

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.06.2018

CORAM :

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. No. 38331 of 2006

J.Mullainathan

...Petitioner

Versus

1.The District Collector,
Perambalur District.

2.The Assistant Director,
Department of Animal Husbandry,
Ariyalur.

...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 impugned order dated 21.04.2005 in Na.Ka.A4/4724/2005 of the first respondent and quash the same and consequently direct the respondents to reinstate the petitioner as Junior Assistant, Department of Animal Husbandry, Ariyalur on a consolidated pay of Rs.4,000/- per month.

For Petitioner : M/s.A.L.Gandhimathi

For Respondents : Mr. Govindasamy
Special Government Pleader

ORDER

The petitioner has filed this Writ Petition to quash the impugned order dated 21.04.2005 in Na.Ka.A4/4724/2005 passed by the first respondent and consequently direct the respondents to reinstate the petitioner as Junior Assistant, Department of Animal Husbandry, Ariyalur on a consolidated pay of Rs.4,000/- per month.

2. The case of the petitioner is that he appeared for an interview on 07.07.2003 for appointment to the post of Junior Assistant filled up through employment exchange in order to carry out the day to day work that got affected due to an indefinite strike in July 2003. Thereafter, he was appointed as temporary Junior Assistant in the Animal Husbandry Department,

Ariyalur, on a consolidated pay of Rs.4,000/- per month. Accordingly, he has joined duty on 08.07.2003. Thereafter, due to family animosity and civil dispute, three criminal cases were registered against him thereby remanded to judicial custody due to which, the petitioner could not attend his duty. Subsequently, the second respondent issued show cause notice to explain about why he has not attended for duty from 1.1.2005 to 31.1.2005 for which the petitioner sent an explanation letter dated 16.02.2005 informing about the criminal cases foisted against him and he under judicial custody. On receipt of the same, the first respondent/District Collector gave a reply stating that due to pending criminal cases and also the petitioner was in judicial custody for 30 days, his temporary employment as Junior Assistant at the Office of the Animal Husbandry at Ariyalur was terminated. Against which the petitioner has filed this present petition with the aforesaid prayer.

3. Heard the learned counsel for the petitioner and the learned Special Government Pleader for the respondents.

4. The learned counsel for the petitioner submitted that subsequent to filing of writ petition, all the three criminal cases registered against the petitioner ended in acquittal and in view of the above, the petitioner is entitled for reinstatement into service as Junior Assistant. However, on the date of passing the communication, the petitioner was in judicial custody and also that the petitioner was appointed only as temporary Junior Assistant and hence no detrimental would be caused in the right of the re-employment of the respondent. The law is well settled that no contract or temporary employers have right to get regularization or permanent employment unless the employment is made under public employment system. This has been clearly discussed in the case of State of Karnataka Vs. Umadevi (3) and others reported in 2006 4 SCC 1 and the relevant portions of the decision of the Hon'ble Apex Court is extracted hereunder:

"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 merit in the writ petition to issue any direction to reinstate the petitioner. Accordingly, the writ petition is dismissed. No Costs. Consequently, connected miscellaneous petition is closed.

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Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The District Collector,
Perambalur District.

2.The Assistant Director,
Department of Animal Husbandry,
Ariyalur.

+lcc to M/s.A.L.Gandhimathi, Advocate sr.no.39667

WP.No.38331 of 2006

nr 16/07/2018



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