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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 14.12.2021

CORAM:

THE HON'BLE MR. JUSTICE M.DURAI SWAMY
AND
THE HON'BLE MR. JUSTICE J. SATHYA NARAYANA PRASAD

W.A.No.1313 of 2014 and
M.P. No.1 of 2014

1. The Secretary to Government,
School Education Department,
Fort St. George, Chennai - 600 009.
 2. The Director of Public Libraries,
Anna Salai,
Chennai - 600 002.
 3. The District Library Officer,
Erode District,
Erode. ... Appellant/Respondent
- v.
- R. Mallika ... Respondent/Petitioner

Writ Appeal filed under Clause 15 of the Letters Patent,
to set aside the order in W.P.No.16338 of 2013, dated 19.06.2013
and thereby allow the Writ Appeal.

Prayer in WP.16338/13: Writ Petition filed under Article 226 of
the constitution of India for the issuance of writ of mandamus
directing the respondents to regulated the services of the
petitioner from the date of completion of 10 years of service
from the date of initial appointment on 01/04/1998 with all
monetary and other consequential services benefits including the
arrears of pay in the revised scale.

For Appellant : Mr. Mr. S.Silambannan,
Addl. Advocate General
Assisted by Mythrrye Chandru
Special Government Pleader



For Respondents : Notice Served-No appearance

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JUDGMENT

(Judgment was delivered by M. DURAISWAMY, J.)

Challenging the order passed in W.P.No.16338 of 2013, the Government has filed the above Writ Appeal.

2. The respondent filed the Writ Petition to issue a Writ of Mandamus, directing the appellants-respondents to regularize the services from the date of completion of 10 years of service from the date of initial appointment on 01.04.1998 with all monetary and other consequential service benefits including the arrears of pay in the revised scale.

3. The respondent, who was working as a part-time or casual employee, has sought for the relief of regularization of service granted to the employees working on daily wages by bringing them into regular establishment on completion of 10 years of service.

4. When the Writ Appeal is taken up for hearing, it has been informed that a subsequent Government Order has been passed in G.O.Ms.No.74, Personnel and Administrative Department, dated 27.06.2013, by which, the Government has decided not to disturb those cases, where orders have already been passed by the competent authority in pursuant to the Government Order passed in G.O.Ms.No.22, P & AR(F) Department, dated 28.02.2006 as well as the orders issued in pursuant to the court direction "where the verdict reached finality".

5.1 Mr. S.Silambannan, learned Additional Advocate General appearing for the appellants submitted that the order passed by the Hon'ble Supreme Court in Civil Appeal Nos. 2730-2731 of 2014 [Secretary to Government, School Education Department, Chennai v. Thiru R.Gondiaswamy and others] will have to be made applicable to this case where orders have been implemented. Further, the learned learned Additional Advocate General submitted that G.O.Ms.No.22, P & AR(F) Department, dated 28.02.2006 is also not applicable to the case of the respondent. Further, the Hon'ble Supreme Court in AIR 2011 SC 1193 [State of Rajasthan and others v. Daya Lal and others] has held as follows :-

"..... 8(i) The High Courts, in exercising power under Article 226 of the



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Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized.

(ii) Mere continuation of service by an temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be 'litigious employment'. Even temporary, ad hoc or daily- wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut off date), it is not possible to others who were appointed subsequent to the cut off date, to claim or contend that the scheme should be applied to them by extending the cut off date or seek a direction for framing of fresh schemes providing for successive cut off dates.



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(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees.

(v) Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute. (Emphasis added)

5.2. Further, the learned Additional Advocate General in support of his contention relied upon a Judgment of the Apex Court, made in Civil Appeal Nos.5689-5690 of 2021 [Union of India and others v. Ilmo Devi and another], dated 07.10.2021, wherein the Apex Court held as follows:-

" 8.4 The observations made in paragraph 9 are on surmises and conjunctures. Even the observations made that they have worked continuously and for the whole day are also without any basis and for which there is no supporting evidence. In any case, the fact remains that the respondents served as part-time employees and were contingent paid staff. As observed above, there are no sanctioned posts in the Post Office in which the respondents were working, therefore, the directions issued by the High Court in the impugned judgment and order are not permissible in the judicial review under Article 226 of the Constitution. The High Court cannot, in exercise of the power under Article 226, issue a Mandamus to direct the Department to sanction and 17 create the posts. The High Court, in exercise of the powers under Article 226 of the Constitution, also cannot direct the Government and/or the Department to formulate a particular regularization policy. Framing of any scheme is no function of the Court



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and is the sole prerogative of the Government. Even the creation and/or sanction of the posts is also the sole prerogative of the Government and the High Court, in exercise of the power under Article 226 of the Constitution, cannot issue Mandamus and/or direct to create and sanction the posts.

8.5 Even the regularization policy to regularize the services of the employees working on temporary status and/or casual labourers is a policy decision and in judicial review the Court cannot issue Mandamus and/or issue mandatory directions to do so. In the case of R.S. Bhonde and Ors. (supra), it is observed and held by this Court that the status of permanency cannot be granted when there is no post. It is further observed that mere continuance every year of seasonal work during the period when work was available does not constitute a permanent status unless there exists a post and regularization is done.

8.6 In the case of Daya Lal & Ors. (supra) in paragraph 12, it is observed and held as under:-

"12. We may at the outset refer to the following wellsettled principles relating to regularisation and parity in pay, relevant in the context of these appeals:

(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 posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularisation of services of an employee which would be violative of the constitutional scheme. While something that is irregular for want of compliance



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with one of the elements in the process of selection which does not go to the root of the process, can be regularised, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.

(ii) Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularisation in the absence of a legal right.

(iii) Even where a scheme is formulated for regularisation with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(iv) Part-time employees are not entitled to seek regularisation as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularisation or permanent continuance of part-time temporary employees.

(v) Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the



8.9 Though, we are of the opinion that even the direction contained in paragraph 23 for granting minimum basic pay of Group 'D' posts from a particular date to those, who have completed 20 years of part-time daily wage service also is unsustainable as the part-time wagers, who are 21 working for four to five hours a day and cannot claim the parity with other Group 'D' posts. However, in view of the order passed by this Court dated 22.07.2016 while issuing notice in the present appeals, we are not quashing and setting aside the directions contained in paragraph 23 in the impugned judgment and order so far as the respondents' employees are concerned.

9. In view of the above and for the reasons stated above, both the appeals succeed. The impugned judgment and order passed by the High Court and, more particularly, the directions contained in paragraphs 22 and 23 in the impugned judgment and order are hereby quashed and set aside. However, it is observed that quashing and setting aside the directions issued in terms of paragraph 23 in the impugned judgment and order shall not affect the case of the respondents and they shall be entitled to the reliefs as per paragraph 23 of the impugned judgment and order passed by the High Court.

With these observations, both the appeals are allowed and in the facts and circumstances of the case, there shall be no order as to costs."

5.3 The learned Additional Advocate General submitted that in view of the ratio laid down by the Hon'ble Supreme Court the Writ Appeal filed by the State has to be allowed.

6. Though notice has been served on the respondent and her name has been printed in the cause list, none appeared for her.



7. On a perusal of the Judgments relied upon by the learned Additional Advocate General, we are satisfied that the issue involved in the present Writ Appeal is covered by the decisions of the Hon'ble Supreme Court. In such view of the matter, the order passed in W.P.No.16338 of 2013 is liable to be set aside. Accordingly, the same is set aside and the Writ Appeal stands allowed. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-VII)

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Sub Assistant Registrar

Rj

To

1. The Secretary to Government,
School Education Department,
Fort St. George, Chennai - 600 009.
2. The Director of Public Libraries,
Anna Salai,
Chennai - 600 002.
3. The District Library Officer,
Erode District,
Erode.

+lcc to the Government Pleader, SR.No.67539

W.A.No.1313 of 2014 and
M.P. No.1 of 2014

SVI (CO)
CB(27/12/2021)