

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.03.2018
CORAM

THE HONOURABLE Mr.JUSTICE V.PARTHIBAN

W.P.No.6635 of 2012

L.Chinnathambi

... Petitioner

Vs

1.The Secretary to Government,
Department of Public Health care and Family Welfare,
Fort St.George, Chennai-9.

2.The Director of Public Health & Preventive Medicine,
Chennai-6.

3.The Deputy Director of Health Services,
Dharmapuri District.

... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, to call for the records of the second respondent in Na.Ka.52623/Putha II/Iru2/2011, dated 13.06.2011 and quash the same and further direct the respondents 1 to 3 to appoint the petitioner to the permanent post of Mazdoor lying vacant with the respondents.

For Petitioner : Mr.C.Umashankar

For Respondents : Mr.D.Venkatachalam,
Additional Government Pleader

सत्यमेव जयते
O R D E R

Heard Mr.C.Umashankar, learned counsel for the petitioner and Mr.D.Venkatachalam, learned Additional Government Pleader appearing for the respondents.

2. The petitioner has approached this Court, seeking the following relief:-

"To issue a Writ of Certiorarified Mandamus, to call for the records of the second respondent in Na.Ka.52623/Putha II/Iru2/2011, dated 13.06.2011 and quash the same and further direct the respondents 1 to 3 to appoint the petitioner to the permanent post of Mazdoor lying vacant with the respondents."

3. The case of the petitioner is as follows:-

The petitioner had studied upto 9th Standard. He belongs to Most Backward Community and has registered his name in the local employment exchange in 1994 and the same is being renewed from time to time.

4. By proceedings dated 22.09.2006, the third respondent has appointed the petitioner as temporary Seasonal Mazdoor in the Primary Health Care Centre, Eariyur Village, Pennagaram Taluk, Dharmapuri District, as daily wager. His primary job was to undertake the activity for preventing Malaria and related diseases, particularly, when such diseases were active during monsoon period. The petitioner was continued in service year after year till September 2016. But, his services were only utilised as temporary Seasonal Mazdoor all these years. Therefore, initially he submitted a representation in 2010, when the petitioner came to know that the respondents were resorting to permanent appointment for the post of Mazdoor in the Department of Public Health Care and Family Welfare.

5. The petitioner submitted his representation on 21.06.2010. However, there was no reply to his representation and therefore he was constrained to approach this Court in W.P.No.9999 of 2011, seeking direction to the respondents to consider his claim for permanent appointment. This Court by an order dated 20.04.2011, was pleased to direct the second respondent to consider the representation of the petitioner and pass orders on merits and in accordance with law. Ultimately, an order was passed on 13.06.2011, by the second respondent, rejecting the claim of the petitioner stating that he was only employed as Seasonal Mazdoor only during monsoon period and therefore, not entitled to permanent absorption. The said rejection order is put to challenge in the present writ petition.

6. Upon notice, learned Additional Government Pleader appearing for the respondents, entered appearance and filed a detailed counter affidavit. In the counter affidavit, it is stated that the Mazdoor who are employed for anti-mosquito activities, were employed on temporary basis with daily wages for about 90 to 120 days during the period of monsoon. Their services automatically would stand discharged after the monsoon period was over. These Mazdoors were paid for the actual number of days they worked and therefore, they cannot expect them to be made permanent, since, they were only seasonal employees and not employed throughout the year.

7. The learned Additional Government Pleader while making his arguments had strongly reiterated the averments as contained in the counter affidavit.

8. Per contra, the learned counsel for the petitioner would submit that the petitioner had been admittedly employed for 10 years from 2006 to September 2016 and when this Court directed for filing of counter in the writ petition, deliberately the respondents have stopped the petitioner from work in 2016, otherwise, the petitioner had to be in 10 years of continuous work though employed during monsoon seasons. The employment for the period from 2006 till 2016 of the petitioner has not been disputed in the counter affidavit.

9. The learned counsel for the petitioner would further submit that the respondents themselves have initiated action in 2016 for recruiting regular employees as Field Workers (Mazdoor) in the Directorate of Public Health and Preventive Medicine. In regard to such regular recruitment, the Government has issued G.O (2D). No.97, Health and Family Welfare Department, dated 20.07.2016, followed by proceedings dated 07.09.2016, wherein, a Committee was appointed to undertake the recruitment to fill up 182 permanent post of Field Workers (Mazdoor) after following certain procedure provided in the said proceedings.

10. According to the learned counsel for the petitioner, in response to the proceedings, the petitioner herein had submitted a representation on 28.09.2016, to all the respondents, seeking to consider him for permanent appointment in any one of the notified vacancies. However, the said representation was not considered by the authority concerned and no orders were passed on the said representation. The learned counsel would submit that there are still three vacancies available in the Dharmapuri District itself and the petitioner can be considered by the authority concerned for permanent absorption, as the petitioner's services have been utilised by the respondents for more than 10 years continuously.

11. At this, the learned Additional Government Pleader would submit that the petitioner did not respond to the recruitment notification in proper format and merely a representation was submitted for seeking permanent absorption and therefore, the same was not considered by the authorities. Having failed to respond to the recruitment notification in proper manner, it is not open to the petitioner, now, to seek permanent absorption in furtherance of the notification dated 07.09.2016. Moreover, the learned Additional Government Pleader would submit that as per the decision rendered by the Hon'ble Supreme Court of India viz., in the case of State of Karnataka Vs. Umadevi, such regularisation of temporary employees was frowned upon stating that such regularisation amounted to encouraging back door entry. Therefore, he would submit that in view of the Hon'ble Supreme Court order, the petitioner is not entitled to the relief as prayed for in the writ petition.

12. Further, the learned Additional Government Pleader would also submit that in similar circumstances, the learned Judge of this Court recently passed an order in W.P.Nos.27210 and 27211 of 2010, dated 08.11.2016, wherein, the learned Judge has dismissed the writ petition. There also the learned Judge had relied upon the decision of the State of Karnataka Vs. Umadevi, reported in 2006 (4) SCC 1 and rejected the relief prayed for by the petitioners who were also working as Seasonal Mazdoors in anti-malaria activity, like the petitioner herein. Therefore, he would submit that in all fours, the claim of the petitioner cannot be entertained by this Court.

13. On the other hand, the learned counsel for the petitioner would draw the attention of this Court to the decision of the Hon'ble Supreme Court of India in the case of Amarkant Rai Vs. State of Bihar and others, reported in (2015) 8 SCC 265. He would draw the attention of this Court to paragraph Nos.11 and 13 of the order which are reproduced below:-

"11. Elaborating upon the principles laid down in Umadevi's case (supra) and explaining the difference between irregular and illegal appointments in State of Karnataka & Ors. v. M.L. Kesari & Ors., (2010) 9 SCC 247, this Court held as under:

"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi (3) , if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing

the process of open competitive selection, such appointments are considered to be irregular."

13. In our view, the exception carved out in para 53 of Umadevi is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bear any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularization viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularized w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 03.1.2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits be paid from 01.01.2010."

14. The learned counsel for the petitioner would submit that the case of the petitioner falls within the exception to the general principle laid down by the Hon'ble Supreme Court of India in the case of State of Karnataka Vs. Umadevi, since admittedly, the petitioner has rendered 10 years of service as Seasonal Mazdoor. According to the learned counsel, the above decision of the Hon'ble Supreme Court of India would directly apply to the case on hand and therefore, the exception as laid down in the case of Umadevi in paragraph No.53 of the said Judgment has to be applied and the benefit has to enure to the petitioner herein. As regards the decision of this Court passed by the learned Judge in the aforesaid writ petitions, he would submit that the facts of those writ petitions were completely different because there the petitioners were working for few days before 1984 and their services were discharged in 1984. Therefore, they cannot come up with any grievances of being not employed in 2009 and in the absence of any proof of the petitioners therein, agitating the issue for 15 years, the writ petition filed by them was held to be not maintainable. Therefore, the decision of the said learned Judge cannot be applied to the facts of the present case.

15. As far as the present case is concerned, the petitioner had been working continuously from 2006 to 2016 and after this Court ordered for filing of the counter affidavit, the authority deliberately stopped the petitioner from work to curtail the right of the petitioner from seeking absorption. Therefore, in

all, the learned counsel would submit that the petitioner having suffered no disqualification and having all the eligibility, can be considered for permanent absorption in any one of the existing vacancies, particularly, when the respondents themselves have sanctioned 182 permanent posts of Field Workers (Mazdoor).

16. This Court has considered the rival submissions of the learned counsels appearing for the parties and perused the materials and pleadings placed on record. The fact that the petitioner had been employed from 2006 till September 2016 and the fact that the petitioner had necessary qualification for appointment of Seasonal Mazdoor, had also not been disputed by the respondents. The only point in issue which is put against the petitioner is that he was a seasonal employee and cannot therefore stake any claim for permanent absorption. This objection cannot be validly countenanced by this Court in the teeth of the fact that the Government itself has passed an order in G.O(2D). No.97, Health and Family Welfare Department, dated 20.07.2016, for recruitment of permanent Field Workers (Mazdoor) and a further notification was issued on 07.09.2016, for filling up of 182 permanent post of Field Workers (Mazdoor).

17. When such is the case, this Court does not find any justification for not considering the name of the petitioner herein who had rendered continuous service from 2006 till 2016. In fact, the petitioner had responded to the notification by submitting a representation to all the respondents on 28.09.2016, but, unfortunately, the respondents have not considered the representation in the light of the recruitment notification and in the light of the fact that the petitioner had been employed for 10 years or so. The objection by the learned Additional Government Pleader that the petitioner did not respond to the notification in proper format, cannot be accepted as a valid piece of argument for the simple reason that the petitioner having chosen to submit the representation, it is incumbent to the authority to forward the representation and consider the candidature of the petitioner along with the other candidates who were considered and appointed in pursuance of the said notification.

18. The decision of the Hon'ble Supreme Court of India relied on by the learned counsel for the petitioner would also support the claim of the petitioner that the case of the petitioner has to be treated as an exception to the ruling of the Hon'ble Supreme Court of India in paragraph No.53 of Umadevi's case. The petitioner having worked for 10 years continuously from 2006 to 2016, has to be considered for permanent absorption who is otherwise fit and eligible for such consideration. The non-consideration of the petitioner for the

above said reasons cannot stand the test of judicial scrutiny, particularly, in the face of the fact that there are vacancies which are still available in the post of permanent Field Workers (Mazdoor). Once the respondents have extracted the work from the petitioner for over 10 years, it is not open to them to deny the petitioner the right to be considered for permanent absorption along with other similarly placed Mazdoors. In the said circumstances, the petitioner is entitled to be considered for permanent absorption by the authority concerned.

19. During the course of the arguments, it is submitted by the learned Additional Government Pleader that the Committee which was appointed to undertake the recruitment process of 182 permanent Field Workers (Mazdoor) had been disbanded after the recruitment process was over. However, notwithstanding the fact that the Committee had been disbanded, the issue of regularisation on permanent absorption of the petitioner has to be considered by the competent authority by applying the exception carved out by the Hon'ble Supreme Court of India in the case of Umadevi as found in paragraph No.53 of the Judgment.

20. In the light of the above findings, this Court directs the respondents / competent authorities to consider the claim of the petitioner for permanent absorption in any one of the existing vacancies on the basis of his continuous employment from 2006 till 2016 and pass orders accordingly, within a period of eight weeks from the date of receipt of a copy of this order. The authority shall take into consideration the above observations of this Court as well as the exception carved out by the Hon'ble Supreme Court of India in the case of Umadevi as found in paragraph 53 of the judgment as well as the other Supreme Court judgment relied on by the learned counsel for the petitioner.

21. With the above direction, the writ petition stands disposed of. No costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gsk

To

1.The Secretary to Government,
Department of Public Health care and Family Welfare,
Fort St.George, Chennai-9.

2.The Director of Public Health & Preventive Medicine,
Chennai-6.

3.The Deputy Director of Health Services,
Dharmapuri District.

+2cc to Mr.C.Uma Shankar, Advocate, S.R.No.20877

+1cc to the Government Pleader, S.R.No.21414

W.P.No.6635 of 2012

RV(CO)

RRK(03/04/2018)



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