
(1991) 10 MAD CK 0032
In the Madras High Court

A. Periasamy

APPELLANT

Vs

The State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 01-10-1991

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (1992) 2 MLJ 229

Hon'ble Judges : Somasundaram, J

Bench : Division Bench

Judgement

Somasundaram, J.—The prayer in the writ petition is as follows:

For the reasons stated in the accompanying affidavit, it is prayed that this Hon"ble Court may be pleased to issue a writ of certiorarifted mandamus

or any other appropriate writ, order or direction in the nature of a writ of certiorarified mandamus by calling for the records from the file of the first

respondent in G.O.Ms. No. 534, dated 4.4.1988 and to quash the same and directing the 4th respondent to give effect to the order of the 3rd

respondent passed in Mu.Mu. No. 371308/(SE/E3/G8/82, dated 29.10.1983 and pass such further or other orders as this Hon"ble Court may

deem fit and proper in the circumstances of the case and thus render justice.

2. The case of the petitioner is as follows:- The petitioner is working as a Tamil Pandit in the 4th respondent-school which was a High School and

when the Higher Secondary pattern of education was introduced in the State of Tamil Nadu in the year 1978, the 4th respondent-school was

allowed to open Higher Secondary course. In 1978 after the introduction of the Higher Secondary course in the 4th respondent-school, the

petitioner was not promoted as Post Graduate Assistant in Tamil to take classes

for the Higher Secondary course for want of vacancy. For the academic year 1979-80 the additional post of P.G. Assistant in Tamil was sanctioned by the Chief Educational Officer, Salem by his order dated 5.7.1979 for the 4th respondent-school. Then the management of the 4th respondent-school promoted the petitioner as P.G. Assistant in Tamil and the petitioner held that post from 5.7.1979 to 31.10.1979. After 31.10.1979 the petitioner was not allowed to continue in the Higher Secondary section as P.G. Assistant as he did not possess the necessary qualification to hold the post of P.G. Assistant viz. M.A. Degree in Tamil.

The qualifications prescribed for the P.G. Assistant for the Higher Secondary course are M.A. Degree in Tamil with B.Ed, degree. On 8.2.1980 the management of the 4th respondent-school appointed the 5th respondent as P.G. Assistant in Tamil directly from the open market. On 8.2.1980 the 5th respondent also did not possess the prescribed qualification. Though he was having P.G. Degree in Tamil he was not having the B.Ed, degree and the 5th respondent acquired the B.Ed. Degree on 13.12.1981. On 30.5.1981 the petitioner became fully qualified for the post of P.G. Assistant by acquiring M.A. Degree in Tamil. The management of the 4th respondent-school after appointing the 5th respondent-as P.G. Assistant for the Higher Secondary Course on 8.2.1980 applied to the District Educational Officer for approval of the appointment of the 5th respondent. This request of the 4th respondent was rejected by the District Educational Officer on 11.8.1980. Again, the management of the 4th respondent applied to the District Educational Officer, Sankagiri for approving the appointment of the 5th respondent as P.G. Assistant in the 4th respondent-school on 31.10.1981 and the same was also rejected by the District Educational Officer on 7.12.1981. The 5th respondent acquired the B.Ed. Degree on 13.12.1981 and thereafter in 1982, the management of the 4th respondent school again moved the District Educational Officer, for approving the appointment of the 5th respondent and the third request of the management of the 4th respondent-school was also rejected by the District Educational Officer, Sankagiri on 8.9.1982. Against the said order dated 8.9.1982 the management of the 4th respondent-school filed an appeal before the Director of School Education. The Director of School Education dismissed the appeal filed by the management of

the 4th respondent-school on 1.10.1983. Against the order of the Director of School Education dated 1.10.1983 a further appeal was filed by the management of the 4th respondent-school before the first respondent on 3.11.1983. The first respondent by the order dated 4.4.1988 allowed the appeal filed by the management of the 4th respondent-school and regularised the appointment of the 5th respondent as P.G. Assistant in the 4th respondent-school. The order of the first respondent dated 4.4.1988 is challenged in the present writ petition. In the meantime the petitioner acquired the Post-graduate qualification in Tamil on 30.5.1981 and he gave a representation on 30.11.1981 to the management of the 4th respondent-school requesting the management to promote the petitioner as P.G. Assistant in Tamil in the post sanctioned by the order of the Chief Educational Officer, Salem dated 5.7.1979. The application of the petitioner dated 30.11.1981 was rejected by the management of the 4th respondent-school and against the said order of rejection the petitioner filed an appeal on 1.1.1983 before the Joint Director of School Education. On 29.10.1983 the Joint Director of School Education allowed the appeal filed by the petitioner and directed the management of the 4th respondent-school to promote the petitioner to the post of P.G. Assistant in the place of the 5th respondent within 15 days from the date of receipt of the order.

3. Mr. A.S. Narasimhan, learned Counsel for the petitioner contended as follows: The 4th respondent-school was allowed to open the Higher Secondary course when the Higher Secondary pattern of education was introduced in the year 1978. When the post of P.G. Assistant in Tamil was sanctioned by the Chief Educational Officer, Salem on 5.7.1989 the petitioner was not qualified to hold the post as he did not possess the P.G. Degree in Tamil. Subsequently on 30.5.1981 the petitioner became fully qualified to hold the post of P.G. Assistant in Tamil. On 8.2.1980 the management of the 4th respondent-school directly appointed the 5th respondent as the P.G. Assistant. Though the 5th respondent was having the M.A. Degree in Tamil he was not having the B.Ed. Degree on the date of his appointment. The petitioner submitted an application on 30.11.1981 requesting the management of the 4th respondent to promote him as P.G. Assistant as he was fully qualified to hold the post with effect

from 30.5.1981. When the management of the 4th respondent rejected his application, he filed an appeal before the Joint Director by the order dated 29.10.1983 the Joint Director of School Education allowed the appeal and directed the management of the 4th respondent-school to promote the petitioner to the post of P.G. Assistant in Tamil in the place of the 5th respondent and the said order has become final. By the impugned order dated 4.4.1988 the first respondent approved the appointment of the 5th respondent as P.G. Assistant in Tamil in the 4th respondent-school without giving any notice to the petitioner, who was also claiming the said post and without giving him an opportunity to state his case, and, therefore, the impugned order is violative of the principles of natural justice and liable to be set aside. In support of his contention the learned Counsel relied on the decision in Kalvi Pani (P) Ltd. v. The Director of School Education 1991 Writ L.R. 103. The learned Counsel for the petitioner further contended that Rule 15(4) of the Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974, hereinafter called the 1974 Rules, is the relevant rule which the respondents should have followed while filling up the post sanctioned by the Chief Educational Officer, Salem in his order dated 5.7.1979. Rule 15(4)(ii) of the 1974 Rules provides that appointment to the various categories of teachers would be made by promoting the qualified teachers in the schools and only if no qualified and suitable candidate is available in the school for promotion the post can be filled up by direct recruitment. The learned Counsel also contended that in this case when the petitioner got himself fully qualified on 30.5.1981, the management of the 4th respondent-school ought to have promoted the petitioner as P.G. Assistant in the place of the 5th respondent. The further contention of the learned Counsel for the petitioner is that the impugned order of the first respondent approving the appointment of the 5th respondent as P.G. Assistant is invalid, because, it contravenes Rule 15(4)(ii) of the 1974 Rules and, therefore, the impugned order dated 4.4.1988 is liable to be set aside.

4. On the other hand, Mr. R. Krishnamurthi, learned senior counsel for the 4th respondent submitted that the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973, hereinafter called the Act, was made applicable to the Higher Secondary Schools by the Tamil Nadu Act 39 of

1987 with effect from 7.11.1987; The 1974 Rules were made applicable to the Higher Secondary Schools by G.O.Ms. No. 1502, dated

23.9.1988; By G.O.Ms. No. 720, Education, dated 28.4.1981 the Government in exercise of the powers conferred by the proviso to Article 309

of the Constitution of India made special rules for the Tamil Nadu Higher Secondary Educational Rules. Though G.O.Ms. No. 720 is dated

28.4.1981 it is stated in the G.O. itself that the special rules made in the said G.O. shall be deemed to have come into force on 1.7.1978. The

special Rules contained in G.O. Ms. No. 720 were applicable to private aided schools like the 4th respondent-school till the 1974 Rules were

suitably amended and made applicable to the Higher Secondary Schools by G.O.Ms. No. 1502, dated 23.9.1988; Till 23.9.1988 Rule 15(4)(ii)

of the 1974 Rules have no application to the aided schools and only the Special Rules will have to be applied to such private aided schools. To

impugned order passed by the first respondent is in accordance with Rule 2(h)(ii) of the Special Rules and, therefore, the impugned order is valid

and it is not liable to be set aside.

5. In view of the above contentions of the counsel for the parties, the main question we have to decide in the case is, what is the relevant Rule

which should be followed in filling up the post of P.G. Assistant in Tamil sanctioned by the Chief Educational Officer, Salem by the order dated

5.7.1979. Whether Rule 15(4)(ii) of the 1974 Rules as contended by the learned Counsel for the petitioner or Rule 2(b)(ii) of the Special Rules as

contended by the learned Counsel for the respondents. Admittedly the provisions of the Act was made applicable to the Higher Secondary schools

by the Act 39 of 1987 with effect from 7.11.1987. Similarly the 1974 Rules were made applicable to the Higher Secondary Schools by G.O.Ms.

No. 1502 with effect from 23.9.1988. By G.O.Ms. No. 720, Education, dated 28.4.1981, the Government in exercise of the powers conferred

under Article 309 of the Constitution made the Special Rules for the Tamil Nadu Higher Secondary Educational Service. Para 2 of the G.O.Ms.

No. 720, dated 28.4.1981 provides that the qualifications and other service conditions prescribed in the appended notification for the posts of

Headmasters, teachers of Higher Secondary Standards and Physical Directors in the Government Higher Secondary schools will mutatis mutandis

be followed also by the aided schools, Schools run by local bodies etc., Pending issue of amendment to the relevant Rules. A Division Bench of

this Court in The Secretaiy-Cum-Correspondent, Z.K.M. Higher Secondary School, Bodinaickanur, Madurai District v. R. Kandaraj, W.A. Nos.

640 and 669 of 1985, by judgment dated 24.6.1986, while holding that appointment of a Headmaster of a private school should be made having

regard to the Special Rules for Tamil Nadu Higher Secondary Educational Service contained in G.O. Ms. No. 720, dated 28.4.1981 has

observed as follows:

The position as it, therefore, emerges today is that there are recruitment rules for the Government Higher Secondary Schools with regulate the

appointment of Headmasters. The qualifications for the post of Head Masters are also laid down. Though these recruitment rules will not in terms

apply in the case of private schools and the appointment will have to be made in" accordance with the provisions of Section 18(i)(b) of the Act,

reference must be made to para 2 of the Government Order containing the recruitment rules. That Government Order specifically refers to the

qualifications and other service conditions prescribed in the recruitment rules for the posts of Headmasters, teachers of Higher Secondary

Standards and Physical Directors in Government Higher Secondary Schools to be followed mutatis mutandis in aided Schools and Schools run by

local bodies (Municipalities and Corporation etc.,) This paragraph reads as follows: ""The qualifications and other service conditions prescribed in

the appended notification for the posts of Headmasters, teachers of Higher Secondary Standards and Physical Directors in Government Higher

Secondary Schools will mutatis mutandis be followed also in Aided schools, schools run by Local Bodies (Municipalities and Corporation etc.)

and Government schools under the Adi Dravidar and Tribal Welfare and Backward Classes Departments, pending issue of amendments to the

relevant rules.

In view of this provision the School Committee will have to make the appointment of the Headmaster having regard to the qualifications prescribed

in the recruitment rules.

In that case the Division Bench directed the School Committee of the Private Schools to consider the claims of persons qualified to be appointed

as Headmasters of Higher Secondary School in accordance with the merit-cum-seniority Rule contained in Rule 2(c) of the Special Rules. The

above decision goes to show that the Special Rules should be followed even by the management of the private schools in making appointments for

the Higher Secondary course pending amendment to the relevant Rules.

6. Mr.A.S. Narasimhan, learned Counsel for the petitioner contended that the Act and the 1974 Rules were applicable to the Higher Secondary

Schools irrespective of the Tamil Nadu Act 39 of 1987 extending the provisions of the Act to Higher Secondary Schools and G.O. Ms. No. 1502

extending the 1974 rules to Higher Secondary Schools with effect from 23.9.1988 and, therefore, only Rule 15(4) of the 1974 Rules should be

followed in filling up the vacancies in the Higher Secondary Schools. In support of this contention, the learned Counsel relied on the decisions in

Senthimathan v. The Chief Educational Officer, South Arcot District 1985 Writ L.R. 533, and S. K. V. Selvaraj, Secretary, S.K.V. Higher

Secondary School Committee v. The District Educational Officer, Cuddalore and Ors. W.A. No. 392 of 1981 and W.R. No. 6925 of 1981

order dated 17.3.1982. The learned Counsel further contended that as per para 2 of G.O.Ms. No. 720, dated 28.4.1981 the Special Rules

contained in G.O. Ms. No. 720 are applicable to the private aided schools also pending issue of amendment to the relevant Rules Rule 15(4) of

the 1974 Rules was amended by G.O.Ms. No. 1376, dated 6.7.1981 providing that appointment to all the categories of teachers shall be made

firstly by promotion from among the qualified teachers in that School and only if qualified teachers are not available the vacancies can be filled by

direct recruitment. The learned Counsel for the petitioner also contended that after 6.7.1981 viz., the date of G.O. No. 1376 which amended Rule

15(4) of the 1974 Rules, only Rule 15(4) of the 1974 Rules should be followed for filling up the vacancies in the Higher Secondary Schools and

the Special Rules contained in G O.Ms. No. 720; On 30.5.1981 the petitioner was fully qualified to hold the post of P.G. Assistant and, therefore,

he is entitled to be promoted as P.G. Assistant in the 4th respondent-school in the place of the 5th respondent and in these circumstances, the

petitioner was entitled to be heard by the first respondent before the first respondent passed the impugned order dated 4.4.1988. I am unable to

accept the contention of the learned Counsel for the petitioner that as Rule 15(4) of 1974 Rules was amended by G.O.Ms. No. 1376, dated

6.7.1981 thereafter the Special Rules in the G.O. No. 720 are not applicable to the private aided schools because, the Act itself was made

applicable to Higher Secondary Schools by Act 39 of 1987 with effect from 7.11.1987 and the 1974 Rules were made applicable to the Higher

Secondary Schools by G.O. No. 1502, dated 23.9.1988, The expressions ""pending issue of amendments to the relevant rules"" in para 2 of G.O.

No. 720, in the context in which they are used only mean pending issue of amendments to the 1974 Rules making them applicable to the Higher

Secondary Schools. Only by G.O. No. 1502, dated 23.9.1988, the 1974 Rules were made applicable to the Higher Secondary Schools. No

doubt, G.O.Ms. No. 1376, dated 6.7.1981 amended Rule 15(4) of the 1974 Rules, but, the said amendment does not make 1974 Rules

applicable to Higher Secondary Schools. Even Rule 15(4) as amended by G.O. No. 1376 will not apply to Higher Secondary Schools, because,

1974 Rules were made applicable to the Higher Secondary Schools for the first time only by G.O. No. 1502, dated 23.9.1988. Further, as

already pointed out, when the Act itself was made applicable to the Higher Secondary Schools only with effect from 7.11.1987 by the Act 39 of

1987, it cannot be said that the 1974 Rules as amended by G.O. No. 1376 was made applicable to the Higher Secondary Schools with effect

from 6.7.1981 itself particularly when there is nothing in G.O. No. 1376 to indicate that 1974 Rules were made applicable to the Higher

Secondary Schools by the said G.O.

7. As rightly contended by the learned Counsel for the respondents the relevant Rules viz., 1974 Rules were amended suitably making them

applicable to Higher Secondary Schools only by G.O. No. 1502, dated 23.9.1988. Under these circumstances, it has to be held that in view of

para 2 of G.O.Ms. No. 720, dated 28.4.1981 the qualifications and other service conditions prescribed in the Special Rules for the posts of

Headmasters and teachers of Higher Secondary Schools have to be followed by private aided Schools also during the period from 1.7.1978 when

G.O.Ms. No. 720 is deemed to have come into force till 23.9.1988 when G.O.Ms. No. 1502 came into force amending the 1974 Rules making

them applicable to the Higher Secondary Schools. The decisions of this Court in Senthilnathan v. The Chief Educational Officer, South Arcot

District 1985 Writ L.R. 533 and S.K.V. SeIvaraj, Secretary, S. K. V. Higher Secondary School Committee v. The District Educational Officer,

Cuddalore and Ors. W.A. No. 392 of 1981 and W.P. No. 6925 of 1981 are not helpful to the petitioner because, this Court while disposing of

those cases has not considered the effect of the statutory special rules contained in G.O. No. 720 particularly para 2 of the said G.O. Further in

the above decisions this Court has no occasion to consider the effect of the amendment of the Act by the Tamil Nadu Act 39 of 1987 extending

the provisions of the Act to Higher Secondary Schools and G.O. No. 1592 extending the 1974 Rules to the Higher Secondary Schools, for the

obvious reason that they came into existence long after the decisions were rendered in the above cases by this Court. From the above discussion it

follows that the Special rules have to be followed in the present case in filling the post of P.G. Assistant sanctioned by the Chief Educational

Officer, Salem by order dated 5.7.1979.

8. Admittedly the Higher Secondary Scheme was introduced in the Tamil Nadu in the year 1978. When the Higher Secondary Scheme was

introduced in the 4th respondent-schools one Velu, the Senior-most teacher in Tamil working in the 4th respondent-school was promoted as P.G.

Assistant to the only available post of P.G. Assistant in Tamil. On 5.7.1979 the Chief Educational Officer, Salem sanctioned one more post of

P.G. Assistant in Tamil. On 5.7.1979 the petitioner was not qualified to hold the post of P.G. Assistant and he became fully qualified to hold the

post only on 30.5.1981. Even before the petitioner qualified himself for the post, the management of the 4th respondent appointed the 5th

respondent as P.G. Assistant directly from the open market on 8.2.1980. On 30.11.1981 the petitioner submitted an application to the

management of the 4th respondent-school to promote him as P.G. Assistant in the place of the 5th respondent. By G.O.Ms. No. 720, Education,

dated 28.4.1981 the Government in exercise of the power under Article 309 of the Constitution made the Special Rules for the Tamil Nadu Higher

Secondary Educational Service. The Special Rules were deemed to have come into force with effect from 1.7.1978. Rule 2(a) of the Special

Rules deals with appointments. The relevant portion of Rule 2(a) runs as follows:

Appoint:- (a) Appointment to several classes and categories of the service shall be made as follows: Class and category Method of recruitment.

Rule 2(b)(ii) of the Special Rules states that 50 per cent of the substantive vacancies in classes II and III of the service shall be filled or reserved to

be filled by direct recruitment. Thus as per Rule 2(b)(ii) of the Special Rules, fifty per cent of the substantive vacancies in Class II have to be filled

only by direct recruitment. As already pointed out, when the Higher Secondary Scheme was introduced in the 4th respondent-school in 1978-79,

one post of the Tamil Pandit was inducted from the High School section to the Higher Secondary Section and one Thiru Velu, Tamil Pandit was

promoted as P.G. Assistant in the said vacancy. In view of Rule 2(b)(ii) of the Special Rules the next vacancy created by the order of the Chief

Educational Officer, Salem, dated 5.7.1979, has to be filled by direct recruitment. Admittedly, the petitioner has not claimed the post on the

ground that he is also a direct recruit. Therefore, the petitioner cannot contend that he should be promoted to the available post of the P.G.

Assistant which is reserved to be filled by direct recruitment by Virtue of Rule 2(b) (ii) of the Special Rules. Further, such a claim made by the

petitioner runs counter to Rule 2(b)(ii) of the Special Rules. Inasmuch as the existing post of P.G. Assistant has to go to a direct recruit, the

petitioner is not eligible to be considered for the same as he claims the post only by way of promotion. As the petitioner is not eligible to be

considered for the post in question, to cannot be said that he is in any way aggrieved by the impugned order passed by the first respondent.

Therefore, the contention of the learned Counsel for the petitioner that the impugned order is violative of the principles of natural justice and is

liable to be set aside cannot be countenanced. As rightly contended by the learned Counsel for the respondents, the petitioner is not entitled to

notice before the first respondent passed the impugned order, because the petitioner cannot be considered for the post in question which has to be

filled by direct recruitment. It has to be pointed out that as the post of P.G. Assistant in question has to go to a direct recruit as per Rule 2(b)(ii) of

the Special Rules the management of the 4th respondent-school appointed the 5th respondent directly as P.G. Assistant. When the request of the

management of the 4th respondent-school for approving the appointment of the 5th respondent was rejected by the Joint Director of School

Education filed an appeal-before the first respondent. The first respondent while passing the impugned order rightly held as follows:

Again according to G.O.Ms. No. 720, Education, dated 28.4.1981 the recruitment to the post of Post Graduate Teacher by direct recruitment

and recruitment by transfer should be in the ratio of 1:1 i.e., one by direct recruit and the other by transfer. The previous vacancy was filled up by

promoting Thiru M. Velu, Tamil Pandit and this vacancy has to be filled by direct recruitment.

In these circumstances, it has to be held that the impugned order of the first respondent is in accordance with the Special Rules and it cannot be

said that the first respondent has violated the relevant rule and procedure prescribed for recruitment. There is no infirmity in the order challenged in

this writ petition. The principles laid down in Kalvi Pani (P) Ltd. v. The Director of School Education 1991 W. L.R. 103, relied on by the learned

Counsel for the petitioner will not apply to the facts of the present case.

9. It is also admitted that during the pendency of the writ petition Velu, who was promoted to the post of P.G. Assistant in Tamil when the Higher

Secondary Scheme was introduced, retired from service and the petitioner was promoted as P.G. Assistant in the vacancy caused by the

retirement of the said Velu.

10. No doubt, the order dated 29.10.1983 passed by the Joint Director of School Education directing the management of the 4th respondent to

promote the petitioner as P.G. Assistant in the place of the 5th respondent has become final. But, it has to be pointed out that by the said order the

Joint Director directed the management of the 4th respondent school to promote the petitioner to the post reserved for direct recruit as per Rule

2(b) of the Special Rules and, therefore, the said order is illegal as it contravenes the said Rule 2(b)(ii) of the Special Rules. The writ of mandamus,

which is an extraordinary and discretionary remedy, cannot be issued to enforce an illegal order. Further as against the order of the management of

the 4th respondent-school refusing to promote the petitioner to the post of P.G. Assistant the petitioner has no right of appeal to the Joint Director

and the order of the Joint Director of School Education, dated 29.10.1983 is not

an order passed in any statutory appeal and, therefore, the order dated 29.10.1983 is only an administrative order and as already pointed out, it is bad, because, it contravenes Rule 2(b)(ii) of the Special Rules. In these circumstances, the petitioner is not entitled to any relief in this writ petition. There is no merit in the writ petition and the same is liable to be dismissed. Accordingly, the writ petition is dismissed. No costs.