IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

FRIDAY, THE 2ND DAY OF DECEMBER 2022 / 11TH AGRAHAYANA, 1944

WP(C) NO. 26934 OF 2022

PETITIONERS:

1 TINTU K.
AGED 40 YEARS
W/O.A.JOBY, ATTENDER, AYUSH NHM HOMEO DISPENSARY, MANANTHAVADY MUNICIPALITY, WAYANAD - 670 645, RESIDING AT ALINKAL HOUSE, MANANTHAVADY P.O., WAYANAD - 670 645.

2 BEENA VICTOR
AGED 40 YEARS
PART TIME SWEEPER, AYUSH NHM MOMEO DISPENSARY, MANANTHAVADY MUNICIPALITY, WAYANAD - 670 645, RESIDING AT PATHIVAYAL HOUSE, MANANTHAVADY P.O., WAYANAD - 670 645.

BY ADVS.
KALEESWARAM RAJ
SHILPA SOMAN
THULASI K. RAJ

RESPONDENTS:

1 UNION OF INDIA
REPRESENTED BY SECRETARY, MINISTRY OF HEALTH AND FAMILY WELFARE, NEW DELHI - 110 011.

2 STATE OF KERALA
REPRESENTED BY SECRETARY, LOCAL SELF GOVERNMENT DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM - 695 001.

3 DIRECTOR OF URBAN AFFAIRS
URBAN AFFAIRS DEPARTMENT, SWARAJ BHAVAN,
NANTHANCODE, KOWDIAR P.O., THIRUVANANTHAPURAM - 695 003.

4 DIRECTOR OF PANCHAYATH
DIRECTORATE OF PANCHAYATH, PATTOM,
THIRUVANANTHAPURAM - 695 001.

5 MANANTHAVADY MUNICIPALITY
REPRESENTED BY SECRETARY, MANANTHAVADY P.O.,
WAYANAD - 670645.

6 SECRETARY
MANANTHAVADY MUNICIPALITY, MANANTHAVADY P.O.,
WAYANAD - 670 645.

7 MEDICAL OFFICER
AYUSH (NHM) PRIMARY HEALTH CENTRE, MANANTHAVADY MUNICIPALITY, MANANTHAVADY P.O., WAYANAD - 670 645.

8 CHIEF SECRETARY
GOVERNMENT OF KERALA, SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.

BY ADVS.
SMT.MINI GOPINATH, CGC
SANTHARAM.P

OTHER PRESENT:

V.K.SUNIL-SR.GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 02.12.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANU SIVARAMAN, J.

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W.P.(c).No.26934 of 2022

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Dated this the 2nd day of December, 2022

JUDGMENT

1. This writ petition is filed seeking the following reliefs:

> "i) To issue a writ of certiorari quashing Ext.P19 as unjust, arbitrary and illegal,
>
> ii. To declare that the petitioners are entitled to be continued in service as Attender and Part Time Sweeper respectively at the Ayush NHM Homeopathic Dispensary, Mananthavady Municipality;
>
> iii. To issue a writ of mandamus directing the respondents 5, 6 and 7 to pass orders permitting the petitioners to continue in service as Attender and Part Time Sweeper respectively at the Ayush NHM Homeopathic Dispensary, Mananthavady Municipality;
>
> iv. issue a writ of mandamus directing the respondents 5, 6 and 7 to refrain from inducting fresh hands in the post of Attender and Part Time Sweeper at the Ayush NHM Homeopathic Dispensary, Mananthavady Municipality."

2. Heard the learned counsel for the petitioners, the learned DSGI, the learned Government Pleader as well as the learned counsel appearing for respondents 5 and 6 at considerable length.

3. It is submitted by the learned counsel for the petitioners that the petitioners were appointed as Attender and Part-Time Sweeper in the Ayush NHM Homeo Dispensary, Mananthavady. It is the specific case of the petitioners that they were appointed after a due selection process and were not backdoor entrants. It is submitted that orders had been issued by the Government as evidenced by Exhibit P3 to the effect that appointments made on contract basis to a particular project or scheme does not have to be discontinued on the basis of general orders for discontinuance of temporary employees. It is submitted that later Government Orders have been issued with regard to continuance of temporary employees and contract appointees during the Covid period. It is submitted that the petitioner had earlier approached this Court and an attempt was made to terminate their services and Exhibit P11 judgment was rendered directing the respondents to permit the petitioners to continue without prejudice to the right of the Municipality to engage contract employees after paper publication and inviting applications

etc. It is submitted that an appeal was preferred by the petitioners and Exhibit P12 judgment was rendered directing that in case the petitioners submit a representation before the Director of Urban Affairs, the same shall be considered with notice to the Municipality as well. The applicability of the Government Orders relied on by the petitioner was also directed to be considered. It is submitted that thereafter, the impugned order has been passed terminating the services of the petitioners on the ground that the Government Orders relied on by the petitioners are not applicable in the instant case.

4. The learned counsel for the petitioners submits that there is absolutely no consideration of the specific contentions raised by the petitioners that they were also appointed after a due selection process and that there is no reason for terminating their appointments except the whimes and fancies of the employer. The learned counsel for the petitioners also relies on Exhibit P20 judgment of this Court and contends that since the petitioners had been continuing from 2010 and 2016

onwards after undergoing a due selection process, the direction to terminate their services only to replace them with similarly situated employees is vitiated.

5. A detailed counter affidavit has been placed on record by the 5th respondent. It is contended that the petitioners had approached this Court in an earlier round of litigation and that the direction in Exhibit P12 was to consider whether the Government Orders relied on by them are applicable in their case. It is submitted that after following the directions contained in Exhibit P12, the Director had come to the conclusion that the Government Orders relied on are not applicable to the petitioners and that therefore they are not entitled to continue in service. It is contended that the petitioners are only contractual employees and that they do not have any indefeasible right to continue in service. It is further contended that when the Covid Pandemic was at its peak, the 2nd petitioner's daughter was infected with Covid and that she had attended duty suppressing the said fact and a show cause notice had been issued to her. It is submitted that

the act of the 2nd petitioner in attending duty without observing protocol amounts to insubordination and the council in its meeting held on 4.6.2021 had, therefore, decided to conduct a fresh interview to the post of Attender and Part Time Sweeper, since the services of the petitioners were found to be unsatisfactory. It is submitted in paragraph 13 of the counter affidavit as follows:-

> "13. There may be other candidates who are also eligible to be considered for the posts of the petitioners herein on temporary basis who were not given opportunity to apply for the post on account of the fact that no applications have been invited by public notice or otherwise. For all public employments, even if temporary, all persons who are eligible to be considered should be given a chance for participating in the selection process otherwise it would be violative of the fundamental rights guaranteed under Article 14 and 16 of the Constitution of India."

6. The learned counsel for the petitioners submits that the contentions of the respondents in the counter affidavit as well as the finding in Exhibit P19 that the services of the petitioners was unsatisfactory was entered into without

issuing any show cause notice to the petitioners or entering into any findings in that regard. It is submitted that there was no performance appraisal carried out in respect of the petitioners and it was only on the subjective satisfaction of respondents 5 and 6 that the decision was taken to terminate the services of the petitioners. Relying on Exhibit P20 decision, the learned counsel for the petitioners submits that if the services were to be terminated on the ground of unsatisfactory performance, then the petitioners would be entitled to some kind of notice and an opportunity to substantiate their contentions.

7. The learned counsel appearing for respondents 5 and 6 would, on the other hand, contend that the petitioners were not employed after undergoing a due process and that the appointment was not under Rule 9 or Rule 9A of the KS&SSR. It is, therefore, contended that the petitioners do not have any vested right in the said post or to seek permanency of their service. It is submitted that the direction in Ext.P12 judgment was only to consider the applicability of the Government

Orders and that the said point had been answered against the petitioners. It is further submitted that the petitioners had not raised a contention that they were appointed on due process of law in the first round of litigation.

8. Having considered the contentions advanced on either side, I notice that there is a specific contention raised in the writ petition that the petitioners had been engaged after a due process of selection and that they are not back door entrants. The employer, that is the 5th respondent has filed a detailed counter affidavit. All what is stated is in paragraph 13 of the counter affidavit, as extracted. This Court in Exhibit P12 judgment had directed the consideration of the claim of the petitioners for continuance as contract employees. It is not in dispute that the petitioners are contract employees and that they do not have any claim for permanent appointment under the Panchayat. However, the question with regard to their claim for continuance was what was directed to be considered. The Panchayat evidently took a stand that they were terminated because of deficiencies in their services. This was

accepted by the Director in Exhibit P19 as well. The primary reason for termination of the petitioners' service as evident from Exhibit P19 appears to be that their services were found to be unsatisfactory. If that be so, even though the petitioners are contractual employees, they were entitled to a notice with regard to the unsatisfactory nature of their service and their services could have been terminated only on a finding being rendered on the same. In the instant case, such findings are conspicuous by their absence. Even in case the contention of the respondents is that the petitioners were not appointed after full process of selection was carried out, it is not in dispute that they have been continuing in service on contract basis from 2010 and 2016 onwards and the contention that they can be sent out of service on the specific ground of unsatisfactory performance without any notice or finding to that effect, according to me, is a perversive.

9. In the above view of the matter, Exhibit P19 order is set aside. There will be a direction to the respondents to permit the petitioners to continue in service as contractual employees in

the 5th respondent municipality. However, this will not stand in the way of the municipality to take an appropriate action against them in accordance with law after issuing due notice.

Writ petition is ordered accordingly.

sd/-

Anu Sivaraman, Judge

sj

APPENDIX OF WP(C) 26934/2022

PETITIONER EXHIBITS

Exhibit P1	TRUE COPY OF THE EXPERIENCE CERTIFICATE OF THE 1ST PETITIONER DATED 21/06/2021 ISSUED BY THE 7TH RESPONDENT.
Exhibit P2	TRUE COPY OF THE EXPERIENCE CERTIFICATE OF THE 2ND PETITIONER DATED 21/06/2021 ISSUED BY THE 7TH RESPONDENT.
Exhibit P3	TRUE COPY OF THE ORDER PAN/14760/2020-E9(DP) DATED 12/01/2021, ISSUED BY THE DIRECTOR OF PANCHAYATS.
Exhibit P4	TRUE A COPY OF THE G.O.(RT) NO.1067/2021/LSGD DATED 01/06/2021, ISSUED BY THE SPECIAL SECRETARY.
Exhibit P5	TRUE COPY OF THE GO(RT) NO.1149/2021/LSGD DATED 15/06/2021 ISSUED BY THE DEPARTMENT OF LOCAL SELF GOVERNMENT.
Exhibit P6	TRUE COPY OF G.O.(MS) 1496/2021/LSGD DATED 09/08/2021.
Exhibit P7	TRUE COPY OF THE INTERIM ORDER IN WA NO.807/2021 DATED 30/06/2021.
Exhibit P8	TRUE COPY OF JUDGEMENT IN WRIT APPEAL NO.925/2021 AND CONNECTED CASE DATED 27/09/2021.
Exhibit P9	TRUE COPY OF THE INTERIM ORDER IN WP(C) NO.9231/2022 DATED 18/03/2022.
Exhibit P10	TRUE COPY OF THE GO(RT) NO.758/2022/LSGD DATED 26/03/2022.

Exhibit P11	TRUE COPY OF THE JUDGMENT DATED 07/12/2021 IN WP(C) NO.12784/2021.
Exhibit P12	TRUE COPY OF THE JUDGMENT DATED 09/03/2022 IN W.A.NO.82/2022.
Exhibit P13	TRUE COPY OF THE REPRESENTATION DATED 14/03/2022 SUBMITTED BY THE 1ST PETITIONER BEFORE THE 3RD RESPONDENT.
Exhibit P14	TRUE COPY OF THE POSTAL RECEIPT OF THE 1ST PETITIONER.
Exhibit P15	TRUE COPY OF THE REPRESENTATION DATED 14/03/2022 SUBMITTED BY THE 2ND PETITIONER BEFORE THE 3RD RESPONDENT.
Exhibit P16	TRUE COPY OF THE POSTAL RECEIPT OF HE 2ND PETITIONER.
Exhibit P17	TRUE COPY OF THE RECEIPT DATED 27/04/2022 ISSUED BY THE RESPONDENT MUNICIPALITY.
Exhibit P18	TRUE COPY OF THE NOTIFICATION DATED 07/05/2022 ISSUED BY THE RESPONDENT MUNICIPALITY.
Exhibit P19	TRUE COPY OF THE ORDER DATED 22/07/2022 ISSUED BY THE 3RD RESPONDENT.
Exhibit P20	TRUE COPY OF THE DECISION IN JENSON M.JOY V. STATE OF KERALA, 2017 SCC ONLINE KER. 15732.

RESPONDENT EXHIBITS

Exhibit R5(A)	TRUE COPY OF THE JUDGMENT DATED 2/6/2022 IN COC 951/2022.

Exhibit R5(B)	TRUE COPY OF THE JUDGMENT DATED 19/8/2022 IN WPC NO.15872/2022.
Exhibit R5(C)	TRUE COPY OF THE LETTER DATED 11/2/2021 ISSUED BY THE 7TH RESPONDENT
Exhibit R5(D)	TRUE COPY OF THE SHOW CAUSE NOTICE DATED 16/2/2021.
Exhibit R5(E)	TRUE COPY OF THE DECISION DATED 4/6/2021.

True copy

PS to Judge