



W.A.No. 959 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Reserved on</i>	<i>Pronounced on</i>
29.03.2023	16.06.2023

CORAM :

THE HON'BLE MR. JUSTICE D.KRISHNAKUMAR

AND

THE HON'BLE MRS. JUSTICE K. GOVINDARAJAN THILAKAVADI

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1. The State of Tamil Nadu,
represented by the Secretary to Government
Rural Welfare (E5) Department,
Fort St.George, Chennai -9.
- 2.The Director/Commissioner,
Rural Development and Panchayat Raj,
Chennai-15.
- 3.The District Collector,
Panchayat Development Wing,
Thanjavur.
- 4.The Block Development Officer,
Thanjavur Panchayat Union,
Thanjavur.
5. The Block Development Officer,
Orathanadu Panchayat Union,
Thanjavur.



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6. The Block Development Officer,
Ammapettai Panchayat Union,
Thanjavur.

7. The Block Development Officer,
Thiruvaiyaru Panchayat Union,
Thanjavur.

.. Appellants

Vs

1. J. Manikandan
2. T. Saravanan
3. M. Parameswaran
4. S. Karthikeyan

.. Respondents

Prayer: Appeal is filed Under Clause 15 of Letter Patent to set aside the order dated 25.04.2019 passed in W.P.No.9073 of 2015.

For Appellants : Mr. P. Anandakumar, AGP

For Respondents : Mrs. Selvi George – R1 to R3

JUDGMENT

(Judgment of the court was made by D. KRISHNAKUMAR, J.)

Challenging the order passed by the learned Single Judge in W.P.No.9073 of 2015 dated 25.04.2019, the instant writ appeal has been filed by the Department.



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Brief facts:

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2.1 The respondents herein were appointed as Road Roller Drivers in the year 2003, 2006 and 2008 at various Panchayat Union. After continuously working for several years, they sought for regularisation of their service based on Government Order in G.O.No. 126 Rural Welfare (E5) Department dated 16.04.1997. As their request was not considered, they approached this Court in W.P.No.20230 of 2012 and sought for directions, directing the respondents therein to regularise their service with effect from the date of their initial appointment. The said writ petition came to be disposed of directing the respondents/appellants herein to consider the case of the petitioners/respondents herein in accordance with G.O.Ms.No. 126, Rural Welfare (E5) Department, dated 16.04.1997, within a period of eight weeks from the date of receipt of a copy of that order.

2.2 Challenging the said order of the learned Single Judge, the respondents/appellants herein have filed Writ Appeal in W.A.No. 1451 of 2014. The Hon'ble Division Bench of this Court by order dated 07.11.2014 disposed of the appeal by extending the time to comply



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with the direction of the learned Single Judge. Thereafter, the 1st appellant herein/Government has passed an order rejecting the petitioners/respondents' herein request of regularization for the reason that they are not having the requisite qualification/eligibility .

2.3. Thereafter, challenging the said rejection order, the respondents herein have filed a writ petition in W.P. No. 9073 of 2015. The learned Single Judge by order dated 25.04.2019, after elaborate discussion of the background of the case, allowed the said writ petition observing that the 1st respondent/1st appellant herein has not chosen to comply with the earlier orders passed by this Court and directed the 1st appellant herein to grant benefits of regularization to the respondents herein, within a period of eight weeks from the date of receipt of a copy of that order. Challenging the same, the instant writ appeal has been preferred by the appellants/department.

3. The learned Additional Government Pleader appearing for the appellants would submit that the G.O.Ms.No. 126, Rural Welfare (E5) Department, dated 16.04.1997 is sanctioned for creating temporary post of road roller drivers in the pay scale of Rs.975-25-1150-30-



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1660 and at later point of time the said sanctioned posts of road roller drivers was not revived by the Government, therefore the post of road roller drivers are no more available in Panchayat Unions.

4. The learned Additional Government Pleader appearing for the appellants would further submit the respondents herein had worked only for a short period of 1375 days, 247 days, 383 days and 129 days respectively during the period from 2003 to 2013 that too not continuously served, but worked on various spells. The respondents herein have already filed writ petition before this Court in W.P.No.17014 of 2014 seeking relief of appointment as permanent jeep driver's and the same was dismissed by this Court by order dated 31.10.2017. The writ appeal in W.A.No. 862 of 2018 filed by the respondents challenging the above order was also dismissed by the Hon'ble Division Bench by judgment dated 20.06.2018. Thereafter, the respondents herein have filed a writ petition in W.P.No. 9073 of 2015, wherein the learned Single Judge by order dated 25.04.2019 has directed the appellants herein to consider the request made by the respondents, which is impugned in the present writ appeal.



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5. According to the learned Additional Government Pleader appearing for the appellants the learned Single Judge without taking note of the Judgment of the Constitutional Bench in the case of State of Karnataka Vs. Umadevi and Others and the Judgment of the Hon'ble Supreme Court in the case of Secretary to Government, School Education Department, Chennai Vs. R. Govindasami, has passed the order in W.P.No. 9073 of 2015, therefore the said order is liable to be set aside.

6. Mrs. Selvi George, learned counsel appearing for the respondents/writ petitioners would submit that the respondents herein were originally employed right from the year 2003 onwards and they are working more than a statutory period, therefore they are entitled for regularisation of services. In the earlier writ petitions filed by the respondents herein, the learned Government Pleader has not raised any objections with regard to regularisation of their services irrespective of their eligibility and also made submission before this Court that the proposal for regularisation is pending consideration before the Government and appropriate orders will be passed by the respondents after taking decision by the Government. Despite the

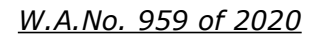


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assurance given by the learned Government Pleader, the respondents had rejected the request of regularisation. The learned Single Judge, in the impugned writ petition filed by the respondent herein challenging the above rejection order passed by the respondent, has categorically observed the findings of this Court and the submissions made by the learned Government Pleader with regard to regularisation of services of the respondents herein and rightly allowed the writ petition giving directions to the appellants herein to regularise the services of the writ petitioners/respondents herein. Therefore, the order of the learned Single Judge is perfectly valid and does not require any interference by this Court.

7. We have heard the rival submissions made by Mr.P.Anandakumar, learned Additional Government Pleader appearing for the appellants and Mrs.Selvi George, learned counsel appearing for the respondents 1 to 3 and perused the materials available on record.

8. A perusal of records would show that the respondents herein have approached this Court by way of writ petitions and writ appeals



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side, the following points needs to be answered by this Court;

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- i. whether the respondents are entitled for regularisation of their service in accordance with G.O.Ms.No. 126, Rural Welfare (E5) Department, dated 16.04.1997.
- ii. whether the above said G.O.Ms.126 mandates the Panchayat Unions concerned to create posts of Road Roller Drivers periodically?
- iii. If so, whether the respondents are entitled to claim benefits as per the said G.O.

11. SUPERNUMERARY POSTS:

11.1. The primordial contention of the respondents/writ petitioners is that they are eligible for regularisation of their service as per G.O.Ms.No. 126, Rural Welfare (E5) Department, dated 16.04.1997. In this regard, it is useful to extract the relevant portion of the said G.O.

"2. In this regard the government has carefully scrutinized it. In the event of appointing the operators under the time scale of pay, to utilize the



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road rollers in full swing and to derive income through it, also enable to maintain it. The Panchayat unions that is operating the road roller machine by appointing the operators under daily wages, which has sufficient funds that to each of them in order to create temporary supernumerary post of operator of Road roller machine in the pay scale of Rs.975-25-115-30-1660, the Government had decided to relax the conditions stated in G.O.No.404 Finance Department dated 16.06.1992 and to grant permission.

3. Accordingly in order to create supernumerary post at the Thiruvudaimaruthur Panchayat Union to operate the road roller machine have already obtained permission and appointed operator on the basis of daily wages and those panchayat union having sufficient funds to appoint an operator to operate, they on temporary basis to create a supernumerary post of operation of road roller machine and to place them under the pay scale of Rs.975-25-1150-30-1660, by relaxing the order made in G.O.No.404 Finance Department dated 16.06.1992 and the government issues order in this regard. "

11.2. The aforesaid G.O. 126, dated 16.04.1997 clearly reveals that the orders were issued is only to create temporary



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supernumerary posts of operator of Road Roller machines in the Panchayat Union which have sufficient funds. The employees who were appointed under the said Government Order were retired and no posts are exists as on date. Further, the respondent herein/writ petitioners who were appointed at a later point of time on daily wages in the year 2003 cannot claim benefits under the said G.O.

11.3. A supernumerary post typically refers to an additional position or job role that is created within an organization, which is not part of the normal hierarchy or established staffing structure. These posts are often created to address temporary staffing needs or to fulfill specific project requirements. Overall, the main purpose to create a supernumerary post is to provide additional resources to an organization in a flexible and cost-effective manner, without the need for permanent increases in staffing levels.

11.4. The Hon'ble Supreme Court in its recent decision with regard to giving directions to the Government to create supernumerary posts, has held as follows; (***In Civil Appeal No. 1951 of 2022, dated 24.03.2022 The State of Gujarat***



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Vs.R.J.Pathan)

"6. The order passed by the learned Single Judge dismissing the writ petition was in the year 2011. The order passed by the learned Single Judge was challenged by the respondents by way of LPA. In the year 2011, the Division Bench granted the interim relief and directed to maintain status quo and pursuant to the said interim order, the respondents were continued in service with the Government. In the year 2021, when the said LPA was taken up for further hearing, it was submitted on behalf of the respondents that as by now the respondents have worked for seventeen years, the State may be directed to absorb them in the Government and their services may be regularised. By observing that as the respondents have worked for a long time, i.e., for seventeen years, the Division Bench has directed the State to consider the cases of the respondents for absorption/regularisation and if required, by creating supernumerary posts. However, while issuing such a direction, the High Court has not at all considered the fact that the respondents were continued in service pursuant to the interim order passed by the High Court. The Division Bench has also not appreciated the fact and/or considered the fact that the respondents were initially appointed for a period of eleven months and on a fixed salary and that too, in a temporary unit – "Project Implementation Unit",



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which was created only for the purpose of rehabilitation pursuant to the earthquake for "Post-Earthquake Redevelopment Programme". Therefore, the unit in which the respondents were appointed was itself a temporary unit and not a regular establishment. The posts on which the respondents were appointed and working were not the sanctioned posts in any regular establishment of the Government. Therefore, when the respondents were appointed on a fixed term and on a fixed salary in a temporary unit which was created for a particular project, no such direction could have been issued by the Division Bench of the High Court to absorb them in Government service and to regularise their services. The High Court has observed that even while absorbing and/or regularising the services of the respondents, the State Government may create supernumerary posts. Such a direction to create supernumerary posts is unsustainable. Such a direction is wholly without jurisdiction. No such direction can be issued by the High Court for absorption/regularisation of the employees who were appointed in a temporary unit which was created for a particular project and that too, by creating supernumerary posts.

7. From the impugned judgment and order passed by the Division Bench of the High Court, it appears that



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what has weighed with the High Court was that the respondents were continued in service for a long time, i.e., seventeen years. However, the High Court has not considered that out of seventeen years, the respondents continued in service for ten years pursuant to the interim order passed by the High Court. Therefore, even considering the decision of this Court in the case of Umadevi (supra), the period for which the employees have continued in service pursuant to the interim order is to be excluded and not to be counted. The High Court has totally missed the aforesaid aspect.

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.....

10. From the impugned order passed by the Division Bench of the High Court it appears that the High Court has observed herein above that in the peculiar facts and circumstances of the case, it is directed that the order of absorption and regularisation and if necessary, by creating supernumerary posts, will not be treated as a precedent in other cases. Even such a direction could not have been passed by the Division Bench of the High Court as there were no peculiar facts and circumstances which warranted the above observation. No such order of absorption and/or regularisation even if required for creating supernumerary posts and not to treat the same as precedent could have been passed by the High Court



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in exercise of powers under Article 226 of the Constitution of India.”

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11.5. In the present case on hand, admittedly, in the above G.O.No. 126, the Government has granted permission to certain panchayat unions which have sufficient funds, which have appointed Road Roller Drivers on daily wages basis to create temporary supernumerary post of operator of Road roller machine by fixing the scale of pay. It is also clear from the above G.O that only the panchayat union which have sufficient funds are only permitted to create temporary supernumerary posts. Though there is no specific submissions by the learned counsel for the respondents with regard to the availability of sufficient funds in the panchayat unions concerned, on the other hand the said G.O also does not mandates the panchayat unions concerned to create the said posts periodically.

11.6. It is stated in the rejection order dated 18.11.2014 passed by the 1st respondent/Government that due to insufficient funds at the panchayat unions, the posts were not subsequently extended and the post has remained vacant for a long time. The respondents herein were appointed at a later point of time only on



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the basis of daily wages and the payment of wages is made in view of
the working days alone and not in accordance with the said G.O.

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11.7. Although the impugned order of the learned Single Judge does not explicitly direct the Government to establish additional positions, the directive to consider the services of the respondents/writ petitioners in accordance with the mentioned G.O, who were initially employed as daily wage workers , indirectly paves the way for the creation of supernumerary posts. This indirect implication of creating supernumerary posts is untenable based on the aforementioned decision of the Honourable Supreme Court cited supra.

11.8. Therefore, in view of the aforesaid decision of the Hon'ble Supreme Court, no such direction can be issued by the High Court for absorption/regularisation of the employees who were appointed in a temporary unit which was created for a particular project and that too, by creating supernumerary posts. On this aspect, the order of the learned Single Judge is liable to be set aside.

12. REGULARISATION OF SERVICES EMPLOYED UNDER NON-SANCTIONED POSTS:

12.1 The respondents were appointed as Road Roller Drivers in



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the year 2003, 2006 and 2008 respectively at various Panchayat Unions as daily wages employees and not under any sanctioned posts. Though they claimed regularisation of service on the ground that they have worked continuously for several years, in view of G.O (M).No. 22, Personal and Administrative Reforms Department, dated 28.02.2006 and subsequent amendment of Government Order in G.O (M).No. 74, Personal and Administrative Reforms Department, dated 27.06.2013, which prescribes that the employees who appointed under daily wages and completed the service of 10 years after 01.01.2006 should not be regularised, the respondents herein have not completed on 10 years of service as per the said G.Os also not entitled for regularisation of service.

12.2 The Constitutional Bench of the Supreme Court of India in respect of the regularisation of the services of the employees in the **STATE OF KARNATAKA AND OTHERS Vs. UMA DEVI (3) & ORS. [(2006) 4 SCC 1]**, and the relevant paragraphs of the same are extracted here under :

"There is no fundamental right in those who have been



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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."

12.3 Undisputedly, in the present case, the respondents herein were employed as daily wages employees on temporary basis and not against any sanctioned posts and also not in accordance with any relevant Rules. In the impugned order, the learned Single Judge without considering the principles laid down by the Hon'ble Supreme Court in the decisions cited supra, has allowed the writ petition filed by the respondents herein and issued positive mandamus directing the appellants herein to regularise the services of the respondents herein. Further more, in the guidelines framed in Government orders in G.O (M).No. 22, Personal and Administrative Reforms Department,



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dated 28.02.2006 and subsequent amendment of Government Order in G.O (M).No. 74, Personal and Administrative Reforms Department, dated 27.06.2013, the Government have prescribed that the services of employees who have engaged as daily wages employees, completed 10 years of service after 01.01.2006 should not be regularised.

12.4 In light of the aforesaid Government Orders, the respondents who were appointed only in the years 2003, 2006 and 2008 respectively at various panchayat unions, which has been admitted by the learned Single Judge at paragraph no. 3 of the impugned order and also by the writ petitioners in their affidavit filed in the writ petition in W.P. No. 9703 of 2015, cannot come under purview of the aforesaid G.O. as they have not completed 10 years of service. On that basis also, the services of the respondents cannot be regularised and the impugned order of the learned Single Judge is liable to be set aside.

12.5 The law laid down by Hon'ble Supreme Court in *Uma Devi* Case cited supra categorically prescribed that the right to be treated



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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.

12.6 In view of the above settled position of law, We are satisfied that the order of the learned Single Judge which has been passed without considering the principles laid down by the Hon'ble Supreme Court cited supra, but based on the statement made by the learned Government Advocate in an earlier writ petition (W.P.No. 20230 of 2012 dated 13.12.2013) and Writ Appeal (W.A.No. 1451 of 2014, dated 07.11.2014) is unsustainable in law and the same is liable to be set aside.

13. COURT CANNOT ISSUE MANDAMUS TO REGULARISE THE SERVICES OF THE TEMPORARY EMPLOYEES:

13.1 It is also relevant to refer yet another decision of the Hon'ble Supreme Court in the case of ***Union of India and Others. Vs. Ilmo Devi and another (Civil Appeal Nos. 5689 & 5690 of***



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2021, dated: 07.10.2021).

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13.2 In the said decision the Hon'ble Supreme Court held that even the regularisation of the services of the employees working on temporary status is a policy decision and in judicial review the Court cannot issue Mandamus to do so. The relevant portion of the decision is extracted hereunder;

"8.4 The observations made in paragraph 9 are on surmises and conjectures. 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 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 and is the sole prerogative of the Government.



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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. "

13.3 In the case on hand, in the impugned order, the learned Single Judge without considering the fact the writ petitioners were employed, only as temporary basis, that too not completed 10 years of continuance service as on 01.01.2006, as per the G.O. 22 & 74, has issued directions to the Government to regularise their services. In view above decision in *Ilmo Devi case*, the Court cannot interfere with the regularisation policy of the Government in respect of employees appointed as temporary posts. On this aspect also, the order of the learned Single Judge is liable to be set aside.



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14. Further, the Hon'ble Supreme Court in a recent judgment in ***Civil Appeal Nos. 10563 to 10570 of 2017, dated 11.04.2023 in the case of The Government of Tamil Nadu & Another Vs. Tamil Nadu Makkal Nala Paniyalargal and Others***, has elaborately discussed its earlier decisions cited supra and held that *"in the absence of sanctioned post, the State cannot be compelled to create the post and absorb the persons who are continuing in service of the State and set aside the judgment of the High Court wherein issued directions to create the posts and absorb the respondents therein, as the same is not sustainable in law"*.

15. On analysing the above facts of the case and the submissions made by the learned counsels of either side, We are satisfied that the initial appointment of the respondents herein/writ petitioners were not made against any sanctioned posts and not in accordance with any service Rules in force. Therefore, We conclude as follows;



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- i. In view of decision of the Hon'ble Supreme Court in the case of ***State of Gujarat Vs.R.J.Pathan*** cited supra, the impugned order of the learned Single Judge giving directions to the Government for absorption/regularisation of the respondents/writ petitioners who were appointed in a temporary unit which was created for a particular project and that too by creating supernumerary posts is unsustainable.
- ii. In view of decision of the Hon'ble Supreme Court in the case of ***State of Karnataka Vs. Uma Devi*** cited supra, the appointment of the respondent/writ petitioners cannot be treated equally with other employees who were regularly employed. Therefore, the respondents cannot claim regularisation of service even by relying the G.O.22 & 74 P& AR Department, dated 28.02.2006 & 27.06.2013, as they have not served prescribed period.
- iii. In view of decision of the Hon'ble Supreme Court in the case of ***Union of India Vs.Ilmo Devi*** cited supra, the High Court cannot issue a Mandamus to direct the department to sanction or create the posts or formulate a particular regularisation policy.

16. In light of the ratio laid down by the Hon'ble Supreme Court in the decisions cited supra, the respondents/writ petitioners



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who were employed as temporarily employees in the non sanctioned posts as road roller drivers in the village panchayats which have sufficient funds at that time, that too for a particular project, and worked for a short period i.e., 1375 days, 247 days and 383 days respectively cannot have any legal right to claim regularisation. Moreover, as discussed in detail above, the G.O. 126, dated 16.04.21997 was issued specifically to create supernumerary posts in certain panchayats, therefore the claim of the respondents/writ petitioners seeking benefits under the said G.O. is untenable and violation of Article 14 and 19 of the Constitution of India.

17. In view of the foregoing discussions and the ratio laid down by the Hon'ble Supreme Court in the decision cited supra, We are of the considered opinion that the impugned order dated 25.04.2019 passed by learned Single Judge, which directed the department to consider the appointment of the respondents/writ petitioners under G.O.No. 126 Rural Welfare (E5) Department dated 16.04.1997, is deemed to require interference by this Court and is liable to be set aside.



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WEB COPY 18. In fine, the order of the learned Single in W.P.No. 9073 of 2015, dated 25.04.2019 is set side. Consequently, the Writ Appeal filed by the State is allowed. No costs. Connected Miscellaneous Petition is closed.

(D.K.K., J.) (K.G.T., J.)
16.06.2023

Index : Yes
Internet : Yes
Speaking Order
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To

1. The Secretary to Government Rural Welfare (E5) Department,
Fort St.George,
Chennai -9.
- 2.The Director/Commissioner,
Rural Development and Panchayat Raj,
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- 3.The District Collector,
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D.KRISHNAKUMAR,J.
AND
K.GOVINDARAJAN THILAKAVADI, J

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Pre Delivery Judgment in
W.A.No.959 of 2020

16.06.2023