
(2009) 12 MAD CK 0216

In the Madras High Court

Case No : Writ Petition No. 16456 of 2009 and M.P. No. 1 of 2009

K.V.S. Panikumar

APPELLANT

Vs

The Government of Tamil Nadu

RESPONDENT

Date of Decision : 07-12-2009

Acts Referred:

Constitution of India, 1950 — Article 21A, 30(1)
Education Department Rules, 1977 — Rule 6(2)

Citation : (2009) 12 MAD CK 0216

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : V. Manohar, for the Appellant; R. Neelakantan, GA, for the Respondent

Judgement

K. Chandru, J.—Heard both sides. The petitioner, who is a Laboratory Assistant working in the fourth respondent Higher Secondary School, has filed the present writ petition directing the respondents 2 and 3 to approve his appointment with effect from 26.6.2006 and to extend all service benefits to him forthwith.

2. When the matter came up on 17.8.2009, the petitioner was directed to take private notice to parties. On notice from this Court, the respondents have filed a counter affidavit, dated Nil (September, 2009).

3. The brief facts leading to the filing of the writ petition are as follows:

The petitioner states that the fourth respondent School is the linguistic minority school and also recognised as such and is entitled to have protection under Article 30(1) of the Constitution of India. The post of Laboratory Assistant became vacant on 30.11.2005 on account of retirement of one Anantha Sarma. In his place, the petitioner was appointed by the fourth respondent Management on 23.6.2006. In the appointment order itself, it was stated that it is subject to approval by the District Educational Officer, Chennai Central. He is working in the said school since then.

4. In the assessment order made by the Chief Educational Officer, dated 18.9.2006, with reference to the staff strength, it is clearly indicated that the fourth respondent School is entitled to have two posts of Laboratory Assistant. Subsequently, the petitioner sent a representation, dated 18.1.2007, 10.8.2007, 20.3.2008 and 2.1.2009, seeking for approval of his appointment and to release wages for the said period. When the same was not forthcoming, he has filed the present writ petition.

5. The contention raised by the petitioner was that since his school is a linguistic minority institution, it does not require prior permission from the Government for filling up the posts.

6. In the counter affidavit filed on behalf of respondents 1 to 3, it was stated that the State Government had imposed a ban on appointment of different categories of posts except Teachers, Doctors and Police as they were declared and certified as essential posts. But insofar as the post of Laboratory Assistant is concerned, since the ban on non teaching staff is still continuing, the petitioner cannot be fitted in the said post. Subsequently, the Government has lifted the ban on filling up the post by direct recruitment vide G.O.Ms. No. 14, P&AR Department, dated 7.2.2006. But, in the subsequent Government letter` No. 11462/D2/2006-1, dated 26.5.2006, it was stated that there was no need to lift the ban for filling up the vacancies of non teaching staff in the aided schools. Thereafter, the Government issued G.O. No. 115, School Education department, dated 30.5.2007 permitting to fill up the vacancies of 164 Junior Assistants and 140 Office Assistants posts all over the State. Since permission was not given to fill up the post of non teaching staff other than Junior Assistants and Office Assistants, the request of the petitioner cannot be considered. It was also stated that only because there was fixation of staff strength by the Chief Educational Officer, it does not mean that approval of the Government should be given for filling up the post.

7. Therefore, the short question that arises for consideration is whether the petitioner is entitled to get approval notwithstanding the ban imposed by the Government.

8. The question raised in this writ petition is no longer res integra. The Supreme Court vide its judgment in State of Tamil Nadu and Others Vs. Amala Annai Higher Secondary School, dealt with a similar case in respect of a minority institution. In paragraphs 11 to 15 of the said judgment, the Supreme Court observed as follows:

11. Secondly, insofar as GOMs` No. 340 dated 1-4-1992 is concerned, it is not attracted at all. GOMs` No. 340 dated 1-4-1992 issued by the Education Department mentions:

Accordingly, the following staffing pattern, was recommended by the Committee for deciding the eligibility for post for the schools in question (opened in 1987-1988 and earlier)....

Thus, GOMs` No. 340 dated 1-4-1992 containing norms for sanction of posts is applicable to the High Schools opened in 1987-1988 and earlier. In the present case, the School was upgraded to High School in 1988-1989.

12. Thirdly, the Division Bench as well as the Single Judge overlooked and ignored Sub-rule (2) of Rule 6 of the Education Department Rules, 1977 which reads:

6.(2) Payment of monthly staff grant shall be made only in respect of qualified and admissible teachers actually employed in minority schools whose appointments have been approved by the authorities concerned according to the number of posts sanctioned to the institution concerned.

Admittedly, in the present case, the management of the School appointed Ms. Rosary as Junior Assistant to a non-sanctioned post. The explanation of the management that she was appointed in anticipation of orders from the competent authority hardly merits acceptance.

13. Fourthly, as per the norms issued in relevant GOMs the strength of the School during 1990-1991 was only 300 and above while the students' strength of the School during 1990-1991 was only 281. As a matter of fact, it is not even the case of the management that during 1990-1991, the student strength was 300 or more. The student strength during 1993-1994 and subsequent years has no relevance. It is here that the High Court fell into a grave error because what was important under the relevant GOMs was that the student strength must have been 300 or more during the years 1988-1989, 1989-1990 and 1990-1991.

14. Fifthly, the reliance placed by the High Court on GOMs` No. 245/Education dated 21-2-1970 is misplaced inasmuch as the said G.O. applied to clerks who were already employed in and around the year 1964 and has no application to a Junior Assistant appointed to a non-sanctioned post in 1988-1989.

15. Last but not the least, the High Court erred in directing the present Appellant 1 to sanction one post of Junior Assistant to Respondent 1, AAHS School from 1-6-1994 overlooking and ignoring that creation and sanction of posts is the prerogative of the executive and the courts cannot arrogate to themselves a purely executive power.

Therefore, the petitioner cannot demand as a matter of right approval and payment of salary.

9. Subsequently, a similar question also came up before the Supreme Court in Kolawana Gram Vikas Kendra Vs. State of Gujarat and Others, . In paragraphs 6 to 8, the Supreme Court observed as follows:

6. In our considered view, we do not view this to be the interference in the selection process. It would be perfectly all right for a minority institution to select the candidates without any interference from the Government. However, the requirement of this prior approval is necessitated because it is for the

Government to see as to whether there was actually posts available in the said institution as per the strength of students and secondly, whether the candidates, who were sought to be appointed, were having the requisite qualifications in terms of the Rules and Regulations of the Education Department. That is precisely the stand taken by the State of Gujarat before us in its counter affidavit. Para 3 of the said affidavit reads as under:

Minority institutions are free to select their teaching and non-teaching staff. No Government Officer or the representative of the Board was appointed in the selection committee of the minority institution. There is no interference by the Government in the administration of the schools. However, N.O.C. is required to be obtained to verify whether there is a vacancy of a teacher of a particular subject as per the workload fixed by the Gujarat Secondary and Higher Secondary Education Board specially when the government is providing grant-in-aid and that he possesses minimum required qualification for the post he is appointed.

7. From the reading of aforementioned para 3, it is clear that all that the Government wants to examine is as to whether the proposed appointments were within the frame work of the rules considering the workload and the availability of the post in that institution and, secondly, whether the selected candidates had the necessary qualifications for the subjects in which the said teachers were appointed. The same applies to the non-teaching staff also.

8. In view of this clear stand taken by the State Government, we cannot pursue ourselves to hold that the aforementioned circular amounts to any unconstitutional interference in the internal working of the minority institution. In that view, we would choose to dismiss these appeals. However, Mr. Ahmadi raised another point saying that if the prior approval or the no objection certificate, as the case may be, is not awarded within seven days without any reason, then it would be hazardous for the minority institution to run itself. We do expect the competent authority to issue the no objection certificate within the time provided in the said circular which is of seven days. Of course, if there are any objections, the authority will be justified to take some more time within the reasonable limits.

10. If these two rulings are applied, the contention of the petitioner that his appointment should be given approval as a matter of right cannot be considered.

11. But at the same time, in paragraph 4 of the counter affidavit, it was stated that by G.O.Ms. No. 525, dated 29.12.1997, the posts are fixed with reference to teacher pupil ratio. In the present case, the staff strength of the school has been fixed in terms of the G.O. by the proceedings of the Chief Educational Officer in Mu.Mu. No. 7148/Aa1/06, dated 18.9.2006. In respect of Laboratory Assistant, there are two posts available to the said school. Since one permanent incumbent had retired, the school is entitled to fill up the post. At the same time, because of the ban, the State Government had not allowed the post to be filled up.

Therefore, till such time the State Government grants approval to fill up the post, the petitioner's services shall be continued and his salary will have to be paid by the fourth respondent Management from and out of their funds. As soon as grants are released by the State Government, the same can be adjusted.

12. The fourth respondent shall pay salary as per the dictum laid by the judgment of the Supreme Court in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, . The Supreme Court has held the employer is responsible to pay salary and other benefits to their staff without waiting for the grant. In paragraph 10 of the judgment, the Supreme Court observed as follows:

10. ...We heard counsel for the State. He disputes the appellants' claim. In fact, he challenges the claim on a number of grounds. He says that the State is under no obligation to pay the appellants as against the sum due to the respondents. We do not think that we need rule today on this controversy. It is indeed wholly outside the scope of these appeals. We are only concerned with the liability of the management of the college towards the employees. Under the relationship of master and servant, the management is primarily responsible to pay salary and other benefits to the employees. The management cannot say that unless and until the State compensates, it will not make full payment to the staff. We cannot accept such a contention.

13. The first respondent must also be directed to consider grant of permission to fill up the post as without a Laboratory Assistant, the school cannot run the laboratory. The first respondent cannot eternally postpone the grant of approval to the said post on the basis of a so-called ban order. A school has to run with necessary para teaching staff also. Therefore, it is incumbent on the first respondent to consider the grant of permission to fill up the post without fail. Otherwise, it will defeat the very purpose of Article 21A of the Constitution, wherein children are guaranteed to get compulsory free education by the State. The first respondent is also directed to consider the grant of permission to fill up the said post and a decision shall be taken within eight weeks from the date of receipt of copy of this order.

14. With the above directions, the writ petition is disposed of. No costs. Consequently, connected miscellaneous petition stands closed.