

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :20.06.2018

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.29310 of 2017
and W.M.P.Nos.31556 & 5385 of 2018

C.Durairaj

..Petitioner

vs

1.The State of Tamil Nadu,
Rep. by its Secretary to Government,
Health and Family Welfare Department,
Fort.St.Goerge,
Chennai-600 009
2. The Director,
Indian Medicine & Homeopathy Department,
Chennai-600 106
3. The District Sidda Medical Officer,
O/o.Sidda Medical Office,
Government of Sidda Hospital,
Erode
4.The Government Primary Health,
Elumathur,
Modakurichi Taluk,
Erode District
5.M.Yuvaraj
6.R.Kokila
7.P.Sivakumar
8.P.Sangeetha
9.R.Muthusamy
10.B.Baby
11.Maragatham
12.P.Balaganesh
13.K.Muhamathu
(R5 to R13 are impleaded as per order dated 06.03.2018 by VPNJ
in WMP.No.5382 of 2018 in W.P.No.29310 of 2017)

..Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certoriarified Mandamus after calling for the records of the 3rd respondent pertaining to his proceedings in R.No.340/E/2017 and Na.Ka.No.66/Ni/2018 and quash the orders dated 10.11.2017 and 3.1.2018 respectively and consequently direct the respondents to

consider the name of the petitioner on priority for appointment to the post of Hospital Worker on regular basis.
(Prayer amended as per order 06.03.2018 by VPNJ in W.M.P.No.5383 / 2018 in W.P.No.9310/2017)

For Petitioner : Mr.A.Vinoth Raj
For RR1 to 4 : M/s.A.Sri Jayanthi,
Special Government Pleader
For RR5 to 13 : Mr.L.Chandrakumar

O R D E R

The order of rejection rejecting the claim of the writ petitioner for appointment to the post of Hospital Worker on the ground that the petitioner is over aged in proceedings dated 10.11.2017 is under challenge in this writ petition.

2. The learned counsel appearing on behalf of the writ petitioner states that the petitioner had registered his name in the District Employment Exchange, Erode. Pursuant to the call letter, he appeared for an interview for appointment to the post of multi-purpose worker on daily wage basis. Accordingly, the writ petitioner was appointed as multi-purpose worker on 21.07.2011 on daily wage basis. The grievance of the writ petitioner is that he continued as daily wages employee for about six years and the services were not regularised. The petitioner was allowed to continue only as temporary worker without any regular service benefits granted to other Government employees. It is contended that the similarly placed persons were granted with the benefit of regularisation and therefore, the same benefit to be extended to the writ petitioner also.

3. In this regard, the Government also passed G.O.D.No.848 Health and Family Welfare Department dated 20.08.2014 granting permanent absorption in respect of temporary multi-purpose worker on daily wage basis. Then, the writ petitioner earlier filed W.P.No.19243 of 2017 and by way of common order dated 27.07.2017, this Court directed the third respondent to consider the representation submitted by the writ petitioner. Pursuant to the orders passed by this Court, the third respondent / the District Sidda Medical Officer issued the impugned order in proceedings dated 10.11.2017 rejecting the claim of the writ petitioner on the ground that the petitioner has already crossed 46 years and 10 months and become over aged. Thus, permanent absorption or regularisation cannot be granted in favour of the writ petitioner.

4. The learned Special Government Pleader appearing on behalf of the respondents states that the writ petitioner was not appointed in accordance with the recruitment rules in force and he was appointed only as the daily rated employee. Such being the status of the writ petitioner, he cannot claim regularisation or permanent absorption contrary to the recruitment rules in force. The writ petitioner has to participate in the regular selection process in accordance with the rules for recruitment. Thus, the writ petitioner is not entitled for any regularisation or permanent absorption and the writ petition is liable to be rejected.

5. This court is of an opinion that regularisation or permanent absorption cannot be granted in violation of recruitment rules in force. All appointments are to be made only under the constitutional schemes. The recruitment rules in force are to be scrupulously followed by the competent authorities. Persons appointed on daily wage basis, consolidated pay basis or temporary basis cannot claim regularisation or permanent absorption in violation of the recruitment rules in force. All such candidates are eligible to participate in the selection process in accordance with the terms and conditions stipulated in the notification and secure public employment. Based on the length of the services rendered on daily wage basis or consolidated basis, the employees cannot claim permanent absorption or regularisation.

6. The Constitutional Bench of the Supreme Court of India in the case of State of Karnataka vs. Umadevi reported in 2006 [4] SCC 1 observes many such circumstances and it is relevant to state that the Honourable Supreme Court of India. It is useful to extract the following paragraphs:

"4. But, sometimes this process is not adhered to and the Constitutional scheme of public employment is by-passed. The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching Courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the concerned posts. Courts have not

always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called 'litigious employment', has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution of India. Whether the wide powers under Article 226 of the Constitution is intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognized by our Constitution, has to be seriously pondered over. It is time, that Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance, tends to defeat the very Constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for High Courts in the scheme of things and their wide powers under Article 226 of the Constitution of India are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

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. Buttrussing 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."

7. The Honourable Supreme Court of India thereafter reiterated or re-emphasized the same principles in the case of Secretary to Government Vs. R.Govindasamy and others reported in [(2014) 4 SCC 769]. and it is relevant to extract Paragraph No.8 of the same:

"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".

8. The Honourable Supreme Court of India authoritatively issued a direction that the High Court in exercise of power under Article 226 of the Constitution of India shall not issue direction for regularisation / absorption or permanent continuance unless the employees claiming regularisation had been appointed in accordance with regular appointment in course of recruitment rules against the sanctioned vacant post. The equality clause contained in Article 14 and 16 should be scrupulously followed. The Court should not issue a direction for regularisation of service of employment, it would be violation of the Constitutional Scheme.

9. The Honourable Supreme Court of India emphasized the principles laid down in the case of Govindasamy [cited supra]. This Court cannot have any hesitation in following direction issued by the Honourable Supreme Court of India in this regard.

10. The spirit of the judgment of the Honourable Supreme Court of India is that the State being the model employer is bound to follow the constitutional scheme, more specifically, for recruitment of candidates. Thus, all appointments to be made only by following the Constitutional Scheme and recruitment rules in this regard. In this view of the matter an inception or intrusion through back door in order to get absorption / regularisation cannot be allowed and the High Court cannot issue such direction for regularisation / absorption.

11. In the present case on hand, admittedly, the writ petitioner has already crossed the age of 46 years. Thus, he is over aged and not eligible as per the recruitment rules in force. This being the factum of the case, this Court is of an opinion that the writ petitioner cannot seek employment on the basis that he is continuing as daily rated employee.

12. Thus, the grounds raised in the writ petition is devoid of merits and the writ petition stands dismissed. Consequently, connected miscellaneous petitions are closed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1.The Secretary to Government,
The State of Tamil Nadu,
Health and Family Welfare Department,
Fort.St.Goerge,
Chennai-600 009

2. The Director,
Indian Medicine & Homeopathy Department,
Chennai-600 106

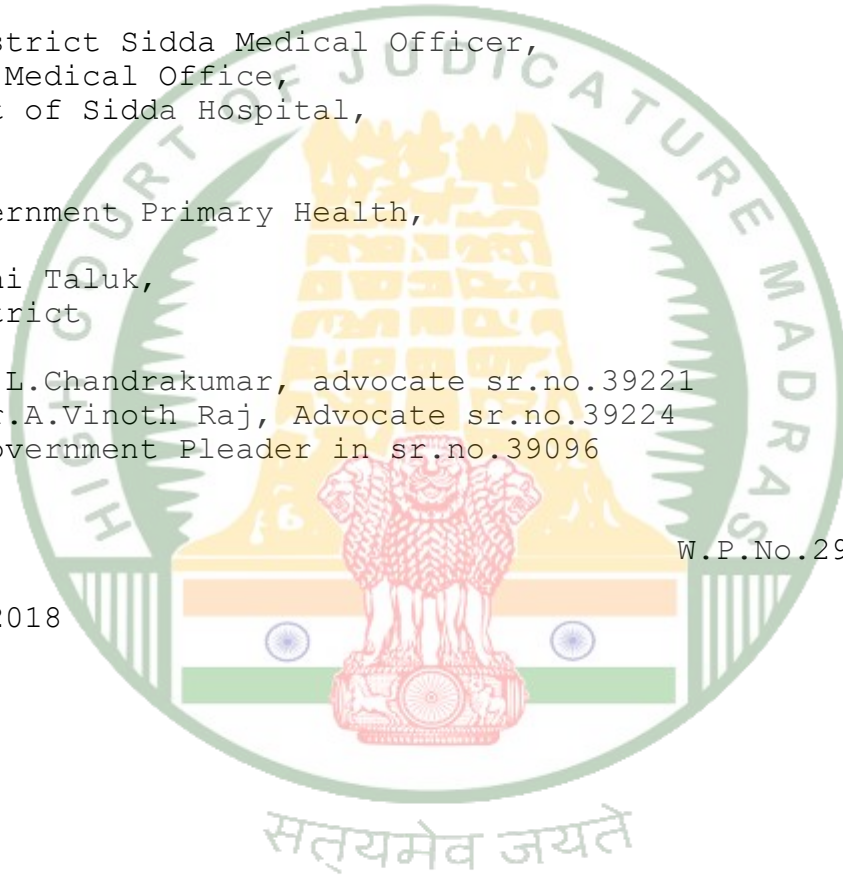
3. The District Sidda Medical Officer,
O/o.Sidda Medical Office,
Government of Sidda Hospital,
Erode

4.The Government Primary Health,
Elumathur,
Modakurichi Taluk,
Erode District

+cc to Mr.L.Chandrakumar, advocate sr.no.39221
+lcc to Mr.A.Vinoth Raj, Advocate sr.no.39224
+lcc to Government Pleader in sr.no.39096

W.P.No.29310 of 2017

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