

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 25.03.2021

CORAM :

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.569 of 2021

P.Gopi

... Petitioner

Vs.

1. The Registrar,
Pondicherry University,
Puducherry.

2. The Chief Warden,
University Hostels (Boys),
Pondicherry University,
Puducherry.

... Respondents

Writ Petition filed under Article 226 of Constitution of India praying for the issuance of a Writ of Mandamus, directing the Respondents to regularize the services of the Petitioner in the post of Mess Manager-cum-Caretaker with effect from 22.07.2009, the date on which the Petitioner was appointed with all other consequential reliefs including seniority.

For Petitioner : Mr.V.Ajayakumar

For 1st Respondent : Ms.Hema Srinivasan

For 2nd Respondent : No appearance

सत्यमेव जयते
ORDER

Petitioner has come up with this Writ Petition seeking a direction to the Respondents to regularize his services in the post of Mess Manager-cum-Caretaker with effect from the date of his appointment, i.e. 22.07.2009 with all other consequential reliefs, including seniority.

2. According to the Petitioner, who is a physically challenged person, he was appointed on 22.07.2009 as a Mess Manager-cum-Caretaker in Pondicherry University to take care of Boys' Hostel. His employment was on contract basis initially for a period of one academic year commencing 30.04.2010, which

was periodically extended and there was a proposal to regularize three posts of Mess Managers in the Respondent University in the regular scale of pay. It was also stated that, Overtime Allowance will be paid during public holidays on par with the University Electrical Wing Staff. Even though proposals have been forwarded as regards regularization of service, the Petitioner was not regularized in service as Mess Manager-cum-Caretaker. Finally, in the year 2019, it was decided to extend the approval to engage three Mess Managers-cum-Caretakers for Boys Hostel on contract basis for a period of ten months and that, there will be a walk-in-interview inviting qualified candidates through Pondicherry University website as well as advertisement in leading Dailies. It was also decided that, the Petitioner shall not be disturbed and that, he shall continue in service, till the selection process is over.

3. The grievance of the Petitioner is that, having utilized his services for more than a decade, instead of regularizing his service, the Respondent University has taken a decision to relieve him vide proceedings dated 17.12.2020. However, before the Relieving order could be served on the Petitioner, he obtained an interim order from this Court in the present Writ Petition, from divesting off his duties from the present post. The Petitioner has also furnished the Local Delivery Register to show that, pursuant to the orders of this Court, the Relieving order was served on him only on 27.01.2021.

4. It is further stated by the Petitioner that, even though salary was revised periodically by the Committee from the year 2017-18, his services were not regularized. It is his contention that, the action of the Respondent in not regularizing his services, is bad. The Petitioner pleaded that, the date on which the interim order was passed and the subsequent developments may be taken into account and that, the Writ Petition may not be thrown out on the ground that, his services have been terminated.

5. The Respondent University has filed a detailed counter, wherein, it is stated that, the Petitioner was engaged on contract basis only as a temporary measure and the same has been mentioned in his Appointment Order itself, as there is no UGC sanctioned post exclusively for "Mess Manager". Hence, according to the Respondent University, the question of regularization of service does not arise.

6. It is stated by the Respondent University that, the Petitioner has been relieved from the contract engagement vide Relieving Order dated 17.12.2020 issued by the 2nd Respondent and that, he has deliberately refused to receive the same, which has been sent by Speed Post on 13.01.2021, as could be seen from the postal endorsement. However, the Petitioner has received the said information through Whatsapp on 11.12.2020 itself and with

unclean hands, he has approached this Court and obtained an order of interim injunction on 18.01.2021, restraining the Respondent University from terminating his temporary engagement, without disclosing (a) his employment period, which has already come to an end in June 2020 itself (b) that, he was not the only employee who had been terminated and (c) that, the Relieving intimation had been received by him on 11.12.2020. Only after the grant of interim order by this Court, the Petitioner collected the Relieving Order on 27.01.2021, in person. The Respondent University pointed out that, the Petitioner fraudulently avoided to receive the Relieving Letter, knowing fully well that, he had already been terminated on 10.12.2020.

7. It is further stated by the Respondent University that, even though, there was a Notification in the year 2019 for recruitment of "Mess Manager-cum-Caretaker", the same was not proceeded with. Also, due to financial crunch on account of COVID-19 pandemic, all the academic activities of the University were suspended and the Hostel inmates were also informed to vacate the Hostels. Also, the salary of temporary staff was reduced by 50% due to limited workload, on administrative grounds. As the Petitioner was not paid from the funds of the University, but paid from the fees collected from the students, there is no requirement for the post of Mess Manager-cum-Caretaker. Subsequently, the Petitioner, whose contract agreement was periodically extended upto 30.04.2019, was relieved from service vide Letter dated 10.12.2020. It is the contention of the Respondent that, the Petitioner was paid only consolidated wages per month, and, in terms of the conditions of appointment, he does not have any right of conferment of permanent status in the University service.

8. In paragraph 4 of the para-wise Reply of the counter, the Respondent University has vehemently denied that, the Petitioner has been working from the date of engagement till the date of filing of the Petition without any break and that, his contract from the initial date of engagement, i.e. from July 2009, has been extended ten times for a period of ten months, with the break of service, as detailed below:

- a From July 2009 to April 2010
- b From July 2010 to April 2011
- c From July 2011 to April 2012
- d From July 2012 to April 2013
- e From July 2013 to April 2014
- f From July 2014 to April 2015
- g From July 2015 to April 2016
- h From July 2016 to April 2017
- i From July 2017 to April 2018
- j From July 2018 to April 2019

9. Learned counsel appearing for the Respondent University contended that, there are no merits in the Writ Petition and the same is not maintainable, in the light of the decision of the Apex Court in the case of Secretary, State of Karnataka vs. Umadevi, (2006) 4 SCC 45, wherein, it has been categorically held that, it would not be appropriate to jettison the constitutional scheme of appointment and to take a view that, a person, who has been temporarily or casually employed, should be directed to be continued permanently, and by doing so, it will be creating another mode of public appointment, which is not permissible. It was further held 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.

10. In reply, learned counsel for the Petitioner submitted that, the break in service is artificial and that, the Petitioner has received only the proposal to relieve him from service through Whatsapp, and not the actual Relieving Order. Hence, the contention of the Respondent University that, there was communication about the Petitioner's disengagement from service, may not be correct.

11. Heard the learned counsel on either side and perused the material documents available on record.

12. The fact that, the Petitioner was appointed as a Mess Manager-cum-Caretaker in 2009 on contract basis is not in dispute. Similarly, as stated in the counter Affidavit, the Petitioner has been engaged for a period of ten years with break of two months every year, for which 50% of the salary alone was paid. The Petitioner's contract period was extended periodically and it came to an end on 17.12.2020.

13. On a perusal of the material documents, it is seen that, a communication through Whatsapp was made to the Petitioner on 11.12.2020 with regard to the proposal to relieve him from service. But, no actual relieving order was passed. But, the Relieving Order was despatched to the Petitioner and knowing well about the Relieving Order, the Petitioner has dodged in such a way by not receiving the same and after obtaining an interim order from this Court, he has received it in person on 27.01.2021. The Postal cover showing the date of despatch of the Relieving Order and the intimation given to the Petitioner by the Postal Department are filed in the Typed Set of Papers. Hence, the contention that, the Petitioner is not aware about the Relieving Order may not be correct, moreso, when he was employed as a Mess Manager-cum-Caretaker in the Respondent University.

14. However, coming to the issue in the Writ Petition, the Respondent University is an "Industry" in terms of the Industrial Disputes Act, 1947, moreso, in the light of the judgment of the Apex Court in the case of A.Sundarambal vs.

Government of Goa, Daman and Diu reported in 1988 (4) SCC 442. The Apex Court has held that, even though an Educational Institution has to be treated as an "Industry", Teachers in an Educational Institution cannot be considered as "workmen" within the meaning of Section 2(s) of the Industrial Disputes Act, 1947. In the case on hand, the Petitioner is not a 'Teacher', but a 'Mess Manager-cum-Caretaker' covered under the principles of the Industrial Disputes Act, 1947.

15. That apart, even going by the counter Affidavit, there is an artificial break created by the Management of the Respondent University, which is not the fault of the Petitioner. A reading of Section 25(B) of the Industrial Disputes Act, 1947 would make it clear that, the Petitioner was in continuous service. When there is no fault on the part of the Petitioner, the period of break will be taken into account for the purpose of continuous service. That apart, for the break during summer holidays, the Petitioner has been paid 50% of the wages as admitted by the Respondent University.

16. The contention of the Respondent University that, there is no sanctioned post, cannot be accepted. The fact that, they require three Mess Managers-cum-Caretakers and that, there was an advertisement in 2019 to that effect, makes it clear that, there is need of Mess Managers-cum-Caretakers. But, for the exigency, Mess Managers-cum-Caretakers could not be appointed in the Respondent University. When there is a requirement and that, the Petitioner was employed in the Respondent University for years together, even going by the contention of the Respondent University, the Petitioner should have been retrenched from service by paying necessary compensation in terms of Section 25 (F) of the Industrial Disputes Act, 1947 and it is nothing but a case of retrenchment and Section 2(oo)(bb) will not apply to this case. The contract, as pointed out by the Respondent University, is not a contract for service, but, it is a contract of service.

17. In a similar circumstance, the Punjab and Haryana High Court in the case of Balbir Singh vs. Kurukshetra Central Co-operative Bank reported in (1990) 1 LLJ 443, has held as under:

"7. ... Sub-clause (bb) to clause (oo) of Section 2 of the Act, which was added in 1984 by an amendment, cannot be so construed as to drastically restrict the orbit of the term of "retrenchment". Clause (bb) is an exception which must be interpreted narrowly. It cannot be given meanings which may nullify or curtail the ambit of the principal clause. No doubt, the intention of the Parliament in enacting clause (bb) was to exclude certain categories of workers from the term of

retrenchment, but there is nothing in this clause which allows an outlet to unscrupulous employers to shunt out workers in the garb of non-renewal of their contract even when the work subsists. This clause as a whole has to be construed strictly in favour of the workman as far as possible as to ensure that the Act is implemented in letter and spirit. If the termination is meant to exploit an employee or to increase the bargaining power of the employer, then it has to be excluded from the ambit of clause (bb) and the definition of term 'retrenchment' has to be given full meaning. The contractual clause enshrined in clause (bb) cannot be resorted to frustrate the claim of the employee against his uncalled for retrenchment or for denying other benefits. It cannot be so interpreted as to enable an employer to resort to the policy of hire and fire and to confer unguided power on the employer to renew or not to renew the contract irrespective of circumstances in which it was entered into or ignore the nature and extent of work for, which he was employed."

18. In yet another similar circumstance, the Bombay High Court in the case of Dilip Hanumantrao Shirke vs. Zilla Parishad Yavatmal reported in 1990 (I) LLJ 445 Bom, has held as under:

"7. As stated above, the terminations which are included in sub-clause (bb) are those which are brought about either because of non-renewal of the contract or because of expiry of time stipulated in the contract of employment. It needs no further explanation but the probability of the employer exploiting the labour by giving fixed tenure appointments can never be overruled and, therefore, it would be improper and unwise simply to decide the nature of employment on the basis of letter of appointment issued by the employer. The nature of employment will have to be determined with reference to the nature of duties performed by the workman and type of job the workman was entrusted with. If the workman is engaged to do a particular job which may require him to do actual work for more than 240 days in twelve calendar months, such employment would be

covered by the amended sub-clause because the employment comes to an end with the completion of the work. A stipulation in the contract that the employment would be for a specific period or till completion of the work may also fall within the scope and ambit of this sub-clause. But if the employer resorts to contractual employment as a device to simply take it out of the principle clause (00) irrespective of the fact that the work continues or the nature of duties which the workman was performing are still in existence, such contractual engagements will have to be tested on the anvil of fairness, propriety and bona fides. May be that such fixed tenure employments are made to frustrate the claim of the workman to become regular or get himself confirmed as a permanent employee either under the Rules applicable to such employment or even under the Standing Orders. It is always open to the Court adjudicating the dispute to examine each and every case in its proper perspective and to protect the workman against the abuse of the amended provision. If this protection is not afforded, the benefit flowing from retrenchment, to which every termination succumbs, would be rendered nugatory. The amended sub-clause (bb) would apply only to such cases where the work ceases with the employment or the post itself ceases to exist or such other analogous cases where the contract of employment is found to be fair, proper and bonafide. To a certain extent, I am also supported in my view by the decision reported in the case of Shailendra Nath Shukla v. Vice Chancellor, Allahabad University and others 1987 Lab. I.C. 1607."

19. In terms of clause 10 of V Schedule to the Industrial Disputes Act, 1947, if the employer continues to employ a person on temporary basis for years together, with the object of depriving them the privilege and status of permanent workman, it is unfair Labour practice.

20. In this case, there is no third party as a contractor. Students cannot be treated as a contractor employing Mess Manager-cum-Caretaker and they are not the employer. If

students are treated as contractor, it is only a camouflage. The Respondent University received fees from the students to be put in the corpus of the University and thereafter, the amount has been disbursed only by the University. To the question posed by this Court to the learned counsel appearing for the Respondent University, as to whether students are paying directly to the Mess Managers or the amount comes to the corpus of the University and thereafter, it is being paid to the Mess Managers, learned counsel for the Respondent University replied that, the University is paying the amount to Mess Managers after remittance of money by the students.

21. Hence, this Court is of the view that, the action of the Respondent University in not regularizing the services of Mess Manager-cum-Caretaker, is not correct. In view of the same, this Court directs the Respondent University to regularize the services of the Petitioner as Mess Manager-cum-Caretaker, immediately, as he has rendered more than a decade of service.

22. Before parting with the case, this Court deprecates the conduct of the Petitioner, as he has approached this Court with unclean hands, when the latter knew very well about the Relieving Order. He has purposely avoided to receive the Relieving Order, awaited the order of this Court and thereafter, received the said communication in person, on 27.01.2021. Hence, this Court imposes costs of Rs.5,000/- (Rupees Five Thousand only) on the Petitioner payable to Annai Illam, Shree Vijayalakshmi Nagar, Ramanujapuram (Bus Stop Behind), Near Agriculture University, Aruppukottai - 626101, Virudhunagar District.

23. It is made clear that, though regularization of the Petitioner will be done immediately, his past services shall be taken into account for the purpose of grant of all terminal benefits. However, the Petitioner will not be entitled to backwages for the period in question, owing to his conduct and taking note of COVID-19 pandemic situation.

24. It is submitted that, the Petitioner will be allowed to work with effect from 19.01.2021. This Court makes it clear that, the Petitioner will be entitled to wages from the date he resumes his post.

The Writ Petition is allowed with the above direction and observation. No costs. Consequently, connected W.M.P.No.630 of 2021 is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

(aeb)

To:

1. The Registrar,
Pondicherry University,
Puducherry.
2. The Chief Warden,
University Hostels (Boys),
Pondicherry University,
Puducherry.

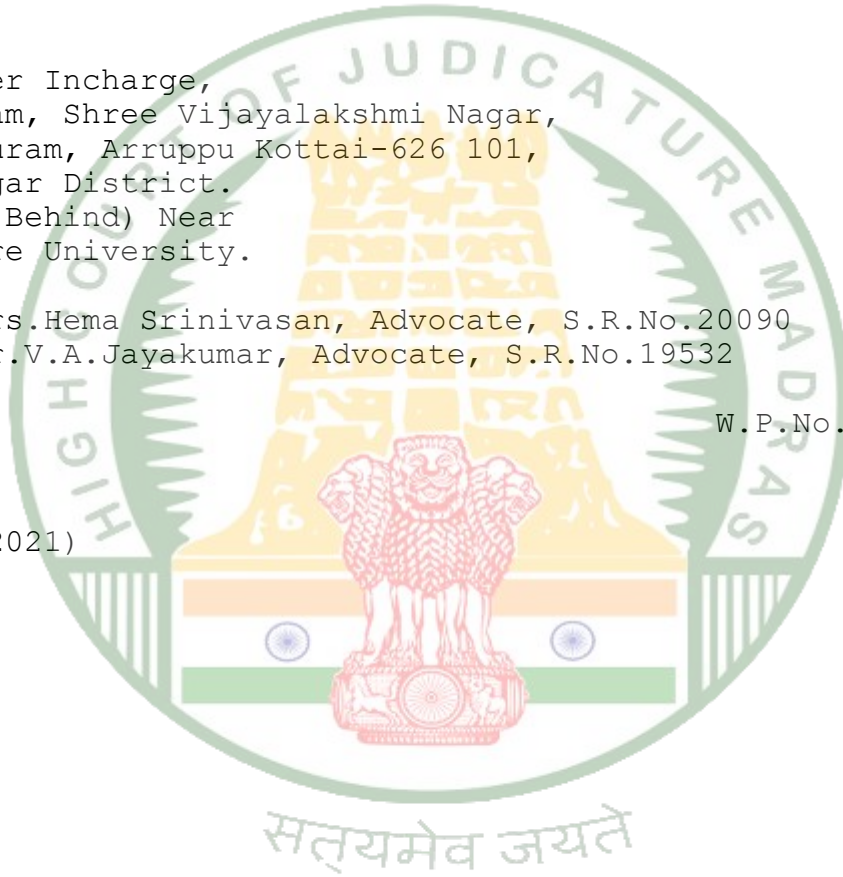
Copy to
The Officer Incharge,
Annai Illam, Shree Vijayalakshmi Nagar,
Ramanujapuram, Arruppu Kottai-626 101,
Virudhunagar District.
(Bus Stop Behind) Near
Agriculture University.

+1cc to Mrs.Hema Srinivasan, Advocate, S.R.No.20090

+1cc to Mr.V.A.Jayakumar, Advocate, S.R.No.19532

W.P.No.569 of 2021

RP (CO)
CB (05/07/2021)



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