

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.10.2019

CORAM:

THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.3975 of 2010

1. Edmond Chellaiah
2. N.Ravi
3. M.Rajendran
4. K.Sivashankar
5. K.Suresh Kumar
6. N.Sekar
7. C.Thiruthuvadoss .. Petitioners

Vs.

1.The Chief Secretary,
Government of Tamil Nadu
Fort St. George, Chennai 600 009.

2. The Secretary to Government,
Personnel and Administrative Reforms Department,
Fort St.George, Chennai 600 009.

3. The Deputy Secretary,
Personnel and Administrative Reforms Department,
Fort St.George, Chennai 600 009.

... Respondents

PRAYER: Writ petition filed under Article 226 of the Constitution of India, for a Writ of Certiorarified Mandamus, calling for the records pertaining to the proceedings made in Lr.No.8993/F2/09-1 dated 29.07.2009 passed by the 3rd respondent and quash the same and consequently direct the respondents to consider and treat the period from 02.02.2001 to 19.07.2007 as a period of service rendered only for the purpose of calculation of eligibility of pensionary and other service benefits to the petitioners.

For Petitioners : Ms.R.Narendran

For Respondents : Mr.A.Zakir Hussain,
Government Advocate

O R D E R

The instant writ petition is filed for issuance of a Certiorarified Mandamus calling for the records pertaining to the proceedings made in Lr.No.8993/F2/09-1 dated 29.07.2009 passed by the Deputy Secretary, Personnel and Administrative Reforms Department, Chennai, and quash the same and consequently direct the respondents to consider and treat the

period from 02.02.2001 to 19.07.2007 as a period of service rendered for the purpose of calculation of eligibility of pensionary and other service benefits to the petitioners.

2. The facts and briefs are that the petitioners were appointed as Mazdoor in various departments in Secretariat between 1987 to 1991. The appointments were purely on casual basis and without the name being sponsored by employment exchange. The Government issued an order vide a letter No. 13840/89-8, dated 05.03.1991 stating that mazdoors on daily wages should be recruited only through employment exchange and mazdoors who were recruited without sponsor from the employment exchange should be replaced by such of those candidates sponsored through employment exchange. The said letter contains the following instructions:-

"(i) The order issued in G.O.Ms.No.790, Labour and Employment, dated 05.07.1971 that all temporary appointments and appointments which do not fall under the purview of the Tamil Nadu Public Service Commission should be made only through Employment Exchange, should be strictly adhered to and henceforth recruitment of casual labour (Mazdoor) or daily wages to be employed in accordance with the provisions in government order No.1762, public (serv.) dated 29.07.1970, should also be done through Employment Exchange.

(ii) It should also be ensured that only fully qualified candidates who are in possession of the qualification prescribed under the Tamil Nadu Basic Service Rules are recruited through Employment Exchange as Mazdoors on daily wages.

(iii) As per orders in G.O.Ms.No.528, P.&A.R., dated 10.10.2008 candidates appointed on daily wages to discharge functions of the posts in Tamil Nadu Basic Service through Employment Exchange initially can be appointed against regular vacancies that may arise under the same appointing authority as direct recruits according to seniority without their being sponsored by the Employment Exchange once again provided they are fully qualified for such posts at the time of appointment on daily wages (i.e.) with reference to age and educational qualifications. The senior most Mazdoor will be absorbed as and when a regular vacancy arises in the post of Office Assistant. The senior most persons who have put in the longest period of service will be given preference in absorption, as this amounts to giving them a premium for the prompt attendance everyday whether they are provided employment or not.

(iv) While considering for regular appointments, the Casual Labourers who had long spell of break for 4

should not be considered.

(v) The names of Mazdoors on daily wages recruited through Employment Exchange should be retained in the live register of the Employment Exchange until they get regular appointments and their names, should be sponsored to any other regular vacancies by the Employment Exchange till they get regular appointments.

(vi) The Departments of Secretariat should maintain a register for daily rated Mazdoors as already instructed in Letter No. 13830/89-1, P.. & A.Ri, dated 24.10.89.

(vii) The administrative departments should get certain number of candidates from the Employment Exchange and keep them in the pool, arranged according to seniority on the basis of their initial recruitment. These candidates may be required to assemble in the departments concerned daily and if their services are required, they will be employed strictly according to seniority depending upon the number of vacancies. Those who are found surplus will not be entertained.

(viii) The Mazdoors on daily wages now working in Departments of Secretariat recruited without consulting Employment Exchange should be replaced immediately by the candidates recruited through Employment Exchange."

3. This letter was challenged in O.A.No.846 and 847 of 1991 before the Tamil Nadu Administrative Tribunal. The Tamil Nadu Administrative Tribunal by an order dated 12.05.1992, directed that those person who have completed 240 days of work on casual basis during the period shall kept on the rolls may be continued subject to the eventual appointment against vacancies arising in the service. The Tribunal was of the opinion that having allowed such persons to continue on the rolls of casual workers it would be unfair to dispense with the service. In compliance of the said order, the Government passed the G.O.Ms.No.398, Personnel and Administrative Reforms (Personnel) Department, dated 18.12.1992 by giving appointment to 162 persons. The Government passed the following orders in the said G.O.Ms.No.398:-

"3. The Government have carefully examined the orders or the Tribunal in consultation with the Senior Standing Qpuneel of the Tribunal. They pass the following orders:-

(i) The ban orders issued in the Government letters-fifth and sixth road above are hereby revoked.

(ii) List of persons in the order of seniority who have completed 240 days as Mazdoors in the Departments of Secretariat is annexed to this order.

They may be absorbed in the existing as well as in the future vacancies arising in the category of Office Assistants in the Departments of Secretariat as per the seniority list found in the annexure to this order.

(iii) Persons who are waiting for appointment as per the orders issued in G.O.Ms.No.92, Personnel and Administrative Reforms (Personnel-F) Department, dated 30.1.1986 may now be appointed as Office Assistants. Personnel and Administrative Reforms (Personnel-H) Department may take action in this regard.

(iv) Persons who are waiting for appointment on compassionate grounds can now be appointed by the Departments of Secretariat concerned.

(v) The persons mentioned in the annexure to this order alone can be appointed as Mazdoors on daily wages until they are regularly absorbed in the post of Office Assistant whenever vacancies arise on account of regular Office Assistant:: proceeding on casual leave and this can be done by the Departments of Secretariat themselves until the list annexed gets exhausted. Thereafter, the Departments of Secretariat cannot appoint persons on daily wages and must make internal arrangements among the Office Assistants available in their respective Departments for attending to the work of Office Assistants who absent themselves from duty.

(vi) The seniority list annexed to this order will be maintained by Personnel and Administrative Reforms (Personnel-H) Department for filling up future vacancies.

(vii) The Departments of Secretariat should intimate the vacancy position of Office Assistants to Personnel and Administrative Reforms (Personnel-H) Department as and when they arise.

(viii) Until the list annexed to this order is exhausted, no appointment of Office Assistant either through Employment Exchange or by any other method should be made except those methods mentioned against item Nos.(iii) and (iv) above.

(ix) The names of Mazdoors who have not put in 240 days must be removed from the list forthwith. They should not be engaged hereafter. Departments of Secretariat concerned may be requested to take necessary action in this regard immediately.

(x) In future, no fresh employment of Mazdoors on daily wages except those mentioned in the annexure should be made by the Departments of Secretariat. This category namely, Mazdoors, will stand abolished in Secretariat as and when the list annexed gets

exhausted.

(xi) While making regular appointment of these Mazdoors as Office Assistants, Rules 5-A (Rule of reservation), 4(a) (recruitment through employment exchange), 5(i) (age) and 5(2) (educational qualification) of Special Rules for Tamil-Nadu Basic-Service have to be relaxed in- their favour, wherever necessary, by the respective Departments of Secretariat with the concurrence of Personnel and Administrative Reforms and Labour and Employment Departments.

(xii) After the list of Mazdoors given in the annexure is exhausted, the-practice of recruiting Office assistants against vacancies through the Employment Exchange should be resorted to and there can b no employment of persons on daily wage."

4. Admittedly, the petitioners herein are had not completed 240 days on the date when the Tamil Nadu Administrative Tribunal passed the order dated 12.05.1992. However, they were not removed from their services and they were permitted to work. On completion of 240 days, the petitioners filed O.A.No.9356 of 1998 for being regularly absorbed. The Tamil Nadu Administrative Tribunal was allowed the O.A.No.9356 of 1998 by an order dated 02.02.2001 and the respondents were directed to absorb the petitioners in the existing vacancies and if sufficient numbers are not available, they should be absorbed as per the seniority. This order was challenged by the Government in WP.No.21085 of 2001. This Court by an order dated 16.02.2005, dismissed the writ petition which reads as under:-

"8. In the present case, the Tribunal has observed that in this first decision of the Tribunal dated 12.5.1992, it was no where specifically indicated that only those who had completed 240 days on or before the date of judgment of the Tribunal should be considered. The Tribunal had merely made an observation saying that the practice of engaging mazdoors on NMR basis should be discontinued and persons who had completed 240 days should be absorbed. Ultimately, G.O.Ms.No.398 was issued by the Government on the aforesaid basis. Even though the respondents 1 to 8 had not completed 240 days by 12.5.1992 and even though there was observation that such practice should be discontinued, yet the respondents 1 to 8 were engaged on subsequent dates and by the time the G.O.Ms.No.398 was issued on 18.12.1992, they had completed 240 days. The observation of the Tribunal, therefore, appears to be justified. Since the respondents 1 to B were continued to be engaged even after the judgment of the Tribunal and they had completed 240 days by the date of Issuance of G.O. Dated 18.12.1992, on the

basis of the same reasoning, they should have been regularised."

5. On dismissal of the writ petition, the Government passed G.O.Ms.No.182 P&AR (Personnel-F) dated 13.07.2007 complying with the order of the Tribunal. However, they were regularized only from 13.07.2007.

6. The petitioners gave a representation stating that they should be absorbed from the date of initial appointment for the purpose of counting pensionary benefits. The same has been rejected by the impugned order. It is this order challenged in the instant writ petition.

7. The Government filed its counter stating that as per the judgment of Hon'ble Supreme Court of India in the case of Secretary, State of Karnataka Vs. Umadevi & Ors., reported in 2006 (4) SCC 1. The petitioners did not have right to get absorbed. It was also stated that these employees had not been joined prior to 01.04.2003, but were regularized and brought into the Government service after 01.04.2003 and therefore they can govern only under the Contributory Pension Scheme and not under the pension scheme existing prior to 01.04.2003. It is the specific stand of the Government that the petitioners case is considered sympathetically and on humanitarian grounds, the G.O.Ms.No.182 P&AR (Personnel-F) dated 13.07.2007 was issued to absorb these persons on existing as well as future vacancies. According to the Government, they should account to a fresh recruitment and the services will be counted only from the date of absorption and therefore, the petitioners had not entitled to the appointment prior to 01.04.2003.

8. Heard the counsel for the parties.

9. The issue which arises for consideration is as to whether the petitioners should be entitled to their past services prior to regularization so that they can get the benefit of G.O.Ms.No.259, Finance (Pension) Department, dated 06.08.2003. The Government of Tamil Nadu brought a pension scheme under G.O.Ms.No.259, Finance (Pension) Department, dated 06.08.2003. In the said G.O. the Government introduced the Contributory Pension Scheme to the employees of the Tamil Nadu State Government, with effect from 01.04.2003, amending the Tamil Nadu Pension Rules 1978. This pension scheme applied to those employees who have been recruited on or after 01.04.2003. The said G.O has specifically has used the word "recruited".

10. The learned counsel for the petitioner placed reliance on a Division Bench judgment passed on 30.09.2015 in WP.(MD)No.1026 of 2015 dated 30.09.2015 in the case of the State of Tamil Nadu Vs. R.Kesavan. In the said case, the respondent therein was appointed as an Electrician on daily

wage basis, in the Town Panchayat, on 10.09.1985. He was absorbed as Electrician Grade-II on 01.09.2000 and his appointment was regularized in the cadre of Electrician Grade-II on 23.06.2006. The respondent in that case retired from service on 30.04.2011, on attaining the age of superannuation. The issue therefore in that case was as to whether the respondent in writ petition was entitled to pension under G.O.Ms.No.259, Finance (Pension) Department, dated 06.08.2003 or to the existing pensionary scheme. The learned Single Judge allowed the writ petition. In appeal, a division bench of this Court dismissed the appeal holding that the respondent got appointment in the year 1985 and regularized with effect from 23.03.2006 and therefore would not fall within the parameters of newly appointed employee on or after 01.04.2003. Para 10 of the Division Bench order in WP.(MD)No.1026 of 2015 dated 30.09.2015, reads as under:-

"10. The pension papers of the respondent were returned on the premise that there is a bar in considering the claim for pension in terms of G.O.No.259, Finance (Pension) Department, dated 06.08.2003 and G.O.No.430, Finance (Pension) Department, dated 06.08.2004. The learned Single Judge, after considering the relevant Government Orders, has clearly held that the Government Orders are in relation to contributory pension scheme, applicable to the newly appointed employees after 01.04.2003. The respondent having been appointed in the year 1985 and regularised on 11.08.2006 w.e.f., 23.06.2006 would not fall within the parameters of newly appointed employees, i.e., after 01.04.2003. The above Government Orders cannot be made applicable to the respondent. As rightly held by the learned Single Judge, the new scheme is applicable only to the employees appointed on or after 01.04.2003, the appointment of the respondent is not a new recruitment and it is a case of regularisation, after putting 20 years of service."

11. In another batch of writ petitions namely WP.No.22741 of 2015 etc., a learned Single judge by an order dated 06.06.2018 allowed a similar prayer. Para 12, 13 and 14 reads as under:-

"12. This rule is applicable to all the employees who rendered service under the State Government in non-provincialised service, consolidated pay, honorarium or daily wages basis on or after 1st January, 1961 and absorbed in regular service before 1st April 2003. The service of any employee is regularized after 01.04.2003, as per Rule 11(4) of the Tamil Nadu Pension Rules, 1978, such employee is not entitled to get the benefit of counting half of the service rendered in daily wage basis along with regular service. The decision in P.Chinnaiyan's case says that the

crucial date i.e. on 01.04.2003 has been chosen since a New Pension Scheme was introduced for those employees who entered into Government Service after 01.04.2003. Hence the Tamil Nadu Pension Rules, 1978 are not applicable to the persons who were recruited after 01.04.2003. Fixing the crucial date as 01.04.2003 makes a difference between Rule 11(2) and Rule 11(4) of the Tamil Nadu Pension Rules because one should have been absorbed in regular service before 01.04.2003 for the benefits of Rules 11(2) and Rule 11(4) of the Tamil Nadu Pension Rules, 1978.

13. After comparing the hardships faced by the employees who entered into service after 01.04.2003 and those who were appointed prior to 01.04.2003, but, given the benefit of regularisation after 01.04.2003, the Government came to the conclusion that the persons who are freshly recruited after 01.04.2003 into the Government Service are governed by the New Pension Scheme and the persons who are absorbed after 01.04.2003 are not extended the benefit of New Pension Scheme and held that the action of the department in denying to count the half of the long service rendered by the employees before their absorption into regular service who are not fresh recruiters, but absorbed into regular service after 01.04.2003, as per Rule 11(4) of the Tamil Nadu Pension Rules has no rationale basis. Hence, the State cannot deny the benefit of the Tamil Nadu Pension Rules based on the date of absorption, particularly, for the employees like the petitioners herein, who had rendered more than 2 or 3 decades of service before absorption.

14. I also fully agree with the ratio laid down by this Court in P.Chinnaiyan's case and being bound by the same, this Court finds no difficulty to follow the same. Further, in appeal, the decisions of the Single Judge in similar circumstances have been upheld by the two Division Benches of Madurai Bench of this Court in the Writ Appeals in W.A.(MD) No.760/2013 dated 09.09.2015 (The Director, Local Fund Audit, Chennai-106 and 2 others vs. A.R.D.Nayagam) and in W.A.(MD) No.1026/2015 dated 30.09.2015 (The State of Tamil Nadu rep. By its Secretary, Department of Municipal and Water Supply Department, Fort St. George, Chennai-9 and 5 others vs. R.Kesavan). Further, when an identical prayer was made to count half of the service rendered by the petitioner therein as Plot Watcher on daily wage basis along with regular service rendered by him in W.P. (MD) No.15903 of 2012 (M.Nagasamy vs. The Government of Tamil Nadu rep. by Secretary to the Government, Forest and

Environment Department, Fort St. George, Chennai-9 and 3 others) by order dated 28.06.2016, after referring to the cut off date of 1.4.2003 fixed in the proviso to Rule 11(4), this Court has categorically held that the benefits given under Rule 11(2) of the Tamil Nadu Pension Rules, cannot be deprived of and take away by Rule 11(4) of the Tamil Nadu Pension Rules, 1978."

12. The petitioners are identically situated. They had been appointed on various dates even after the letter No. 13840/89-8, dated 05.03.1991 was issued. The petitioners continued to work in the department. It is case of the petitioner that O.A.No.846 and 847 of 1991 filed by them had been allowed and the same has been upheld by this Court in WP.No.21085 of 2001 dated 16.02.2005. G.O.Ms.No.158 had been passed by the Government in compliance of the order dated 16.02.2005, passed by this Court in WP.No.21085 of 2001.

13. As stated earlier G.O.Ms.No.259, Finance (Pension) Department, dated 06.08.2003, specifically used the word "recruit". Random House Dictionary defines "recruit" as a newly enlisted or drafter member or a new member of the group organization or alike.

14. The petitioners had been hired by the Government long time before they were absorbed. Government passed G.O.Ms.No.259, Finance (Pension) Department, dated 06.08.2003, applies to those persons who had been regularized or absorbed after 01.04.2003. Had the Government intended to apply the No.259, Finance (Pension) Department, dated 06.08.2003, to those persons who had been regularized later than 01.04.2003, even though they had been appointed prior to the 01.04.2003, the Government would not have used the word 'recruit' which postulates fresh hiring of personnel. By using the word recruit, the Government intend that G.O.Ms.No.259, Finance (Pension) Department, dated 06.08.2003, would apply to a new entrant to the service and therefore this cannot apply to persons who had been enlisted prior to 01.04.2003.

15. Keeping in mind the decision of W.A.(MD).No.760 of 2013 and WP.No.22741 of 2015 etc., the petitioners are entitled to the benefits as prayed for. The impugned order is quashed and the petitioners services prior to G.O.Ms.No.158 be reckoned for the purpose of calculating pension. The Writ Petition is allowed. No Costs.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

To

- 1.The Chief Secretary,
Government of Tamil Nadu
Fort St. George, Chennai 600 009.
2. The Secretary to Government,
Personnel and Administrative Reforms Department,
Fort St.George, Chennai 600 009.
3. The Deputy Secretary,
Personnel and Administrative Reforms Department,
Fort St.George, Chennai 600 009.

+1cc to the Government Pleader, S.R.No. 88707

RSI (CO)
GN(21/11/2019)

W.P.No.3975 of 2010



WEB COPY