

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.11.2018

CORAM:

THE HONOURABLE Dr. JUSTICE S.VIMALA

Writ Petition No.23468 of 2018
& W.M.P.No.27384 of 2018

T.Lakshmanan (Pump Operator),
Sooramangalam Ward Office,
Salem Corporation,
Salem 636 001

... Petitioner

versus

1. The State of Tamil Nadu, Rep. by its Secretary,
Municipal Administration & Water Supply Department,
Fort St. George, Chennai 600 009.
2. The Commissioner of Municipal Administration,
Ezhilagam Complex, Chepauk, Chennai 600 005.
3. Salem Corporation, Rep. by its Commissioner,
Salem 636 001. ... Respondents

Petition filed under Article 226 of the Constitution of India, seeking for the issuance of writ of certiorarified mandamus to call for the records relating to the order of the first respondent, dated 02.08.2017, in letter No.8698/Na.Ka.5/2017-1, quash the same and consequently direct the respondents to regularize the service of the petitioner in the third respondent Corporation, based on G.O.Ms.No.21, Municipal Administration and Water Supply Department, dated 23.02.2006.

For Petitioner : Mr. K.Selvaraj

For R-1 & R-2 : Mr. R.S.Selvam, G.A.,

For R-3 : Ms. Bhuvaneswari, AGP.,

O R D E R

A pump operator employed on a wage of Rs.750/- per month, for a period of 32 years, who is entitled to the benefits under the provisions of either Labour Law or Service Law, strangely encountered a rejection order, on the ground that the policies,

programmes and rules of the Government did not provide for regularization of part-time employee like him. The said pump operator is before this Court now.

1.1. According to Mathew Arnold:

"This strange disease of modern life,
With its sick hurry, its divided aims,

Its heads o'ertax'd, its palsied hearts

For what wears out the life of mortal men?
'Tis that from change to change their being rolls:
'Tis that repeated shocks, again, again,
Exhaust the energy of strongest souls,
And numb the elastic powers.
Till having used our nerves with bliss and teen,
And tired upon a thousand schemes our wit,
To the just-pausing Genius we remit
Our worn-out life, and are-what we have been...."
(Scholar Gypsy)

1.2. The creed of Mathew Arnold is the gospel of Labour and like him, this Court also believe firmly in the moral worth of the efforts of lowly paid employees.

2. By G.O.No.21, dated 23.02.2006, of Municipal Administration and Water Supply Department, provides that the consolidated pay employees, NMRS and daily wage persons should be regularized with effect from 23.02.2006.

3. The petitioner herein filed W.P.No.5925 of 2017 seeking directions to the respondents therein to regularize his services from 23.02.2006 in terms of G.O.No.21, by considering his representation dated 21.02.2017.

3.1. This court, by the order dated 10.03.2017, after extracting the facts, directed the respondents 1 and 2 to pass appropriate orders on the representation dated 21.02.2017, within a period of two weeks from the date of receipt of a copy of the order.

4. The Government, by the order, dated 02.08.2017, rejected the representation of the petitioner on the ground that he is a part-time pump operator and his services cannot be brought under time scale of pay in terms of G.O.No.21 as well as the rules of Municipality. Challenging the order of the Government, dated 02.08.2017, this writ petition has been filed.

5. It is the case of the petitioner that he was continuously employed as Pump Operator in the third respondent Corporation from 17.03.1986 on consolidated wages of Rs.750/- per month, for more than 32 years and therefore, he must be regularized.

5.1. The petitioner is relentlessly fighting to get his services regularized, but unfortunately, for him, he had to file a Contempt Petition, ultimately leading to the rejection of his claim.

6. The counter affidavit has been filed on behalf of the first respondent and the summary of the counter affidavit reads as under:

6.1. The petitioner was appointed by the Special Officer, Jahir Ammapalayam Panchayat Union in the year 1986 (and not by the 3rd respondent). Salem Municipality was upgraded as Corporation in the year 1994 by merging adjoining local bodies and the petitioner was absorbed into Salem Corporation on consolidated pay as part-time pump operator, along with 60 others. The petitioner did not attend the work from Feb 1998 to 23.04.2001, i.e. for a period of three years. Thereafter, the petitioner attended the work from 24.04.2001. The petitioner has the option to choose as he wish and there was no compulsion by the Local Body to continue in the post as he was neither recruited through Employment Exchange nor he was appointed in the sanctioned post. Therefore, he was not entitled for regularization.

6.2. The decision reported in 2017 (3) Scale 365, (Secretary to Government, Commercial Taxes and Registration Department, Secretariat and another vs. A.Singamuthu) is relied upon, in addition to the decision of the Supreme Court in the case of State of Karnataka and others vs. Uma Devi.

7. Under the circumstances, in the light of the averments stated in the counter, the issues to be considered are: a) what is the import of G.O.No.21, dated 23.02.2006; whether it applies to part time employees or not? If not, what are the rights and protection available to the part time employees. b) Whether there is a bar for regularization of part-time employees at all circumstances and in all contingencies?

8. So far as the issue no.2 is concerned, the admission in the counter affidavit has done some justice to the petitioner. There is an admission that there was a merger of the local body with the Salem municipality. At the time of merger, the rights and responsibilities of the pump operator should have been expressly made clear. Though it is stated that the petitioner

was not working from Feb. 1998 to April 2001, no document has been filed to prove the same. The respondent who is bound to maintain documents and who is also the custodian of documents should have filed the entire documents to show, how long the petitioner had been working continuously, under what terms and conditions, when was the break in service, why there was a break in service, re-joining was under what context and with what conditions and under what circumstances. Nothing has been explained and no document has been filed to substantiate the contention. Under such circumstance, the contention that he was doing only a job of operating on/off the switch and their entry is unlawful cannot be accepted. The case of State of Karnataka and others vs. Uma Devi would not apply to the facts of this case and they are clearly distinguishable.

9. Originally, the Government role was to act as a Police State, which ultimately turned out to be one that of a welfare state. While the welfare measures were initiated, there was no system in place to indicate the direction in which welfare measures would be implemented and the extent to which welfare measures ought to have been taken.

10. The Government, which is expected to be a model (ideal) employer cannot be allowed to play havoc with working lives of gullible workforce, as if they are guinea pigs, put into clinical trials, without having an ordinary prudence of having a system and regulatory frame work, prior to engaging their services. The employer's failure to provide openings for entry may not be conveniently brushed under the carpet, just for the sake of advising the hopeless employee to approach the Gateways for entry or terming their act as back-door entry. It is akin to sadism displayed in statutory absentia.

11. A person should be employed for hire to discharge the work, manual, skilled or unskilled etc., in any industry. If this test is fulfilled, a part time employee can also be said to be "a workman" (G.M. Telecom, Nagpur vs. Naresh Brijlal Charote & anr. 2001 LAB I.C. 2127 (Bombay High Court)).

12. In order to appreciate this question, it is necessary to look into the circumstances under which this Government Order was issued.

13. There are nine Government Orders relating to the regularization of the services of the workers on consolidated pay and NMRs. G.O.Ms.Nos.1 to 5 referred to in G.O.No.21, the Government has fixed certain norms for creation of Posts, namely, : (a) for maintenance of street light; (b) sanitary workers; (c) maintenance of water supply and general category.

13.1. Subsequently, orders have been issued permitting Municipal Commissioners to appoint the NMRs on daily wages and to bring them in the time scale. At a later point of time, proposals for appointment of persons in various categories have been considered positively. The Government order speaks only about the regularization of the services in the regular post of employees: (a) on consolidated pay; and (b) NMRs and (c) on daily wages.

13.2. The Government Order did not use the expression "part time" or "full time" employees. The Government Order covered the cases of three categories: (i) employees receiving consolidated pay; (b) NMR employees; (c) daily wage employees. It is not in dispute that the petitioner was receiving consolidated pay. The time for which a person will be working is not the criteria but whether the person was employed for hire to discharge the manual, skilled or unskilled work in any industry was the criteria. It would be relevant to quote the decision reported in the case of Div. Mang., New India Assurance vs A.Sankaralingam, where-under it has been held as follows:-

"13. We also find that the preponderance of judicial opinion in the High Courts is also to this effect. As a sample we reproduce passages from two such judgments. A Division Bench of the Punjab and Haryana High Court in Simla Devi's case (supra), has observed as under:

"A plain reading of the definition of "workman" does not exclude the part-time workmen from the definition of "workman". Such exclusion cannot be read into it ipso-facto, except if it is expressly provided or implied that no other interpretation is possible, which is not the case in the case in hand. We find support for our view from the observations made by the Supreme Court in Birdhichand Sharma v. First Civil Judge, (1961-II-LLJ-86), wherein the Supreme Court in facts and circumstances of the case, found that the workers even doing the job at their home are still workmen. Thus we are of the considered view that a part-time workman shall fall within the definition of "workman" and the finding returned by the Labour Court that a part-time worker is not a workman, cannot be sustained. We may hasten to add that nothing has been pointed out that on any principle of equity, justice, good conscience or the technical interpretation of the definition of workman that a part-time workman

cannot be termed as a workman is unknown to the industrial world."

14. Likewise in G.M. Telecom, Nagpur vs. Naresh Brijlal Charote & anr. 2001 LAB I.C. 2127 (Bombay High Court), it has been observed thus:

"The definition of 'workman' as given in the Act does not make any distinction between full time employee and part time employee. It does not lay down that only a person employed for full time will be said to be a workman and that the one who is employed for part time should not be taken as a workman. What is required is that the person should be employed for hire to discharge the work manual, skilled or unskilled etc. in any industry. If this test is fulfilled, a part time employee can also be said to be a 'workman'. Now, if this test is applied to the present case, it can very well be said that respondent No.1, who was appointed as a part-time sweeper and was required to do manual and unskilled work is a 'workman' within the meaning assigned to the said terms in the Act and as he worked for more than 240 days in a year, the provisions of Section 25F of the Act are applicable to the case in hand and as neither any notice, as contemplated under Section 25F of the Act, was served upon the respondent No.1 nor he was paid compensation in lieu of the said notice, nor was paid retrenchment compensation, it cannot be said that the provisions of Section 25F of the Act were duly complied with. It has been time and again held by this Court as well as by the Apex Court that the non-compliance of the mandatory provisions of Section 25F of the Act would render the termination of service void ab initio. I am fortified in this view by a decision of the Apex Court in the case in Mohanlal vs. Management of M/s. Bharat Electronis Ltd., (1981) 3 SCC 225."

13.3. From the decisions, cited supra, it is clear that there is no logic or reason to contend that only full time employees can be described as employees and not part time employees.

14. The more relevant issue would be, whether the person employed was discharging manual / skilled / unskilled work and whether it was for hire in any industry and whether it has established the relationship of employer or employee resulting in establishment of contract of service.

15. If this criteria is applied to the case of the petitioner, it cannot be said that he is not an employee. Once it is found that he is an employee, then he is entitled to the benefits of G.O.No.21. At the time, when the petitioner was engaged, there was no post sanctioned, there were no rules for recruitment, there is no rules for service benefits. Everything has been brought into existence only after the Government decided to bring in regularization for nearly 6058 employees (water supply staff, sanitary workers, street light maintenance staff) belonging to municipalities and other corporations and 674 employees of great three municipalities. Therefore, there is no question of terming the entry of the petitioner as back door entry. The Government itself / Municipalities themselves do not have any provision for entry at all.

16. The petitioner claims that only in order to exploit the labour and to decline the benefit of time scale of pay, his services is not regularized.

16.1. On the other hand, the respondent claims that he was not appointed on time scale of pay and therefore, he can never be on the time scale of pay.

16.2. The contention on the side of the respondents cannot be accepted, for the reasons stated in paragraph 13, 13.1 and 13.2, cited supra.

17. Being temporary does not make the employment any less important, as the point to be considered is, whether there was relationship of employer and employee, however short it may be.

18. In the result, the writ petition is allowed, setting aside the rejection order passed by the Government and with the direction to the respondents to regularize the services of the petitioner in terms of G.O.No.21, dated 23.02.2006 and to grant other benefits to the petitioner. The said exercise shall be completed within a period of eight weeks from the date of receipt of a copy of this order. No costs. Consequently, the connected WMP is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

srk

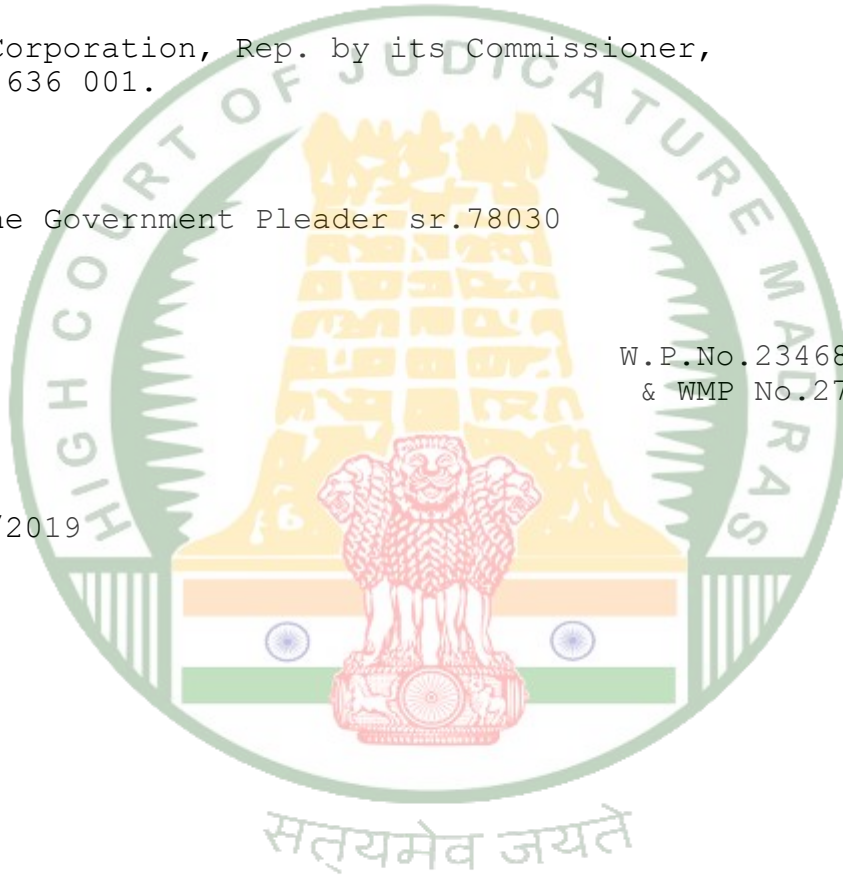
To

1. The Secretary, State of Tamil Nadu,
Municipal Administration & Water Supply Department,
Fort St. George, Chennai 600 009.
2. The Commissioner of Municipal Administration,
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Chennai 600 005.
3. Salem Corporation, Rep. by its Commissioner,
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