

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE K.K. SASIDHARAN
and
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALU

W.A. No. 1850 of 2018
and
C.M.P. No. 14788 of 2018

The Administrator,
M.R. Krishnamurthy Co-operative Sugar Mills Limited,
Sethiathope - 608 702,
Cuddalore District. Appellant /
Second Respondent

-vs-

1. V. Suresh Kumar First Respondent /
Petitioner
2. The Commissioner of Sugar,
E.V.R. Periyar Maligai.
690, Anna Salai,
Nandanam,
Chennai - 600 035. Second Respondent /
First Respondent

PRAYER : Writ Appeal filed under Clause 15 of Letter Patent,
praying to set aside the order dated 04.04.2018 passed in W.P.
No. 20942 of 2011 on the file of this Court.

WP No.20942/2011: Writ of mandamus, to direct the respondents to
consider the candidature of the petitioner to the post of Junior
Engineer (Mechanical) under the 2nd respondent as per the
relevant provisions contained in Special Bye-laws relating to
Service Conditions of Persons Employed by the Society of the 2nd
respondent-mills within a time frame fixed by this Honble Court.

For Appellant : Mr. V. Venkadasalam

For Respondents : Mr. S. Sathiachandran

J U D G M E N T

(Judgment of the Court was delivered by P.D. AUDIKESAVALU, J.)

The intra-Court Appeal arises out of the order dated 04.04.2018 passed by Learned Judge of this Court in W.P. No. 20942 of 2011. The parties are hereinafter referred to as per their description in the Writ Petition for the sake of convenience.

2. The father of the Petitioner was originally provided employment in the Co-operative Sugar Mills of the Second Respondent on the basis that a small piece of land owned by him was acquired for establishing that mill. As he died in harness in July 1998, the Petitioner was employed by the Co-operative Sugar Mills of the Second Respondent as mazdoor. He had obtained permission from the Second Respondent and joined Diploma course in Mechanical Engineering, which he had successfully completed in the year 2007 and he subsequently joined B.Tech., Mechanical Engineering part-time course in SRM University in August 2007, which he had also successfully completed in the year 2011. In view of the Diploma in Mechanical Engineering acquired by the Petitioner, he was posted as part-time Junior Engineer in-charge from July 2007 onwards by the Second Respondent, which post he continues to hold till date.

3. While the matter stood as narrated supra, the Petitioner filed W.P. No. 20942 of 2011 before this Court for a direction to the Respondent to consider the candidature of the Petitioner to the post of Junior Engineer (Mechanical), under the Second Respondent as per the relevant provisions contained in the Special Bye-laws relating to service conditions of persons employed in the Co-operative Sugar Mills of the Second Respondent.

4. The Learned Judge, while disposing of the aforesaid Writ Petition, in the order dated 04.04.2018, has extensively captured the rival submissions and has arrived at the factual finding that the Petitioner is entitled to the relief as sought by him in the Writ Petition, but had proceeded to grant further reliefs, which read as follows:-

"16.Accordingly, the Writ Petition is allowed. The Second Respondent is directed to forthwith initiate steps to fill up the post of Junior Engineer (Mechanical) by considering the candidature of the Petitioner for regular appointment and obtain necessary approval from the First Respondent if any such requirement is necessary and appoint the Petitioner as regular Junior Engineer (Mechanical) and grant him all

attendant benefits including pay and arrears as admissible to the post of Junior Engineer (Mechanical) from the date of his original appointment. The above exercise shall be initiated and completed by the Second and First Respondents within a period of 12 weeks from the date of receipt of copy of this order..."

Aggrieved thereby, the Second Respondent has preferred this Appeal.

5. Though we are broadly in agreement that the candidature of the Petitioner to the post of Junior Engineer (Mechanical) in the Co-operative Sugar Mills of the Second Respondent deserves consideration, we are, however, unable to subscribe to the consequential directions issued by the Learned Judge, which are not in consonance with the settled legal principles, for the reasons mentioned hereinafter.

6. Firstly, in the authoritative decision of the Constitution Bench of the Hon'ble Supreme Court of India in *Shankarsan Dash -vs- Union of India* [(1991) 3 SCC 47], it has been held as follows:-

"Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. But, it does not mean that the State has the licence of acting in an arbitrary manner and the decision not to fill up the vacancies has to be taken bonafide for appropriate reasons and if the vacancies or any of them are filled up, the State is bound to respect the comparative merits of the candidates, as reflected at the recruitment test, and no discrimination can be permitted."

In the instant case, it is strenuously urged by the Learned Counsel for the Second Respondent by relying on G.O. Ms. No. 131, Industries (MIC.2) Department dated 05.07.2013 issued by the Government of Tamil Nadu that the post of Junior Engineer (Mechanical) is one of the ten technical posts identified to be surrendered for creation of new posts of Co-generation Staff in consultation with the TANGEDCO for implementation of Co-generation Plant in the Co-operative Sugar Mills of the Second Respondent. Though it is contended by the Learned Counsel for the Petitioner that the said decision has not yet been given effect and the Petitioner continues to work temporarily as Junior Engineer (Mechanical) in-charge even now, we are of the view that in the light of the aforesaid legal position, it would be the prerogative of the Second Respondent as employer to

decide upon the necessity of filling up the post of Junior Engineer (Mechanical) on permanent basis or otherwise and that the discretion of the employer to be exercised in that regard based on administrative exigencies cannot be curtailed by this Court.

7. That apart, even if the Petitioner has been found to possess the requisite qualifications for appointment to the post of Junior Engineer (Mechanical) and he has been working for a long period from July 2007 onwards in that post on temporary basis, it would not be possible to issue any direction to regularize his employment in view of the dictum laid down by the Constitution Bench of the Hon'ble Supreme Court of India in Secretary, State of Karnataka -vs- Umadevi [(2006) 4 SCC 1], in which it has been held as follows:-

"6. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (see Basu's Shorter Constitution of India). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed in public services and posts in connection with the affairs of the Union or any of the States. That article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedures which specify the necessary qualifications, the mode of appointment, etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognised that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because,

following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed."

Following the same, the Apex Court in *State of Rajasthan -vs- Dayalal* [(2011) 2 SCC 429] has considered the scope of regularization of irregular and part-time employees and summarized the principles relating to regularization and parity in pay in the context of the issues therein as follows:-

"(i) The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption of permanent continuance, unless the employees claiming regularization 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 regularization 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 regularized.

(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 should 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 regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization 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 regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization 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."

8. Finally, it has to be pointed out that the engagement of the Petitioner temporarily in the post of Junior Engineer (Mechanical) by the Second Respondent was a fortuitous circumstance inasmuch as he was already working in that mill as a mazdoor and had acquired the educational qualification for the post of Junior Engineer (Mechanical) while working in that mill and his service had accordingly been utilized in those peculiar circumstances. The indisputable fact yet remains that no invitation had been extended to all qualified persons to apply for that post at the time of engaging his services in consonance with the mandate of Articles 14 and 16 of the Constitution, which has been reminded from time to time by the Hon'ble Supreme Court of India in various decisions including those in *Excise Superintendent Malkapatnam -vs- K.B.N. Visweshwara Rao* [(1996) 6 SCC 216], *Suresh Kumar -vs- State of Haryana* [(2003) 10 SCC 276] and *State of Orissa -vs- Mamata Mohanty* [(2011) 3 SCC 436], which have been followed by this Court in *P. M. Malathy -vs- State of Tamil Nadu* [(2012) 3 MLJ 669] and *Commissioner, Department of Employment and Training -vs- K.P. Jaganathan* (Judgement dated 09.06.2014 in W.A. No. 1027 of 2013).

9. On a conspectus of the aforesaid legal principles, which the Second Respondent is bound to follow, we set aside the relief granted to the Petitioner in the order dated 04.04.2018 in W.P. No. 20942 of 2011 and direct that the following relief shall be substituted in lieu thereof:-

"As and when the Second Respondent decides to fill up any permanent vacancy in the post of Junior Engineer (Mechanical), the candidature of the Petitioner along with all other applicants through recognized mode of recruitment in public employment as per the relevant rules shall be considered, and if the merit of the Petitioner is found to be equal to other successful competing candidates found suitable for such

employment, the Petitioner shall be entitled to preference in such appointment."

10. The Writ Appeal is disposed of with the aforesaid modification in the relief granted to the Petitioner in the Writ Petition. No costs.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

vjt

To

1. The Administrator,
M.R. Krishnamurthy Co-operative Sugar Mills Limited,
Sethiathope - 608 702,
Cuddalore District.
2. The Commissioner of Sugar,
E.V.R. Periyar Maligai.
690, Anna Salai,
Nandanam,
Chennai - 600 035.

+1 cc to Mr.S.Sathiachandran, Advocate, S.R.No.9806

PVS (CO)
SSM(11/02/2019)

W.A. No. 1850 of 2018

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