

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.10.2018

CORAM :

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.8537 of 2013

1. A.Palani
2. C.Chinnakulanthai
3. D.Gopi ... Petitioners
vs.

1. The State of Tamil Nadu,
rep. by its Secretary to Government,
Environment and Forest Department,
Fort St.George, Chennai - 9.
2. The Principal Chief Conservator of Forest,
Panagal Building, Saidapet,
Chennai - 15.
3. The District Forest Officer,
Thiruvannamalai North Division,
Thiruvannamalai. ... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a writ of Mandamus, (i) to reinstate the petitioners in service, (ii) to include the petitioners names in the State Wide Seniority List in the appropriate place as per G.O.Ms.No.64, Environment & Forest (FRII) Department, dated 08.03.1999 and (iii) to regularize petitioners service in the regular time scale of pay as per G.O.Ms.No.22 P&A.R (F) Department dated 28.02.2006 and G.O.Ms.No.95, Environment & Forest (FRII) Department dated 07.08.2009 with effect from the date of the petitioners juniors regularization with consequential benefits.

For Petitioner : M/s.K.Jenitha
For Respondents 1- 3 : Mr. M.Santhanaraman
Addl.Government Pleader,
(Forests)

COMMON ORDER

The relief sought for in the present writ petition is for a direction to direct the respondents to reinstate the petitioners in service, to include the petitioners names in the State Wide Seniority List in the appropriate place as per G.O.Ms.No.64, Environment & Forest (FRII) Department, dated 08.03.1999.

2. The writ petitioner joined as Plot Watcher on 01.01.1981 in the Polur, Eucalyptus Range. From the year 1982 to 1994, the petitioner served as tending watcher and Plot Watcher, from 01.01.1994 to 31.07.1994 as tending watcher and from 1994 to 1996 as Check Post Watcher at Polur Range. The 2nd petitioner joined as Check post watcher on 01.03.1981. From 11.03.1981 to 01.10.1996, the petitioner served as check post watcher and tending watcher in the Santhavasal Range. The 3rd petitioner joined in 01.08.1981 as check post watcher in the Polur Range. From 01.08.1981 to 04.10.1996 the petitioner served as check post watcher in the Polur Range.

3. The grievances of the writ petitioners are that, though the petitioners served as the temporary employees for a considerable length of time, their case was not considered for regularization and permanent absorption in the sanctioned post. The 2nd petitioner as well as the 3rd petitioner were employed as temporary employees in between the year 1981 and 1996 and thereafter they were ousted from services. The present writ petition has been filed on the grounds that the Government issued G.O.Ms.No.95, Environment & Forest (FRII) Department dated 07.08.2009 to regularize the services of all such Plot Watchers/Social Forest Workers in the department and serving for more than 10 years. The case of the writ petitioners were not considered on account of the fact that, they have not served for more than 10 years in the department and therefore they are not eligible for regularization even as per the Government orders in force.

4. The learned Additional Government Pleader appearing on behalf of the respondents states that, the case of the writ petitioners are also considered along with all other eligible persons and the respondents found that they are not eligible with reference to the terms and conditions stipulated in the Government order for grant of regularization. Thus the present writ petition is to be rejected. Even the writ petitioners admittedly served in the department as temporary employees in between the years 1981 to 1996 and the present writ

petition was filed on 22.03.2013 after a lapse of about 17 years from the date of discontinuance from the department. Thus, the claim of the writ petitioners are not only belated but even on merits the regularization and permanent absorption cannot be granted in violation of the recruitment rules in force.

5. The legal principles in the matter of regularization and permanent absorption are settled by the Constitutional Bench of Hon'ble Supreme Court of India in the case of State of Karnataka vs. Umadevi reported in 2006 [4] SCC 1 and the relevant paragraphs are extracted hereunder:-

"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."

6. Reiterating the Article provisions settled by the Constitutional Bench, the two Judges Bench of the Hon'ble Supreme Court of India in the case of Secretary to Government Vs. R.Govindasamy and others reported in [(2014) 4 SCC 769] held that High Court cannot be issued directions for regularisation in para 8 which is extracted hereunder:-

"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. Even recently, the Hon'ble Supreme Court of India in the case of State of Tamil Nadu vs. A.Singamuthu [2017 (4) SCC 113] and the relevant paragraphs 18, 19 and 20 are extracted hereunder:-

"18. The learned Single Judge erred in extending the benefit of GOMs No. 22 dated 28-2-2006 to the respondent that too retrospectively from the date of completion of ten years of service of the respondent. The respondent was appointed on 1-4-1989 and completed ten years of service on 31-3-1999. As rightly contended by the learned Senior Counsel for the appellants, if the respondent is to be given monetary benefits from the date of completion of ten years of service, that is, from 1-4-1999 till the date of his regularisation, that is, 18-6-2012, the financial commitment to the State would be around Rs 10,85,113 (approximately) towards back wages apart from pension which will have a huge impact on the State exchequer. That apart, the learned Senior Counsel for the appellant submitted that in respect of

Registration Department, about 172 persons were regularised under various G.Os. and if the impugned order is sustained, the Government will have to pay the back wages to all those persons from the date of completion of ten years in service and this will have a huge impact on the State exchequer. Since the impugned order directing regularisation of the respondent from the date of completion of their ten years would adversely affect the State exchequer in a huge manner, the impugned order cannot be sustained on this score also.

19. It is pertinent to note that even the regularisation of services of part-time employees vide G.O. (Rt.) No. 505 Finance (AA-2) Department dated 14-10-2009 and G.O. (2D) No. 32 Finance (T.A. 2) Department dated 26-3-2010 was effected by extending the benefit of G.O. dated 28-2-2006 only from the date of government orders and not from the date of completion of their ten years of service. The Division Bench also failed to take note that GOMs No. 22 P & AR Dept. dated 28-2-2006 is applicable only to full-time daily-wage employees and who had completed ten years of continuous service as on 1-1-2006 and not to part-time employees. As per G.O. (Rt.) No. 84 dated 18-6-2012, the respondent is entitled to the monetary benefits only from the date of issuance of government order regularising his service, that is, 18-6-2012. The impugned order [Commercial Taxes and Registration Deptt., State of T.N. v. A. Singamuthu, Writ Appeal No. 1209 of 2012, decided on 4-7-2012 (Mad)] of the Division Bench affirming the order [A. Singamuthu v. Commercial Taxes and Registration Deptt., State of T.N., WP No. 26702 of 2010, order dated 26-11-2010 (Mad)] of the Single Judge granting benefits to the respondent from the date of completion of ten years of service is erroneous and the same is liable to be set aside.

20. In the result, the impugned order is set aside and this appeal is allowed. No costs."

8. When the Hon'ble Supreme Court has settled the legal principles in the matter of regularisation and permanent absorption, even the Government orders raising contrary to the legal principles settled by the Constitution Bench can never be followed by the Hon'ble Courts while considering or granting the relief of regularisation or permanent absorption. The legal principles settled by the Constitution Bench of the

Hon'ble Supreme Court of India became the land of the law under Article 14 of the Constitution of India. This being the legal position, this Court is of an opinion that the regularisation or permanent absorption now cannot be granted even by the State in violation of the law settled by the Supreme Court which is binding on all the authorities and the Courts across the Country. The Government cannot issue orders in contravention to the legal principles, when it is settled by the Hon'ble Supreme Court that any such scheme running contrary to the Constitution principles cannot be implemented.

9. This Court is of an opinion that even the State cannot issue orders for regularisation or permanent absorption in violation of the recruitment rules in force as well the legal principles settled in this regard. This being the factum of the case, the writ petitioner has not established any valid ground for the purpose of grant of the relief of regularisation and permanent absorption.

10. 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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To

1. The Secretary to Government,
State of Tamil Nadu,
Environment and Forest Department,
Fort St.George, Chennai - 9.
2. The Principal Chief Conservator of Forest,
Panagal Building, Saidapet,
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3. The District Forest Officer,
Thiruvannamalai North Division,
Thiruvannamalai.

+1 CC TO GOVERNMENT PLEADER SR.NO. 71789

W.P.No.8537 of 2013

ASK(10/12/2018)