

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.3235 of 2018

Mrs.Bhuvaneswari

... Petitioner

Vs.

1. The Secretary,
Medical and Health Department,
St. George Fort,
Chennai - 09.
2. The Principal Secretary,
Social Welfare and Physically disability department
St. George Fort,
Chennai -09.
3. The Director,
Medical and Rural Health Services
D.M.S.Campus,
Thynampet,
Chennai - 600 006.
4. The Director,
Medical and Rural Health Services,
Poonnamallee High Road, Kilpauk,
Chennai - 10.

.. Respondents

PRAYER:

This Writ Petition is filed under Article 226 of the Constitution of India, praying for the issue of a Writ of Mandamus, direct the respondents to consider the petitioner representation dated 12.01.2018 and regularize petitioner service as per G.O.Ms.No.151 dated 16.10.2006.

For Petitioner : M/s.R.K.Gandhi

For Respondents : Mr.A.N.Thambidurai
Special Government Pleader

O R D E R

The relief sought for in the present writ petition is for a direction to the respondents to consider the representation submitted by the writ petitioner, on 12.01.2018 and to regularize the services of the writ petitioner as per G.O.(Ms) No.151 dated 16.10.2006.

2. The writ petitioner was appointed as a Nurse by the Director of Medical and Rural Health Services on a consolidated pay. The writ petitioner was initially appointed as a Staff Nurse at the Government Primary Health Centre, Namakkal District and subsequently, transferred to the Government Primary Health Center, Ramapuram. The petitioner claims that as per G.O.Ms.No.151, she is entitled to be regularised in the sanctioned post in the regular time scale of pay. G.O.Ms.151 dated 16.10.2018 states that the differently abled persons, who have served more than two years, on consolidated pay, shall be provided with the time scale of pay.

3. However, the G.O.Ms.No.151 is not in relation to the regularisation or permanent absorption of the employees who were appointed on a consolidated pay. The order of appointment issued to the writ petitioner dated 19.09.2015 is enclosed at Page No.12 of the typed set of papers filed by the writ petitioner. The terms and conditions of the appointment are enumerated in the order itself and the same reads as under;

Terms and Conditions:

1. He/She should report for duty within 10 days from the date of receipt of this order. If the individual fails to join duty within 10 days on receipt of this appointment order, it will be presumed that the candidate is not interested in this offer and the appointment will be cancelled without any further notice, and the arising vacancy will be filled up from the reserve list of the Medical Services Recruitment Board. Failure to join would result in his/her name being removed from the approved list. No representation regarding change of place of posting etc., will be entertained. No extension of joining time will be given.

2. The candidate appointed as Nurse must undertake to work on contract basis with consolidated pay for a period of not less than two years or the period that may be specified by the Government from time to time, in the Government Medical Institutions.

3. The Government represented by the Director of Medical and Rural Health Services shall have the power to terminate the services of any of the staff nurses appointed, on the grounds of unsatisfactory performance if reported by their immediate higher authorities.

4. The Candidate appointed as Nurse on consolidated pay shall be paid a fixed remuneration on Rs.7,700/-p.m. (Rupees seven thousand and seven hundred) with an annual increase Rs.500/- till he/she is absorbed into regular vacancies as per the seniority in selection.

5. The candidate shall work on a three-shift basis and carry out the nursing duties, as assigned by the head of institution or his/her authorised nominee and they should wear the prescribed uniform while on duty.

6. She/He is not eligible for any kind of leave as applicable to the regular Government servants except for the casual leave of one day for one month and Day off. In any other untoward exceptional circumstances, any individual is permitted to avail the leave other than the leave specified above that will be treated as leave on loss of pay.

7. If the individual does not possess adequate knowledge in Tamil he/she has to pass the Second Class language Test (Full Test) in Tamil within a period of two years.

8. The individual should produce all the documents in original to the Heads of institutions concerned to which they are posted at the time of joining duty.

a). Certificate of Registration for Nurse.

b). Certificate of Registration for Midwifery/Phychiatry

c). Diploma or Degree Certificate in General Nursing and Midwifery/ Psychaitry

d) +2 Mark sheet.

e) S.S.L.C. Mark Sheet.

f) School Transfer Certificate.

g) Permanent Community Certificate

h) Disability Certificate in case of Differentially abled persons duly obtained from District Medical Board.

i) physical Fitness Certificate obtained from Civil Asst.Surgeon.

9. The individual is directed to appear before the officer concerned for verification of the original certificates and then to join duty in the insitution to which he/she is posted Health Services, Chennai - 6 immediately.

10. The appointment is made subject to the outcome of the writ petitions pending before the Hon'ble High Court of Madras at Chennai and Madurai.

4. The terms and conditions of appointment narrated above unambiguously portrays that the writ petitioner was appointed on contract basis in a monthly consolidated pay. The appointment is purely temporary and there is no scope for regularisation or permanent absorption.

5. To fill up the regular sanctioned post of Staff Nurse in the department of Medical and Rural Health Services, the

Recruitment Rules are already in force. While so, the temporary appointment made would not constitute a ground for seeking regularisation or permanent absorption. When the writ petitioner herself is aware of the terms and conditions of appointment, now she cannot go back and say that she was allowed to work for a considerable length of time, she is entitled for regularisation. Mere length of service would not confer any right and the regularisation or permanent absorption cannot be granted in respect of the temporary appointments, which all are made contrary to the Recruitment Rules in force.

6. The regularisation or permanent absorption cannot be granted in violation of the recruitment rules in force and all appointments to the sanctioned posts are to be done only in consonance to the constitutional schemes and by following the recruitment rules in force. This apart, mere length of service would not confer any right on the temporary employees to claim regularisation or permanent absorption. Contrary, to the recruitment rules, the writ petitioner was appointed on a consolidated pay on 19.09.2015 and has completed about 3 years of service.

7. This being the factum, the competent authorities may consider grant of special time scale of pay, if any, fixed for temporary staff nurses working in the Medical and Rural Health Services Department. However, regularisation and permanent absorption cannot be granted, contrary to the rules.

8. The legal principles, in this regard are settled by the constitutional Bench of the Hon'ble Supreme Court of India, in the decision of the State of Karnataka Vs. Umadevi reported in 2006 [4] SCC 1 wherein the Constitutional Bench of the Hon'ble Supreme Court has observed as follows:

"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.

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."

26. With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent -- the distinction between regularization and making permanent, was not emphasized here -- can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in paragraph 50 of Piara Singh (supra) are to some extent inconsistent with the conclusion in paragraph 45 therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognized in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent.

"39. There have been decisions which have taken the cue from the Dharwad (supra) case and given directions for regularization, absorption or making permanent, employees engaged or appointed without following the due process or the rules for appointment. The philosophy behind this approach is seen set out in the recent decision in The Workmen of Bhurkunda Colliery of M/s

Central Coalfields Ltd. Vs. The Management of Bhurkunda Colliery of M/s Central Coalfields Ltd. (JT 2006 (2) SC 1), though the legality or validity of such an approach has not been independently examined. But on a survey of authorities, the predominant view is seen to be that such appointments did not confer any right on the appointees and that the Court cannot direct their absorption or regularization or re-engagement or making them permanent.

"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.

"44. The concept of 'equal pay for equal work' is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the Rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after the Dharwad decision, the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the

Constitution of India permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality.

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".

9. In the case of Secretary to Government School Education Department, Chennai vs. R. Govindaswamy and others reported in 2014 [4] SCC 769, the Supreme Court held that:-

"8(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 posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularisation of services of an employee which would be violative of the constitutional scheme. While 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 regularised, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.

(ii) Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularisation in the absence of a legal right.

(iii) Even where a scheme is formulated for regularisation with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(iv) Part-time employees are not entitled to seek regularisation as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularisation or permanent continuance of part-time temporary employees.

(v) Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute." (Emphasis added)

9. The present appeals are squarely covered by clauses (ii), (iv) and (v) of the aforesaid judgment. Therefore, the appeals are allowed. However, in light of the facts and circumstances of the case as Shri P.P. Rao, learned senior counsel has submitted that the appellant has already implemented the impugned judgments and does not want to disturb the services of the respondents, the services of the respondents which stood regularised should not be affected.

10. With the aforesaid observations, the appeals stand disposed of accordingly. No order as to costs."

10. Though the Honourable Supreme Court, in the case cited supra, had issued the above direction in clear terms, the respondents are issuing some orders in violation of Articles 14 and 16 of the Constitution of India by appointing few persons of their choice and depriving the entire Society. Thus, in violation of the principles laid down by the Supreme Court and by the Constitutional Bench and in the case of R. Govindasamy [cited supra], action to be initiated against the erring officials. Equal opportunity in employment is the right of the citizen and any violation will affect the rights conferred to the citizens in the Constitution of India. Thus, the action of the authorities in providing public employment through back door entry to be identified and serious action have to be taken against all such officials, who passed such orders of regularisation of appointments.

11. In this regard, once again the Supreme Court in the case of State of Tamil Nadu through Secretary to Government, Commercial Taxes and Registration Department, Secretariat and Another Vs. A. Singamuthu reported in 2017 [4] SCC 113 has held that the Courts are repeatedly directing the States to follow the constitutional scheme for appointing candidates in public post. The Government, time and again, is violating the legal dictums and favouring some individuals, attempting to get public employment through back door entry. The State must be a model employer and the State is bound to follow the constitutional principles. The State cannot discriminate the citizens and the State is the authority to follow Articles 14 and 16 in respect of all citizens scrupulously. If the State itself is discriminating the citizens and encouraging the back door appointment to public post, this Court is unable to imagine the plight of the meritorious citizens of this Country, who are longing for public employment. Few miscreant officials have to be put on task and strict action against those officials are to be undertaken.

12. Thus, this Court is of the firm and clear opinion that all the citizens should get equal treatment from the Government and the Government, being the model employer, cannot discriminate the citizens. In this regard, the mere continuation of services on temporary/casual/daily wages would not confer any right and in order to appoint any candidate in the permanent basis in the public post, the scheme recognized by the constitution has to be strictly adhered to and the violation of the same to be viewed seriously. Repeatedly, the Constitutional Courts are flooded with these kind of writ petitions and the candidates, who entered through back door entry in public post, are repeatedly filing writ petition in order to secure regularisation through Courts after few years. The Courts are also unable to solve this, in view of the continuous irregularities and illegalities committed in this regard. Since, at the time of weighing the principles of equity, the Courts have to grant some relief to the persons who are in stress and strain on account of long period of services. Though such cases are considered on few occasions, those cases can never be cited as precedent nor the Government to follow such cases as principle. In such view of the matter, no further consideration can be shown in this writ petition."

13. In view of the legal principles settled, relief sought for in the present writ petition for grant of regularisation cannot be granted. Even, to direct the respondents to consider the representation, the petitioner has to establish a legal right and in the absence of any legal right, no such direction can be issued to consider for regularisation or permanent absorption. However, if any Government order provides special time scale of pay for consolidated pay/temporary employees, the same can be considered insofar as the writ petitioner is concerned.

14. With these observations, the present writ petition stands dismissed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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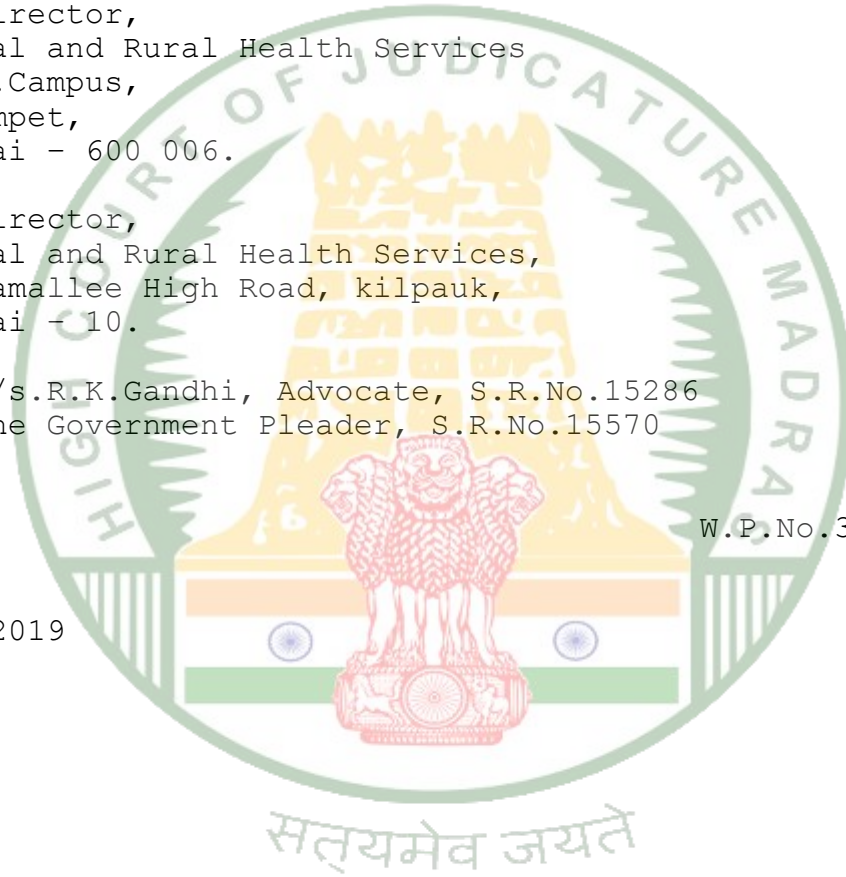
To

1. The Secretary,
Medical and Health Department,
St. George Fort,
Chennai - 09.
2. The Principal Secretary,
Social Welfare and Physically disability department
St. George Fort,
Chennai - 09.
3. The Director,
Medical and Rural Health Services
D.M.S.Campus,
Thynampet,
Chennai - 600 006.
4. The Director,
Medical and Rural Health Services,
Poonnamallee High Road, kilpauk,
Chennai - 10.

+1cc to M/s.R.K.Gandhi, Advocate, S.R.No.15286
+1cc to the Government Pleader, S.R.No.15570

W.P.No.3235 of 2018

GJII (CO)
CS/29/03/2019



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