

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.01.2019

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.A.No.2841 of 2018
and
C.M.P.No.23618 of 2018

A.Valarmathi

... Appellant

Vs.

1. The Director of Public Health
and Preventive Medicine,
Teynampet,
Chennai - 600 018.

2. The Joint Director of Medical, Rural
Health Services and Family Welfare,
Cuddalore - 607 001,
Cuddalore District.

... Respondents

Writ Appeal filed under Clause 15 of the Letters Patent against the Order
dated 12.03.2018 made in W.P.No.11706 of 2016.

For Appellant : Mr.D.Balachandran

For Respondents : Mr.P.S.Sivashanmugasundaram
Special Government Pleader

J U D G E M E N T

(Order of the Court was delivered by S.MANIKUMAR, J)

Instant writ appeal is directed against the order dated 12.06.2018 made in W.P.No.11706 of 2016, by which the writ Court, rejected the request of the appellant for retrospective regularization.

2. Short facts leading to the filing of writ appeal are as follows:

(i) Writ petitioner is a Diploma holder in Pharmacy and registered her name in the District Employment Exchange in the year 1991. The writ petitioner attended the interview for the post of Pharmacist on 23.08.1999. Accordingly, she was appointed on 06.09.1999. However, not permitted to join duty. Therefore, petitioner and others filed O.A.Nos.928, 934, 932 & 933 of 2000 before the Tamilnadu Administrative Tribunal, for a direction to the respondent to permit them to discharge their duties as Pharmacists against the existing vacancies, pursuant to the appointment order issued by the respondents. Said Original Petitions were dismissed on 10.08.2001.

(ii) Aggrieved by the same, petitioner filed W.P.No.25037 of 2007, to set aside the order of the Administrative Tribunal and to direct the respondents therein to permit her to join the duty as Pharmacist, Madalapatty, Primary Health Centre, pursuant to the proceedings R.NO.53/A1/98 dated 06.09.1999 issued by the first respondent therein. A Hon'ble Division Bench of this Court

vide order dated 23.07.2007 allowed the writ petition, directing the respondents therein, to give effect to the appointment order dated 06.09.1999 issued to the petitioner forthwith. Pursuant to the order dated 23.07.2007 made in W.P.No.25037 of 2007, petitioner was allowed to join duty as Pharmacists by the Deputy Director of Health Services, Cuddalore, vide proceedings dated 27.12.2007 in R.No.6923/A1/2005-4. The initial appointment of the writ petitioner was on temporary basis and she continued as Pharmacist uninterruptedly without any break in service. Her services were not regularised from the date of her initial appointment i.e. 06.09.1999.

(iii) Contending that she is entitled to be regularised with effect from the initial date of appointment, for all service benefits, the appellant sent a representation dated 05.06.2015 to the respondents. As there was no response, the appellant filed W.P.No.11706 of 2016 for a writ of mandamus, to direct the respondent to regularise her services from 07.09.1999 to 29.12.2007 as per the order of this Court in W.P.No.25037 of 2002.

3. Before the writ Court, learned Government Advocate appearing on behalf of the respondents opposed the writ petition stating that though the writ petitioner was appointed in the year 1999, the order of appointment was kept in abeyance and was permitted to join duty only with effect from 30.12.2007. Since the writ petitioner had not even served in the Department as a

Pharmacist from the year 1999 to 2007, the question of regularization of the petitioner with retrospective effect does not arise at all.

4. After hearing both parties, a learned Single Judge of this Court vide order dated 12.05.2018 dismissed W.P.No.11706 of 2016, as hereunder.

"5. This Court is of an opinion that though the writ petitioner was appointed in the year 1999, the order of appointment had not been implemented. Contrarily, the order of appointment issued in favour of the writ petitioner had been kept in abeyance. However, the writ petitioner was permitted to join duty as Pharmacist only on 30.12.2007. The writ petitioner also had not challenged the order keeping the appointment in abeyance. Thus, now she cannot seek any such retrospective regularization of the service for the period when the petitioner had not served in the Department. It is brought to the notice of this Court that the writ petitioner has joined as Pharmacist only as 30.12.2007 and her services were already regularized with effect from her date of joining on 30.12.2007. Thus, the relief as such sought for with retrospective regularization cannot be granted. As the writ petitioner had not even served as pharmacist in the Department from the year 1999 and she was permitted to join duty only with effect from 30.12.2007 and her services were regularized from the date of joining her duty. Such being the factum of the case, the writ petitioner has not established any permissible ground for the purpose of considering the relief as such sought for in this writ petition.

6. Accordingly, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed."

5. Aggrieved by the dismissal of the writ petition, writ petitioner has filed the instant writ appeal on the following grounds:

(i). The learned single judge failed to consider that though the appointment of the appellant is on 07.09.1999, she was not allotted to join the post. Thereafter, the Tamilnadu Administrative Tribunal also passed an order directing the respondents to make fresh selection and permit the appellant to participate in the said selection but on an appeal before this Hon'ble Court, in W.P.No.25037/2002, A Hon'ble Division Bench of this Hon'ble Court, setaside the impugned order dated 06.09.1999 forthwith. Therefore, the appellant is entitled for regularisation from 06.09.1999.

(ii) The learned single Judge failed to consider the well considered judgment of the Hon'ble Division Bench of this Hon'ble Court, discussing the case of the appellant and setaside the impugned order and to give effect to the appointment order dated 06.09.1999. But the same was not at all considered by the learned single Judge and it was simply held that the appellant was permitted to join duty on 30.12.2007 and further erroneously came to the conclusion that since, the appellant did not challenge the order keeping the appointment in abeyance, and therefore she cannot seek any retrospective regularisation of service, without considering the order of Division Bench properly.

(iii) The learned single Judge erroneously come to the conclusion that the appellant did not challenge the order kept in abeyance, without considering

that there is no necessity to challenge the said order when the Hon*ble Division Bench had specifically directed the respondents to give effect to the appointment orders issued on 06.09.1999 forthwith. Therefore, the appellant is entitled for regularisation as on 06.09.1999.

(iv) The learned single Judge had failed to consider that the Hon'ble Division Bench, had clearly held

- As far as the stand of respondents 1 to 3 that in the matter of appointment of the petitioners by the then Deputy Director failed to follow the communal rotation is concerned, we do not find any substance in the said allegation, It is relevant to note that the appointment were made in the year 1999. At that point of time the previous schedule III was in operation in the Rules. The new schedule III with 100 points roster was brought into the rule book only as from 06.05.2000 by way of substitution in the rules by G.O.Ms.No.105, P& AR(S) Department, dated 20.06.2000 with a corresponding amendment to rule 22(c) by way of an explanation. The explanation to rule 22(c) specifically stated that the vacancies arising on and from 6th May 2000 should be filled up as per schedule III and all selections for appointments should be started afresh from serial number one of the amended schedule III with effect on and from the said date. Therefore, since the appointments in the case on hand were made in the year' 1999, the relevant roster point to be applied was the one which prevailed at that point of time. We also perused the Roster register maintained in the office of the third respondent. The five vacancies which were to be filled up at that relevant point of time commenced from serial numbers 21 to 25. The said Roster points disclose that the first Vacancy was meant for MBC and DC,

the second one for OC, the third one for BC, the fourth one for OC woman candidate and the last one for MBC and DC woman candidate. When we compared the said Roaster pointes with the stand of the respondents as stated in their reply statement before the Tribunal, we find that the said Roster points have been correctly set out in their reply statement.

- When we consider the rival submissions of the parties, as far as the contention relation to non-adherence of the communal rotation is concerned, as per the subsequent order of the Tribunal, dated 11.11.2002 passed in O.A.No.6687 of 1999, wherein the Tribunal itself had in respect of the very same selection recorded a finding as to how the communal rotation as disclosed by the respondents in the reply affidavit, has been duly taken care of in the selection of the candidates who came to be appointed, namely the petitioners and the applicant in O.A.No,6687 of 1999. When the order of the Tribunal dated 11.11.2002 passed in O.A.No.6687 of 1999 has been implemented by appointing the applicant in that original application, namely Selvi.C.Jayashree, it is not now open to the respondents to take a sudden 'U' turn and contend that the Communal rotation was not duly adhered to by the appointing authorities while making the selection. We are not therefore impressed by the said contention of the respondents while attempting to sustain the order impugned in these writ petitions.
- As far as the seniority of the petitioners in the employment exchange is concerned, it is to be stated that the said issue was never raised before the Tribunal while resisting the claim of the petitioners. For the first time in the counter affidavit filed in these writ petitioner, that too in paragraph 10, a stand has been taken to the effect that the candidates ought not to have been

selected as they were not possessing seniority in the employment exchange register. Except the said bald averment contained in the counter affidavit, there is nothing on record to support the said stand. Therefore, both the reasons, namely for not having raised it before the Tribunal and for not substantiating the same in the court the said contention of the respondents cannot be countenanced.

- As stated by us earlier, in the present impugned order, the Tribunal has failed to examine whether or not there was failure in adhering to the communal rotation while making the selection of the petitioners for the post of Pharmacist. The Tribunal, by merely stating that the petitioners have not denied the averment made in the reply affidavit filed by the respondents before the Tribunal presumed that the stand of the respondents was correct. Such an approach of the Tribunal was impermissible in law. When a substantial issue has been raised by the respondents themselves alleging that the communal rotation was not adhered to while making the appointment, it was for the respondents to have satisfied the Tribunal as to how such a stand was true. No material was placed before the Tribunal to state that any of the applicants before the Tribunal who were selected and appointed, not belong to the particular community, for which the representative roster points of the vacancies were to be filled up. On the other hand, in respect of the very same selection, in a different original application in O.A.No.6687 of 1999 the very same Tribunal had taken pains to examine the correctness of the stand of the respondents and has ascertained as to how the five applicants did satisfy their community status and were eligible for being appointed to the respective roster points.
- For all the above stated reasons, we hold that the order impugned

in the writ petitions cannot be sustained. Therefore, while setting aside the order impugned in the writ petitions, we direct the respondents to give effect to the appointment orders issued to the petitioners dated 06.09.1999 forthwith.

(v) The learned single Judge erroneously come to a conclusion that the appellant is not entitled for regularisation. It is pertinent to note that if the services of the appellant is regularised from 07.09.1999 to 29.12.2007, as per the order of the Hon'ble Division Bench of this Court, then the appellant will be coming under old pension scheme. Since the respondents did not regularise the appellant, the respondents are recovering for pension contribution from her salary.

(vi) The learned single Judge failed to consider that the appellant is entitled for regularisation and entitled to avail all pension benefits . available is Tamilnadu Pension Rules 1978 and not entitled to pay 10% for contributory pension.

(vii) The learned single Judge failed to consider that even in the counter affidavit filed by the respondents, there is no mention about the order of the Hon'ble Division Bench mentioning to give effect to the appointment order dated 06.09.1999 forthwith which clearly shows the non-application of mind of the respondents.

6. Though the appellant was issued with an order of appointment in the year 1999, the same was not implemented. She joined as a Pharmacist only on

30.12.2007. She cannot claim regularisation for the period during which, she was in service.

7. Rule 2(1) of the Tamil Nadu State and Subordinate Service Rules, 1955 defines as to when a person is appointed to service.

Appointed to a service

(1) A person is said to be “appointed to a service” when in accordance with these rules or in accordance with the rules applicable at the time, as the case may be, he discharges, for the first time the duties of a post borne on the cadre of such service or commences the probation, instruction or training prescribed for members thereof.

*(Explanation - The appointment of a person holding a post borne on the cadre of one service to hold additional charge of a higher post in the same service or a post borne on the cadre of another service or to discharge the current duties thereof does not amount to appointment to the latter service;)

8. Rule 2(3) of the Tamil Nadu State and Subordinate Service Rules, 1955 defines 'Approved probationer' as hereunder.

(3) “Approved Probationer” in a service, class or category means member of that service, class or category who has satisfactorily completed his probation and awaits appointment as a full member of such service, class or category ;

9. Rule 2(10) of the Tamil Nadu State and Subordinate Service Rules, 1955 defines 'Member of a service' as hereunder.

(10) “Member of a service” means a person who has been appointed to that service and who has not retired or resigned, been removed or dismissed, been substantively transferred or reduced to another service or been discharged otherwise than for want of a vacancy. He may be a probationer, an approved probationer or a full member of that service;

10. In *B.N.Nagarajan and others Vs. State of Karnataka and others*, reported in (1979) 4 SCC 507, at Paragraph Nos.23 to 25, the Hon'ble Supreme Court, held thus:

"23..... It was argued that the regularisation of the promotion gave it the colour of permanence and the appointments of the promotees as Assistant Engineers must therefore be deemed to have been made substantively right from November 1, 1956. The argument however is unacceptable to us for two reasons. Firstly, the words “regular” or “regularisation” do not connote permanence. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to the methodology followed in making the appointments. They cannot be construed so as to convey an idea of the nature of tenure of the appointments. In this connection reference may with advantage be made to *State of Mysore v.S.V. Narayanappa* [AIR 1967 SC 1071 : (1967) 1 SCR 128, 132] and *R.N. Nanjundappa v. T. Thimmiah* [(1972) 1 SCC 409 : (1972) 2 SCR 799] . In the former this Court observed:

“Before we proceed to consider the construction placed by the High Court on the provisions of the said order we may mention that in the High Court both the parties appear to have proceeded on an assumption that regularisation meant permanence. Consequently it was never contended before the High Court that the effect of the application of the said order would mean only regularising the appointment and no

more and that regularisation would not mean that the appointment would have to be considered to be permanent as an appointment to be permanent would still require confirmation. It seems that on account of this assumption on the part of both the parties the High Court equated regularisation with permanence.”

24. In Nanjundappa case [(1972) 1 SCC 409 : (1972) 2 SCR 799] also the question of regularisation of an appointment arose and this Court dealt with it thus: (SCC p. 416, para 26)

“Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation 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 regularised. Ratification or regularisation 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. Regularisation 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.”

25. Apart from repelling the contention that regularisation connotes permanence, these observations furnish the second reason for rejection of the argument advanced on behalf of the promotees and that reason is that when rules framed under Article 309 of the Constitution of India are in force, no regularisation is permissible in exercise of the executive powers of the Government under Article 162 thereof in contravention of the rules. The regularisation order was made long after the Probation Rules, the Seniority Rules and the Recruitment Rules were promulgated and could not therefore direct something which would do violence to any of the provisions thereof. Regularisation in the present

case, if it meant permanence operative from November 1, 1956, would have the effect of giving seniority to promotees over the direct recruits who, in the absence of such regularisation, would rank senior to the former because of the Seniority Rules read with the Probation Rules and may in consequence also confer on the promotees a right of priority in the matter of sharing the quota under the Recruitment Rules. In other words, the regularisation order, in colouring the appointments of promotees as Assistant Engineers with permanence would run counter to the rules framed under Article 309 of the Constitution of India. What could not be done under the three sets of Rules as they stood, would thus be achieved by an executive fiat. And such a course is not permissible because an act done in the exercise of the executive power of the Government, as already stated, cannot override rules framed under Article 309 of the Constitution."

11. In *State of Karnataka Vs. Umadevi*, reported in (2006) 4 SCC 1, at Paragraph Nos.43 and 48, the Hon'ble Supreme Court, held thus:

"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. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, 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 the 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.

“48. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a

regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules.”

12. In the light of the above provisions, appellant who not even entered the service cannot seek for retrospective regularisation. Hence, instant writ appeal is dismissed. No Costs. Consequently, the connected civil miscellaneous petition is closed.

[S.M.K., J.] [S.P., J.]
04.01.2019

Index : Yes/No.
Internet : Yes
Speaking/Non-speaking order
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To

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