

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :12.02.2019

CORAM

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

W.P.Nos.3793 to 3797 of 2018

K.G.Sampathkumar	..Petitioner in W.P.No.3793/2018
G.Chittibabu	..Petitioner in W.P.No.3794/2018
E.Padmanaban	..Petitioner in W.P.No.3795/2018
R.Sekar	..Petitioner in W.P.No.3796/2018
C.Kumar	..Petitioner in W.P.No.3797/2018

vs

1. The Government of Tamil Nadu
Rep.by the Secretary to Government,
Municipal Administration & Water Supply
Department,
Fort St.George, Chennai - 600 009
 2. The Commissioner,
Municipal Administration & Water Supply Department
Chepauk, Chennai - 600 005
 3. The Commissioner,
Maraimalai Nagar Municipality,
Maraimalai Nagar,
Kancheepuram District - 603 209
- ..Respondents in all W.Ps

Common Prayer: Writ Petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records relating to the impugned order issued by the 3rd respondent bearing Na.Ka.No.518/2017/C1 dated 17.08.2017 and quash the same and consequently direct Respondents 2 and 3 to bring the petitioner into regular time scale of pay of Rs.2550-50-2650 w.e.f.23.02.2006 onwards and to pay the difference in salary with all arrears.

For Petitioners : Mr.K.M.Ramesh(in all W.Ps)
For Respondents : Mr.A.N.Thambidurai
Special Government Pleader for R1
(in all W.Ps)
Mr.P.Srinivas for R2 & R3
(in all W.Ps)

C O M M O N O R D E R

The notices issued by the Commissioner, Marimalai Nagar Municipality in proceedings dated 17.08.2017, stating that the writ petitioners are not entitled for the regularization and permanent absorption are under challenge in the present writ petitions. Further, a direction is sought is to direct the respondents 2 to 3, to bring the petitioners into regular time scale of pay of Rs.2550-50-2650 w.e.f.23.02.2006 onwards and to pay the difference in salary with all arrears.

2.The learned counsel for the writ petitioners state that the writ petitioners were engaged as casual workers for maintenance of Over Head Tank in the 3rd respondent Municipality during the year 1994. They were engaged on a consolidated pay and they are continuing in service without any break and therefore, they are entitled for regularization and permanent absorption. The petitioners state that as per the G.O.Ms.No.21, Municipal Administration and Water Supply Department dated 22.03.2006, the writ petitioners are entitled to be brought under the regular establishment in the regular time scale of pay. However, the benefit extended by the Government by way of a policy in G.O.Ms.No.21, has not been extended in favour of the writ petitioners. The writ petitioner are continuously working for more than two decades and therefore, they are entitled for regularization and permanent absorption with reference to the policy decision taken by the Government in G.O.Ms.No.21.

3.The learned counsel for the petitioners state that even as per the instructions issued by the superior officials, the writ petitioners are made to work as a full time employees and therefore, the benefit of permanent absorption cannot be denied at all.

4.The learned counsel appearing on behalf of the 3rd respondent Municipality opposed the contention in entirety by stating that the writ petitioners were not appointed under any Government order such as G.O.Ms.No.198 dated 26.10.1998. The petitioners were appointed as a part-time employees and they were performing the duties and responsibilities of the Over Head Tank Operator. The nature of the job requires few hours to work and even sometimes, the writ petitioners are authorizing some other persons, his relatives or friends to perform the duties of operating the Motor to fill up the Over Head Water Tank. At no point of time, the writ petitioners were engaged as a full time employees and even now, they have continued as a part time Over Head Tank Operators. The writ petitioners are not entitled to get the benefit of G.O.Ms.No.21 as they have continuing only as a part-time employees on a consolidated pay.

5. In paragraph 9 of the counter affidavit filed on behalf of the 3rd respondent, it is stated that "the petitioner is not required to attend the office of the Municipality even for signing the Attendance register. In fact, the petitioner does not even have to be present by himself and more than often than not, the petitioner and other such similar persons carry out the work either by themselves or by the Family members or friends. Therefore, the said work is not a permanent one and the petitioner is therefore, not entitled to be permanent appointment as per the request."

6. This Court is of an opinion that all appointments are to be made only by following the recruitment rules in force. Equal opportunity in public employment is the constitutional mandate. Admittedly, the writ petitioners were initially engaged as a part-time Over Head Tank Operators on a consolidated pay and the nature of the job involves one or two hours of work, more specifically, to operate the Motor to fill up the water in the Over Head Tank.

7. This being the nature of the job, this Court is of an opinion that the claim of the writ petitioners for grant of permanent absorption cannot be considered. In respect of appointment to the regular sanctioned post, the petitioners have to undergo the selection process and all such permanent sanctioned posts are to be filled up by the competent authorities only by following the procedures as contemplated under the service rules and not otherwise. The initial appointment of the writ petitioners was not made in accordance with the recruitment rules in force and therefore, the said appointment is to be considered as an irregular appointment, more so, the writ petitioners were appointed as a part-time employees and at no point of time, they were brought under the regular establishment. Mere statement that the writ petitioners were made to work in the office for sometime would not confer any right on them. In the counter affidavit, it is clarified that even the writ petitioners have not signing any attendance register and they are not necessary to be present by themselves and they are operating the Motor fixed in the room with the assistance of their family members or friends.

8. This being the nature of the job and the nature of the engagement, this Court is of an opinion that the writ petitioners are not entitled for the grant of regularization or permanent absorption in view of the legal principles settled by the Constitution Bench of the Hon'ble Supreme Court of India in the case 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.This Court is bound to follow the legal principles settled in the judgment, holding that all public employments to be made only in accordance with the Constitutional Scheme by providing equal opportunity to all the citizens of this Country. The Constitutional Bench, while reiterating the legal principles, directed that Articles 14 and 16 of the Constitution of India to be strictly adhered to, while indicating the process of recruitment to the public post. Certain exceptions are carved out in order to provide or mitigate certain exceptional circumstances for instance, Compassionate Appointment and Emergency Appointment. Except these exceptional cases, all other appointment to public employment has to be done only in accordance with the constitutional scheme.

10.In respect of the judgment of the Apex Court as well as this Court, the respondents are time and again committing certain irregularities and illegalities by appointing persons through some other modes in violation of the directions issued by the Constitutional Bench of the Supreme Court of India. Such an attitude of the Officers of the Government has to be severely viewed and the Government has to take appropriate action against the Officials who are committing such illegalities and irregularities in violation of the constitution by providing full time appointment in public employment in contravention to the Recruitment Rules. 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."

11. 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.

12. 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.

13. 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 cannot 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 these writ petitions.

14. Accordingly, all these writ petitions stand dismissed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Secretary to Government,
Municipal Administration & Water Supply
Department,
Fort St. George, Chennai - 600 009
2. The Commissioner,
Municipal Administration & Water Supply Department
Chepauk, Chennai - 600 005
3. The Commissioner,
Maraimalai Nagar Municipality,
Maraimalai Nagar,
Kancheepuram District - 603 209

+5 ccs to Mr.K.M.Ramesh, Advocate, S.R.No.12260

+1 cc to Mr.P.Srinivas, Advocate, S.R.No.12915

+1 cc to the Government Pleader, S.R.No.13493

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W.P.Nos.3793 to 3797 of 2018

VSN-II (CO)
SSM(07/03/2019) .