

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved on : 27.07.2018

Order Pronounced on : 11.08.2018

CORAM:

THE HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

W.P.No.11681 of 2009

1. K.M.Sivakumar
 2. M.Sivaguru
 3. N.Sahadevan
- ... Petitioners

Vs.

1. State of Tamil Nadu,
rep. by its Secretary,
Department of Agriculture,
Fort St.George, Madras - 600 009.
 2. Director of Horticulture,,
Department of Horticulture,
Government of Tamil Nadu,
Madras.
 3. Joint Director of Horticulture,
Department of Horticulture,
Udagamandalam.
- ... Respondents

PRAYER: Writ Petition has been filed under Article 226 of the Constitution of India seeking a Writ of Certiorarified Mandamus, to call for records connected with the Government Order No.494 (Agriculture) dated 29.11.2007 only in so far as denial of regularisation with effect from the date of initial appointment and grant of pay scale of Rs.1300- 20 - 1500 - 25 - 2000 and denial of other benefits like house rent allowance, city compensatory allowance etc., are concerned, together with the letter No.25256/AAI/08-5,dated 05.12.2008 of the first respondent and quash the same and consequently direct the respondents to grant regularisation from the date of initial appointment of the petitioners with the pay scale of Rs.2550 - 3540/- and grant all attendant benefits as applicable to other similarly placed as regular employees.

For Petitioners	: Mr.D.Muthukumar for M/s.Paul and Paul
For Respondents	: Mr.M.Sricharan Rangarajan Additional Government Pleader

- - - - -

O R D E R

The Petitioners seeks to quash Government Order No.494 (Agriculture) dated 29.11.2007 of the Agriculture Department denying the regularisation of the petitioners from the date of their initial employment and for grant of regular pay scale applicable to the last grade in the concerned department instead of fixing a pay scale at Rs.1300- 20 - 1500 - 25 - 2000/-.

2. The petitioner were working as a gardeners under the control of Joint Director, Horticulture Department, Udagamandalam, from May 1984 as casual workers. The petitioners stated that they have been representing to the authorities concerned for regularising the services and for granting of all benefits as applicable to the other permanent employees.

3. Since the government did not consider the representation, the petitioner approached the Tamil Nadu Administrative Tribunal, Chennai by filing O.A.No.1188 of 1997 seeking for regularisation of services with all consequential benefits. During the pendency of the petition before the Tribunal, the government passed an G.O.No.494 (Agriculture) dated 29.11.2007 regularising the services of the petitioner and others who were working as gardeners and had been employed as casual worker. However, the order stated that the regularisation will take effect from the date of the government order that is on 29.11.2007. All the persons who figured in the government order were placed in a pay scale of Rs.1300- 20 - 1500 - 25 - 2000/-. This has been challenged by the petitioners claiming that the period from their initial appointment must be reckoned and they must be regularised from the date of their initial appointment. It is also contended that the petitioner should have been placed at the last pay scale of that cadre and not at the pay scale of Rs.1300- 20 - 1500 - 25 - 2000/-.

4. The respondents have filed their counter stating that the petitioners were employed as casual labourer purely on need basis for the purpose of work such as budding of plants, watering the nursery, planting, hoeing, weeding, manuring etc., It is stated that during monsoon season, when watering is not required the petitioners were not called for work. It is stated that they are not employed everyday.

5. The government after considering the representations, passed G.O.No.494 (Agriculture) dated 29.11.2007, by which about 1083 casual labourer working in Horticulture Department for more than 10 years in Tamil Nadu as on 01.01.2006 were brought under the Tamil Nadu Horticulture Development Agency in the pay scale of Rs.1300- 20 - 1500 - 25 - 2000/- and their

services were regularised. The services of the petitioners were re-fixed from the pay scale of Rs.2550 - 3540/- with effect from 01.01.2007. It was also stated that since there was no post of gardener they could not be placed on the lower pay structure. Instead they were placed on the scale applicable to Noon-meal employees at Rs.1300- 20 - 1500 - 25 - 2000/-.

6. Heard the learned counsel for the petitioners and respondents. The question as to when the initial appointment of a person is de-hors the rules, whether his past service should be considered till the date of the regularisation is no longer res-integra. The learned counsel for the State Government placed as strong reliance of the judgement of the Honourable Supreme Court in the case of K.Madalaimuthu Vs State of Tamil Nadu reported in (2006) 6 SCC 558 where it has been observed as under:-

"19. Even though the services of such temporary appointees were intended to be regularised with effect from the dates of their original appointments on a temporary basis, this court held that they would not be entitled to count their temporary service for the purpose of seniority and that the services rendered by the appointees under Rule 10(a)(i)(1) could not be considered for the purpose of seniority as such appointment was a stop-gap arrangement, emergency or fortuitous arrangement.

20. A later decision of this court in Sanjay K. Sinha - II Vs State of Bihar¹ was then referred to by Mr.Rao regarding promotions against non-existing postes and its effect on inter se seniority with direct recruits. This court held that appointments made contrary to the Rules were merely fortuitous and did not confer any benefits of seniority on appointees over and above the regular/substantive appointees to the service.

24. On a consideration on the submissions made on behalf of the respective parties and the decisions cited on their behalf, the consistent view appears to be the one canvassed on behalf of the appellants. The decisions cited by Mr.Rao have been rendered in the context of Rule 10(a)(i)(1) and the other relevant rules which are also applicable to the facts of the instant case. Apart from the above, the law is well settled that initial appointment to a

1. 2004 (10) SCC 734

post without recourse to the rules of recruitment is not an appointment to a service as contemplated under Rule 2(1) of the General Rules, notwithstanding the fact that such appointee is called upon to perform

duties of a post borne on the cadre of such service. In fact, Rule 39(c) of the General Rules indicates that a person temporarily promoted by a member of the service who is entitled to the promotion under the Rules. It stands to reason that a person who is appointed temporarily to discharge the functions in a particular post without recourse to the recruitment rules, cannot be said to be in service till such time as his appointment is regularised. It, therefore, follows that it is only from the date on which his services are regularised that such appointee can count his seniority in the cadre.

25. In the instant case, the authorities on the strength of the several government orders giving retrospective effect to the regularisation of the promotees, have taken the date of initial appointment of such promotees as the starting point of their seniority. In our view, such a course of action was erroneous and contrary to the well-established principles relating to determination of seniority...."

7. The learned counsel for the respondents contended that this judgement is not applicable to the facts of the case, since it is only deals with the issue of fixing inter se seniority between promotees and direct recruits.

8. This submission cannot be accepted as the principle which has been laid down by the Apex Court is that retrospective effect to the regularisation cannot be given to a person who has been appointed contrary to the rules of appointment. Attention was drawn on the learned counsel for the State, a full bench judgement of this court in S.Dhanasekaran and others Vs Government of Tamil Nadu and others, reported in 2013 (6) CTC 593 (FB). The full bench would considering that the case of sanitary workers in Municipalities who were regularised under various government orders has concluded as follows:-

"27. In our considered view, in the case of sanitary workers, who were appointed against the newly created posts in pursuance of G.O.Ms.No.101, Municipal Administration and Water Supply Department, dated 30.06.1997, their regularisation is governed by G.O.Ms.No.21, Municipal Administration and Water Supply Department, dated 23.02.2006. Such a regularisation, as per the said G.O., should take effect only from the date of G.O. and not from the date on which they had completed three years of service from the date of their initial appointment. Following are the reasons for our conclusion.

(a) As we have already pointed out, appointments of the petitioners and the appellants herein, were not made as per the Tamil Nadu

Municipal Corporations Basic Service Rules, 1996. As per the said Rules, sanitary workers can be appointed only by direct recruitment, in time scale of pay. There is no provision in the Rules to appoint sanitary workers on consolidated pay. Therefore, there can be no doubt that the petitioners and the appellants herein, who were all appointed, not as per the Tamil Nadu Municipal Corporations Basic Service Rules, 1996, but, outside the scope of the said Rules, however, governed by the Orders issued by the Government in G.O.Ms.No.101, Municipal Administration and Water Supply Department, dated 30.04.1997.

(b) As we have already pointed out, as per G.O.Ms.No.101, Municipal Administration and Water Supply Department, dated 30.04.1997, new posts of sanitary workers were all created, on need basis. The said Government Order permitted filling-up of such newly created posts, through Employment Exchanges, on consolidated pay. That is how the petitioners and the appellants herein came to be appointed.

(c) As per Clause 4(6) of G.O.Ms.No.101, Municipal Administration and Water Supply Department, dated 30.04.1997, the said appointment was initially for a period of one year, which could be extended upto three years. As we have already extracted, as per Clause 4(6), on completion of three years, the Government would decide whether to regularise the services of such employees, so as to bring them into regular time scale of pay. Therefore, as per this Government Order, it is fallacious to contend that on completion of three years from the date of initial appointment, such appointed sanitary workers shall be regularised.

(d) As narrated above, the Government thereafter examined the question of regularisation only in the year 2006 and accordingly issued G.O.Ms.No.21, Municipal Administration and Water Supply Department, dated 23.02.2006. The said Government Order directs that the regularisation shall be from the date of issue of the Government Order, namely 23.02.2006.

(e) Thus, a conjoint reading of G.O.Ms.No.101, Municipal Administration and Water Supply Department, dated 30.04.1997 and G.O.Ms.No.21, Municipal Administration and Water Supply Department, dated 23.02.2005, would go to clearly show that on completion of three years of service from the date of initial appointment, the Government had an option to examine the question of

regularisation, which the Government did only in 2006 and it is the wisdom of the Government to give regularisation from any date. (Vide judgment of the Supreme Court in K.Madalaimuthu and another vs. State of T.N. And others - (2006) 6 SCC 558). Unless such date fixed by the Government, giving effect to the regularisation, is proved to be arbitrary and violative of Article 14 of the Constitution of India or any other constitutional provision, it cannot be held, in vacuum, that the said norms prescribed in G.O.Ms.No.21 for the purpose of regularisation is either illegal or unconstitutional. Therefore, we have no hesitation to hold that regularisation of such sanitary workers, who are governed by G.O.Ms.Nos.101, 71 and 21, Municipal Administration and Water Supply Department, dated 30.04.1997, 05.05.1998 and 23.02.2006, respectively, shall be only from 23.02.2006. The contrary view expressed elsewhere in the judgments referred to above, in our respectful view, are not correct."

8. The judgement holds its field. The learned counsel for the petitioner drew attention to the review judgement of full bench of Madras High Court dated 29.11.2013 which reviewed the judgement reported in 2013 (6) CTC 593 (FB). The review judgement reads as under:-

"16. For the purpose of our discussion, it is not necessary to refer to the sanitary workers, who were appointed on regular basis, as against the permanent vacancies prior to G.O.Ms.No.101, Municipal Administration and Water Supply Department, dated 30.04.1997. So far as the sanitary workers referred to as second and third categories, as above, they continue to work only on consolidated pay for several years. There were several representations in respect of their request for regularisation of their services. Having taken note of the same, G.O.Ms.No.21, Municipal Administration and Water Supply Department, dated 23.02.2006, came to be issued. Thus, this Government Order is very crucial for the purpose of our discussion. Clause 4 of the said order states that the question of regularisation of these employees could not be considered between 29.11.2001 and 07.02.2006 because the Government had issued G.O.Ms.No.212, Personnel and Administrative Reforms Department, dated 29.11.2001, thereby completely banning filling-up of all vacant posts by direct recruitment. The ban came to be lifted by the Government only from 07.02.2006, as per G.O.Ms.No.14, Personnel and Administrative Reforms Department, dated 07.02.2006. Thus, after

the ban was lifted, the Government issued G.O.Ms.No.21 Municipal Administration and Water Supply Department, dated 23.02.2006. Clauses 5 and 6 of the said Government Order (G.O.Ms.No.21 Municipal Administration and Water Supply Department, dated 23.02.2006) read as follows:

"5. They accordingly direct the appointing authorities viz .Municipal Commissioner, Grade-III, Municipal Commissioners and Commissioners of Municipal Corporations (Except Chennai) to appoint the employees on consolidated pay and NMRs on daily wages on their roll as on 01.10.1996 in respect of Municipalities and Municipal Corporations (except Chennai) and as on 31.12.1996 in respect of Grade-III Municipalities in the vacant posts and to regularize their services in the regular post, from the date of issue of this order subject to the following conditions.

- i) Sanctioned posts should be available.
- ii) Persons should fulfill all educational and other qualifications and
- iii) Establishment (pay and pension) expenditure of the Urban Local Body should not exceed 49% of revenue after filling up of posts.

6. The appointing authorities are strictly advised not to appoint any person on daily wages or on consolidated pay in the Municipalities and in the Municipal Corporations in future."

17. It is the contention of the respondents that as per Clause 5 of the said Government Order, regularisation, if any made, shall take effect only from the date of issue of the said Government Order, namely on 23.02.2006. It is, after the issuance of the above G.O.Ms.No.21, Municipal Administration and Water Supply Department, dated 23.02.2006, the petitioners and the appellants herein have been regularised with effect from 23.02.2006. In this regard, the learned counsel Mr.G.R.Swaminathan, learned counsel appearing for the respondent No.3 in W.P. (MD) No.1083 of 2012, would place reliance on the judgment of the Hon'ble Supreme Court in K.Madalaimuthu and another vs. State of T.N. And others, (2006) 6 SCC 558, wherein, in paragraph 24, the Supreme Court has held as follows:

"24. On a consideration on the submissions made on behalf of the respective parties and the decisions cited on their behalf, the consistent view appears to be the one canvassed on behalf of the appellants. The decisions cited by Mr.Rao have been

rendered in the context of Rule 10(a)(i)(1) and the other relevant rules which are also applicable to the facts of the instant case. Apart from the above, the law is well settled that initial appointment to a post without recourse to the rules of recruitment is not an appointment to a service as contemplated under Rule 2(1) of the General Rules, notwithstanding the fact that such appointee is called upon to perform duties of a post borne on the cadre of such service. In fact, Rule 39(c) of the General Rules indicates that a person temporarily promoted in terms of Rule 39(a) is required to be replaced as soon as possible by a member of the service who is entitled to the promotion under the Rules. It stands to reason that a person who is appointed temporarily to discharge the functions in a particular post without recourse to the recruitment rules, cannot be said to be in service till such time as his appointment is regularised. It, therefore, follows that it is only from the date on which his services are regularised that such appointee can count his seniority in the cadre."

18. According to the petitioners and the appellants herein, as per G.O.Ms.No.101, Municipal Administration and Water Supply Department, dated 30.04.1997, regularisation should have been made on completion of three years of service from the date of their initial appointment.

20. A close reading of the above judgment would go to show that in the said judgment, the Division Bench had an occasion to consider only the scope of G.O.Ms.No.22, School Education Department, dated 28.02.2006. The Division Bench held that G.O.Ms.Nos.100, School Education Department, dated 13.04.2010, was only the permission given by the Government to the Director of School Education to take further action for regularisation of the services of the persons concerned, as against the available vacancies. Therefore, the Division Bench held that G.O.Ms.No.100, dated 13.04.2010, has got nothing to do with the date of regularisation and instead regularisation should be given effect to as per G.O.Ms.No.22, dated 28.02.2006, only from the date of issuance of the G.O. The judgment would further go to show that the Division Bench had no occasion to consider the Government Orders, namely G.O.Ms.Nos.101, 71 and 21, G.O.Ms.No.21 Municipal Administration and Water Supply Department, dated 30.04.1997, 05.05.1998 and 23.02.2006, respectively. Thus, the Division Bench had no occasion to consider as to whether in the light of the Government orders issued by the Department of Municipal Administration

and Water Supply, the regularisation could be made from the date on which the sanitary workers had completed three years of service from the date of their initial appointment or from the date of G.O.Ms.No.21, Municipal Administration and Water Supply Department, dated 23.02.2006. In such view of the matter, we are of the view that the correctness of the view taken by the Division Bench in W.P.(MD) No.4170 and 4171 of 2011, dated 02.04.2013, need not be gone into by us, since the view expressed in the said judgment has got nothing to do with the issues involved in the present litigations.

24. A reading of the above judgment in W.A.(MD) No.729/2013 would reflect that the Division Bench had no occasion to refer to the relevant Government Orders, namely G.O.Ms.Nos.101, 71 and 21, Municipal Administration and Water Supply Department, dated 30.04.1997, 05.05.1998 and 23.02.2006, respectively. These are the relevant Government orders pertaining to sanitary workers who were appointed as against newly created posts as per G.O.Ms.No.101, Municipal Administration and Water Supply Department, dated 30.04.1997 .

26. The judgment in W.A.(MD)No.729 of 2013 relates to the sanitary workers working in Municipalities. But, the Division Bench had considered only G.O.Ms.No.199, Municipal Administration and Water Supply Department, dated 12.08.1997 and not the G.O.Ms.Nos.101, 71 and 21, Municipal Administration and Water Supply Department, dated 30.04.1997, 05.05.1998 and 23.02.2006, respectively. So far as G.O.Ms.No.199, Municipal Administration and Water Supply Department, dated 12.08.1997 is concerned, the said G.O. has got nothing to do with the Sanitary Workers employed on consolidated pay in Municipalities and Municipal Corporations. There were only six categories of employees for whose benefit G.O.Ms.No.199, dated 12.08.1997, was issued. They are Sanitary Inspector, Sanitary Maistry, Sweeper, Coss Pool Cleaner, Compost Mazdoor and Drainage Cleaner. Therefore, in our considered view, the said G.O.Ms.No.199, Municipal Administration and Water Supply Department, dated 12.08.1997, cannot be made applicable to the sanitary workers working in Municipalities/Municipal Corporations. This point was not argued before the Division Bench and further it was not even brought to the notice of the Division Bench about G.O.Ms.Nos.101, 71 and 21, Municipal Administration and Water Supply Department, dated 30.04.1997, 05.05.1998 and 23.02.2006, respectively, referred to above.

Therefore, we regret that we are unable to subscribe to the view taken by the Division Bench in W.A.(MD) No.729 of 2013. "

9. The learned counsel of petitioners contended that the judgement of full bench reported on 2013 (6) CTC 593 (FB) stands reversed by the review judgement dated 29.11.2013. This submission cannot be accepted. The judgement in review that the order of regularisation will take effect only from the date of the government order and not from the date of initial appointment has not been set aside by the review judgement. The review order is to be restricted only to the facts concerning these persons who would be affected by para 23(iii) of the judgement reported in 2013 (6) CTC 593 (FB).

10. In the light of the fact that the ratio for the judgement dealing with the date on which the regularisation should take effect stands concluded both judgement of full bench reported in 2013 (6) CTC 593 (FB) which follows the dictum of the Honourable Supreme Court in K.Madalaimuthu Vs State of Tamil Nadu reported in (2006) 6 SCC 558. The submission of the learned counsel for the petitioners with the same analysis of the order in review must be extended to the petitioners also cannot be accepted because that would mean that the full bench judgement reported in 2013 (6) CTC 593 (FB) stands set aside by the review order. The law has it stands today is that regularisation of the casual employees as per government orders should take effect only from the date of the government order and not from the date of the initial employment. Unless the order cannot effect the regularisation specifically provides that it would take effect from an anterior date.

11. The further submission of the petitioner that they should have been given the pay scale of the lowest post in the service cannot be accepted because there was no post of sweeper and the government placed them at post with noon-meal employee which cannot be faulted with.

12.Hence, the writ petition is dismissed and there shall be no order as to costs.

pkn

//True Copy//

Sd/-
Assistant Registrar(CS-ix)

Sub Assistant Registrar

To

1. The Secretary,
Government of Tamil Nadu,
Department of Agriculture,
Fort St.George, Madras - 600 009.

2. Director of Horticulture,,
Department of Horticulture,
Government of Tamil Nadu,
Madras.

3. Joint Director of Horticulture,
Department of Horticulture,
Udagamandalam.

+1 cc to Mr.Paul & Paul Advocate SR.NO. 55401

+1cc to Government Pleader SR.NO. 56413

VSN II (CO)
ASK(27/08/2018)

W.P.No.11681 of 2009



WEB COPY