



W.P(MD).Nos.10739 & 10740 of 2023

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDER RESERVED ON : 28.11.2023

ORDER PRONOUNCED ON : 12.12.2023

**CORAM:
THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR**

**W.P.(MD).Nos.10739 & 10740 of 2023
and WMP(MD).Nos.9454 & 9457 of 2023**

1.V.KanagamaniPetitioner in WP(MD).No.10739 of 2023

2.S.KalavathiPetitioner in WP(MD).No.10740 of 2023

Vs

1.The Government Additional Chief Secretary
The Principal Secretary to Government
Rural Development and Panchayat Raj Development
Secretariat, Chennai

2.The Project Director
Kanyakumari District Rural Development Agency
Collectorate Complex
Nagercoil-1
Kanyakumari District

3.The District Collector/Chairman of DRDA
Collectorate Complex
Nagercoil-1
Kanyakumari District

...Respondents in both petitions

Common Prayer: These Petitions have been filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for



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the records of the relating to the impugned order of the first respondent in Letter No.11333/E5(2)/2020-4 dated 05.04.2021 and quash the same and consequently directing the respondents to regularize the service of the petitioner in time scale of pay from the date of appointment on 02.12.1985.

(In both petitions)

For Petitioners : Mr.R.Maheswaran

For Respondents : Mr.Veera.Kathiravan
Additional Advocate General
Assisted by
Mr.T.Villavan Kothai
Additional Government Pleader

COMMON ORDER

The present writ petitions have been filed by the Sanitary Workers working in the third respondent office challenging the order of the first respondent wherein their request for regularisation for their services with effect from 02.12.1985 had been rejected.

2(A).The facts leading to the filing of the writ petition are as follows:

(i)The petitioners herein were originally appointed as Sanitary Workers in the third respondent office in the year 1985 and they made a request to the third respondent for regularising their services. The third respondent had rejected their request by an order dated 11.04.2017 on the ground that they



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are part time sweepers and hence, they are not eligible for any regularisation.

The said order was challenged by the writ petitioners in WP(MD).Nos.15808 and 15809 of 2018. This Court by an order dated 14.02.2019 had allowed the writ petitions. The operative portion of the order in paragraph No.7 is extracted as follows:

“7.In line with the judgment of the Division Bench of this Court as well as the order of the Hon'ble Supreme Court, the impugned orders dated 11.04.2017 are hereby set aside. The respondents are directed to pass appropriate orders in terms of the judgment passed by the Division Bench of this Court in W.A(MD).No.193 of 2018, dated 27.03.2018, after affording an opportunity of hearing to the petitioners, within a period of eight weeks from the date of receipt of a copy of this order.”

(ii)The order of the learned Single Judge was challenged by the State before the Hon'ble Division Bench by filing W.A(MD).Nos.989 and 990 of 2019. The Hon'ble Division Bench was pleased to dismiss the writ appeals. The operative portion of the order in paragraph No.24 is extracted as follows:

“24.It is also to be noted at this juncture that so far, the writ petitioners have rendered nearly more than 30 years of continuous service without any blemish or stigma and in the light of the recommendation made by the second respondent and also in the light of the observations made in this judgment, the concerned authorities/official respondents shall pass appropriate orders in accordance with law. It is further made clear that if any positive



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order is passed regularising the services of the private respondents/writ petitioners, the actual monetary benefits shall be from the date of Government Orders and further for the purpose of pension and other benefits, it should be notionally calculated from the date of regularization. This judgement is being passed in the peculiar circumstances of the case and as such, it cannot be cited as a precedent for regularisation of part-time employees or for salary or remuneration of the said employees, which is paid out of contingent fund.”

(iii)After Division Bench order, the District Collector recommended for regularization by an order dated 08.01.2021. However, the first respondent herein under the impugned order dated 05.04.2021 had rejected the request of the writ petitioners primarily on the ground that the petitioners were working in the District Rural Development Agency in a non-sanctioned post. In view of the rejection order, the petitioners herein filed Contempt Petition (MD).Nos.824 and 837 of 2021.

(iv)While the contempt petitions were pending, the District Collector had passed an order appointing the writ petitioners on a special time scale of pay in Melasankarankuzhy Panchayat and Erachakulam Panchayat with effect from 07.05.2013. This Court was pleased to dispose of the contempt petitions on 19.07.2021. The relevant portion of the said order in paragraph Nos. 3 to 5 are extracted as follows:



“3.It at all the petitioners are aggrieved by the order of rejection, they should challenge the order. Seeking for regularization of a part time employment is not a vested right. In the discretion, they may take step for regularisation, but the Court will not be justified in issuing direction to regularise the services of a person who is working on part time basis.

4.Mr.Veera Kathiravan, learned Senior Counsel for the State Government pointed out that though such a plea for regularisation has been rejected, the District Collector, Kanyakumari District by proceedings dated 01.07.2021, has allowed the petitioners to work as Sweepers in Melasankarankuzhy Panchayat and Erachakulam Panchayat respectively in Special Time Scale of Pay and they are continuing. In such circumstances, there is no disobedience much less willful disobedience to the directions issued in the Writ Appeal.

5.In view of the above, these Contempt Petitions are closed with liberty to the petitioners to challenge the order of the first respondent dated 05.04.2021, if so advised.”

(v)Not being satisfied with the closure of the contempt petitions, the petitioners herein filed Sub Applications(MD).Nos.172 and 173 of 2021 in Contempt Petition(MD).Nos.824 and 837 of 2021 to reopen the contempt proceedings. This Court by an order dated 18.11.2022 had closed the said applications granting liberty to the petitioners to challenge the order dated 05.04.2021. The operative portion of the said order in paragraph No.2 is extracted as follows;



“2.A cursory perusal of the order dated 19.07.2021 passed in the above contempt petitions, shows that this Court did not find the disobedience much less willful disobedience on the part of the respondents to the directions issued in the common judgement dated 31.07.2020 in W.A(MD).Nos.989 & 990 of 2019, since the petitioners were allowed to work as Sweepers in the respective Panchayats even though their plea for regularisation of service was rejected. Further, it is seen that the petitioners have been granted liberty to challenge the order dated 05.04.2021, passed by the first respondent, rejecting the petitioners' plea for regularisation of service, if so advised. When a categorical finding has been given by this Court in the order dated 19.07.2021 that there is no willful disobedience on the part of the respondents, the question of reopening the hearing the contempt petitions once again does not arise at all.”

(vi) Thereafter, the petitioners have chosen to challenge the order of the first respondent dated 05.04.2021 in the present writ petitions.

3(B).Contentions of the learned counsel appearing for the writ petitioners are as follows:

(i) The petitioners were appointed in the year 1985 as full time temporary employees as Sweepers on a consolidated pay scale. Therefore, the contention of the authorities that they are part time Sweepers is not correct.

(ii) The petitioners were appointed in the retirement vacancies and in the sanctioned post after being sponsored by the Employment Exchange.



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(iii) A learned Single Judge as well as the Hon'ble Division Bench have categorically considered the issue of part time employment and they have arrived at a specific finding that the nature of employment of the writ petitioners is not part time in nature, but it is a full time job. Once the Division Bench had arrived at such a finding, thereafter, the authorities cannot turn around and contend that it is a part time job.

(iv) For the first time, in the impugned, it has been contended by the authorities that they are appointed in a non-sanctioned post in the District Rural Development Agency. No such submission was ever made in the previous round of litigation.

(v) Though the petitioners were appointed on a special time scale of pay by the District Collector by an order dated 01.07.2021, it has been given effect only from 07.05.2013. Therefore, the petitioners will not be benefited in any way by the said order, in view of the fact that they are employed from the year 1985 onwards. Hence, the petitioners are not willing to take up the said post. Hence, he prayed for allowing the writ petitions and for issuing a direction to the authorities to regularise their service with effect from their initial date of appointment and to confer all monetary benefits.

4(C).Contentions of the learned Additional Advocate General are as follows:

(i) The petitioners were employed as part time Sanitary Workers in the



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District Rural Development Agency (DRDA). The DRDA has been created only for the purpose of implementation of the Government Schemes. Therefore, it does not fall within the scope of Government employment. At no point of time, the petitioners were ever appointed to a sanctioned post.

(ii) All the employees to DRDA were drawn from the District Collectorate or from other departments for implementation of various State and Central Government Schemes. Therefore, there are no sanctioned post or Service Rules for DRDA.

(iii) The petitioners cannot cite the Government Orders in which the temporary employees have been regularised. All those regularizations were based upon a scheme announced by the Government. Since there are no sanctioned vacancy and DRDA is only a Scheme implementing authority, there is no scheme for regularising the said employees. In fact, the appointment of the writ petitioners in the non-sanctioned post under the scheme has been raised even during the writ appeal stage.

(iv) The petitioners are insisting for regularisation of their services only in DRDA which is not permissible in law. In order to implement the orders of this Court, the District Collector had appointed the petitioners in the Village Panchayats on a special time scale of pay. The petitioners have not shown any inclination to accept the said offer and the petitioner in WP(MD).No.10740 of 2023 namely Kalavathi had got superannuated on 31.07.2021. The



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petitioners heavily relied upon the order of the Division Bench of this Court in W.A(MD).Nos.989 and 990 of 2019. However, this Court was pleased to hold that the present impugned order passed by the first respondent cannot be treated as a contempt. Therefore, the petitioners cannot seek to get an order of regularisation when there is no sanctioned post or any Scheme for regularisation. Hence, he prayed for dismissal of the writ petitions.

5.I have considered the submissions made on either side and perused the material records.

(D).Discussion:

6.It is not in dispute that the petitioners are employed as Sanitary Workers from the year 1985 onwards in DRDA Office. The fact that it is an agency for implementing the Government Scheme is also not in dispute. The Hon'ble Division Bench of this Court in W.A.(MD)Nos. 989 and 990 of 2019 dated 31.07.2021 had issued a positive direction to the authorities to regularise the services of the writ petitioners. However, under the impugned order dated 05.04.2021, the first respondent had rejected the request of the writ petitioners on the ground that they were appointed in a non-sanctioned post. Two Division Bench of our High Court have rejected the attempt made on the side of the writ petitioners for initiating contempt proceedings as against the first respondent for passing the order dated 05.04.2021.



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7.In order to comply with the orders of this Court, the District Collector namely the third respondent herein has taken earnest step by passing an order dated 01.07.2021 wherein the petitioners have been appointed as Sweepers in the Village Panchayat on special time scale of pay in Melasankarankuzhy Panchayat and Erachakulam Panchayat with effect from 07.05.2013. However, the petitioners are not satisfied with the said order and insist upon their appointment in DRDA as discussed supra. It is clear that DRDA is a Scheme Implementing Agency and therefore, they are no sanctioned post in the said agency. The staff in the said agency are drawn from various other departments whose schemes are sought to be implemented.

8.When there are no sanctioned post, this Court cannot direct the creation of post and thereafter regularise the services of the writ petitioners. The Hon'ble Supreme Court in a judgment reported ***in (2008) 1 SCC 683 (Divisional Manager, Aravali Golf Club and another Vs. Chander Hass and another)*** in paragraph No.15 has held as follows:

“15. The Court cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the Court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organisation. This Court has time and again pointed out that the creation of a post is an executive or legislative function and it



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involves economic factors. Hence the Courts cannot take upon themselves the power of creation of a post. Therefore, the directions given by the High Court and First Appellate Court to create the posts of tractor driver and regularize the services of the respondents against the said posts cannot be sustained and are hereby set aside. “

9.The Hon'ble Supreme Court in a judgment reported in **2023 SCC Online SC 393 (Government of Tamil Nadu and another Vs. Tamil Nadu Makkal Nala Paniyalargal and others)** in paragraph No.57 has held as follows:

“57. We are of the considered view that the direction of the High Court to reinstate after creating the posts and absorb the respondents based on their qualification is not sustainable in law and deserves outright rejection.”

10.The Hon'ble Supreme Court in a judgment reported in **(2022) 5 SCC 394 (State of Gujarat and others Vs. R.J.Pathan and others)** in paragraph No.11 has held as follows:

“11. 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.



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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.”

Conclusion:

11.In view of the judgements of the Hon'ble Supreme Court cited supra, this Court is of the considered opinion that the petitioners have been appointed in District Rural Development Agency which is a Scheme Implementing Agency in a non-sanctioned post, would not be entitled to get absorbed in a regular vacancy. It is for the petitioners to take a call whether to accept the order of the third respondent dated 01.07.2021 appointing them under the special time scale of pay with effect from 07.05.2013 onwards. There are no merits in the writ petitions. The writ petitions stand dismissed. No Costs. Consequently, connected miscellaneous petitions are closed.

12.12.2023

Internet : Yes/No
Index : Yes/No
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R.VIJAYAKUMAR, J.

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Pre-delivery order made in

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