruitment. The writ petitioners have already granted with one concession and now they are working as regular post of Cleaners and receiving time scale of pay. Thus, any further

relaxation of Rule will have serious consequences in respect of the promotional opportunities to all the other qualified persons who are waiting for promotion, so also the opportunity of the eligible youth of this great nation aspiring to secure public employment through open competitive process. The Rule of relaxation cannot be claimed as a matter of right by the petitioners in a routine manner. The Government must be cautiously and this apart competitive officials should be exercising the power of regularisation under the relevant Rules in a routine manner and such exercise of power should be viewed seriously if any such Rule of relaxation is granted to a particular independent class of persons. Then it is necessary to the competent authority also to be subjected for departmental disciplinary proceedings for the misconduct. Exercising the power in order to extend the favoritism and nepotism is also misconduct under the conduct Rules. Exercise of power to extend certain benefits without any justifiable reasons will be construed as if the competent authority extended the favoritism. Thus, the action under those authorities is also eminent in order to uphold the constitutional mandate and perceptsives.

30. This Court is forced to record the displeasure on the part of the Government in exercising the power under Rule 48 in a routine manner. Power of relaxation under Rule 48 is an exemption in law. In other words, the Government cannot exercise the power of relaxation to favour some employees on their own choice. The Rule of regularization is to be exercised only on exceptional circumstances, in a case where an injustice occurred on account of administrative grounds.

31. Relaxation granted cannot be cited as a precedent and each case is to be decided based on its sole merits and in accordance with law. The Hon'ble Supreme Court of India also reiterated that the comparison of the cases are impermissible in normal circumstances and each case has to be decided based on the facts and in accordance with law. Thus, no further adjudication on the grounds raised in this writ petition needs to be under taken.

32. Accordingly, the writ petition stands dismissed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

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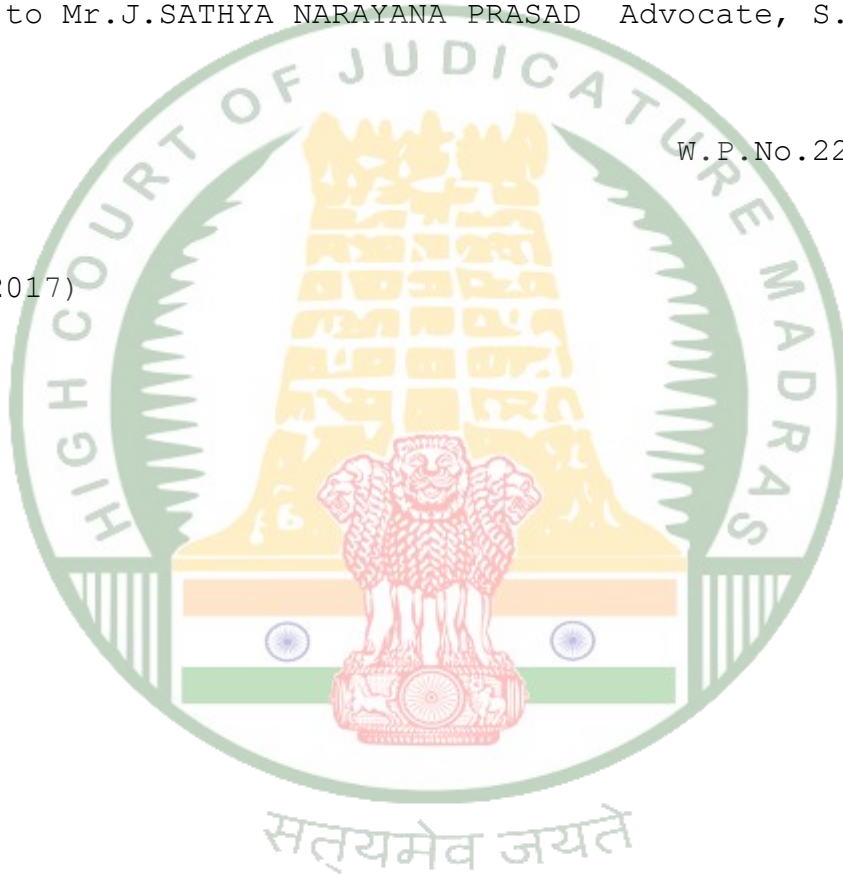
1.The Secretary to Government,
Municipal Administration and Water Supply Department,
Chennai -109.

2.The Commissioner,
Coimbatore Municipal Corporation,
Coimbatore.

+1cc to Mr.J.SATHYA NARAYANA PRASAD Advocate, S.R.No. 78916

W.P.No.22378 of 2014

RR (CO)
TR(22/11/2017)



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