

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:29.06.2018

Coram

The Hon'ble Mr. Justice V.PARTHIBAN

W.P.No.30116 of 2012

1.D.Christy
2.D.Mohan
3.K.Manoharan
4.A.Madurai
5.D.Saroja

... Petitioners

Vs

1.The Government of Tamil Nadu,
rep.by its Secretary,
Health and Family Welfare Department,
Chennai-9.
2.The Director of Medical Education,
E.V.R.Periyar High Road,
Kilpauk, Chennai-10
3.The Dean,
Rajiv Gandhi Government
General Hospital,
Chennai

... Respondents

Petition filed under Article 226 of the Constitution of India praying to issue a writ of certiorarified mandamus to call for the records from the respondents and in particularly from the first respondent pertaining to the impugned condition in G.O.(Ms) No.149, dated 08.05.2007 issued by the first respondent and its consequential impugned letter No.3397/F-2/2011-6, dated 16.12.2011 and quash the same and consequently to regularize the services of the petitioners as regular workers based on the G.O.(Ms) No.22, dated 28.2.2006, issued by the Administrative (F) Department.

For Petitioners: Mr.R.Jayaprakash for
Mr.P.Vijendran

For Respondents: Mr.J.Pothiraj, Spl.G.P.

ORDER

The petitioners were appointed as Substituted Workers in the third respondent Hospital on 09.06.1988 and on 29.10.1991, respectively. They were engaged in various types of works like Scavenging, Pump Operator, Lift Operator, Motor Operator, Operation Theater Assistants, Office Attenders, Patient Ward Attenders etc. They were originally sponsored by employment exchange and they were subjected to interview before they came to be appointed as Substituted Workers.

2. Ever since the date of their original appointment in 1988 and 1991, the petitioners have been continued in service without any interruption except on one occasion, where 90 days break was given between two spells of service. Many of the similarly placed substituted workers, who had been employed for a long number of years, had represented to the Government for regularisation of their services. Since their request was not considered favourably, they had approached the then Tamil Nadu Administrative Tribunal and filed Original Application, which was dismissed by the Tribunal. Aggrieved by the same, Writ Petitions in W.P.Nos.4920 to 4923 of 2004 were filed before this Court. When the Writ Petitions were taken up for hearing, the Court was informed that the Government has passed G.O.Ms.No.22, Personnel and Administrative Reforms (F) Department, dated 28.02.2006, wherein, the Government have issued instructions to regularise the services of daily wage employees, who had rendered 10 years of service as on 01.01.2006. Based on the statement on behalf of the Government, the Writ Petitions came to be disposed of.

3. In pursuance of the issuance of above G.O.Ms.No.22, P & AR Department, dated 28.02.2006, several hundred employees' services came to be regularised. Separate Government Orders were also issued in respect of the Substituted Workers, employed under the respondents and several hundred Substituted Workers' services came to be regularised under the respondents. Particularly under G.O.Ms.No.149 dated 08.05.2007, such benefit had been conferred on 383 Substituted Workers, who had rendered 10 years or more continuous service. However, the said G.O.Ms.No.149, dated 08.05.2007, prescribes that regularisation of services of employees would be subject to the condition that break in service between two spells of employment should not exceed 90 days. By applying the said exception, the names of these petitioners, though originally found in the list for regularisation, were not considered.

4. In these circumstances, the petitioners have approached the respondents by their representations seeking for

regularisation of their services as granted to the other similarly placed persons. However, the first respondent, by communication dated 16.12.2011 rejected the request of the petitioners on the ground that these petitioners had 90 days break in service and had not completed 10 years of service continuously as on 01.01.2006, and therefore, they were not entitled to the benefit of G.O.Ms.No.22, P & AR Department, dated 28.2.2006. The rejection of the petitioners' request for regularisation is put in challenge along with the condition provided in the Government Order in G.O.Ms.No.149, dated 08.05.2007 that the benefit of regularisation cannot be granted if 90 days break is applied in respect of any employee's service.

5.Upon notice Mr.J.Pothiraj, the learned Special Government Pleader has entered appearance and filed a detailed counter affidavit.

6.In the counter affidavit the fact of appointment of the first four petitioners on 09.06.1988 and the 5th petitioner on 29.10.1991, has been categorically admitted. It was also admitted that these petitioners were sponsored by Employment Exchange and subjected to selection before they were recruited. However, the only point of resistance to the relief being granted to these petitioners is that the petitioners had suffered a 90 days break in service during their long years of service and therefore, they are not entitled to the benefit of either G.O.Ms.No.149, dated 08.05.2007 or G.O.Ms.No.22, P & AR Department, dated 28.02.2006.

7.The learned counsel appearing for the petitioners would vehemently contend that the third respondent in fact recommended the case of the petitioners for condonation of break in service and consideration of their claim for regularisation. But unfortunately, the first respondent rejected the claim of the petitioners, on untenable grounds. The recommendation of the third respondent is evidenced by the documents filed in support of the writ petition. He would submit that in similar circumstance, this Court has allowed Writ Petitions and ordered regularisation of the petitioners therein on their completion of 10 years of service on casual basis.

8.The learned counsel would draw the attention of this Court to an order passed by a Division Bench of this Court in W.A.(M.D.) No.391 of 2007, dated 25.10.2007 (District Educational Officer, Tirunelveli District, Tirunelveli vs. 1.S.Perumal and 12 others), wherein at paragraph Nos.5 to 9, the Division Bench has confirmed the favourable orders passed by the learned single Judge, by dismissing the Appeal filed by the Department. Paragraph Nos.5 to 9 of the said judgment are extracted hereunder:

"5.We have heard the learned counsel on either side. In view of the Government Order mentioned supra, the respondents are eligible for getting regularization in their service. It is not disputed that they have rendered service for over 10 years as on 01.01.2006 and all the respondents have completed more than 10 years of service so as to get eligibility under the Government Order. There is nothing on record to show that any of the respondents suffer from any disqualification to hold the post.

6.We have also gone through the order passed by the learned Single Judge of this Court, which does not warrant any interference. The fact remains that they were already selected by the concerned authorities and at the time of selection, their names were sponsored by the employment exchange and they are continuing as wage earners.

7.Since we do not find any disqualification on their part, it is just and necessary to direct the appellant herein to regularize the service of the respondents. The appellant is directed to comply with the direction of this Court, within a period of four weeks from the date of receipt of a copy of this order.

8.In these circumstances, the order passed by the learned Single Judge of this Court dated 22.12.2006 in W.P.(MD) No.11707 of 2006 deserves to be confirmed.

9.In fine, this writ appeal is dismissed. Consequently, connected miscellaneous petition is also dismissed. No costs."

9.The learned counsel further would draw the attention of this Court to a decision rendered in W.P.No.16110 of 2012, dated 26.6.2012 (1.G.Chinnapaiyyan and five others vs. 1.The State of Tamil Nadu, rep.by the Secretary to Government and two others), wherein, the learned Judge of this Court, by applying G.O.Ms.No.22, P & AR Department, dated 28.2.2006, had ordered regularisation of Part Time Sweepers, employed in Government Schools. Paragraph Nos.8 and 9 of the judgment of the learned Judge are extracted below:

"8.On a perusal of the above referred orders, it is evident that persons

similarly placed i.e. Part Time Sweepers employed in Government Schools were granted regularization of their services on completion of 10 years of service by relaxing the rule whenever required in terms of G.O.Ms.No.22, P & AR Department, dated 28.2.2006 and they were paid arrears of full time salary. The Government having passed such an order has to apply the same to all similarly placed persons without any discrimination.

9.Applying the above said orders passed by this Court to the facts of the present case, the writ petition is allowed with a direction to the respondents to regularize the services of the petitioners based on the common representation dated 15.6.2012 after verifying their service particulars as to completion of ten years of service with time scale of pay. The regularization order is directed to be issued by the respondents within a period of eight weeks from the date of receipt of a copy of this order. The arrears of salary, payable to the petitioners, pursuant to their regularization, shall be paid to them within a period of four weeks therefrom. No costs."

10.Alternatively, the learned counsel would submit that even assuming that the petitioners could not continuously complete 10 years of service as on 01.01.2006, he would rely on the decision rendered by a learned Judge of this Court in a batch of Writ Petitions in W.P.Nos.29346 of 2014 etc. batch, dated 22.09.2017 (1.G.Sivagiganesan and five others vs. 1.The State of Tamil Nadu, rep.by its Secretary, Public Works Department, Fort St.George, Chennai and two others). The learned counsel would particularly draw the attention of this Court to paragraph Nos.20 to 24. The learned Judge of this Court has held that even the persons, who have completed 10 years of service after 01.01.2006, were entitled to the benefit of regularisation. The learned Judge has quashed G.O.Ms.No.74, P & AR Department, dated 27.06.2013, which was put into effect retrospectively from 01.01.2006, in so far as it restricts the benefit of regularisation only for employees who had completed 10 years of service as on 01.01.2006 and not thereafter. Paragraph Nos.20 to 24 are re-produced below:

"20.Having heard the learned counsel

appearing for the learned counsels for the petitioners and the learned Addl. Advocate General for the respondents and upon perusing the materials and pleadings placed on record, this Court is of the view that the offending portion of the G.O.Ms.No.74, dated 27.6.2013, namely, paragraph 6 which is extracted supra, is unconstitutional and it only seeks to introduce a naked discrimination in the matter of treatment of identically placed employees. As rightly contended by the learned counsels appearing for the petitioners and in view of the various decisions rendered by this Court, the right which is accrued to the employees cannot stand negated by giving retrospective effect to the G.O. Ms.No.74, dated 27.6.2013. Moreover, in the several decisions rendered by this Court which have been confirmed in Writ Appeals and also in some other cases by the Hon'ble Supreme Court, it does not lie within the power of the Government to bring the impugned G.O. with retrospective effect. Such retrospectivity is blatant attempt by the Government to violate the principles of promissory and equitable estoppel and doctrine of legitimate expectation.

21. This Court also cannot lose sight of the fact that in several cases, in fact, few of them have cited above, the employees had obtained beneficial orders and those orders also came to be implemented by the Government on various dates even in the present year. In the said circumstances, this Court is unable to understand the situation as to how the petitioners alone can be singled out for discriminatory treatment by retrospectively applying the G.O.Ms.No.74, dated 27.6.2013. Any Governmental action is to be tested on the touchstone of Articles 14 and 16 of the Constitution of India. A State cannot be allowed to adopt the discriminatory practice while dealing with the citizens or Government servants.

22. In the instant case, the attempt to implement the impugned G.O.Ms.No.74, dated 27.6.2013 with retrospective effect, is nothing but a clear case of colourable exercise of power. The fundamental rights guaranteed by our Constitution sought to be impinged by bringing in the impugned G.O. with retrospective effect.

Exercise of such power, therefore, cannot be held to be constitutionally valid. This Court is also conscious of the fact that in policy matters, the Court should be little slow in interfering with the same, however, under the guise of public policy, the Government cannot arbitrarily and unjustly take away the rights of the employees which is against the scheme of the Constitution. In the instant case, the Government has preciously done the same.

23. In the light of the above narrative and discussion, this Court finds that retrospective implementation of the impugned G.O.Ms.No.74 dated 27.6.2013 and the other conditions enumerated in para 6 of the G.O., are liable to be struck down as being unconstitutional and interfering with the fundamental rights of the Government servants.

24. For the foregoing reasons, the impugned G.O.Ms.No.74 P.&AR. Department, dated 27.6.2013 is hereby set aside insofar as para 6 is concerned and the petitioners in all the Writ Petitions are entitled to regularization of their services on completion of 10 years of service by virtue of G.O.Ms.No.22 P.& AR. Department, dated 28.2.2006 and also in line with similar orders passed by this Court in various earlier writ petitions quoted supra. The respondents are directed to pass orders regularizing the services of the petitioners, within a period of three months from the date of receipt of a copy of this order."

11. In the said circumstances, even otherwise, these petitioners, who have admittedly completed 10 years of service, are entitled to regularisation. According to the learned Counsel, admittedly, the services of several persons, who had completed 10 years of service, after 01.01.2006, came to be regularised in pursuance of implementation of several orders/directions passed by this Court. Therefore, he would submit that the petitioners being similarly placed, are also entitled to the relief of regularisation.

12. This Court has given its anxious consideration to the rival submissions of counsels and perused the materials and pleadings placed on record.

13. The fact that these petitioners were initially appointed in 1988 and 1991 has been admitted by the respondents in their counter affidavit. The fact that they have been

continuously working from 1988 and 1991, as the case may be, has also not been disputed. The only bone of contention between the parties is that the petitioners had suffered 90 days break in between spells of employment and therefore, the benefit of G.O.Ms.No.149, dated 08.05.2007, cannot be extended to them and that it was by application of 90 days break, they could not complete 10 years of uninterrupted service as on 01.01.2006 and hence, not entitled to the benefit of G.O.Ms.No.22, P & AR Department, dated 28.2.2006, either.

14.This Court is unable to appreciate the stand of the Government as to how an artificial break which was given in respect of the petitioners' service could be a material factor for denying the valuable right of the petitioners having their services regularised, despite the fact that they had rendered more than 18/14 years of service as on 01.01.2006. It was not the fault of the petitioners that they had remained absent for 90 days. The fact is that the petitioners were prevented from discharging their duty, despite the fact that the nature of employment was continuous and permanent. The nature of employment being continuous and permanent, as it could be seen that the petitioners have been continuously engaged for 18/14 years, which itself would strengthen the case of the petitioners for regularisation of their services. The application of break in service, when the nature of employment of the petitioners was continuous and permanent, cannot be countenanced both in Law and on facts. Needless to mention that such artificial break in service is applied only in order to defeat the legitimate rights of the employees in the matter of regularisation of their services. Therefore, this Court cannot appreciate the stand of the Government that merely because the petitioners suffered 90 days break in service, they were not entitled to the relief of regularisation of their services.

15.If the stand of the Government is to be accepted, it will only result in grave miscarriage of justice, since admittedly, the petitioners had worked from 1988/1991 continuously otherwise. It will also be a grave injustice to the petitioners if the stand of the Government is allowed to prevail in the teeth of the fact that the services of the similarly placed employees, hundred in numbers, were regularised under various orders passed by the Government. It would be a travesty of justice if the services of the petitioners are not regularised, even after utilising their services for more than three decades. Therefore, the denial of regularisation of the services of the petitioners is ex facie arbitrary and the exception as found in G.O.Ms.No.149, dated 8.5.2007, restricting the benefit of regularisation, subject to the condition that the break in service should not exceed 90 days, cannot meet the constitutional standard and of equality. Therefore, such

condition imposed for grant of regularisation is hereby held as illegal and void.

16. Since the condition imposed in G.O.Ms.No.149, dated 08.05.2007, is held to be illegal and void, the petitioners are entitled to the benefit of G.O.Ms.No.22, P & AR Department, dated 8.2.2006, as they were admittedly recruited in 1988 in respect of three writ petitioners and in 1991 in respect of the fifth writ petitioner and they had completed more than much 10 years of service as on 01.01.2006.

17. During the course of argument, the learned counsel for the petitioners would submit that pending disposal of the writ petition, the 3rd writ petitioner had died and therefore, no relief could be granted to him.

18. For the above said reason, the Writ Petition is allowed and the impugned communication of the first respondent in Letter No.3397/F-2/2011-6, dated 16.12.2011, is hereby quashed along with the offending condition in G.O.Ms.No.149, dated 08.05.2007. Consequently, the respondents are directed to regularise the services of the petitioners by giving the benefit of G.O.Ms.No.22, P & AR Department, dated 28.02.2006, with all attendant consequential benefits as given to other similarly placed employees, who had been granted the benefit of regularisation under the said Government Order. The respondents are directed to pass orders complying with the direction issued by this Court within a period of eight weeks from the date of receipt of copy of this order.

In fine, the writ petition stands allowed as above. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1. The Secretary,
Government of Tamil Nadu,
Health and Family Welfare Department,
Chennai-9.
2. The Director of Medical Education,
E.V.R.Periyar High Road,
Kilpauk, Chennai-10

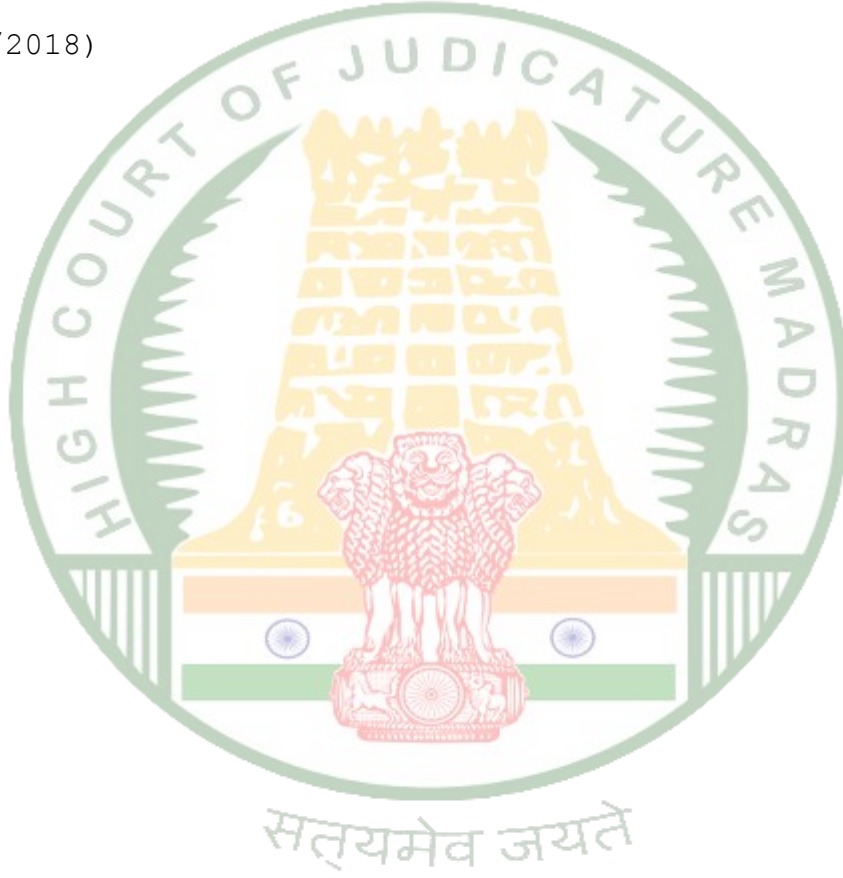
3. The Dean,
Rajiv Gandhi Government
General Hospital,
Chennai

+1cc to Mr.R.Jayaprakash, Advocate, S.R.No.42217

+1cc to the Government Pleader, S.R.No.42299

W.P.No.30116 of 2012

SSD(CO)
GSP(10/07/2018)



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