
(2012) 03 MAD CK 0161

In the Madras High Court

Case No : Writ Petition (MD) No. 3850 of 2007 and M.P. (MD) No's. 1 and 2 of 2011

J. Pitchaimani Sahayarani, B.T. Assistant (Science), St. Johns
Girls Higher Secondary School, Nazareth-628 617, Tuticorin
District

APPELLANT

Vs

Chief Educational Officer, Tuticorin-628 002 and Others

RESPONDENT

Date of Decision : 14-03-2012

Acts Referred:

Constitution of India, 1950 — Article 30(1)

Citation : (2012) 4 MLJ 939

Hon'ble Judges : K. Ravichandra Baabu, J

Bench : Single Bench

Advocate : Issac Mohanlal, for the Appellant; R. Karthikeyan, Additional
Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K. Ravichandra Baabu, J.—In this writ petition, the petitioner has challenged the proceedings of the second respondent dated 23.8.2005 and the consequential proceedings dated 25.2.2006 and for further direction to the second respondent to approve the petitioner's appointment as Graduate Teacher (Middle School) with effect from 10.1.2005 and as B.T. Assistant (High School) with effect from 1.9.2005 with all salary, allowances and attendant benefits. The case of the petitioner is that she was appointed as Record Clerk on 6.3.1997 in Samaria St. John's Higher Secondary School, Thisayanvillai. The petitioner is a Graduate in B.Sc. (Zoology) with B.Ed. Degree. The said School is a recognized, aided and minority educational Institution. On 11.10.2002, the petitioner was transferred to another School, under the same Management, namely St. Marks Higher Secondary School, Mukkuperi. Subsequently, a vacancy arose in the post of Secondary Grade Teacher in another School under the same Management on 10.1.2005 and in such vacancy, the petitioner was promoted and appointed as Middle Grade Graduate Teacher at Tucker Higher Secondary School, Pannaivillai,

Tuticorin District. The said appointment of the petitioner was made by following the G.O. Ms. No. 79 (School Education) dated 14.6.2002. After appointing the petitioner, a proposal was sent for approval. The District Educational Officer refused to approve the said appointment through his proceedings dated 20.3.2005 on the ground that only a Junior Grade B.T. Assistant can be appointed in the vacancy caused in the Secondary Grade Post and not a Middle Grade B.T. Assistant as has been done in the case of the petitioner. The School re-submitted the proposal once again on 29.4.2005 for approval and the District Educational Officer returned the proposal once again on 23.8.2005, by reiterating the very same reason. In the meantime, a vacancy of B.T. Assistant post arose in another School under the same Management on account of the retirement of previous incumbent. In that vacancy, the petitioner was promoted and appointed as B.T. Assistant (Science) on 1.9.2005. The Management submitted the proposal seeking for approval and by proceeding dated 25.8.2006, the second respondent refused to approve the appointment on the ground that a Record Clerk could not be promoted as B.T. Assistant.

2. Aggrieved against the said orders refusing to approve the appointment of the petitioner as Middle Grade B.T. Assistant and further as B.T. Assistant (Science), the present writ petition has been filed.

3. Notice of motion was ordered by this Court on 26.4.2011. The respondents 1 and 2 entered appearance and filed a counter affidavit wherein, it is stated that the petitioner was appointed as Record Clerk on 6.3.1997 and she was subsequently transferred to another School and posted as Middle Grade B.T. Assistant in a Secondary Grade Teacher vacancy on 10.1.2005 and again she was promoted as B.T. Assistant (Science) in another School. It is stated by the respondents 1 and 2 that the petitioner, who was working as Record Clerk, is not eligible for promotion as Middle Grade B.T. Assistant which is in violation of Rule 15(4) of the Tamil Nadu Recognized Private School Regulation Act, 1973 and Rules 1974. The request for approval of the appointment of the petitioner was rejected on two reasons namely the promotion of Record Clerk is contrary to Rule 15(4) of the Tamil Nadu Recognized Private School Regulation Act, 1973 and Rules 1974 and the second reason being the appointment could be made only as Junior Grade B.T. Assistant on consolidated pay as per G.O. Ms. No. 125, Education Department, dated 12.11.2003 and not as Middle Grade B.T. Assistant.

4. The learned counsel for the petitioner argued that the petitioner was working as Record Clerk and was promoted and appointed as Middle Grade Teacher by following G.O. Ms. No. 79 (School Education) dated 14.6.2002. The learned counsel further argued that as per the said G.O, the vacancies arising from 1.6.2003 could be filled up only with Graduate Teachers. Therefore, according to the learned counsel for the petitioner, the petitioner is having the requisite qualification to be promoted as Middle Grade Graduate Teacher and the Management considered the petitioner for such promotion and accordingly, she was appointed as Middle Grade Graduate Teacher. The learned counsel for the

petitioner further argued that the petitioner was further promoted as B.T. Assistant (Science) in another vacancy that arose due to the retirement of previous incumbent on 1.9.2005. In both the promotion and appointment of the petitioner, the School has considered the petitioner's qualification and consequently, appointed in those posts and therefore, the respondents are not justified in rejecting the claim for approval of the appointment of the petitioner. He further argued that insofar as the School in which the petitioner is working, is being a private minority School, G.O. Ms. No. 100 (School Education) dated 27.6.2003 is not applicable as held in a batch of cases in Viveka Poorana Aided Elementary School Vs. The Director of Elementary Education, The District Elementary Educational Officer and The Additional Assistant Elementary Educational Officer, . Even assuming that the said G.O. Ms. No. 100 is applicable, the same also empowers to make appointment on promotion with time scale of pay. Likewise, the learned counsel for the petitioner further argued that G.O. Ms. No. 125, Education Department, dated 12.11.2003, is also not applicable to the petitioner's case as it is only a clarification order of G.O. Ms. No. 100 (School Education) dated 27.6.2003. Equally, G.O. Ms. No. 4 is not applicable to the petitioner's case as it is a further clarification issued for G.O. Ms. No. 100 (School Education) dated 27.6.2003 and G.O. Ms. No. 125, Education Department, dated 12.11.2003. The learned counsel further argued that in all these G.Os, amendments were sought to be carried out in the Private School Regulation Act. It is the further contention of the learned counsel for the petitioner that G.O. Ms. No. 125 and G.O. No. 4 have dealt only with the direct recruitment and not with the promotive posts and therefore the same cannot be made applicable to the case of the petitioner, since the petitioner was promoted and appointed to the post of Middle Grade Graduate Teacher and further to the post of B.T. Assistant (Science). He further contended that the Rule 15(4) of the Tamil Nadu Recognized Private School Regulation Act, 1973 and Rules 1974, is not applicable to the minority institution as has been held by a Division Bench in the case of Eka Ratchagar Sabai Higher Secondary School, rep. by its Correspondent, Tuticorin District and Others v. K. Sumathi and Another (2009) 1 MLJ 322. Even assuming that the said rule is applicable, the same does not prohibit the consideration of non teaching staff to the teaching post if such person is having requisite qualification. He further argued that similar persons like that of the petitioner who got appointment by the respective School also got their approval from the Department. He further submitted that with effect from 1.6.2006, the Government dropped the consolidated payment scheme and restored to the original position namely by direct recruitment or by promotion but both on regular scale of pay.

5. Per contra, the learned Additional Government Pleader argued that the School artificially created the vacancies and filled up the posts by appointing the petitioner. But G.O. Ms. No. 100 (School Education) dated 27.6.2003, deals with the retirement vacancy alone and not the vacancy that arises due to transfer. He further argued that when the eligible teachers are available in a particular

School, appointment of teacher without following the Rule 15(4) is not proper. Moreover, it is also argued by the learned counsel for the respondents that a non-teaching staff cannot be promoted as teacher as the same involves the transfer of service conditions. It is further argued by the respondents that at the time of making appointment, a ban on recruitment was in force.

6. The learned counsel for the petitioner in reply to the said argument, contended that the ban imposed is lifted from 1.6.2003 and the same is also considered by this Court in the decision in Viveka Poorana Aided Elementary School, rep. by its Secretary R. Aravamudhan, Cuddalore Old Town Cuddalore v. The Director of Elementary Education, Madras -6 and Others (supra).

7. Heard both sides.

8. The point for consideration in this case is as to whether the petitioner's appointment as Middle Grade B.T. Assistant on 10.1.2005 and further promotion and appointment as B.T. Assistant (Science) from 1.9.2005 are entitled to be approved by the respondents 1 and 2.

9. In this case, the petitioner was originally appointed as Record Clerk on 6.3.1997. She was further promoted and appointed as Middle Grade Graduate Teacher in an vacancy that arose due to the transfer of the previous Secondary Grade Teacher to another School. The said appointment of the petitioner as Middle Grade Graduate Teacher was made by following G.O. Ms. No. 79 School Education) dated 14.6.2002. The approval sought for was rejected by the impugned order dated 23.8.2005 on the ground that the approval can be granted only to the post of Junior Grade B.T. Assistant that too on consolidated pay and not to the post of Middle Grade Graduate Teacher. For passing such order, the second respondent relied on G.O. Ms. No. 125 Education Department, dated 12.11.2003. It is true that under the said G.O. Ms. No. 125 Education Department, dated 12.11.2003, the Government has ordered that from the academic year 2003-2004, all the vacancies in various categories of teacher posts in all kinds of Schools had become "Junior Grade Teacher" posts on consolidated pay. But, at the same time, it should be seen that the said G.O. though referred to G.O. Ms. No. 100 dated 27.6.2003, has not totally superseded the said G.O.

10. On the other hand, it has to be only construed that the same has been made to clarify G.O. Ms. No. 100. When G.O. Ms. No. 100 is perused it also says that time scale of pay has to be paid if an appointment is made on promotion. Consequently, when the petitioner was promoted and appointed as Middle Grade Graduate Teacher by following G.O. Ms. No. 79, the appointment was not on direct recruitment, but only on promotion from the post of Record Clerk. Consequently, the application of G.O. Ms. No. 125 to deny the benefits to the petitioner is not justified. At any event, insofar as the Private Schools are concerned, a learned Judge of this Court has already held in the case of Viveka Poorana Aided Elementary School, rep. by its Secretary R. Aravamudhan,

Cuddalore Old Town Cuddalore v. The Director of Elementary Education, Madras -6 and Others (supra), in paragraph "12" that G.O. Ms. No. 100, S.E Department, dated 27.6.2003 does not govern the appointment of Private Aided Schools, as follows:

12. Learned counsel appearing for some of the petitioners represented that in some of the cases by virtue of interim order obtained from this Court appointments have been made specifically subject to the Government Order that may be passed. Inasmuch as the Government Order No. 100 dated 27.6.2003 does not govern the appointments in private aided school, that Government Order is not applicable to them. Hence, those appointments will have to be considered as valid notwithstanding the impugned circulars. In some other cases, some appointments have already been made before 1.6.2003 but approval has not been given in view of the impugned circulars. Inasmuch as the impugned circulars are held invalid insofar as it relates to the writ petitioners and inasmuch as no Government Order has been passed so far relating to the aided private schools the appointments made does not suffer from any illegality; in so far as the appointments made before the issuance of the impugned circular there is no ground to refuse the grant of approval. But it is for the authorities to consider the same and pass orders. Hence, the respondents are directed to consider those cases within four weeks from the date of receipt of copy of this order and pass orders.

11. The other reason stated by the respondents to deny the benefits to the petitioner is that a Record Clerk cannot be promoted as a Teacher. The contention of the learned counsel for the respondents is that the School has to follow the Rule of the Tamil Nadu Recognized Private School Regulation Act, 1973 and Rules 1974 and accordingly, they should make appointments only after considering the eligible staffs available within the said School. Though the respondents have raised a vague averment in the counter affidavit that there are many teachers fit for promotion as B.T. Assistant no specific particulars about the available persons were made. Moreover, it could be seen that is no rival claim made against the petitioner's appointment by any other Teacher.

12. Therefore, now what is to be seen is as to whether the School is bound to follow Rule 15(4) of the Tamil Nadu Recognized Private School Regulation Act, 1973 and Rules 1974 or not.

13. Admittedly, the petitioner's School is a minority Institution and consequently, the same need not follow the said Rule 15(4) as held in the case of Eka Ratchagar Sabai Higher Secondary School, rep. by its Correspondent, Tuticorin District and Others v. K. Sumathi and Another (supra). In paragraph "15" of the said order it is held as follows:

15. Judged in light of the observations made by the Supreme Court in Secretary, Malankara Syrian Catholic College v. T. Jose (supra), the provisions which lay down qualification for appointment of teachers are obviously required to be

followed; whereas the procedure contemplated in Rule 15(4) of the Rules severely constricting the scope of the discretion of the Management in appointment of teachers and confining the same to a particular source would be violative of Article 30(1). Therefore, such provisions are not required to be followed by the minority institutions. In view of the above, we cannot agree with the view expressed by the learned single Judge under the impugned judgment and such decision is liable to be over-turned.

14. The same view was taken by another Division Bench in *A. Belavendran v. The Joint Director of School Education, DPI Compound, College Road, Nungambakkam, Chennai and Others* 2010 (1) CWC 343 : LNIND 2009 Mad 2450 and paragraphs "23 and 24 are as follows:

23. In *Eka Ratchagar Sabai Higher Secondary School, rep. by its Correspondent, Tuticorin District and Others v. K. Sumathi and Another* (supra) which is almost identical to the present case, the Division Bench dealt with each of the judgments that have been cited before us. The minority institutions' right of appointment of Principals/ Headmasters and Teachers of their choice have been protected under Article 30(1) of the Constitution of India in the above case. As observed by the Supreme Court in *St. Xavier's* case, the Division Bench held that though it relates to appointment of Principal, the same logic and ratio would be applicable to the appointment of Teachers also and the Division Bench further held that since the matter has been decided by the Supreme Court in the decision in *The Secretary, Malankara Syrian Catholic College Vs. T. Jose and Others*, , the interpretation given earlier by different Judges of this Court cannot hold good and therefore the necessary conclusion is that the discretion of the Management to appoint Teachers of its own choice (of course a Teacher, who is otherwise qualified and eligible as per the prescribed regulations) cannot be curtailed through the process of rules, regulations or other executive instructions.

24. We see no reason to differ from the view of the Division Bench of this Court since it is in line with the Supreme Court's pronouncement. Further, we need not go into the applicability of Rule 15(4) of the Rules, since the Supreme Court has observed that all enactments must be brought in line with the *T.M.A. Pai Foundation's* case. The principles laid down in *T.M.A. Pai Foundation's* case have been crystallized in *P.A. Inamdar's* case, which is again reiterated in *Secretary, Malankara Syrian Catholic College v. T. Jose and Others* (supra) case. In such circumstances, the writ appeal is dismissed. No costs.

Therefore, when the School is a Minority Institution, there is no necessity to follow Rule 15(4) of the Tamil Nadu Recognized Private School Regulation Rules 1974 and consequently, the respondents are not entitled to insist upon the School to follow Rule 15(4) while appointing staff members in the said School. Even otherwise, Rule 15(4) does not ban the consideration of other eligible non teaching staff within the School if no other qualified teachers are available to be promoted to such posts. For better understanding, the said rule 15(4) is extracted hereunder:

15(4)(i) Promotion shall be made on grounds of merit and ability, seniority being considered only when merit and ability are approximately equal.

(ii) Appointments to the various categories of teachers shall be made by the following methods;

(i) Promotion from among the qualified teachers in that school.

(ii) If no qualified and suitable candidate is available by method (i) above,-

(a) Appointment of other persons employed in that school, provided they are fully qualified to hold the post of teachers;

(b) Appointment of teachers from any other school;

(c) Direct recruitment

In the case of appointment from any other school or by direct recruitment the School committee shall obtain the prior permission of the District Educational Officer in respect of Pre-primary, Primary and Middle School and that of the Chief Educational Officer in respect of High Schools and Higher Secondary Schools. Teachers" Training Institutions setting out the reasons for such appointment. In respect of corporate body running more than one school, the schools under that body shall be treated as one unit for purpose of this rule.

(d) Appointment to the post of Headmaster of Higher Secondary School shall be made by the method specified in clause (ii) either from the category of Headmasters of High Schools or Teachers" Training Institute or from the category of Post-Graduate Assistants in academic subjects or Post-Graduate Assistants in Languages provided they possess the prescribed qualification.

From the reading of the above said rules, it is clear that the non-teaching staff also can be considered to the post of teachers if they are otherwise qualified. Consequently, the reasons assigned by the respondents in the impugned orders are not sustainable and therefore, the impugned orders are set aside and consequently, the writ petition is allowed with a direction to approve the appointment of the petitioner as Graduate Teacher with effect from 10.1.2005 and further as B.T. Assistant (Science) with effect from 1.9.2005 and pay all salary and other benefits within a period of eight weeks from the date of receipt of a copy of this order. Consequently, connected miscellaneous petitions are closed. No costs.

Petition allowed.