

(2010) 02 MAD CK 0143

In the Madras High Court

Case No : Writ Petition No. 19465 of 2003 and W.P.M.P. No. 24306 of 2003

K. Subramanian

APPELLANT

Vs

The Secretary to Government, Rural Development
Department, The Director of Rural Development, The District
Collector and The Commissioner, Panchayat Union

RESPONDENT

Date of Decision : 17-02-2010

Acts Referred:

Citation : (2011) 8 RCR(Criminal) 1918

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : S.M. Subramaniam, for the Appellant; S. Anitha, G.A. for RR1 to 3
and M.S. Palanisamy, for R4, for the Respondent

Final Decision : Allowed

Judgement

M. Venugopal, J.—This writ petition is filed for issuance of a writ of certiorarified mandamus, in calling for the records in pursuant to the

order of the first respondent in Lr. No. 47729/E7/2000-5 dated 19.3.2002 and the consequential order of the third respondent in Proc.Na.Ka.

No. 45/2000/Ni 3 dated 16.5.2002 and to quash these orders and consequently, direct the respondents to regularise the services of the petitioner

with effect from his initial date of appointment on 5.8.87 in the time scale of pay and to pay the arrears and other consequential service benefits.

2. The petitioner was appointed as Night Watchman as per the appointment order dated 28.7.1987 on compassionate ground since his father A.

Kandasamy, who was working as Office Assistant expired, while in service. The petitioner joined in service on 5.8.87. In the said appointment

order dated 28.7.1987, it was mentioned by the third respondent/District

Collector that the petitioner's appointment was mentioned as a temporary one.

3. As per G.O.Ms. No. 878 Rural Development and Local Administration Department dated 15.5.1981, the appointment of persons under contingent establishment was abolished and all the employees previously working under contingent establishment were brought under regular establishment in time scale of pay. Accordingly, the petitioner's services were regularised in the regular post of Night Watchman as per G.O.Ms.

No. 161 Rural Development Department dated 26.6.2000 and the petitioner's services were regularised with effect from 5.8.1997 and received the time scale and arrears of pay with effect from 5.8.1997 and now working as a regular employee.

4. The third respondent/District Collector in his proceedings Ni.Mu. No. 363/2000/Ni3 dated 5.1.2000 had regularised the services of the petitioner from 5.8.1987 and he was directed to be paid the salary and the outstanding amount thereto. Further, consequent upon the G.O.Ms.

No. 161 Rural Development (E7) Department dated 26.6.2000, the services of the petitioner were regularised by the third respondent in his proceedings in Na.Ka. No. 45/2000/Ni3 dated 25.7.2000 and he had also mentioned the date of regularisation is after completion of ten years ie., 5.8.1997.

5. While, this being so, the petitioner received the impugned letter dated 19.3.2002 from the first respondent stating that the regularisation already given in G.O.Ms. No. 161 Rural Development (E7) Department dated 26.2.2000 on completion of ten years of service in the contingent establishment could not be given and instead ordered that the regularisation be given to 171 persons (including the petitioner) from the date of the Government order.

6. The learned Counsel for the petitioner submits that the impugned order dated 19.3.2002 passed by the first respondent was without notice or opportunity to the petitioner and therefore, the same was in violation of principles of natural justice. Pursuant to the impugned order dated 19.3.2002 issued by the first respondent, the third respondent had passed the impugned order dated 16.5.2002 requesting the fourth respondent to send revised proposals in respect of the regularisation of the Night Watchman.

7. The stand of the respondents 1 to 3 is to the effect that the petitioner was appointed as Night Watchman on a compassionate ground by the third respondent/District Collector in proceeding dated 28.7.1987 and that he joined the service on the forenoon of 5.8.1987 and the scheme of compassionate ground appointment was introduced in the year 1972 as per G.O.Ms. No. 225 Labour Department dated 15.2.1972 and the said scheme was extended to all employees of Panchayat Unions in G.O.Ms. No. 1684 Rural Development and Local Administration Department dated 18.7.1974 and further as per G.O.878 Rural Development and Local Administration Department dated 15.5.1981, the contingency appointment was banned from 1.4.1981 and as seen from paragraph 7 of the above said Government Order, the contingent employees appointed after 1.4.1981 were brought into the time scale of pay only after completion of 10 years of contingency service and since the Government Order of introduction of compassionate ground appointment, there was no prohibition regarding the mode of appointment and therefore, the petitioner was appointed on contingency basis. Further, the petitioner's educational qualification was 7th standard but the time scale of pay for the post of Office Assistant require the minimum educational qualification of 8th standard passed and if the petitioner had requisite qualification of 8th standard, he might have been appointed in the regular time scale post i.e., Office Assistant and since his qualification was only 7th standard, he was appointed in existing contingency Night Watchman post in the Puduchatram Panchayat Union.

8. Added further, as per G.O.Ms. No. 878 Rural Development and Local Administration Department dated 15.5.1981, the contingent employees appointed after 1.4.1981 were brought under regular establishment only after completion of ten years of contingency services and therefore, the petitioner was brought into regular establishment and his services were regularised with effect from 5.8.1997 with time scale of pay as per G.O.Ms. No. 161 Rural Development Department dated 26.6.2000 and also as per G.O. No. 161 Rural Development Department dated 26.6.2000, the petitioner was received arrears of pay and allowances with effect from 5.8.1997 in the time scale of pay.

9. That apart, because of the service of the petitioner was brought into regular establishment, he is now receiving his pay in the time scale of pay

and pension and other terminal benefits and therefore, this was a great concession to him and similarly placed him for his livelihood and therefore,

the Government in Lr. No. 47729/E7/200-5 Rural Development Department dated 19.3.2002 directed that the individuals, who were brought into

regular establishment, were eligible to be get their pay in the time scale of pay only from the date of issue of the Government Order and also

informed that arrears of pay also be given only from 26.6.2000 and not from 5.8.1997 in the case of the petitioner and therefore, as per direction

of the Government Lr. No. 47729/E7/2000-5 Rural Development Department dated 19.3.2002, steps to be taken to recover the excess pay

already received by the petitioner for the period from 5.8.1997 to 26.6.2000 and therefore, prays for dismissal of the writ petition.

10. In the counter filed by the fourth respondent, a plea was taken that the service of the petitioner with effect from 5.8.1997 as per G.O.Ms. No.

161 Rural Development Department dated 26.6.2000 was regularised and the Government in Letter No. 47729/E7/2000-5 dated 19.3.2002 had

instructed to fix the pay of regularised employee with effect from 26.6.2000, the date of the Government order and not from the date of

regularisation and as such the petitioner could not claim that he was entitled to pay on regularised basis from 5.8.1997 and more over, the arrears

of pay already fixed and arrears of pay already paid has to be recovered from the petitioner, since the payment was made contrary to the

Government orders and therefore, prays for dismissal of the writ petition.

11. At this juncture, the learned Counsel for the petitioner cites the decision of the Hon"ble Supreme Court reported in The Direct Recruit Class-II

Engineering Officers" Association and others Vs. State of Maharashtra and others, wherein it is held as follows:

Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to

the date of his confirmation. The corollary of the above rule is that where the initial appointment is only adhoc and not according to rules and made

as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till

the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard, they must ordinarily be followed strictly.

If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In

case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that

the quota rule had broken down.

Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the

procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source

inducted in the service at a later date.

Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such

relaxation when there is a deviation from the quota rule.

The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive

instruction has ceased to remain operative.

The posts held by the permanent Deputy Engineers as well as the Officiating Deputy Engineers under the State of Maharashtra belonged to the

single cadre of Deputy Engineers.

The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than

scrutinised for finding out any possible error. It is not in the interest of service to unsettle a settled position.

12. The pith and substance of the contention of the learned Counsel for the petitioner is that the petitioner was appointed by means of appointment

order in Na.Ka. No. 97773/87-Ni6 dated 28.7.1987 issued by the District Collector, Salem and later was regularised with effect from 5.8.1987

as per proceedings of the third respondent in Ni.Mu. No. 363/2000/Ni3 dated 5.1.2000 and now the first respondent issued the impugned order

in Lr. No. 47729/E7/2000-5 dated 19.3.2002 to the effect that 171 Night Watchmen after completion of ten years of service, they could not be

fixed in the time scale and paid the outstanding salary amount and therefore was directed to fix the time scale of pay from the date of G.O. No.

161 Rural Development Department dated 26.6.2000 which could not be done per se in the eye of law, because of the simple fact that the

petitioner was continuing in the post of Night Watchman without any interruption and moreover his services were regularised by the third

respondent/District Collector as per proceedings in Ni.Mu. No. 363/2000/Ni3 dated 5.1.2000 and at the distance of time, it was not open to the

first respondent to upset apple cart and therefore the same was liable to be quashed to prevent an aberration of justice.

13. It is to be noted that recovery from pay is a civil consequence and no recovery of pay on account of mistaken over payment could be made

without reasonable opportunity being provided by means of a notice to the affected. It is also the law where the detection of an error was not

within a reasonable period of time, no claim for recovery of such over paid sums could be made as opined by this Court. Also, the recovery of

over payments to an employee by the State on account of its own mistake would not be recovered from an employee as per decision of Hon''ble

Supreme Court Bhagwan Shukla v. Union of India AIR 1994 SC 1480.

14. At this juncture, this Court pertinently points out in Union of India and Others Vs. Shri Ram Gopal Agarwal and Others, , the Hon''ble

Supreme Court noticing that recovery orders caused hardship held that such recovery could not be effected. Moreover, as the effect of recovery

was a deprivation, the issuance of show cause notice was a must and further once a pay was fixed and drawn for years there would not be any

recovery on the ground of mistake in fixation. The query, a Court of law is to answer is whether it will be equitable to uphold the order of

recovery?.

15. This Court aptly recalls the decision of Hon''ble Supreme Court The State of Karnataka and Another Vs. Mangalore University Non-Teaching

Employees Association and Others, wherein it is held that "if additional payment

was made to an employees for no fault of theirs, they should not penalised.

16. If regularisation of services was in accordance with the relevant statutory provisions, the services rendered prior to such regularisation will have to be counted towards discrimination of seniority in the considered opinion of this Court.

17. On a careful consideration of respective contentions and on an overall assessment of the facts and circumstances of the present case on hand

and also in the light of the decision of the Hon'ble Supreme Court cited supra, this Court comes to the inevitable conclusion that the petitioner is to

be regularised from his first appointment as Night Watchman i.e., from 5.8.1987 by the competent authority and in that view of the matter, the

order of the first respondent in Lr. No. 47729/E7/2000-5 dated 19.3.2002 and the consequential order of the third respondent in Proceeding

Na.Ka. No. 45/2000/Ni 3 dated 16.5.2002 are unsustainable in the eye of law and accordingly they are quashed.

18. In the result, this writ petition is allowed, the order of the first respondent in Lr. No. 47729/E7/2000-5 dated 19.3.2002 and the consequential

order of the third respondent in Proceeding Na.Ka. No. 45/2000/Ni 3 dated 16.5.2002 are quashed. It is made clear that the arrears of pay

received by the petitioner from 5.8.1987 till the issue of G.O. No. 161 Rural Development Department dated 26.6.2000 shall not be recovered by

the fourth respondent to subserve the ends of justice. Connected W.P.M.P. is closed.