

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :05.10.2017

CORAM

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

W.P.No.2649 of 2014

and

W.M.P.No.10956 of 2016

J.Jayakumari

..Petitioner

Vs

1.State of Tamil Nadu
Rep.by its Secretary
Education Department
Fort.St.George
Chennai 600 009.

2.The Director of Elementary
Educational Officer
D.P.I.Complex
Chennai 600 006.

3.The District Elementary Educational Officer
Tiruppur, Tiruppur District.

4.The Additional Assistant Elementary
Educational Officer
Kangayam, Tiruppur District.

.. Respondents

PRAYER : Petition filed Under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records relating to the order passed by the fourth respondent in O.Mu.No.422/அ/13, dated 25.10.2013 and the order passed by the third respondent in அ.தி.மு.எண்.1155.அ/2013. dated 02.09.2013 and quash the same thereby directing the respondents 1 and 2 to pass suitable orders, regularizing the service of the petitioner from 11.10.1988 and to pay all attended benefits to the petitioner.

For Petitioner : Mr.A.R.Nixon

For Respondents : Mr.K.Thangapandi
Government Advocate

O R D E R

The order of rejection dated 25.10.2013 issued by the fourth respondent and the order of the third respondent dated 02.09.2013 are under challenge in this writ petition. A further direction is sought against respondents 1 and 2 to pass suitable orders regularising the service of the writ petitioner on 11.10.1988 and to pay all attendant benefits to the writ petitioner.

2. The learned counsel appearing for the writ petitioner made a submission that the writ petitioner was initially appointed as part time Sewing Instructress in the Elementary Education Department on 11.10.1988. Subsequently, the service of the writ petitioner was regularized in proceedings dated 15.02.1991. Thereafter, the writ petitioner is continuing as a regular employee and the post of Sewing Instructress was treated equivalent to that of the Secondary Grade Teacher in the Elementary Education Department. The grievance set out in this writ petition is that the part time service in the cadre of Sewing Instructress rendered by the writ petitioner is to be treated as regular service and the same is to be regularized for the purpose of getting the service benefits. The benefit of regularization now is to be considered in respect of the temporary/part time employee by this Court only in the light of the legal principles settled by the Constitutional Bench of the Hon'ble Supreme Court of India in the case of State of Karnataka Vs. Umadevi and others reported in 2006 4 SCC 1, wherein the Hon'ble Supreme Court of India has authoritatively pronounced the legal principles in this regard as extracted hereunder:

4. This Court has also on occasions issued directions which could not be said to be consistent with the Constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualization of justice. The question arises, equity to whom? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin, has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the Constitutional scheme, certainly tend to water down the Constitutional requirements. It is this conflict that is reflected in these cases referred to the

Constitution Bench.

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 (See Basu's Shorter Constitution of India). 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. Buttredding 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 misconception 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.

26. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency an ad hoc appointment can be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularization. The cases directing regularization have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.

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.

39. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the concerned department on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on

contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

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.

3. The judgment of the Constitutional Bench was followed by the Hon'ble Supreme Court of India in the case of The Secretary to Government, School Education Department Vs. R.Govindhasamy and others reported in 2014 4SCC Page No.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".

सत्यमेव जयते

4.The Apex Court reiterated the legal principles enunciated by the Constitutional Bench and held that the High Court in exercising the power under Article 226 of the Constitution of India will not issue direction for regularization, absorption or permanent continuance, unless the employees had been appointed in pursuance of the regular recruitment in accordance with the relevant rules in a open competitive process, against the sanctioned vacant post. Equality class contained under Articles 14 and 16 has to be scrupulously followed and the Courts should not issue a direction to the regularization of the employee which would be violative of a constitutional scheme while something irregular for want of compliance in one of the

elements in the process of selection. It does not go to the root of the process can be regularized to the back door entries, appointment contrary to the constitutional scheme and scope or appointment of ineligible candidates cannot be regularized. Admittedly, the writ petitioner was initially appointed as part time Sewing Instructress on consolidated pay. Subsequently, the Government itself passed an order of regularization regularizing the service of the writ petitioner and accordingly, the writ petitioner had come under the regular establishment in the regular time scale of pay. Such being the fact that, this Court cannot grant a relief of retrospective regularization from the date of initial appointment in the post of Sewing Instructress.

5. However, it is made clear that 50% of the temporary/part time service rendered by the petitioner can be taken into account for the purpose of calculating the qualifying service for the grant of pensionary benefits. The Government of Tamil Nadu also issued amended Rule 11 of the Tamil Nadu Pension Rules, 1978. According to the amended Rule 11, the temporary service rendered by an employee in the Government department has to be taken into account for the purpose of qualifying service to the extent of 50% of the total service.

6. Accordingly, the respondents are at liberty to consider the case of the writ petitioner in the light of amended Rule 11 of the Tamil Nadu Pension Rules, 1978. However, the retrospective regularization as such sought for in the writ petition by the writ petitioner cannot be granted and accordingly, the other grounds raised in this writ petition for the retrospective regularization needs no further consideration. Thus, the writ petition in respect of the retrospective regularization cannot be granted.

7. Accordingly, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is also closed.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

dna

To

1.The Secretary, State of Tamilnadu,
Education Department
Fort.St.George
Chennai 600 009.

2.The Director of Elementary
Educational Officer
D.P.I.Complex
Chennai 600 006.

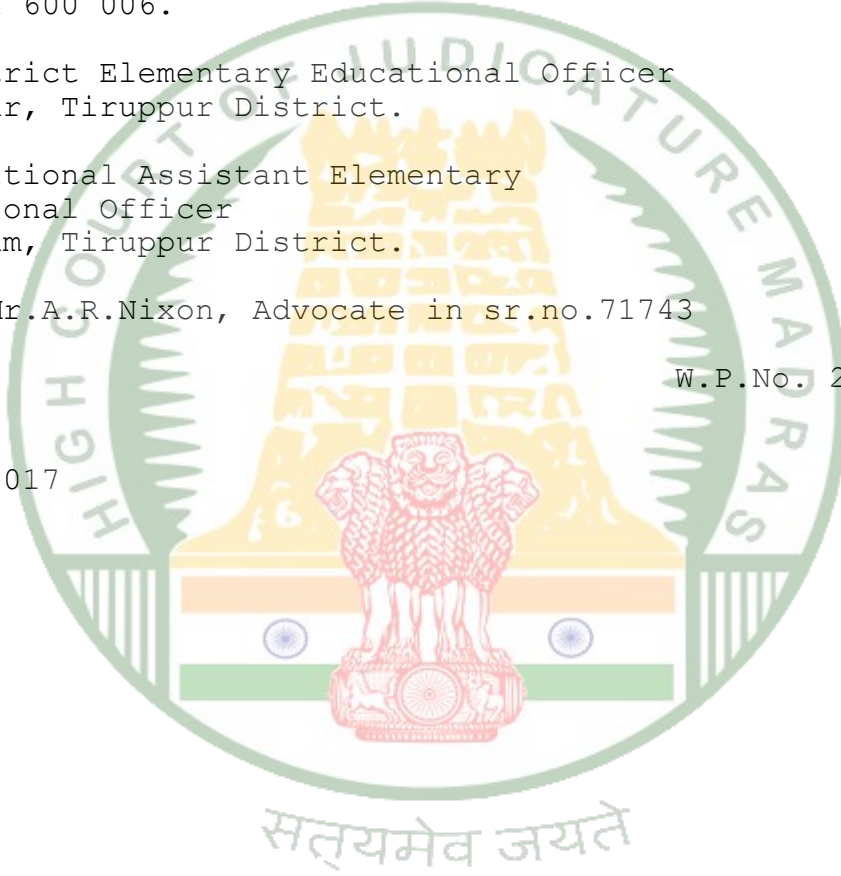
3.The District Elementary Educational Officer
Tiruppur, Tiruppur District.

4.The Additional Assistant Elementary
Educational Officer
Kangayam, Tiruppur District.

+lcc to Mr.A.R.Nixon, Advocate in sr.no.71743

W.P.No. 2649 of 2014

NRJK (CO)
NR 22/11/2017



WEB COPY