

(2008) 10 MAD CK 0055

In the Madras High Court

Case No : Writ Petition No. 16778 of 2008 and M.P. No. 2 of 2008

Dr. P. Arthur Daniel

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 13-10-2008

Acts Referred:

Citation : (2008) 10 MAD CK 0055

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : R. Muthukumarasamy and E. Martin Jeyakumar, for the Appellant;
K.H. Ravikumar, Government Advocate (Edun.) for R. 1 and R. 2 and Sam Edwin
for R. 3, for the Respondent

Judgement

P. Jyothimani, J.—By consent of both parties, the main writ petition itself is taken up for final disposal.

2. The writ petition is directed against the order of the first respondent-Government dated 13.3.2008, by which the first respondent, on the basis

of the direction given by this Court dated 2.7.2007 in W.P No. 22215 of 2007, has rejected the claim of the petitioner made in the representation

dated 3.5.2008 not approving his appointment in the third respondent college as Physical Education Instructor from 26.8.1994 and promotion in

the post of Physical Director from 1.6.2004 .

3. The facts leading to passing of the impugned order are that the third respondent is a recognised private minority aided college, governed by the

provisions of the Tamil Nadu Recognised Private Colleges (Regulation) Act, except some provisions which are not applicable to the minority

institutions. The third respondent college has been sanctioned with two posts of physical education teachers, viz., one Physical Education Instructor

and another Physical Education Director, by the Directorate of Collegiate Education in the order dated 15.10.1977. The then incumbent holding

the post of Physical Education Instructor, Mrs.Suseela Nesamani got promoted as Physical Director and in the resultant vacancy in the post of

Physical Education Instructor, the third respondent being the minority institution, appointed the petitioner as Physical Education Instructor on

26.8.1994 in conformity with the qualifications prescribed for the said post. The third respondent management sent proposals to the respondents 1

and 2 to approve the appointment of the petitioner as Physical Education Instructor, which have not been considered in spite of repeated requests.

3(a). In the meantime, due to retirement of Mrs.Suseela Nesamani as Physical Education Director, the petitioner was promoted as Physical

Education Director by the third respondent with effect from 1.6.2004 and necessary proposals have also been sent by the third respondent

management for approval of the said promotion. The first respondent asked for certain particulars from the second respondent in the

communication dated 27.9.2006 and the second respondent, in turn, directed the Joint Director of Collegiate Education, Tirunelveli Region to send

remarks with regard to the approval of appointment of the petitioner. Since no orders were passed, the petitioner was constrained to file W.P No.

22215 of 2007 and this Court, by order dated 2.7.2007 directed the respondents to consider the representation of the petitioner dated 3.5.2007

and pursuant to the said order, the present impugned order came to be passed.

3(b). The reason given in the impugned order is that the post of Physical Education Instructor in the third respondent college is a vanishing post and

therefore, the appointment of the petitioner to that post cannot be approved and consequential promotion of the petitioner to the post of Physical

Education Director also came to be rejected. It is also stated that after the academic year 1999-2000, no vacant post was filled up and it was only

in 2006, 600 posts in aided colleges were filled up as per G.O.Ms No. 198, Higher Education Department, dated 5.7.2006 and subsequently in

the year 2007, 2000 vacant posts were permitted to be filled up by allotting the same to the needy colleges as per G.O.Ms No. 211, Higher

Education (E2) Department, dated 3.7.2007. It is relevant to point out that after the appointment of the petitioner, the second respondent has

called for particulars in his proceedings dated 23.4.1997, 27.3.1998, etc. which were furnished by the third respondent college and the Joint

Director of Collegiate Education, Tirunelveli Region has also sent a report to the second respondent on 21.11.2006 and without referring to

anyone of the proceedings, the impugned order came to be passed stating that the post of Physical Education Instructor has become a vanishing

post.

4. The impugned order is attacked on various grounds including that inasmuch as the proceedings originally sanctioning the post of Physical

Education Instructor as well as Physical Education Director to the third respondent college remain in force, it is not correct to say that the post of

Physical Education Instructor is a vanishing post, particularly when there is no mention in the original proceedings of the year 1977 that the post is a

vanishing post. It is true that when Mrs.Suseela Nesamani was holding the post of Physical Education Instructor till her promotion, necessary grant

in respect of Physical Education Instructor post had been made and while so, after 1994, in the absence of any proceedings by the respondents

treating the post as a vanishing post, either on the basis of student strength or otherwise, it cannot be presumed that the Physical Education

Instructor post is a vanishing post. The petitioner was appointed in the existing vacancy as Physical Education Instructor on 26.8.1994, who

possessed necessary qualifications and the third respondent being a minority institution is entitled to make such appointment and there is no illegality

or irregularity in the appointment of the petitioner. Subsequent to the retirement of the then Director of Physical Education, on 1.6.2004 the

petitioner was promoted as Physical Education Director and the same was well within the powers of the third respondent. Merely because the

petitioner was paid Rs. 1000/- per month as consolidated pay till the approval of the appointment of petitioner and the petitioner was asked to sign

in an attendance register separately maintained, it does not mean that the petitioner was employed under the self-financing pattern and according to

the petitioner, the impugned order is opposed to the principles of natural justice and therefore, liable to be set aside.

5. In the counter affidavit filed by the second respondent, it is stated that when the vacancy of Physical Education Instructor arose in the third

respondent college due to the promotion of Mrs.Suseela Nesamani as Director of Physical Education, admittedly, the petitioner was appointed in

the vacant post. It is the case of the second respondent that the said appointment was not approved by the Director of Collegiate Education and

therefore, the further promotion of the petitioner as Physical Education Director on 1.6.2004 cannot be approved since the initial appointment itself

is lacking approval from the competent authority. It is further reiterated in the counter affidavit of the second respondent that the post of Physical

Education Instructor in the third respondent college is a vanishing post which ought not to have been filled up by the third respondent.

6. In the counter affidavit filed by the third respondent management it is stated that as far as third respondent college is concerned, the original grant

of two posts of Physical Education Teachers remain valid as on date and no post has been taken away by the Government. It is stated that one

D.D.W.Daniel was working as Physical Education Director in the third respondent college who retired from service on 30.4.1983 and in that

vacancy Mrs.Suseela Nesamani, who was then working as Physical Education Instructor was promoted as Physical Education Director and

consequently, in the vacancy of Physical Education Instructor that arose due to the promotion of Mrs.Suseela Nesamani, prior to the appointment

of petitioner, one Sathiya Doss was appointed as Physical Education Instructor, however, pending approval of his appointment, he left the job. It

was subsequent to the said incident, the writ petitioner was appointed by the third respondent and the proposals for approval were forwarded. In

the meantime, when Mrs.Suseela Nesamani retired on superannuation as Physical Education Director, the petitioner was promoted as Physical

Education Director with effect from 1.6.2004. The conduct of the respondents 1 and 2 in not approving the appointment of petitioner either as

Physical Education Instructor or as Director is unlawful. Simply because for the past 14 years, the post of Physical Education Instructor in the third

respondent college was not approved by the respondents 1 and 2, the said post will not become a vanishing post. It is also stated by the third

respondent that it was, as per the resolution of the third respondent college, the petitioner was paid a honorarium of Rs. 1000/- per month till the

approval of the appointment of the petitioner and the payment was made only for the purpose of enabling him to continue in service and it is not

correct to state that the petitioner was paid Rs. 1000/- as honorarium for the purpose of employing him in the self-financing college. The payment of Rs. 1000/- is a payment towards subsistence and it is only due to the conduct of the respondents 1 and 2 the matter got prolonged for more than 10 years and it is only the petitioner's livelihood which is affected and to protect him, Rs. 1000/- has been paid and it does not mean that it is under self-financing pattern.

7. The learned Government Advocate appearing for the respondents 1 and 2 has also produced relevant records. I have referred to various averments made in the affidavits as well as in the records and considered the issues involved in this case.

8. First of all, it is not in dispute even in the counter affidavit filed by the second respondent that in respect of third respondent college which is an aided minority college, the Director of Collegiate Education by proceedings in Rc. No.72391/S2/77 dated 15.10.1977, while approving the staff strength in the third respondent college along with scales of pay payable to them, has clearly stated that in respect of Physical Education subject in the third respondent college two posts have been sanctioned, viz., 1+1 PTT. It is not even the case of the second respondent in the counter affidavit that the sanctioned strength which was granted originally to the Physical Education department of the third respondent college viz., two posts, has been taken away in the manner known to law. Normally, it is the procedure that the Director of Collegiate Education makes periodical inspection regarding student strength of all aided colleges and in the event of consistent reduction of student strength, the Director of Collegiate Education, after issuing notice and calling for necessary remarks, may take steps to take away the posts and direct the management to surrender such posts for the reasons so recorded. Such surrendering of posts may also be due to the reason of closure of a particular department.

9. On the factual situation of this case, it is no where the case of respondents 1 and 2 that due to any of those situations, the original sanctioned strength of two posts in Physical Education Department has been reduced. It is also seen that in respect of appointment of Mrs. Suseela Nesamani, not only her appointment as Physical Education Instructor but also her subsequent promotion as Physical Education Director have been approved

by the Director of Collegiate Education and accordingly grant has been released. It is also relevant to point out that even in the communication of the Joint Director of Collegiate Education to the third respondent college on 28.10.1994 in the form of a report on the accounts submitted for the year 1991-92, there is no whisper about the so-called vanishing post. The original sanction of two posts as stated above in the year 1977 is very much available in the file produced by the second respondent. On the other hand, the original files produced before this Court nowhere show that the second respondent has taken any steps in these years to take away both or any one of the posts of the Physical Education Department in the third respondent college and no such notice has ever been given to the third respondent at all.

10. It is also seen in the communication of the second respondent dated 23.4.1997 addressed to the third respondent institution that a question has been raised about the communication of the third respondent that in the year 1996-97 1630 students were studying in the third respondent college and particulars were called for. It is further seen in the proceedings of the Director of Collegiate Education dated 27.3.1998 that particulars have been called for the purpose of approving the appointment of Mrs. Suseela Nesamani as Physical Education Instructor with a direction to the management to produce the original sanction order dated 15.10.1977. In the proceedings of the Director of Collegiate Education the second respondent has directed the management to forward the sanction order of the year 1977. It is seen in the files that the said order is very much available and it is not known as to why repeatedly this sort of communication has been sent without reference to the files at all.

11. The second respondent who now states that the posts in the Physical Education Department of third respondent college are vanishing posts and instructions have been issued not to fill up any vacant post during the period from 2001 to 2006, has in fact granted approval in respect of Nesamony Memorial Christian College, Marthandam permitting the said college to fill up the post of Physical Education Director. There are so many proceedings similar to the above one permitting various colleges to make appointment of Librarian as well as Physical Education Instructors, as found in the typed-set of papers filed by the petitioner, for which there is no proper reply on the side of the second respondents.

12. It is seen in the proceedings of the Joint Director of Collegiate Education, Tirunelveli Region addressed to the third respondent in Na.Ka No.

15634/E1/06 dated 21.11.2006 that on verifying the salary register in respect of third respondent college for the period from 1980 to 1994, it was

found that during April, 1980 one D.D.W.Daniel was working as Physical Education Director in the college in the scale of pay, Rs. 700-40-1100-

50-1300 and Mrs.Suseela Nesamani was working as Physical Education Instructor in the scale of pay, Rs. 350-10-420-15-600 and from April,

1980 till 30.4.1983 both of them were receiving salary as Physical Education Teachers. After the said D.D.W.Daniel retired on 30.4.1983,

Mrs.Suseela Nesamani was promoted as Physical Education Director from 1.6.1983 and her promotion was approved by the Department on

7.5.1984.

13. It is stated that from 1.6.1983 only one teacher has been working in the third respondent college in the Department of Physical Education and

Mrs.Suseela Nesamani, though retired on 31.3.2004, worked till 31.5.2004 as Director of Physical Education and the post of Director of Physical

Education has become vacant from 1.6.2004. Very strangely, in the said letter, the Joint Director has chosen to state that after the retirement of

D.D.W.Daniel on 30.4.1983, in the third respondent college only one Physical Education Teacher has been allowed to be appointed and after

1.6.2004, even the said post of Director of Physical Education remains vacant. In the absence of taking away or surrendering of both the posts of

the Department of Physical Education in the third respondent college, the second respondent has a legal duty to consider the proposal for approval

of the appointment of petitioner in the vacancy created either on promotion of Mrs.Suseela Nesamani or after her retirement as Director of

Physical Education and it is not possible to accept the contention raised by the second respondent that the post of Physical Education Instructor in

the third respondent college has become a vanishing post.

14. The respondents 1 and 2 have failed to explain under what circumstances the post of Physical Education Instructor in the third respondent

college has become a vanishing post. Merely because the second respondent has failed to take any action on the proposal for approval of the

appointment of petitioner in the post of Physical Education Instructor for many

years during which period also it was not even informed by the second respondent that it is a vanishing post and therefore, the appointment cannot be approved, I am of the considered view that the third respondent being a minority institution is not only entitled to appoint the petitioner as Physical Education Instructor in the vacancy caused in the year 1994, but also to subsequently promote him as Physical Education Director in June, 2004 after the then incumbent Mrs.Suseela Nesamani retired. The reason given by the second respondent that the original appointment of the petitioner as Physical Education Instructor has not been approved and therefore, his appointment as Physical Education Director can not also be approved has no meaning. The fault is entirely on the part of the second respondent in not even going through the records in proper manner, especially when the records produced categorically show that the original sanctioned strength of Physical Education Department in the third respondent college as sanctioned in the year 1977 has not been taken away or changed.

15. In a similar circumstance, Elipe Dharma Rao,J. in W.P No. 28396 of 2004 [between Mrs.Natesha Sebastian and The Government of Tamil Nadu rep. by its Secretary, Higher Education Department, Fort St. George, Chennai 600 009 and 2 others], by order dated 29.3.2006, has held that in the absence of order of the Director of Collegiate Education pointing out any reduction in the strength of students or financial constraints, the appointment made in respect of existing posts by the private management, especially minority institutions is not invalid. The relevant portion of the order is as follows:

11. Further, as regards the other limbs of the rule relating to the norms of the workload and financial considerations also, where there is no reduction of workload in the third respondent college and in the absence of any order passed by the second respondent pointing out any such reduction or financial constraints, it can be held that the appointment of the petitioner is done in accordance with the Rule and therefore, no prior permission is required to appoint the petitioner.

16. In view of the above said finding, there is no difficulty to come to the conclusion that the impugned order is bereft of any reason, much less acceptable reason, since the case of the second respondent that the posts have

become vanishing posts has not been properly explained and has not been properly enforced on the factual situation of this case. In view of the same, the impugned order of the first respondent is set aside with direction to the respondents 1 and 2 to consider the proposals of the third respondent college for the approval of appointment of the petitioner as Physical Education Instructor and subsequent promotion of the petitioner as Physical Education Director taking into consideration the qualifications which the petitioner possessed at the relevant point of time and pass appropriate orders on merits and in accordance with law and grant approval in the event of the petitioner possessing required qualifications as per the Tamil Nadu Private Colleges Regulations Act, 1976 and if there are no other legal impediments, such order shall be passed by the respondent Department expeditiously, in any event, within a period of twelve weeks from the date of receipt of copy of this order. The writ petition is allowed. No costs. Connected miscellaneous petition is closed.