

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 12.02.2019

CORAM
THE HONOURABLE Mr. JUSTICE S.M.SUBRAMANIAM

W.P.No.1579 of 2018
and
WMP.No.1979 of 2018

S.Lalitha

...Petitioner

Vs

1. The District Collector,
Krishnagiri District, Krishnagiri.

2. The Assistant Director,
Regional Town Panchayats,
District Collectors Office Complex,
Collectorate Post, Dharmapuri,
Dharmapuri District.

3. The Executive Officer,
Townpanchayat,
Kelamangalam,
Krishnagiri District-635 113.

...Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, to issue a writ or order or orders or direction particularly in the nature of Writ of Mandamus, directing the respondents herein to consider the petitioner for the appointment to post of sweeper in Kelamangalam Town Panchayat under control of 3rd respondent considering her 11 years of service as sweeper.

For Petitioner : M/s.J.Selvarajan

For Respondents 1 & 2: Mr.R.S.Selvam
Government Advocate.

for R3: Mr.M.Jothikumar

O R D E R

The relief sought for in the present writ petition is for a direction to direct the respondent to consider the petitioner for appointment to the post of sweeper in Kelamangalam Town Panchayat under the control of 3rd respondent, considering her 11 years of service rendered by the writ petitioner as sweeper.

2. The learned counsel for the writ petitioner states that the writ petitioner studied up to 6th standard and registered her name in the Employment Exchange. The writ petitioner is fully eligible and qualified for an appointment to the post of sweeper in Kelamangalam Town Panchayat. Now the writ petitioner is working continuously for about 11 years on consolidated pay and therefore, her case is to be considered for regularization and permanent absorption.

3. The learned Government Advocate appearing on behalf of the respondents states that the writ petitioner is not the staff of Kelamangalam Town Panchayat. The writ petitioner was not given salary by the Kelamangalam Town Panchayat. The writ petitioner is being engaged as a contract staff by the Women Self Help Groups for sanitary work. The writ petitioner was engaged through outsourcing and therefore, she is not entitled to claim the benefit of regularization or permanent absorption. The contract amount as per the rate fixed by the District Administration is given to the Women Self Help Groups. The Kelamangalam Town Panchayat is having linkage with the Women Self Help Groups and therefore, the persons engaged by such Women Self Help Groups cannot be construed as employees of the Kelamangalam Town Panchayat.

4. The length of services rendered by the writ petitioner has no relevance in respect of the claim made by the present writ petition for regularization and permanent absorption. The benefit of regularization and permanent absorption cannot be granted contrary to the recruitment rules in force.

5. The writ petitioner was initially appointed only on contract basis and the rules regarding the regular recruitment has not been followed at the time of recruiting the writ petitioner. Therefore, the contract appointment itself was for a specific period and on expiry of the contract period, the writ petitioner is liable for termination. However, the continuance of services was granted only on contract/temporary basis according to the needs of the Kelamangalam Town Panchayat. This continuance can never be a ground for the writ petitioner to claim for regularization or permanent absorption of service. The mere continuance of service on contract basis will not confer a legal right on the writ petitioner to claim regularization and permanent absorption automatically. In respect of the regularization and permanent absorption, appointment made should be based on the recruitment rules in force. In the absence of following recruitment rules, the regularization and permanent absorption cannot be extended.

6. All appointments to public post to be made only under the Constitutional Scheme by following the recruitment rules in force. The persons appointed on contract/temporary basis, even

against the available vacancies cannot claim regularization and permanent absorption, in view of the fact that the initial appointment was not made by following the recruitment rules. Non adherence of the recruitment rules in force will certainly in violation of the Article 14 and 16 of the Constitution of India. Equal opportunity in Public Employment to all the citizens of this great nation is the Constitutional mandate and all such posts should be filled by the public authorities only through the Constitutional scheme and the recruitment rules in force. The practice of appointing candidates on temporary / contract basis in a permanent vacancy is to be deprecated. In view of all such appointments, the candidates so appointed on contract basis also put to inconvenience and thereafter, they are claiming regularization based on the length of service rendered on contract basis. Thus, the authorities competent also to be cautious while appointing the persons on contract basis. Certainly, continuous extension will create certain hope in the minds of the young candidates, who are aspiring to continue in public employment and giving such a false hope by the authorities, are certainly unwarranted. In these circumstances, the Constitutional Courts earlier issued directions to grant regularization of temporary / contract employment. At one point of time. The Courts found that such order of regularization are causing not only denial of opportunity other candidates but in violation of the Constitutional mandate in this regard. Equal opportunity of Public Employment is a Constitutional Principles and such a mandate cannot be violated. In these circumstances, the issue was elaborately discussed and dealt by the Constitutional Bench of Honourable Supreme Court of India in the case of State of Karnataka Vs. Umadevi and other and the Constitutional Bench has categorically analyzed the possibilities and probabilities in the matter of regularization of temporary / contract employment who were appointed otherwise then that of the recruitment rules in force. The following paragraph are relevant to extract for the purpose of extending the legal principles stated by the Constitutional Bench:

"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.

10. In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment. Buttressing these fundamental rights, Article 309 provides that subject to the provisions of the Constitution, Acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the instrumentalities that come within the purview of Article 12 of the Constitution. With a view to make the procedure for selection fair, the Constitution by Article 315 has also created a Public Service Commission for the Union and Public Service Commissions for the States. Article 320 deals with the functions of Public Service Commissions and mandates consultation with the Commission on all matters relating to methods of recruitment to civil services and for civil posts and other related matters. As a part of the affirmative action recognized by Article 16 of the Constitution, Article 335 provides for special consideration in the matter of claims of the members of the scheduled castes and scheduled tribes for employment. The States have made Acts, Rules or Regulations for implementing the above constitutional guarantees and any recruitment to the service in the State or in the Union is governed by such Acts, Rules and Regulations. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

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."

14. Even at the threshold, it is necessary to keep in mind the distinction between regularization and conferment of permanence in service jurisprudence. In STATE OF MYSORE Vs. S.V. NARAYANAPPA [1967 (1) S.C.R. 128], this Court stated that it was a mis-conception to consider that regularization meant permanence. In R.N.

NANJUNDAPPA Vs T. THIMMIAH & ANR. [(1972) 2 S.C.R. 799], this Court dealt with an argument that regularization would mean conferring the quality of permanence on the appointment. This Court stated:- "Counsel on behalf of the respondent contended that regularization would mean conferring the quality of permanence on the appointment, whereas counsel on behalf of the State contended that regularization did not mean permanence but that it was a case of regularization of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized.

Ratification or regularization is possible of an act which is within the power and province of the authority, but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

In B.N. Nagarajan & Ors. Vs. State of Karnataka & Ors. [(1979) 3 SCR 937], this court clearly held that the words "regular" or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This court emphasized that when rules framed under Article 309 of the Constitution of India are in force, no regularization is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognized therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only 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 and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization.

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.

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."

7. The view expressed by the Hon'ble Supreme Court in Paragraph No.13 are more relevant in respect of the facts of the case on hand. The Hon'ble Supreme Court has dealt with similar circumstances and stated that,

"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"

and it is also relevant to extract the following paragraphs:

"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.

33. In the earlier decision in Indra Sawhney Vs. Union of India [1992 Supp. (2) S.C.R. 454], B.P. Jeevan Reddy, J. speaking for the majority, while acknowledging that equality and equal opportunity is a basic feature of our Constitution, has explained the exultant position of Articles 14 and 16 of the Constitution of India in the scheme of things. His Lordship stated:-

"6. The significance attached by the founding fathers to the right to equality is evident not only from the fact that they employed both the expressions 'equality before the law' and 'equal protection of the laws' in Article 14 but proceeded further to state the same rule in positive and affirmative terms in Articles 15 to 18

7. Inasmuch as public employment always gave a certain status and power --- it has always been the repository of State power --- besides the means of livelihood, special care was taken to declare equality of opportunity in the matter of public employment by Article 16. Clause (1), expressly declares that in the matter of public employment or appointment to any office under the state, citizens of this country shall have equal opportunity while clause (2) declares that no citizen shall be discriminated in the said matter on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. At the same

time, care was taken to, declare in clause (4) that nothing in the said Article shall prevent the state from making any provision for reservation of appointments or posts in favour of any backward class of citizen which in the opinion of the state, is not adequately represented in the services under the state.."

(See paragraphs 6 and 7 at pages 544 and 545) These binding decisions are clear imperatives that adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment."

8. It is useful to cite the judgment of the Supreme Court in the case of Secretary to Government, School Education Department, Chennai vs. R.Govindasamy reported in 2014 4 SCC 769 and it is relevant to extract Paragraph No.8:

"8.this Court in State of Rajasthan & Ors. v. Daya Lal & Ors., AIR 2011 SC 1193, has considered the scope of regularisation of irregular or part-time appointments in all possible eventualities and laid down well-settled principles relating to regularisation and parity in pay relevant in the context of the issues involved therein. The same are as under:

"(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 post".

9. Thus, there is a direction by the Supreme Court in this regard to all the High Courts that the manner in which the writ petitioner is to be dealt with under Article 226 of the Constitution of India in the matter of regularization.

10. In the case on hand, the very appointment is on contract basis and for a specified period. Therefore, it is admitted that the recruitment rules in force was not followed while appointing these writ petitioners. There was no open competition process method was adopted while appointing these writ petitioners. In this view of the matter, the claim of regularization and permanent absorption set out by the writ petitioner in this writ petition cannot be considered.

11. The arguments advanced by the learned counsel appearing for the petitioner is that the writ petitioner has served for long period cannot be considered in view of authoritative pronouncement of the Constitution Bench of the Supreme Court of India. More so, the writ petitioner is very well aware of the conditions of appointment and having accepted the conditions and served with the respondent- Kelamangalam Town Panchayat, now,

they cannot claim for regularization and permanent absorption, so as to deprive the other citizen of this great nation from participating in the open recruitment process. Such being the firm view taken by this Court in such a nature of case, no further consideration is required to be undertaken on the ground raised by the writ petitioner in this writ petition.

12. Accordingly, the writ petition stand dismissed. No Costs. Consequently connected Miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

Pkn

To

- 1.The District Collector,
Krishnagiri District, Krishnagiri.
- 2.The Assistant Director,
Regional Town Panchayats,
District Collectors Office Complex,
Collectorate Post, Dharmapuri,
Dharmapuri District.
- 3.The Executive Officer,
Townpanchayat,
Kelamangalam,
Krishnagiri District-635 113.

+1cc to the Government Pleader, S.R.No.12822

सत्यमेव जयते

W.P.No.1579 of 2018

MG(CO)

rrs 18/03/2019

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