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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.07.2023

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**THE HONOURABLE MR.JUSTICE R.MAHADEVAN
AND
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ**

W.A.Nos.1124, 1150 and 1151 of 2021

Arasu Rubber Corporation Limited,
Rep. by its Managing Director,
Vadasery, Nagercoil.

...Appellant in all Writ Appeals

Vs.

1.S.Sundar

2.The State of Tamil Nadu,
Rep. by its Secretary to Government,
Environment and Forest Department,
Secretariat, Fort St.George, Chennai -6 00 009.

3. The Principal Chief Conservator of Forests,
Panagal Building, Saidapet,
Chennai-600 015.

4.The District Forest Officer,
Kanyakumari Division,
Nagercoil, KK District – 629 001.

...Respondents in W.A.No.1124 of 2021

1.P.Denson

1/31



2.The State of Tamil Nadu,
Rep. by its Secretary to Government,
Environment and Forest Department,
Secretariat, Fort St.George, Chennai -600 009.

3. The Principal Chief Conservator of Forests,
Panagal Building, Saidapet,
Chennai-600 015.

4.The District Forest Officer,
Kanyakumari Division,
Nagercoil, KK District – 629 001.

...Respondents in W.A.No.1150 of 2021

1.B.Vickraman

2.The State of Tamil Nadu,
Rep. by its Secretary to Government,
Environment and Forest Department,
Secretariat, Fort St.George, Chennai -6 00 009.

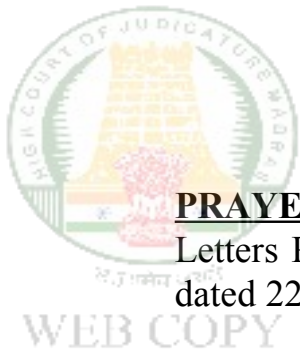
3. The Principal Chief Conservator of Forests,
Panagal Building, Saidapet,
Chennai-600 015.

4.The District Forest Officer,
Kanyakumari Division,
Nagercoil, KK District – 629 001.

...Respondents in W.A.No.1151 of 2021

PRAYER in W.A.No.1124 of 2021: Writ Appeal filed under Clause 15 of the Letters Patent praying to set aside the order of this Court in W.P.No.7070 of 2006 dated 22.12.2011.

PRAYER in W.A.No.1150 of 2021: Writ Appeal filed under Clause 15 of the Letters Patent praying to set aside the order of this Court in W.P.No.5924 of 2006 dated 22.12.2011.



PRAYER in W.A.No.1151 of 2021: Writ Appeal filed under Clause 15 of the Letters Patent praying to set aside the order of this Court in W.P.No.5923 of 2006 dated 22.12.2011.

For Appellant : Mrs.Kavitha Nithyanandan
in all the appeals

For Respondents : Mr.M.Guruprasad for R1
in all the appeals Mr.G.Nanmaran, SGP for R2 to R4

COMMON JUDGMENT

MOHAMMED SHAFFIQ, J.

The short question that arises for consideration in these writ appeals is as to whether the workmen on completion of 480 days of service as Plantation Worker and thus being entitled to permanency in terms of Section 3 of Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981 (hereinafter referred to as “the Permanent Status Act”), can be regularized as Forest Watcher which is a sanctioned post and placed on time scale of pay.

2. Brief facts:

(i) The appellant, which was originally called as Government Rubber Plantations, became Arasu Rubber Corporation Limited (in short “Corporation”), a company fully owned by the Government of Tamil Nadu with effect from



01.10.1984.

(ii) The 1st respondent(s) / writ petitioner(s) (hereinafter referred to as “the workmen”) in these writ appeals viz., S.Sundar, P.Denson and B.Vikraman, joined the services of the Tamil Nadu Forest Department on 18.11.1972, 15.07.1977 and 01.08.1976 respectively.

(iii) The workmen were engaged on daily wages with the Corporation which functioned under the control of Tamil Nadu Forest Department. The workmen worked with the appellant Corporation without interruption.

(iv) While so, seeking a direction to the appellant Corporation to regularize their services as Forest Watcher in the Forest Department with effect from the date of their appointments, the workmen filed O.A.Nos.1351, 1359 and 1350 of 2002 before the Tamil Nadu Administrative Tribunal, Chennai.

(v) On abolition of the Tribunal, the aforesaid original applications were transferred to the file of this Court and renumbered as W.P.Nos.7070, 5924 and 5923 of 2006 respectively. The Corporation, which was not originally arrayed as a party in the original applications, was subsequently, impleaded during the pendency of the writ petitions and they filed a common affidavit in all the writ petitions.

(vi) According to the Corporation, the workmen were engaged on daily wages to protect the rubber plantation and not as a Forest Watcher under the Forest



Department and they were extended the benefit of various legislations such as The Plantation Labour Act 1936, The Tamil Nadu Industrial Employment (National and Festival Holidays) Act 1981, The Employees Provident Fund and Miscellaneous Provisions Act 1952 and The Payment of Bonus Act 1965.

(vii) The workmen were being paid minimum wages as notified by the Government of Tamil Nadu under the Minimum Wages Act.

(viii) The workmen having been in employment for more than three decades were however not granted permanent status nor regularized. The Corporation being an Industrial Establishment in terms of Section 2(3) of the Permanent Status Act and the plantation as defined under the Plantation Labour Act was covered under Section 2(3)(b) under the Permanent Status Act, the workmen claimed that they ought to have been conferred with permanent status.

(ix) In the writ petitions, the workmen stated that they have been in continuous employment for over three decades and thus, in terms of Section 3 of the Permanent Status Act, they ought to have been made permanent.

3. Order of the Writ Court:

By a common order dated 22.12.2011, the aforesaid writ petitions were disposed of, by the learned Judge, on the following findings:



(i) The appellant Corporation is an “industrial establishment” in terms of Section 2(3) of the Tamil Nadu Industrial Establishments Act, 1981.”Plantation” as defined under Plantation Rubber Act is covered under Section 2(3)(b) of the Tamil Nadu Industrial Establishments Act, 1981.

(ii) The appellant having been found to fall within the meaning of “Industrial Establishment”, in terms of Section 3 of the Permanent Status Act, the workmen who were in continuous service for a period of 480 days in 24 calendar months, shall be made permanent.

(iii) The appellant Corporation having admitted that the workmen were in continuous service for more than 30 years, are entitled to be regularized in terms of Section 3 of the Permanent Status to Workmen Act.

(iv) The submission of the appellant Corporation that the workmen can seek remedy under the Industrial Disputes Act and thus, ought not to have bypassed the alternate remedy, was rejected on the premise that the workmen cannot seek remedy under the Industrial Disputes Act, as it was available only in the case of non-employment and that, the individual workman could approach the Labour Court seeking redressal of his/ her grievance.

(v) The learned Judge after having observed that the workmen could approach the authority under the Permanent Status Act, found that the workmen need not be



relegated to approach the authority under the Permanent Status Act in view of the fact that the matter is pending adjudication for over a decade, initially before the Tribunal and thereafter on transfer, before this Court and that, the workmen have admittedly been engaged for over three decades.

(vi) The learned Judge found that the Corporation being an instrumentality of the State, shall behave as a model employer and that, the least that is expected is to ensure that the appellant Corporation does not engage itself in any unfair labour practice in terms of Section 2(r)(a) of the Industrial Disputes Act, 1947 read with Clause 10 of the V Schedule to the said Act.

(vii) The Industrial Disputes Act provides that employing workmen, badlis, casuals, temporaries and continuing them for years and depriving them of the permanent workmen status, would constitute unfair labour practice. The instant case was found to be a classic case of unfair labour practice, in fact, the workmen were engaged / employed by the appellant Corporation for more than 30 years without making them permanent. It was also found by the learned Judge that in the counter affidavit, it was stated by the appellant Corporation that if minimal salary is paid, the same would result in absenteeism and affect the production of rubber.

(viii) The learned Judge found that the Permanent Status Act read with Articles 42 and 43 of the Constitution of India would make it clear that the workmen



were entitled to regularization of their services on the facts of the case.

(ix) It is on the strength of the above findings that the learned Judge directed the Corporation to make the workmen permanent in the last grade of service and grant scale of pay and other benefits applicable to the last grade in the Corporation inasmuch as the workmen had complied with the condition stipulated under Section 3 of the Permanent Status Act.

4. Review Applications:

(i) Seeking to review the order of the learned Judge dated 22.12.2011 passed in the writ petitions, the appellant Corporation preferred Review applications in Rev.Appln.Nos.158 to 160 of 2016 on the premise that they are neither a successor nor have taken over the workmen as Forester which was originally under the control of the Environment and Forest Department and thus, the prayer to regularize the services of the workmen as Forest Watchers in the Forest Department, could not be granted.

(ii) The workmen though admittedly permanent workmen on the rolls of the appellant Corporation coming under the category of “general workers” and its services are governed by the settlement entered into under Section 2(3) of the Industrial Disputes Act periodically on 04.12.1979, 22.11.1988, 27.03.1992,



01.04.1995, 04.09.1995 and 22.10.2008, cannot claim regularization as Forest Watcher. It was also submitted that the service condition of the workmen was governed by the Service Standing Orders, 1970.

(iii) The learned Judge ought to have seen that the reliance placed by the workmen on G.O.Ms.No.892 dated 17.10.1978 in support of their claim for regularization as Forest Watcher, is misplaced inasmuch as the said Government Order does not impose any obligation whatsoever to the appellant Corporation.

(iv) The order of the learned Judge would result in changing the service conditions of the 1st Respondent(s) from that of general workmen category constituting labour force to that of a staff category where the service conditions are entirely different and not covered by any settlements (1979 to 2008).

(v) In view of the above, the direction of the learned Judge to regularize the workmen as a last grade service in the appellant Corporation, suffers from a grave error apparent on the face of the record.

5. However, the review applications came to be dismissed on 19.12.2019 by the learned Judge on the premise that the scope of review is limited and the order under challenge does not suffer from any error apparent on the face of the record and hence, it did not warrant any review.



6. To the contrary, the issues that arise for consideration, require this Court to examine the matter at length and thus would not constitute error apparent warranting interference in exercise of review jurisdiction.

7. It is in these circumstances, the present writ appeals have been filed against the order of the learned Judge dated 22.12.2011 passed in the writ petitions.

8. Contention of the Appellant Corporation:

(i) When the relief sought for by the workmen/ 1st respondent(s) herein was only against the Respondents 2 to 4 herein and not against the appellant Corporation, in the absence of any amendment to the prayer, the writ petitions itself cannot be sustained.

(ii) None of the workmen were engaged as Forest Watchers but only as daily wage workers in the appellant Corporation to protect the Rubber Plantations from theft/ fire etc. Further and more importantly, the nature of work assigned to the workmen was different from that which is assigned to a Forest Watcher in the Forest Department and thus, the direction to regularize the workmen in the post of Forest Watcher by equating the service of the writ petitioners to that of the Forest Watcher in the Forest Department, is without any basis and suffers from error apparent on the



face of the record.

(iii) Though the writ petitioners are entitled to permanent status as workmen in terms of Section 3 of the Permanent Status Act, the learned Judge was not right in directing that the workmen be regularized in the capacity as Forest Watcher inasmuch as the service condition of the 1st respondent(s) / workmen as per the prevailing practice including satisfaction of eligibility criteria, availability of sanctioned post, etc., was not examined by the learned Judge.

(iv) The appellant herein has not committed any unfair labour practice and such assumption of the learned Judge is without basis.

(v) The effect of the direction of the learned Judge is to alter the service condition of the 1st respondent(s) / workmen from being a general workmen into one of managerial or staff category of the Industrial Establishment.

(vi) The workmen are entitled only to daily wages irrespective of the fact, whether they are treated as temporary or permanent workmen; and that, the only difference being that if the workmen were conferred with Permanent Status, they would be entitled to benefits under various other enactments, such as Plantation Labour Act, 1951, the Tamil Nadu Industrial Employment (National and Festival Holidays) Act 1981, the Employees Provident Fund and Miscellaneous Provisions Act 1952, the Payment of Gratuity Act 1972 and the Payment of Bonus Act 1965.



(vii) The Central Wage Board as well as Standing Orders only provide for daily wages payable to the Rubber Plantation workers and therefore, the conferment of permanent status would not automatically result in placing the permanent workmen on a time scale of pay applicable to managerial or staff category.

(viii) The learned Judge ought to have seen that Arasu Rubber Plantation Limited has carried out two types of work force viz., worker category and staff category; and that, the workmen were never engaged as Forest Watchers but engaged only as daily wage workers for protection of rubber plantations from theft, fire etc.

(ix) The thrust of the workmen's argument is on the basis of Section 3 of the Permanent Status Act. It is not in dispute that the workmen/1st respondent(s) have complied with the requirement set out in Section 3 of the Permanent Status Act thereby entitled to permanency. However, their request does not stop with claiming permanency in the position, which they are presently working / engaged viz., Plantation Worker. However, their request, which has been acceded to by the learned Judge is to absorb / regularize the workmen as part of the last grade employee i.e., Forest Watcher.

(x) It is submitted by the learned counsel for the appellant that the Plantation Worker and Forest Watcher are posts which carry different obligations / functions



and their eligibility is also different. In the absence of the workmen possessing necessary qualification for being appointed as Forest Watcher, mere conferment of permanent status would not enable them to claim the post of Forest Watcher. The eligibility criteria for the post of Forest Watcher is governed by the rules framed in exercise of powers under Article 309 of the Constitution of India. Therefore, the learned counsel sought to allow these appeals by quashing the order passed by the learned Judge in the writ petitions.

9. Contention of the 1st respondent(s) / workmen

To the contrary, it is submitted by the learned counsel for the 1st respondent(s) /workmen that the eligibility criteria has been relaxed by G.O.Ms.No.273 dated 26.11.1999 whereby hundreds of Plot Watcher / Social Forestry Workers similarly placed as the 1st respondent(s) herein, have been absorbed/ regularized as Forest Watchers. Therefore, the order of the learned Judge need not be interfered with by this court.

10. Heard both sides. Perused the material available on record.

Analysis

11. It is not in dispute that the 1st respondent(s) herein, who were the writ petitioners, had worked as Plantation workers in the appellant Corporation. It is also



an admitted fact that they never worked under the Forest Department of the State Government. From the beginning, they had all worked in the Government rubber plantations in Kanyakumari, which though initially came under the control of the Forest Department, thereafter, under the direct control of the 4th respondent Corporation from 01.10.1984. The Original Applications filed by the writ petitioners were initially filed in the year 2001 before the Tamil Nadu Administrative Tribunal and later on, transferred to this Court in the year 2006 as Writ Petitions. It is strange that even then, the relief sought for in the writ petitions relate to seeking regularization in the services of the Forest Department and not in the appellant Corporation (4th respondent in the writ petitions / impleaded as R4 on 08.11.2011). On the other hand, the learned Judge has ordered that the services of the writ petitioners may be regularised by the appellant herein on completion of 480 days of service with all monetary benefits by granting them scale of pay and other benefits which are applicable to the last grade in the appellant Corporation, in which they are directed to be placed and made permanent. Therefore, the relief sought for in the writ petitions and the relief as granted in the writ petitions are irreconcilable.

12. Coming to the merits of the case, it has been brought to the attention of this Court that from the very beginning, the writ petitioners were engaged to protect



the rubber plantations from theft, fire, etc. and that, at no point of time, they were engaged as Forest Watcher in the Tamil Nadu Forest Department. The nature of the work assigned to the writ petitioners was different from that which is assigned to a Forest Watcher in the forest department and as such, these two posts cannot be equated. Further, it is the specific contention of the counsel for the Appellant Corporation that the writ petitioners are indeed permanent workmen on the rolls of the Appellant Corporation. However, they are plantation workers coming under the category of “general workers” and their service conditions including wages are governed by settlements entered into under Section 12(3) of the Industrial Disputes Act 1947, which are dated 04.12.1979, 22.11.1988, 27.03.1992, 04.09.1995, 01.04.1995 and 22.10.2008. The counsel for the appellant Corporation also emphatically stated that the only difference between a temporary and permanent plantation workman would be that of entitlement of the several benefits under the different enactments including the Plantation Labour Act 1936, the Tamil Nadu Industrial Employment (National and Festival Holidays) Act 1981, the Employees Provident Fund and Miscellaneous Provisions Act 1952 and the Payment of Bonus Act 1965. The fact that a plantation worker has been conferred permanent status would not mean that he/she would have to be placed on a time scale of pay, which is applicable to other managerial or staff category of employees. With respect to the



workmen being made permanent, the Central Wage Board for the Rubber Plantation Industry, 1966 as well as the Standing Orders are clear that only daily rate of wages are payable to rubber plantation workers based on piece rate system predominant in tapping operations enabling the tappers to tap a minimum number of trees to earn wages proportionate to their work. It is further contended that the order under appeals is incapable of being implemented as it seeks to place the writ petitioners in the last grade of service of the Appellant Corporation, which cannot be done in the case of plantation workmen.

12.1. We find merit in the contentions so made on the side of the appellant Corporation. A reading of the Central Wage Board policy and Section 12(3) settlements annexed in the typed set of papers filed by the Appellant Corporation fortify the position. More importantly, the writ petitioners do not deny the position nor have they been able to show how the writ petitions filed to direct the Forest Department to regularise the services of the writ petitioners as Forest Watchers in the Forest Department with effect from the date of their appointment, could be maintainable when the fact is that they have always worked under the Appellant Corporation, established in 1984, and even prior to that only in the Rubber plantations in Kanyakumari which were technically under the control of the



Forest Department upto 1984. The Original Applications came to be filed only in 2001 and even then, the writ petitioners did not seek any relief as against the Appellant Corporation. It is also to be noted that the relief sought for in the writ petitions is only against the respondents 2 and 3 herein and not against the appellant herein and as such, without there being any amendment of prayer seeking specific relief against the Appellant Corporation, the order of the learned Judge directing that the writ petitioners may be regularised by the appellant herein on completion of 480 days of service with all monetary benefits by granting them scale of pay and other benefits which are applicable to the last grade in the appellant Corporation, is clearly erroneous.

13. Though the learned counsel for the first respondent(s)/workmen referred to G.O.Ms.No.273 dated 26.11.1999 and contended that similarly placed persons were granted such benefits by relaxing the eligibility criteria, the same cannot be countenanced by this court, in view of the fact that plot watchers/ social forestry workers were appointed as forest watchers on finding that they had the necessary qualification prescribed for regular appointment to the post of forest watcher / mali and importantly, it was also found that the absorption of the workers in terms of G.O.Ms.No.273 did not involve creation of new posts. It is trite law that



there must be parity in treatment of workers, who are similarly placed in absorption / regularization subject to the condition that they possess the necessary qualification and the absorption does not require creation of additional post. We say so for the reason that fixation of qualification is the prerogative of the employer and it cannot be relaxed through a judicial process. Further, creation of post also falls within the exclusive domain of the executive and a post must be created or sanctioned before filling it up. In this regard it may be useful to refer to the following judgments:

(A) Fixing qualification - Prerogative of the employer

(i) Punjab National Bank v. Anit Kumar Das, [(2021) 12 SCC 80], in which, it was held by the Hon'ble Supreme Court as under:

“17.3. Thus, as held by this Court in the aforesaid decisions, it is for the employer to determine and decide the relevancy and suitability of the qualifications for any post and it is not for the courts to consider and assess. A greater latitude is permitted by the courts for the employer to prescribe qualifications for any post. There is a rationale behind it. Qualifications are prescribed keeping in view the need and interest of an institution or an industry or an establishment as the case may be. The courts are not fit instruments to assess expediency or advisability or utility of such prescription of qualifications.

(emphasis supplied)

(ii) Sanjay Kumar Manjul v. UPSC, [(2006) 8 SCC 42], wherein, it was observed by the Hon'ble Supreme Court as follows:

“25. The statutory authority is entitled to frame the statutory rules laying down the terms and conditions of service as also the qualifications essential for holding a particular post. It is only



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the authority concerned which can take ultimate decision therefor.

26. The jurisdiction of the superior courts, it is a trite law, would be to interpret the rule and not to supplant or supplement the same.

27. It is well settled that the superior courts while exercising their jurisdiction under Article 226 or 32 of the Constitution of India ordinarily do not direct an employer to prescribe a qualification for holding a particular post.”

(B) Creation of Post – within exclusive domain of the Executive

(i) *State of U.P. v. U.P. Madhyamik Shiksha Parishad Shramik Sangh,*

[(1996) 7 SCC 34], wherein, it was held by the Hon'ble Supreme Court as follows:

"3. It is an administrative procedure that creation of a post is a condition for filling up the post on permanent basis. The exigencies of the administration and the need for the creation of number of posts are matters of executive policy by the appropriate Government. It is stated in the special leave petition filed in this Court that during the examinations conducted by the Board, when the exigencies demand for doing the manual work like lifting of bundles, pasting of envelopes and shifting of answer books etc. the daily wagers are engaged and a sum of Rs 25 per day was being paid as fixed by the District Magistrate of Allahabad under the Minimum Wages Act. Unless the posts are created, they are not entitled to be fitted into any regular post. The performance of the manual duty may be like the duty of regular Class IV employees. However, they are not entitled for the payment of equal wages so long as there are no posts created in that behalf. We can understand that if there are vacant posts available in Class IV and they are filled up by appointing them to these posts on daily wages performing the same duties of regular employees, perhaps there may be justification for issuing directions for regularisation of their services according to rules and payment of the salary to the post to which they are fitted. But in view of the fact that no posts are created or existing, we cannot uphold



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the direction issued by the High Court to pay equal wages or to regularise their services

(emphasis supplied)

(ii) Indian Drugs & Pharmaceuticals Ltd. v. Workmen, [(2007) 1 SCC 408],

in which, it was pointed out by the Hon'ble Supreme Court as follows:

"14. The distinction between a temporary employee and a permanent employee is well settled. Whereas a permanent employee has a right to the post, a temporary employee has no right to the post. It is only a permanent employee who has a right to continue in service till the age of superannuation (unless he is dismissed or removed after an inquiry or his service is terminated due to some other valid reason earlier). As regards a temporary employee, there is no age of superannuation because he has no right to the post at all. Hence, it follows that no direction can be passed in the case of any temporary employee that he should be continued till the age of superannuation.

15. Similarly, no direction can be given that a daily-wage employee should be paid salary of a regular employee vide *State of Haryana v. Tilak Raj* [(2003) 6 SCC 123 : 2003 SCC (L&S) 828] .

16. We are afraid that the Labour Court and the High Court have passed their orders on the basis of emotions and sympathies, but cases in court have to be decided on legal principles and not on the basis of emotions and sympathies.

17. Admittedly, the employees in question in court had not been appointed by following the regular procedure, and instead they had been appointed only due to the pressure and agitation of the union and on compassionate grounds. There were not even vacancies on which they could be appointed. As held in *A. Umarani v. Registrar, Coop. Societies* [(2004) 7 SCC 112 : 2004 SCC (L&S) 918 : AIR 2004 SC 4504] such employees cannot be regularised as regularisation is not a mode of recruitment. In *Umarani case* [(2004) 7 SCC 112 : 2004 SCC (L&S) 918 : AIR 2004 SC 4504] the Supreme Court observed that the compassionate appointment of a woman whose husband deserted her would be illegal in view of the absence of any scheme providing for



such appointment of deserted women.

18. In State of M.P. v. Yogesh Chandra Dubey [(2006) 8 SCC 67 : 2006 SCC (L&S) 1797] this Court held that a post must be created and/or sanctioned before filling it up. If an employee is not appointed against a sanctioned post he is not entitled to any scale of pay.

(emphasis supplied)

Thus, it is clear from the above decisions that prescribing qualification for a particular post is essentially one of the policies to be decided by the executive and it is beyond the realm of the Court jurisdiction to determine the desirability of such prescription; and that, absorption / regularization cannot be claimed unless there is a sanctioned post and there cannot be a direction by the Court to create a post inasmuch as the exercise of creation of post falls within the exclusive domain of the executive.

14. It is also to be noted that any relaxation of the qualification in exercise of the powers under Article 162 of the Constitution of India contrary to the regulation framed under Article 309 of the Constitution of India, is clearly bad. Article 162 cannot be understood to give the executive power to override statutory rules framed under Article 309 of the Constitution. In this regard, it may be relevant to refer to the following judgments:



(i) *Sk. Nausad Rahaman v. Union of India*, [(2022) 12 SCC 1], wherein, it

was held by the Hon'ble Supreme Court as follows:

“29. Fifth, where there is a conflict between executive instructions and Rules framed under Article 309, the rules must prevail. In the event of a conflict between the Rules framed under Article 309 and a law made by the appropriate legislature, the law prevails. Where the rules are skeletal or in a situation when there is a gap in the rules, executive instructions can supplement what is stated in the rules. [Union of India v. Somasundaram Viswanath, (1989) 1 SCC 175, para 6 : 1989 SCC (L&S) 150]

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33. There is a fundamental fallacy in the submission which has been urged on behalf of the appellants. Administrative instructions, it is well-settled, can supplement Rules which are framed under the proviso to Article 309 of the Constitution in a manner which does not lead to any inconsistencies. Executive instructions may fill up the gaps in the rules. But supplementing the exercise of the rule-making power with the aid of administrative or executive instructions is distinct from taking the aid of administrative instructions contrary to the express provision or the necessary intendment of the Rules which have been framed under Article 309. The 2016 RR have been framed under the proviso to Article 309. Rule 5 of the 2016 RR contains a specific prescription that each CCA shall have its own separate cadre. The absence of a provision for filling up a post in the Commissionerate by absorption of persons belonging to the cadre of another Commissionerate clearly indicates that the cadre is treated as a posting unit and there is no occasion to absorb a person from outside the cadre who holds a similar or comparable post.

35. Rule 5 of the 2016 RR postulates that each CCA has a separate cadre and does not contain a provision for bringing in, by way of absorption, persons from outside the cadre. Inducting persons from outside the cadre by absorption requires a specific provision in the subordinate legislation for the simple reason that the concept of a cadre would otherwise militate against bringing in those outside



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the cadre. That is the reason why Rule 4(ii) of the erstwhile 2002 RR contained a specific provision to this effect. That provision has however not been included when the 2016 RR were framed. If the authority entrusted with the power of framing Rules under Article 309 of the Constitution did so on the ground that the provision was subject to misuse and was contrary to the interests of the administration, no employee can assert a vested right to claim an ICT.

(emphasis supplied)

(ii) ***K. Kuppusamy v. State of T.N., [(1998) 8 SCC 469]***, in which, it was observed by the Hon'ble Supreme Court as under :

“3. The short point on which these appeals must succeed is that the Tribunal fell into an error in taking the view that since the Government had indicated its intention to amend the relevant rules, its action in proceeding on the assumption of such amendment could not be said to be irrational or arbitrary and, therefore, the consequential orders passed have to be upheld. We are afraid this line of approach cannot be countenanced. The relevant rules, it is admitted, were framed under the proviso to Article 309 of the Constitution. They are statutory rules. Statutory rules cannot be overridden by executive orders or executive practice.”

(emphasis supplied)

(iii) In ***Union of India v. Ashok Kumar Aggarwal, [(2013) 16 SCC 147]***, it was observed by the Hon'ble Supreme Court as follows:

*“59. The law laid down above has consistently been followed and it is a settled proposition of law that an authority cannot issue orders/office memorandum/executive instructions in contravention of the statutory rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions. (Vide *Union of India v. Majji Jangamayya [(1977) 1 SCC 606 : 1977**



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SCC (L&S) 191] , *P.D. Aggarwal v. State of U.P.* [(1987) 3 SCC 622 : 1987 SCC (L&S) 310 : (1987) 4 ATC 272] , *Paluru Ramkrishnaiah v. Union of India* [(1989) 2 SCC 541 : 1989 SCC (L&S) 375 : (1989) 10 ATC 378 : AIR 1990 SC 166] , *C. Rangaswamaiah v. Karnataka Lokayukta* [(1998) 6 SCC 66 : 1998 SCC (L&S) 1448] and *Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation* [(2011) 5 SCC 435 : AIR 2011 SC 2220] .)

60. Similarly, a Constitution Bench of this Court, in *Naga People's Movement of Human Rights v. Union of India* [(1998) 2 SCC 109 : 1998 SCC (Cri) 514 : AIR 1998 SC 431] , held that the executive instructions have binding force provided the same have been issued to fill up the gap between the statutory provisions and are not inconsistent with the said provisions.

61. In *Nagaraj Shivarao Karjagi v. Syndicate Bank* [(1991) 3 SCC 219 : 1991 SCC (L&S) 965 : (1992) 19 ATC 639 : AIR 1991 SC 1507] this Court has explained the scope of circulars issued by the Ministry observing that it is binding on the officers of the department, particularly the recommendations made by CVC.”

(emphasis supplied)

(iv) In a recent decision in ***ESI Corpn. v. Union of India***, [(2022) 11 SCC

392], in which, it was held by the Hon'ble Supreme Court as follows :

“17. In *P.D. Aggarwal v. State of U.P.* [*P.D. Aggarwal v. State of U.P.*, (1987) 3 SCC 622 : 1987 SCC (L&S) 310] a two-Judge Bench of this Court declined to grant primacy to an office memorandum issued by the Government of Uttar Pradesh which purportedly amended the method of recruitment of Assistant Civil Engineers in the U.P. Public Service Commission without amending the relevant regulations. The Court held : (SCC p. 640, para 20)

“20. The office memorandum dated 7-12-1961 which purports to amend the United Provinces Service of Engineers (Buildings and Roads Branch) Class II Rules, 1936 in our opinion cannot override, amend or supersede



statutory rules. This memorandum is nothing but an administrative order or instruction and as such it cannot amend or supersede the statutory rules by adding something therein as has been observed by this Court in Sant Ram Sharma v. State of Rajasthan [Sant Ram Sharma v. State of Rajasthan, AIR 1967 SC 1910 : (1968) 1 SCR 111] . Moreover the benefits that have been conferred on the temporary Assistant Engineers who have become members of the service after being selected by the Public Service Commission in accordance with the service rules are entitled to have their seniority reckoned in accordance with the provisions of Rule 23 as it was then, from the date of their becoming member of the service, and this cannot be taken away by giving retrospective effect to the Rules of 1969 and 1971 as it is arbitrary, irrational and not reasonable.”

15. Thus, we are of the opinion that mere fact that there has been relaxation in the past by itself cannot be a reason to extend the same relaxation to the case of the workmen / 1st respondent herein, as it is trite law that Article 14 of the Constitution of India does not provide for equality in illegality. One cannot take shelter under Article 14 of the Constitution, which is a positive concept. In this regard it may be relevant to refer to the following judgments:

(i) ***South-Eastern Coalfields Ltd. v. Prem Kumar Sharma*, [(2007) 14 SCC 508]**, wherein, the Hon'ble Supreme Court held as under:

“9. The concept of equality as envisaged under Article 14 of the Constitution of India is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual



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or group of individuals the others cannot claim the same illegality or irregularity on the ground of denial thereof to them. Similarly, wrong judgment passed in favour of one individual does not entitle others to claim similar benefits.

10. In this regard this Court in Gursharan Singh v. New Delhi Municipal Committee [(1996) 2 SCC 459] held that citizens have assumed wrong notions regarding the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court. The Court observed : (SCC p. 465, para 9)

“9. ... Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination.”

12. In State of Haryana v. Ram Kumar Mann [(1997) 3 SCC 321 : 1997 SCC (L&S) 801] this Court observed : (SCC p. 322, para 3)

“3. ... The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them i.e. benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing misappropriation of money, is



dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality under Section 14 for reinstatement? The answer is obviously 'No'. In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right."

(emphasis supplied)

(ii) ***State of M.P. v. Ramesh Chandra Bajpai, [(2009) 13 SCC 635]***, in

which, it was held by the Hon'ble Supreme Court as follows:

"17. It is also well settled that Article 14 of the Constitution carries with it a positive concept of equality. That article cannot be invoked for perpetuating illegality. To put it differently, an illegal or wrong order passed in one case cannot be made the basis for compelling a public authority to pass similar order in other cases. Even if the State implements an erroneous order passed by the court, it cannot be precluded from challenging similar order passed in another case, simply because appeal was not preferred in the earlier case.

18. In Govt. of W.B. [(2004) 1 SCC 347 : 2004 SCC (L&S) 225] the Court upon noticing a large number of decisions, observed: (SCC pp. 357-58, paras 25 & 28)

"25. In a case of this nature, the courts are required to determine the issue having regard to larger public interest. It is one thing to say that in a given case the High Court or this Court may not exercise an equitable jurisdiction under Article 226 or Article 136 of the Constitution of India, but it is another thing to say that the courts shall grant a relief to a party only on the ground that a contention which is otherwise valid would not be raised on the ground that the same was not done in



earlier proceedings.

28. In the aforementioned situation, the Division Bench of the Calcutta High Court manifestly erred in refusing to consider the contentions of the appellants on their own merit, particularly, when the question as regards difference in the grant of scale of pay on the ground of different educational qualification stands concluded by a judgment of this Court in *Debdas Kumar [State of W.B. v. Debdas Kumar, 1991 Supp (1) SCC 138 : 1991 SCC (L&S) 841 : (1991) 17 ATC 261]*. If the judgment of *Debdas Kumar [State of W.B. v. Debdas Kumar, 1991 Supp (1) SCC 138 : 1991 SCC (L&S) 841 : (1991) 17 ATC 261]* is to be followed, a finding of fact was required to be arrived at that they are similarly situated to *Debdas Kumar [State of W.B. v. Debdas Kumar, 1991 Supp (1) SCC 138 : 1991 SCC (L&S) 841 : (1991) 17 ATC 261]* which in turn would mean that they are also holders of diploma in Engineering. They admittedly being not, the contention of the appellants could not be rejected. Non-filing of an appeal, in any event, would not be a ground for refusing to consider a matter on its own merits (See *State of Maharashtra v. Digambar [(1995) 4 SCC 683]*.)”

19. In *State of Jharkhand v. Manshu Kumbhkar [(2007) 8 SCC 249 : (2007) 2 SCC (L&S) 879]* this Court held: (SCC p. 251, para 11)

“11. Reliance by the High Court on the order passed in *Sanjay Kumar case [Ed.: See paras 6 and 7 of Manshu Kumbhkar case, (2007) 8 SCC 249 : (2007) 2 SCC (L&S) 879.]* was thoroughly misconceived. It is to be noted that LPA was dismissed on the ground of delay. Even otherwise, merely because mistake had been committed in one case, there is no rational for perpetuating that mistake, even when the same is illegally impermissible.”

20. In *M.D. University v. Jahan Singh [(2007) 5 SCC 77 : (2007) 2 SCC (L&S) 118]* this Court observed: (SCC p. 84, para 28)

“28. Even assuming the respondent and the said Shri Taneja were similarly situated, we may observe that Article 14 of the



Constitution of India carries with it a positive concept. Article 14 of the Constitution cannot be invoked, for perpetuating illegality. (See Kuldeep Singh v. Govt. of NCT of Delhi [(2006) 5 SCC 702])”

Conclusion

16. Applying the aforesaid legal position to the facts of the present case, wherein, the first respondent(s) do not possess the necessary qualification to be appointed as Forest Watchers and Section 3 of the Permanent Status Act, does not in any manner provide for regularization / absorption to a post, for which the workmen do not possess the necessary qualification by relaxing the qualification to the post to which permanency is sought, we are of the opinion that the order of the learned Judge to absorb/ regularize the first respondent(s) / workmen without examining / finding as to whether they possessed the necessary qualification and whether there were sanctioned posts, which are vacant, cannot be allowed to be sustained. Further, when it is the specific case of the appellant that the writ petitioners had been made permanent and that, they had received all the connected benefits and also retired with all terminal and other benefits due to them as early as in 2014 and 2018, the claim of the first respondent(s) / writ petitioners cannot be considered at all.



17. In such perspective of the matter, all these writ appeals are allowed and the order under appeal is set aside. No costs.

[R.M.D., J.] [M.S.Q.,J.]

13.07.2023

Index: Yes/No

Speaking/Non Speaking Order

Neutral Citation: Yes/No

Shk/mka

To

1.The Secretary to Government,
Environment and Forest Department,
Secretariat, Fort St.George, Chennai -6 00 009.

2. The Principal Chief Conservator of Forests,
Panagal Building, Saidapet,
Chennai-600 015.

3.The District Forest Officer,
Kanyakumari Division,
Nagercoil, KK District – 629 001.



R.MAHADEVAN, J.
and
MOHAMMED SHAFFIQ, J.

Shk/mka

W.A.Nos.1124, 1150 and 1151 of 2021

13.07.2023