
(2010) 11 MAD CK 0417

In the Madras High Court

Case No : Writ Petition (MD) No's. 4814 of 2007, 1682, 7160, 7202, 7224, 7235, 8701, 8651, 11394, 11398, 11434, 11441 and 11445 of 2008 and M.P. (MD) No's. 2, 3 and 4 of 2007, 3, 1, 2, 1, 2, 1, 2, 1, 2, 1, 1, 2, 3, 1, 2, 3, 1, 2, 3, 1, 2, 3, 1, 2 and 3 of 2008

S. Muthukumar and Others

APPELLANT

Vs

Government of Tamil Nadu and Others

RESPONDENT

Date of Decision : 10-11-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 309, 315

Citation : (2010) 11 MAD CK 0417

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : M. Jothi Basu, in WP MD No. 1682/2008, G. Thalaimutharasu, in WP MD No. 7160, 7202, 7224, 7235, 8701, 11394, 11398, 11434, 11441 and 11445 of 2008, S. Bharathy Kannan, in WP MD No. 8651/2008 and Priya Ravi, in WP MD No. 4814 of 2007, for the Appellant; V. Chellammal Moorthy, Additional Advocate General Assisted by and S.C. Herold Singh, GA, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—In these writ petitions, (except in W.P.(MD)Nos.4814 of 2007, 1682, 8701 and 8651 of 2008), the challenge is to the order of the first Respondent State Government in G.O. Ms. No. 34 Highways (HK3) Department, dated 29.01.2008 and after setting aside the same, the Petitioners are seeking for a consequential direction to consider their case for appointment to the post of Road Inspector-Grade II or any other equivalent post in the Highways Department.

2. In W.P.(MD)Nos.4814 of 2007 and 1682 of 2008, the challenge is to the impugned order, dated 18.4.2007 passed by the first Respondent, under which the Government informed the Chief Engineer (General), Highways Department that the department should seek for candidates from the employment exchange for filling up the posts of Road Inspectors. Therefore, the said order directing him

to call for names from the employment exchange on the basis of 1:1 came to be challenged in both these writ petitions and for a consequential direction to consider the Petitioners' case for the posts of Road Inspectors Grade II.

3. In the other two writ petitions, i.e. W.P.(MD)Nos.8701 and 8651 of 2008, the prayer is for a direction to the Respondent to consider and pass orders on the written representation made by the Petitioner dated 24.01.2008 for appointment to the post of Road Inspector Grade-II/Overseer or any other equivalent post in the light of the order passed by this Court in W.P.(MD) No. 202/07 and batch etc. dated 09.05.2007 and also for a direction to the Respondents 1 to 3 herein to appoint the Petitioner as Road Inspector grade II in any one of the existing three vacancies now available in the Respondent department with effect from 23.1.2008 with consequential benefits. All these writ petitions were grouped together and a common order is passed.

4. Heard the arguments of M/s.G. Thalaimutharasu, M. Jothi Basu, S. Bharathy Kannan and Priya Ravi, learned Counsel for the Petitioners and Mrs. V. Chellammal Moorthy, learned Additional Advocate General assisted by Mr. S.C. Herold Singh, learned Government Advocate appearing for the Respondents.

5. In W.P.(MD) Nos.7160, 7202 and 7224 of 2008, the Respondents have filed counter affidavits. In the counter affidavit filed in W.P.(MD) No. 1682 of 2008, it was stated that G.O. Ms. No. 22, P&AR Department, dated 28.2.2006 will not apply to the Petitioners and for any employment in the Government, as per G.O. Ms. No. 65, Labour & Employment (N2) Department, dated 30.3.2007, the same will have to be filled up only through employment exchange. Even as per the Special Rules in G.O. Ms. No. 9, Highways Department, dated 5.1.2007, the post of Road Inspector will have to be filled up only in accordance with the recruitment rules. In W.P. (MD)Nos.4814 of 2007 and 1682 of 2008, the Petitioners have not challenged the special rules as was done in the other case.

6. The Government Order under challenge, i.e.G.O. Ms. No. 34, Highways (HK3) Department, dated 29.1.2008 is an amendment to the Special Rules for the Tamil Nadu Highways Engineering Subordinate (Work Charged) Service made under Article 309 of the Constitution of India. The amendment provides the ratio between the direct recruitment and recruitment by transfer from among the holders of the post of Gang Mazdoor belonging to the Tamil Nadu Basic Service at the ratio of 3:1. It also provides that if no suitable persons are available in the category of Gang Mazdoor, even those vacancies will be filled up by direct recruitment. The amended rule also prescribed educational qualification for direct recruitment as well as for recruitment by transfer. The reason for making the said amendment is set out in the G.O., which is as follows:

In the G.O. third read above, orders have been issued amending the Special Rules for the Tamil Nadu Highways Engineering Subordinate (Work Charged) Service to the effect that no person shall be eligible for appointment by direct recruitment to the post of Road Inspector Grade-II unless he has passed SSLC

and a certificate in ITI draftsman or ITI surveyor course. In the letter fourth read above, the Chief Engineer (General) has requested that 75% of the total vacancies in the post of Road Inspector may be filled up by direct recruitment and remaining 25% by recruitment by transfer from the post of Gang Mazdoor. The Chief Engineer (General) has also requested that Rule 4(b) of the Special Rules for the Tamil Nadu Highways Engineering Subordinate (Work Charged) Service may be amended to the effect that the Gang Mazdoors, who have completed 5 years of service and gained technical knowledge in road work and possessing the educational qualification of old SSLC (11th Std.) or +2 from a recognized school are eligible for appointment as Road Inspector Grade-II. He has also suggested that if no eligible persons are available in the post of Gang Mazdoor then those posts may also be filled up by direct recruitment in the same year. 2. The Government have examined the proposal of the Chief Engineer (General) and decided to accept the same. Accordingly, the Government direct that 75% of the vacancies in the post of Road Inspector Grade-II shall be filled up by direct recruitment and the remaining 25% by recruitment by transfer from the post of Gang Mazdoor included in the Tamil Nadu Basic Service. The Government also order that if no qualified persons are available in the post of Gang Mazdoor then the vacancies earmarked to them should also be filled up by direct recruitment in the same year. Accordingly, the following amendments are issued to the Special Rules for the TamilNadu Highways Engineering Subordinate (Work Charged) Service.

7. Therefore, it can be seen that in the earlier G.O., i.e.G.O. Ms. No. 9, Highways Department, dated 5.1.2007, it provided minimum educational qualification for appointment by direct recruitment for the post of Road Inspector. Subsequently, recommendations were made by the Chief Engineer to accommodate the Gang Mazdoors who have completed 5 years of service and have gained technical knowledge in road work and those who are having minimum qualification of SSLC can also be eligible for appointment. Therefore, the Petitioners by attacking the said G.O. do not gain any advantage in respect of their present grievance. Even the rule which existed before the impugned order did not consider that employment in which the Petitioners were engaged had been recognized as a feeder category in the said post.

8. By the impugned order all that it has been done was that a ratio has been prescribed between the direct recruitment and transfer and that additionally, Gang Mazdoors" experience was equated to the educational qualification prescribed for direct recruitment. It is not clear as to why the Petitioners have chosen to impugn the service rules made under Article 309 of the Constitution, especially when they do not belong to any of the category mentioned in the service rules and they are rank outsiders to the said rules. The rule made under Article 309 of the Constitution in respect of the services under the State is legislative in character and it can be tested only with the touchstone of Articles 14 and 16 of the Constitution. The amendment to the existing service rules cannot give any cause of action to the Petitioners to come before this Court.

Hence the challenge to the said G.O. is misconceived.

9. Mr. Thalaimutharasu, learned Counsel for some of the writ Petitioners submitted that the Petitioners have been working as NM Rs (Nominal Muzdoor Roll) for number of years and in the other Government departments, the Government had taken a policy decision to regularise them in the regular post and that only in the Highways Department, such concession is not extended. Even in respect of Class IV employees, the Government had taken a policy decision in terms of G.O. Ms. No. 22, P&AR Department, dated 28.2.2006 providing regularizing of employees who worked for various Government departments for more than 10 years as on 1.1.2006. Therefore, non regularizing the Petitioners by evolving suitable policy, the employees of the Highways Department are discriminated. In the various typed sets filed by them, they have enclosed some service certificates given by various officers. At some point of time, details of their employment were also called for from the Chief Engineer's office.

10. However, the Petitioners themselves have admitted that they were not recruited through any employment exchange and they were working on daily wages basis. They do not belong to any constituted service under the State Government. In some of the representations, they have also stated that from the year 2008, their salaries are paid in the name of Contractors and not borne on the roll of the department. Pending writ petitions, in some of the cases, this Court also directed one post of Road Inspector to be reserved. Therefore, the counsel submitted that there is no impediment for regularizing them.

11. The learned Counsel placed heavy reliance upon an unreported judgment of this Court in W.P.(MD) No. 11660 of 2006 and batch cases in P. Sudalaimuthu and Ors. v. The Secretary to Government, Rural Development and Panchayat Raj Development, Secretariat, Chennai-9 and Ors., dated 09.05.2007, wherein in respect of panchayat department, this Court directed the Government to consider their absorption in regular posts. The learned Counsel also stated that the Petitioners having worked for several years as NM Rs have legitimate expectation of getting absorbed into the regular Government service.

12. Per contra, Mrs.V. Chellammal Moorthy, learned Additional Advocate General, submitted that in the matter of public employment, the question of legitimate expectation will not arise and any person can be appointed only in terms of regular recruitment rules. In this context, she relied upon a judgment of the Supreme Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, . She referred to the following passage found in paragraph 47 of the said judgment which is as follows:

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in

nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

13. With reference to evolving Government policy for absorbing these persons, the learned Additional Advocate General heavily relied upon Umadevi's case (cited *supra*). While the Petitioners placed reliance upon paragraph 5 of the said judgment, she stated that the said passage cannot be tone out of context. In Umadevi's case (cited *supra*) itself, the Supreme Court in paragraph No. 11 had observed as follows:

11. In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment. Buttressing these fundamental rights, Article 309 provides that subject to the provisions of the Constitution, Acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the instrumentalities that come within the purview of Article 12 of the Constitution. With a view to make the procedure for selection fair, the Constitution by Article 315 has also created a Public Service Commission for the Union and the Public Service Commissions for the States. Article 320 deals with the functions of the Public Service Commissions and mandates consultation with the Commission on all matters relating to methods of recruitment to civil services and for civil posts and other related matters. As a part of the affirmative action recognised by Article 16 of the Constitution, Article 335 provides for special consideration in the matter of claims of the members of the Scheduled Castes and Scheduled Tribes for employment. The States have made Acts, rules or regulations for implementing the above constitutional guarantees and any recruitment to the service in the State or in the Union is governed by such Acts, rules and regulations. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

14. The learned Additional Advocate General also stated that when subsequent attempts were made to distinguish the Constitution Bench judgment of the Supreme Court in Umadevi's case, the said attempts were frowned upon by the subsequent judgments. In this context, she also relied upon several other decisions of the Supreme Court. However, it is unnecessary to list out all of them

as they laid down very same principles of law. It is suffice to refer to few decisions.

15. In Union of India (UOI) and Another Vs. Kartick Chandra Mondal and Another, , in paragraph 25, the Supreme Court had observed as follows:

25. Even assuming that the similarly placed persons were ordered to be absorbed, the same if done erroneously cannot become the foundation for perpetuating further illegality. If an appointment is made illegally or irregularly, the same cannot be the basis of further appointment. An erroneous decision cannot be permitted to perpetuate further error to the detriment of the general welfare of the public or a considerable section. This has been the consistent approach of this Court. However, we intend to refer to a latest decision of this Court on this point in State of Bihar v. Upendra Narayan Singh, the relevant portion of which is extracted hereinbelow: (SCC p.102, para 67)

67. By now it is settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing wrong order....

(A reference in this regard may also be made to the earlier decisions of this Court. See also (1) Faridabad CT Scan Centre v. D.G. Health Services; (2) South Eastern Coalfields Ltd. v. State of M.P.; and (3) Maharaj Krishan Bhatt v. State of J and K.)

16. Subsequently, the Supreme Court in State of Karnataka and Others Vs. Ganapathi Chaya Nayak and Others, rejected the demands for regularization basing upon certain passages. In paragraphs 7 and 8 of the said judgment, it was observed as follows:

7. Subsequent to the aforesaid decision, the issue again arose for consideration before a three-Judge Bench of this Court in Official Liquidator v. Dayanand wherein this Court, in paras 68 and 116, observed as follows: (SCC pp.44 & 67)

68. The abovenoted judgments and orders encouraged the political set-up and bureaucracy to violate the soul of Articles 14 and 16 as also the provisions contained in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 with impunity and the spoils system which prevailed in the United States of America in the sixteenth and seventeenth centuries got a firm foothold in this country. Thousands of persons were employed/engaged throughout the length and breadth of the country by backdoor methods. Those who could pull strings in the power corridors at the higher and lower levels managed to get the cake of public employment by trampling over the rights of other eligible and more meritorious persons registered with the employment exchanges. A huge

illegal employment market developed in different parts of the country and rampant corruption afflicted the whole system.

116. In our opinion, any direction by the Court for absorption of all company-paid staff would be detrimental to public interest in more than one ways. Firstly, it will compel the Government to abandon the policy decision of reducing the direct recruitment to various services. Secondly, this will be virtual abrogation of the statutory rules which envisage appointment to different cadres by direct recruitment.

8. In view of the settled position of law in this regard which has been reiterated in a number of judgments of this Court, we hold that the claims of the Respondents for regularisation or absorption cannot be sustained. Accordingly, we allow the appeals and set aside the orders passed by the High Court as also KAT.

17. Thereafter, the Supreme Court in *Satya Prakash and Others Vs. State of Bihar and Others*, once again reiterated similar contentions and in paragraphs 14 and 15, it was observed as follows:

14. Allowing the appeal preferred by the Commercial Taxes Department, this Court set aside the directions given by the High Court for regularisation of services of those daily-wage employees who had more than 10 years of service. The Court held as follows:

(*Umadevi (3)* case¹, SCC p.43, para 55)

55. ... We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that is being paid to regular employees be paid to these daily-wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily wage earners, there would be no question of other allowances being paid to them. In view of our conclusion, that the courts are not expected to issue directions for making such persons permanent in service, we set aside that part of the direction of the High Court directing the Government to consider their cases for regularisation. We also notice that the High Court has not adverted to the aspect as to whether it was regularisation or it was giving permanency that was being directed by the High Court. In such a situation, the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent. If sanctioned posts are vacant (they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. But when regular recruitment is undertaken, the Respondents in C As Nos. 3595-612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some

weightage for their having been engaged for work in the Department for a significant period of time.

(Emphasis supplied)

15. In our view, the Appellants herein would fall under the category of persons mentioned in paras 8 and 55 of the judgment and not in para 53 of the judgment in Umadevi (3)¹.

In the light of the above, learned Additional Advocate General submitted that the Petitioners' case do not deserve any merit and it is liable to be rejected.

18. Though Mr. Thalaimutharasu, learned Counsel for the Petitioners stated that this Court should give direction to the State Government to formulate a policy by taking sympathetic attitude, however, this Court is unable to countenance such a prayer in the light of the binding legal precedents set out above. Therefore, in the light of the above factual matrix and the legal precedents referred to above, this Court is not inclined to entertain any of the writ petition. Hence all writ petitions will stand dismissed. However, there will be no order as to costs. Consequently, connected miscellaneous petitions stand closed.