

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.08.2017

Coram :

The Honourable Mr. Justice S.M.SUBRAMANIAM

W.P. No.29805 of 2015

R.Murugan

...Petitioner

Vs

The Managing Director,
Tamil Nadu State Transport Corporation Ltd,(TNSTC)
3/137 Salamedu, Vazhuda Reddy Post, P.O.No. 56
Villupuram – 605 602,
Tamil Nadu.

...Respondent

Prayer: Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus directing the respondent to regularize the petitioner's service as a permanent driver with effect from 01.10.2001, on which the service of the similarly placed Co-employee of the petitioner was regularized and pay the petitioner all monetary benefits and such other benefits taking into account of his service with effect from 01.10.2001.

For Petitioner

: P.R.Thiruneelakandan

For Respondent

: Mr.P.Kannan kumar

ORDER

The relief sought for in this writ petition is for a direction directing the respondent to regularize the services of the petitioner as a permanent driver with effect from 01.10.2001. The writ petitioner claims regularization on the ground that similarly placed Co-employees were regularized in the post of Drivers.

2. The learned counsel appearing for the writ petitioner contended that the writ petitioner was appointed as a trainee Driver in the respondent-Corporation. Thereafter, he was appointed on daily wage basis vide proceedings dated 29.12.2000. On a perusal of the order of appointment, it is clear that the writ petitioner was appointed on daily wages for Rs.149/- per day. Thus, the appointment is on daily wage basis and there is no right of confirmation mentioned in the order of appointment.

3 The learned counsel appearing for the writ petitioner contended that though the initial appointment of the writ petitioner was on daily wage basis, the colleagues and the Co-employees, who were

appointed along with the writ petitioner were brought under the regular establishment and their services were regularized in the post of Driver. Thus, the same benefit has to be extended to the writ petitioner also. That apart, the learned counsel submitted that the service condition of the Driver of the Transport Corporation has to be dealt with under the provision of Industrial Disputes Act, 1947. Since, he has continued in service for more than 480 days, he is entitled for permanent absorption on the basis of conferment of permanent States Act.

4 The Learned counsel further cited the Judgment of this Court dated 03.09.2015 passed in W.P.No.14148/2013 and Paragraph No.13 cited by the learned counsel is extracted hereunder

"13.Learned counsel for the Corporation, in support of his contention that these workment cannot be regularised as their appointments were not made in accordance with the Corporation Act, 1971, relied on the judgment of the Honble Supreme Court in the case of Uma Devi Vs. State of Karnataka and others [2006 (4) SCC 1]. However, it is pertinent to mention here that when Uma Devi's case came up for consideration before the Honbel Suupreme Court in Maharashtra SRTC Vs. HYPERLINK " Rajya Parivahan Karmchari Sanghatana reported in [2009 (8) SCC 556], the Honble Supreme Court has dealt with the scope of Uma Devi

case in respect of labour matters and held that thought the employees [in that case] were appointed irregularly by the Maharashtra SRTC Limited in violation of the Standing Orders, since they were exploited by the Corporation for years together by engaging them as piece-rate basis, such employees were entitled for permanent status and if such privilege was not extended to such employees, it would tantamount to putting premium on their unlawful act of engaging in unfair labour practice."

5 The learned counsel further stated that the writ petitioner is entitled for regularisation with effect from 01.10.2001, the day on which he was initially appointed on daily wages, in view of the fact that the writ petitioner has completed 480 days on 01.10.2001.

6 This Court is of the opinion that the Tamil Nadu State Transport Corporation Limited is wholly owned by the State of Tamil Nadu and State being the employer, have got a separate set of recruitment rules in respect of recruitment of Drivers and Conductors in Transport Corporation. All appointments in this regard is to be made only by following the recruitment rules and not otherwise. Further, special Rules will prevail over the general laws. Thus, the recruitment Rules in this regard in force

alone to be followed for appointments and regularisation. Merely absorbing the temporary employees as permanent Government servants will affect the opportunity of the general public and the eligible candidates who are waiting outside, seeking for public employment. Equal opportunity of public employment is a Constitutional mandate and all the citizen of this great Nation to be provided with equal opportunity in respect of public employment. Getting appointment on temporary/casual/daily wages post and working for certain period and thereafter, claim the regularisation/permanent absorption will certainly affect the equality right of other citizen of this great Nation. Lakhs and lakhs of qualified youths are waiting for the public employment and preparing for the open competent process. The principles of equality contemplated under Article 14 of the Constitution of India will be provided to all the citizen equally. Creating back door entries for regularisation or permanent absorption can never be encouraged by the Constitutional Courts. There cannot be any comparison with good olden days, in view of the changing circumstances in the Society. The Courts has to take into consideration the prevailing circumstances and other social economic developments of our great Nation, before granting any such relief to the petitioner. In the current days, a lot of youth are waiting for public employment and they are preparing hardly to participate

in the open competitive process. Thus, all recruitments to the public employment by the State has to be undertaken only by following the recruitment rules in this regard by providing equal opportunity to all the citizens and by following procedures contemplated in the recruitment rules. Any other method other than the constitutional scheme for recruitment has to be stopped at once. State being the employer in the case on hand, no exception can be drawn in the matter of recruitment to the post. The Constitutional Bench of the Supreme Court of India in the case of ***State of Karnataka vs. Umadevi reported in 2006 [4] SCC 1*** observes many such circumstances and it is relevant to state that the Honourable Supreme Court of India. It is useful to extract the following paragraphs:

“4. But, sometimes this process is not adhered to and the Constitutional scheme of public employment is by-passed. The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching Courts, seeking directions

to make them permanent in their posts and to prevent regular recruitment to the concerned posts. Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called 'litigious employment', has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under [Article 226](#) of the Constitution of India. Whether the wide powers under [Article 226](#) of the Constitution is intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognized by our Constitution, has to be seriously pondered over. It is time, that Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance, tends to defeat the very Constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for High Courts in the scheme of things and their wide powers under [Article 226](#) of the Constitution of India are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

5. 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.

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. In spite of this scheme, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be recognized and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognized and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for courts whether acting under [Article 226](#) of the

Constitution or under [Article 32](#) of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme.

13. 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."

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.

43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of [Article 14](#) or in ordering the overlooking of the need to comply with the requirements of [Article 14](#) read with [Article 16](#) of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the

appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the

economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted

fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in [Article 14](#) of the Constitution of India.

“49. It is contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in Tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the

court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.”

The Honourable Supreme Court of India thereafter reiterated or re-emphasized the same principles 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".

7. The Honourable Supreme Court of India authoritatively issued a direction that the High Court in exercise of power under Article 226 of the Constitution of India shall not issue direction for regularisation / absorption

or permanent continuance unless the employees claiming regularisation had been appointed in accordance with regular appointment in course of recruitment rules against the sanctioned vacant post. The equality clause contained in Article 14 and 16 should be scrupulously followed. The Court should not issue a direction for regularisation of service of employment, it would be violation of the Constitutional Scheme.

8. The Honourable Supreme Court of India emphasized the principles laid down in the case of *Govindasamy [cited supra]*. This Court cannot have any hesitation in following direction issued by the Honourable Supreme Court of India in this regard. In this view of the matter, this Court is unable to consider the findings made out by this Court in the case submitted by the writ petitioner in WP.[MD].No.14148 of 2013.

9. The spirit of the judgment of the Honourable Supreme Court of India is that the State being the model employer is bound to follow the constitutional scheme, more specifically, for recruitment of candidates. Thus, all appointments to be made only by following the Constitutional Scheme and recruitment rules in this regard. In this view of the matter an

S.M.SUBRAMANIAM,J

sk

inception or intrusion through back door in order to get absorption / regularisation cannot be allowed and the High Court cannot issue such direction for regularisation / absorption. Thus, no further consideration on merits in this writ petition needs to be undertaken.

10. Accordingly, the writ petition stands dismissed. No costs.

21.08.2017

sk

To

The Managing Director,
Tamil Nadu State Transport Corporation Ltd, (TNSTC)
3/137 Salamedu, Vazhuda Reddy Post, P.O.No. 56
Villupuram – 605 602,
Tamil Nadu.

सत्यमेव जयते

W.P. No.29805 of 2015

WEB COPY