

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WRIT PETITION Nos 12099 and 43878 of 2018

And

C.C.No.2511 of 2018

COMMON ORDER:

WP.No.12099 of 2018 is filed with the following prayer:

“to issue writ order or direction more particularly one in the nature of writ of mandamus by declaring the Proceedings Roc.No.733/2017-M1, 27.10.2017, so far as promoting the unofficial respondent who is junior to the petitioner is concerned is illegal, arbitrary and further direct the respondents to consider the claim of the petitioner for appointment by promotion as Sanitary Inspector in the place of the 5th respondent w.e.f.27.10.2017 on which date the junior is promoted and pass such other order or orders.....”

WP.No.43878 of 2018 is filed with the following prayer:

“.....to issue writ order or direction more particularly one in the nature of the writ of mandamus by declaring the Proc.No.326/2012/RDMA/A1, dt.13.8.2018 issued by the 3rd respondent as illegal, arbitrary and contrary to rules and set aside the same and further be pleaded to held that the petitioner is entitled to be considered for promotion as Sanitary Inspector with all consequential benefits and pass such other order or orders....”

Since the issue in both the writ petitions is one and the same, these writ petitions are being disposed of by way of common order.

The case of the petitioner in WP.No.12099 of 2018 is that he was selected and appointed as Health Assistant

in pursuance to the paper advertisement issued by the 4th respondent-municipality in terms of the Council Resolution No.1034, dated 24-01-2005 and accordingly, the proceedings vide Proc.No.F1/419/2005, dated 24-01-2005 were issued by the Chair person, Municipal Council appointing the petitioner as Health Assistant. Subsequently, when the wages were not being paid in terms of the Government Orders, the petitioner filed O.A.No.10887 of 2008 before the Andhra Pradesh Administrative Tribunal (for short "the Tribunal) and the Tribunal granted interim orders dated 26-12-2008 directing the respondents therein to pay basic pay as per GO.Rt. No.217, dated 26-02-2001 and as per Para No.4 of G.O.Ms.No.10, dated 08-01-2008 pending further orders. In pursuance to the same, the Municipal Council unanimously passed Resolution No.30, dated 30-05-2009 to pay the wages due and payable to the petitioner with effect from 24-01-2006 and also resolved to regularize the services of the petitioner w.e.f. 24-01-2006. Subsequently, the said O.A. was disposed of by way of order dated 25-04-2011 directing the respondents therein as follows:

"In these circumstances the 1st and 2nd respondents are directed to send proposals to the District Audit Officer for payment of salaries through Treasuries as per GoMs.No.179, dated 25-02-2009 and also issued GOMs.No.405, dated 23-06-2009 on par with the other employees and also for payment of arrears. This exercise shall be completed within a

period of 4 weeks from the date of receipt of a copy of this order. The OA is accordingly allowed.”

Challenging the same, the respondent-Municipal Council filed WP.No.20329 of 2011 before this Court and the same was dismissed on 21-07-2011. The respondent-Municipal Council filed SLP (Civil) CC.No.7756 of 2012 against the said dismissal order before the Supreme Court. The Supreme Court dismissed the said SLP by its order dated 02-01-2013 directing the 4th respondent-Municipality in WP.No.12099 of 2018 to pay salary to the petitioner and in pursuance to the same, the Government issued G.O.Rt.No.959, Municipal Administration & Urban Development (G1) Department, dated 05-06-2013 permitting the 2nd respondent to authorize the Municipal Commissioner, Mahabubnagar to send the proposals to the District Audit Officer, Mahabubnagar District for payment of arrears to the petitioner from the Treasury under 010 Head of account on par with other employees of municipality. In pursuance to the same, the Special officer & District Collector, Mahabubnagar issued proceedings in Rc.No.C1/4435/2013, dated 28-06-2013 regularizing the services of the petitioner w.e.f. 01-06-2009 and to draw the pay and allowances from Treasury under the Head of Account 010. Subsequently, the 4th respondent-municipality addressed a letter to the 3rd respondent vide Letter Roc.No.C1/9044/2013, dated 05-07-2013 recommending the

case of the petitioner for inclusion in the seniority list of Health Assistants. But when the tentative seniority list was prepared by the 3rd respondent vide Lr.Roc.No.295/2015/A1, dated 26-07-2016 and communicated to the individuals calling for objections, the name of the petitioner was not figured. Then the 4th respondent-Mahabubnagar Municipality addressed a letter in Roc.No.C1/HA/Seniority List/2016, November, 2016 sending proposals to the 3rd respondent for inclusion of names of the individuals, who are working in Mahabubnagar Municipality. The petitioner also filed objection petition to the 3rd respondent dated 27-12-2016 through Mahabubnagar Municipality and requesting the Regional Director to include his name in the seniority list. When the matter stood thus, the 2nd respondent issued promotion orders to four Health Assistants vide Roc.No.733/2017-M1, dated 27-10-2017, but the name of petitioner is not figured in the said list. On that the petitioner filed WP.No.37849 of 2017 for declaring the action of respondents in not including his name in the seniority list and also not promoting him as Sanitary Inspector as arbitrary and the same is pending. But aggrieved by the proceedings, dated 27-10-2017 promoting his juniors, the petitioner filed WP.No.12099 of 2018 and seeking interim direction to consider the case of the petitioner for promotion as Sanitary Inspector in the existing vacancies by taking into consideration of seniority of the petitioner with effect

from 01-06-2009. In the said writ petition, this Court granted interim orders on 10-04-2018 as follows:

“It is noticed in the seniority list filed at page No.40 of material papers that the unofficial respondent was appointed on 28-11-2014, whereas the petitioner’s services were regularized on and with effect from 01-06-2009, in pursuance to the judgment of Administrative Tribunal as confirmed by the High Court and the Apex Court.

Learned counsel for the petitioner says that the petitioner’s name is not included in the panel, though the petitioner is senior to the unofficial respondent.

In view of the same, the respondents are directed to consider the case of the petitioner for promotion to next higher post in the existing vacancies within a period of four months from the date of receipt of a copy of this order.”

In pursuance to the orders referred to above, the Commissioner, Mahabubnagar Municipality by letter dated 20-06-2018 requested the 2nd respondent to take necessary action and the 3rd respondent vide Proceedings No.326/2012/RDMA/A1, dated 13-08-2018 rejected the case of the petitioner. Aggrieved by the same, the petitioner filed WP.No.43878 of 2018.

The 2nd respondent filed counter and vacate petition and 4th respondent also filed counter affidavit in WP.No.12099 of 2018.

The sum and substance of the counter affidavit filed by the 2nd respondent and 4th respondent that they admitted to

the effect that that the petitioner was appointed as claimed by him and also filing of O.A.No.10887 of 2008 before the Tribunal and dismissal of Writ Petition filed by the Municipal Council and confirmed by the Supreme Court. In para Nos 10 and 11, it is stated that appointments for the post of Health Assistant has to be done by Service Commission and the Municipal Council has no power to appoint without the prior permission of the Government and there is ban in respect of appointments of all posts without prior permission of the Government as per the Act 2 of 1994. As such, the Government initiated action on the engagement of the petitioner and the Commissioner and Director of Municipal Administration, Hyderabad vide its letter Roc.No.1287/2012/M3, dated 14-08-2013 sought detailed report from the Commissioner, Mahabubnagar and the report is awaited from the Mahabubnagar Municipality. It is also stated that the petitioner got appointment by influencing the Mahabubnagar Municipal Council. The petitioner obtained earlier orders on contract basis. It is also stated that the petitioner is not a regular employee to be considered for promotion, as he was engaged on contract basis by Municipality and there is no extension for further period as per the records. As per the fundamental rules, only regular employees are to be considered for promotion based on the seniority list available in the concerned department. It is also stated that the Government is competent to issue

regularization orders and that the petitioner has not filed any Government orders regularizing his services and sought for vacating the interim orders.

Since both counsel advanced arguments in the writ petitions, this Court is disposing of the same.

Learned counsel for the petitioner in both the writ petitions submits that the petitioner was appointed after giving advertisement and the Special and District Collector, Mahabubnagar issued Proc.Rc.No.C1/4435/2013, dated 28-06-2013 regularizing his services with effect from 01-06-2009 in terms of Resolution No.30, dated 30-05-2009 as Health Assistant in the existing vacancy. He also submits that when the petitioner was not paid regularly, he filed O.A.No.10887 of 2008 before the Tribunal and the same was allowed and the respondent-Municipal Council filed writ petition and the same was dismissed and as affirmed in the SLP, the Government issued GORt.No.959, dated 15-06-2013 permitting the Commissioner and Director of Municipal Administration to authorize the Municipal Commissioner, Mahabubnagar for payment of salaries. In the said G.O., it is shown that the services of the petitioner were regularized and the amounts under new contributory pension was also deducted from the salary of the petitioner and that he was paid salary under 010 Head of account, from which account regular employees salaries are also being paid. When the orders of the Court become final, the respondents cannot reject the case of the

petitioner for promotion on the ground that he is not a regular employee. He also submits that Act 2 of 1994 has no application, since the appointment of the petitioner was made after issuing the advertisement and by the competent authority i.e. municipal council. As per the Division Bench judgment (**The Commissioner Alwal Municipality, Ranga Reddy District v. N.Danaiah**) passed in WP.No.26580 of 2005, dated 14-12-2005, the Chair person of concerned municipality is the appointing authority of the various classes of employees as contemplated under Sections 73 and 74 of the A.P. Municipalities Act, 1965. He also submits that Act 2 of 1994 has no application, since the appointment made through advertisement, which cannot be termed as illegal appointment. In support of his contention, he relied on the judgment of **State of Karnataka v. M.L.Kesari**¹, wherein, the Supreme Court has held that irregular appointments can be regularized, but not the illegal appointments. As such, the regularization of the petitioner cannot be found fault with.

On the other hand, learned Government Pleader for Services submits that the appointment of the petitioner was in pursuance to the G.O.Rt.No.217, dated 26-02-2001 and G.O.Rt.No.847, dated 27-10-2003 issued by Health, Medical and Family Welfare Department, wherein the committee is constituted and headed by District Collector and appointments have to be made by the said committee,

¹ (2010) 9 Supreme Court Cases 247

as such the Municipal Council has no role to appoint the petitioner and also to regularize his services, when the very appointment is illegal. She also submits that though it is stated that the petitioner was appointed in pursuance to the advertisement issued, no such record is produced. As per the Act 2 of 1994, the Government imposed ban in respect of appointments of all posts without prior permission of the Government. Since the appointment of petitioner itself is in violation of Act 2 of 1994, necessary proceedings were initiated to enquire into the matter and called for the detailed report for taking action against the illegal appointment. Since the appointment of petitioner is on contract basis, he cannot claim the promotion on par with the regular employees.

In this case it is to be seen that admittedly O.A.No.10887 of 2008 was filed by the petitioner, for payment of salaries by treating him as regularly appointed Health Assistant with effect from 24-01-2005, was allowed and Writ Petition No.20329 of 2011 filed by the Municipal Council, Mahabubnagar Municipality was dismissed vide order dated 25-07-2011. Aggrieved by the same, the Mahabubnagar Municipal Council filed SLP (Civil) CC.NO.7756 of 2012 and the same was dismissed by the Supreme Court on 02-01-2013 with the following direction:

“ The petitioners are directed to pay the amount of salary to the respondent within three months and submit a report in the Registry of the High

Court. Thereafter, Registrar (Judicial) shall place the matter before the concerned Bench. If the Bench finds that the petitioners have not complied with the order, then it shall initiate proceedings against the defaulting officers under the Contempt of Courts Act, 1971.”

Admittedly, in pursuance to the orders of the Supreme Court, the Government issued G.O.Rt.No.959, Municipal Administration and Urban Development Department, dated 15-06-2013 accorded permission to pay arrears to the petitioner. In the said G.O. in para No.2 it is stated as under:

“The Chair Person, Mahabubnagar Municipal Council, Mahabubnagar Municipality in his proceedings second read above has passed orders regularizing the services of the applicant w.e.f. 01-06-2009 in terms of C.R.No.30, dated.30-05-2009 as Health Assistant in the existing vacancy with all the benefits, without approval/permission from Higher Authorities/Government.

The Government by stating so permitted the Commissioner and Director of Municipal Administration, A.P.,Hyderabad to authorize the Municipal Commissioner, Mahabubnagar Municipality to send proposals to the District Audit Officer for payment of arrears to the petitioner under 010 Head of Account on par with other employees to show that the order in O.A.No.10887 of 2008 has become final.

Though the learned Government Pleader submitted that permission is accorded by the Government for appointments on contract basis vide G.O.Rt.No.217, dated 26-02-2001, G.O.Rt.No.847, dated 27-10-2003 and the

committee made contract appointments, but the fact remains that the District Collector and Special officer of Mahabubnagar Municipality who is the head of Committee as per G.O.Ms.No.847, dated 27-10-2003 issued proceedings in Procs.Rc.No.C1/4435/2013, dated...06.2013, wherein it reads as follows:

“Sri P.Vajrakumar Reddy, was appointed as Health Assistant w.e.f.24.01.2005. As per directions of the Hon’ble A.P.A.T. Hyderabad dated 26.12.2008 in O.A.No.10887/2008-09, in terms of C.R.No.30, Dated 30.05.2009 and Procs.Roc.No.C1/4750/2008-09, Dated.02.09.2009 of the Chairperson Municipality, Mahabubnagar the services of the individual were regularized w.e.f. 01.06.2009.”

Para No.2 of G.O.Rt.No.847, dated 27-10-2003 issued by the Health, Medical and Family Welfare (J1) Department reads as under:

“ The vacant posts of Municipal Health Officers, available in the Municipal Corporation of Hyderabad and important municipalities (Selection Grade-1, Grade-II) shall be filled up by Health, Medical and Family Welfare Department on priority. In respect of other municipalities which do not have Municipal Health Officers, posts or where the posts are vacant, the municipalities are hereby empowered to engage the services of Municipal Health Officers, on contract basis. The candidate would be selected by the DCC already constituted for selection of medical officers and selected list forwarded to Municipality concerned for contractual appointment.”

From the reading of above, it is clear that municipalities are empowered to appoint Health Officers on contract basis. Even otherwise, as per the judgment of Division Bench of this Court in WP.No.26580 of 2005, dated 14-12-2005 Chair Person is the appointing authority of the various classes of employees, by virtue of declaration under Section 74 of the A.P. Municipalities Act and no permission or approval or sanction for regularization of services is required from the Government. As such, the stand taken by the municipality in the said writ petition is not approved by the Division Bench. In view of the same, it cannot be said that the respondent-municipality has no power to make the appointments and more so, having lost in the O.A., the writ petition and before the Supreme Court, now the respondents cannot say that the petitioner is not a regular employee. One more fact is that the amounts are being deducted towards Contributory Pension Scheme from the salary of petitioner, which is not in dispute. He was paid under 010 Head of account. The relief as per G.O.Ms.No.10, Health, Medical & Family Welfare (J2) Department, dated 08-01-2008 i.e. enhancement of remuneration to those who were appointed in pre-revised pay scales of 2005, was also granted to the petitioner.

Having regard to the above, rejection of the case of the petitioner for promotion vide impugned order dated 13.08.2018 in WP.No.43878 of 2018 is set aside. Since it is

the case of the petitioner that his case has to be considered in the existing vacancy and he is not challenging the appointment of juniors and he does not claim seniority with the Sanitary Inspectors, who were already promoted, the respondents are directed to consider the case of petitioner for entitlement for promotion in the existing vacancy, since his juniors were already promoted, within a period of six weeks from the date of receipt of a copy of this order.

The matter was argued at length on 28-03-2019. At the time of dictating the order, the learned Government Pleader for Services produced G.O.Rt.No.271, Municipal Administration & Urban Development (TPE2) Department, dated 29-03-2019 stating that the Council Resolution No.1034, dated 24-01-2005 and Council Resolution No.30, dated 30-05-2009 passed by the Municipal Council, Mahabubnagar Municipality for contractual appointment and regularizing the services of the petitioner in the post of Health Assistant are cancelled. Learned counsel for the petitioner says that without any notice, said G.O. is issued. In view of the same, it is open to the petitioner to challenge the said G.O.

Accordingly, both the writ petitions are allowed.

The C.C.No.2511 of 2018 filed against the respondents for willful disobedience of the interim orders dated 10-04-2018 in WP.No.12099 of 2018. Since the respondents have considered the case of the petitioner and

passed orders and they also filed vacate petition, I do not see any violation of order passed by this Court and accordingly, the contempt case is closed.

As a sequel to the disposal of these writ petitions and contempt case, miscellaneous applications, if any, pending shall stand closed.

A.RAJASHEKER REDDY,J

29-03-2019

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