

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.06.2018

CORAM :

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. No.439 of 2006

G.Sivakumar

... Petitioner

Versus

1. The Government of Tamilnadu rep.by
Secretary to Government,
Municipal Administration and Water Supply Department,
Fort St.George,
Chennai-600 009.
 2. The Commissioner of Municipal Administration,
Chepauk, Chennai-600 005.
 3. The Commissioner,
Salem Municipal Corporation.
- ... Respondents

PRAYER:

Writ petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, calling for the records relating to the orders in (1) No.C3/26716/2000 dated 03.05.2005 of the third respondent (2) O.Mu.C3/3261/04 dated 08.10.2004 by the third respondent (3) Government letter No.19620/Corp.5/2003-1, dated 05.02.2004 of the first respondent (4) No.C.3/26716/99 dated 15.08.2000 of the third respondent (5) Government Letter No.15418/Corp.5/2000-2 dated 04.08.2000 of the first respondent and (6) Pr.Na.Ka.No.C3/4395/2006 dated 14.06.2006 of the third respondent and the orders from 1 to 5 and to quash the order dated 14.06.2006 of the third respondent to the limited extent of the post in which the petitioner has been regularized and the date of effect regularisation and issue consequential directions to regularize the services of the petitioners as Technical Assistant from the date of his initial appointment (1.9.1996) with reference to G.O.Ms.No.125, Municipal Administration and Water Supply Department dated 27.05.1999 and appoint him as Assistant Engineer on consolidated pay basis from 08.09.1999 and after the completion of one year thereafter place him in regular time scale of pay applicable to the post and to grant consequential service and monetary benefits.
(prayer amended as per order dated 07.09.2011 by TSSJ in

W.P.M.P.No.2821 of 2007 in W.P.No.439 of 2006.)

For Petitioner : Mr.M.Ravi
For Respondents : Mr.K.Ravikumar, AGP
for R1 & R2
Mr.G.Sankaran, for R3

O R D E R

The petitioner has filed the Writ Petition challenging the orders of the third respondent in No.C3/26716/2000 dated 03.05.2005, O.Mu.C3/3261/04 dated 08.10.2004 and Government letter No.19620/Corp.5/2003-1, dated 05.02.2004 of the first respondent, No.C.3/26716/99 dated 15.08.2000 of the third respondent, Government Letter No.15418/Corp.5/2000-2 dated 04.08.2000 of the first respondent and Pr.Na.Ka.No.C3/4395/2006 dated 14.06.2006 of the third respondent and to quash the same and for consequential relief.

2.The case of the petitioner is that the petitioner belongs to Most Backward Community and he was initially appointed as Nominal Muster Roll Employee in the cadre of Technical Assistant in Salem Municipal Corporation on daily wages basis with effect from 01.09.1996. He was a Diploma Holder in Civil Engineering and has passed B.E. Degree in the year 1999 and therefore according to him, he is fully qualified for appointment as Assistant Engineer, a post included in category I, Group II Class II in Tamil Nadu Municipal Corporations Engineering and Water Supply Service Rules 1996. While so, after three years of service as Nominal Muster Roll Employee, the petitioner came to know that vacancies exist for the post of Assistant Engineer in Salem Corporation. Hence, he sent a representation on 08.09.1999 to the 3rd respondent/Commissioner, Salem Corporation for appointing him as Assistant Engineer considering his period of service. The further case of the petitioner is that the Government in G.O.Ms.No.125, Municipal Administration and Water Supply Department dated 27.05.1999 has issued orders for regularization of the services of the employees working in the Corporation on daily wages on or before 01.10.1996 in a phased manner. The 3rd respondent sent a letter to 1st respondent/Government seeking clarifications with regard to the claim of the petitioner and the 1st respondent/Government in G.O.Ms.No.125 dated 27.05.1999 clarified that "Entry Level Posts" mentioned in the posts denotes the posts in which persons were initially appointed on daily wage basis and for which posts they were then qualified. Hence, the petitioner made a representation to the third respondent on 21.08.2000 disputing

the clarification issued by the 1st respondent and pointing out that 'Entry Level Post' would mean and include posts for which provision has been made for appointment by direct recruitment and Rule 4 of the Tamil Nadu Municipal Corporations Engineering and Water Supply Service Rules, 1996 provide for appointment to the post of Assistant Engineer by direct recruitment and that the petitioner possess the prescribed qualification to the post of Assistant Engineer as on the date of his representation. The 3rd respondent rejected his request since there is no provision for appointing the petitioner as Assistant Engineer. Though several contentions raised in his representations, the 3rd respondent rejected his request vide C3/26716/2000 dated 03.05.2005 against which the present writ petition has been filed.

3. Heard the learned counsel for the petitioner as well as the learned counsel for the respondents.

4. It is an admitted fact that the petitioner was appointed as a Nominal Muster Roll Employee in the cadre of Technical Assistant in Salem Municipal Corporation on a daily wages basis from the year 1996. Though he allegedly claim that he was fully qualified for the post of Assistant Engineer, the 3rd respondent has not considered the petitioner for the aforesaid post on the ground that he has not satisfied the conditions as prescribed under G.O.Ms.No.125 dated 27.05.1999. Wherein the said G.O. Prescribed certain conditions i.e, the person claiming regularization has to complete 10 years of service, as one time concession. Since the petitioner joined in the 9th month of 1996 and he could not complete 10 years of service as on the date of G.O. He has not satisfied the requirements of the conditions prescribed in the G.O. In this regard, it is relevant to extract hereunder the relevant portions of the decision of the Hon'ble Apex Court reported in 2006 4 SCC 1 (State of Karnataka Vs. Umadevi (3) and others):

"49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels to 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 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.

50. It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has included Articles 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the respondents would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.

51. The argument that the right to life protected by Article 21 of the Constitution would include the right to employment cannot also be accepted at this

juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the backdoor. The obligation cast on the State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognise that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution.

52. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in *Rai Shivendra Bahadur (Dr.) v. Governing Body of the Nalanda College*. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues

and a mandamus could not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V.Narayanappa, R.N. Nanjundappa and B.N.Nagarajan and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional

requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

5. In view of the above, I do not find any error in the orders passed by the 3rd respondent. Accordingly, this writ petition stands dismissed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//
Sub Assistant Registrar

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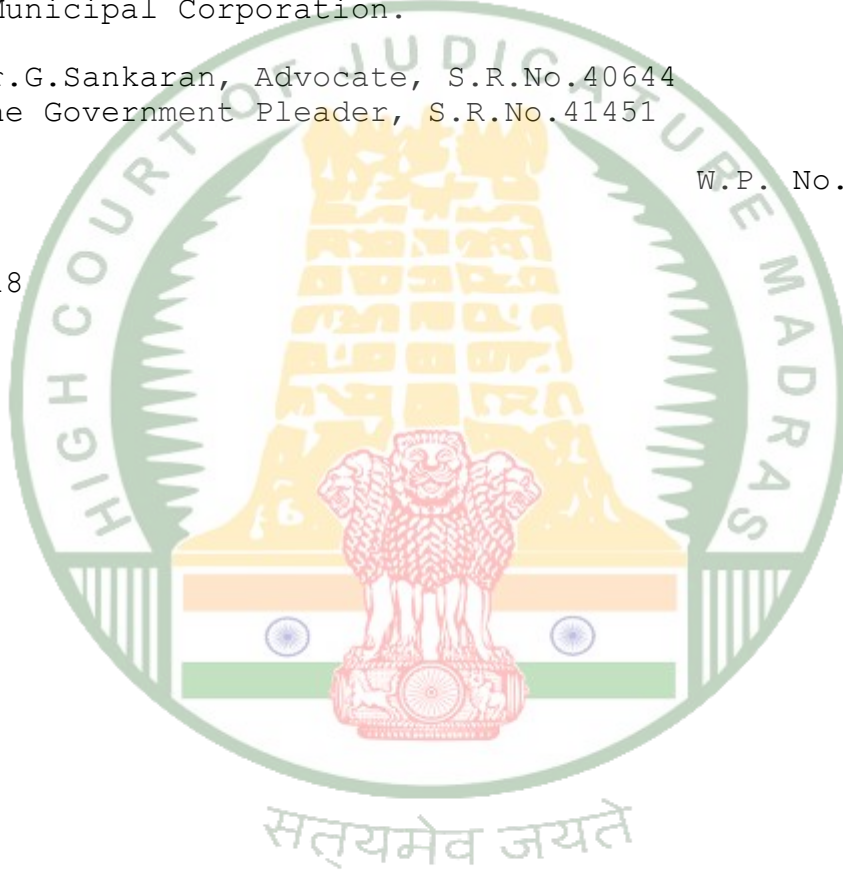
To

1. The Secretary to Government,
Government of Tamilnadu,
Municipal Administration and Water Supply Department,
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2. The Commissioner of Municipal Administration,
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3. The Commissioner,
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+1cc to Mr.G.Sankaran, Advocate, S.R.No.40644
+1cc to the Government Pleader, S.R.No.41451

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KGK(CO)
CS/01/08/18



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