
(2010) 06 MAD CK 0183

In the Madras High Court

Case No : Writ Petition No. 13437 of 2009 and M.P. No's. 1 to 3 of 2009

Mrs. Arokia Mary

APPELLANT

Vs

The Director of School Education and Others

RESPONDENT

Date of Decision : 08-06-2010

Acts Referred:

Constitution of India, 1950 — Article 30(1)

Citation : (2010) 06 MAD CK 0183

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : A. Xavier Arul Raj, for the Appellant; A.C. Mani Bharathi, GA for RR1 to 4, P. Chandrasekaran, for R5 and A. Arul Mary, for R6, for the Respondent

Judgement

K. Chandru, J.—The petitioner has filed the present writ petition seeking to challenge the order of the second respondent, dated 30.1.2009

and the consequential proceedings of the third respondent dated 18.2.2009 as well as the proceedings of the fourth respondent, dated 26.2.2009.

After setting aside those orders, he seeks for a direction to respondents 2 to 4 to accord approval to transfer and appointment of petitioner

working as Secondary Grade teacher in the RCM Primary School, Kamaraja Nagar, Avadi, Chennai with effect from 19.12.2006 and also to

regularise her service with all attendant benefits.

2. When the matter came up on 17.7.2009, this Court directed the learned Government Advocate to take notice and also granted an interim stay.

Subsequently, a counter affidavit, dated 18.12.2009 was filed by the third respondent DEEO, Thiruvallur on his behalf as well as on behalf of

respondents 2 and 4 also. On behalf of 5th and 6th respondent, who are private respondents, a counter affidavit, dated 19.2.2010 was also filed.

3. It was claimed by the school management that on 18.12.2006 they transferred the petitioner from 5th respondent school to the 6th respondent school by way of transfer and that a proposal was also forwarded on 19.12.2006 for approval. The DEO, Ponneri granted approval for relieving the petitioner, on 2.4.2007. On 17.7.2007, the third respondent informed the fourth respondent to get appropriate approval from the Directorate, the second respondent herein. Thereafter, the first respondent by an order dated 8.9.2008 ratified the transfer having joined the sixth respondent school on 19.12.2006. Subsequently, on 21.10.2008, a consent was given for the said transfer. On 24.11.2008, the first respondent Director of School Education wrote to the second respondent to grant necessary order for continuance of the petitioner in the sixth respondent school as the said school came under the control of the second respondent Directorate. However, strangely, the second respondent Directorate of Elementary Education, by the impugned order, dated 30.1.2009, stated that transfer was made unilaterally and the school in question, i.e. sixth respondent, was having the sanctioned post of $1 + 11 = 12$, which included the post of Headmaster. Since the case of the petitioner is surplus to the requirement, the action of the management cannot be ratified.

4. The third respondent informed the fourth respondent AEE, Poondamalli about the order passed by the second respondent. The school was also communicated by the fourth respondent about the decision taken by the second respondent. Thereafter, the management of the school, by a letter, dated 17.3.2009, informed that one Regina had gone on voluntarily retirement on 1.8.2006. Since a vacancy arose in that school, the petitioner was appointed against that post. Since both schools were recognized and only against a sanctioned post, she was transferred to that post. The posting of the petitioner was only a transfer and not migration. In the meanwhile, the petitioner school was informed that staff requirement for three years from 2006-2007, 2007-2008 and 2008-2009 was ordered by the third respondent. It is found that while there was requirement of one post during 2006-2007. For 2007-2008 and 2008-2009, the complement was full and one post of teacher had become surplus.

5. In the counter affidavit filed by the third respondent, it was claimed that no proposal was submitted by the management before transfer request

was made and the present transfer cannot be approved by the department. With reference to the reason for rejecting for grant of approval, in

paragraph 11 of the counter, it was averred as follows:

11....Here, the petitioner was transferred between the aided minority school without obtaining prior permission either from the school Education

Department or the Elementary Education Department and the transfer order was given effect unilaterally which ultimately caused great hardship to

the petitioner who is put to unwarranted trouble on account of the administration, though the petitioner initially appointed in a sanctioned post of a

recognized minority institution. It is relevant to mention here that the place where the petitioner claimed to be working become surplus on account

of student strength in accordance with the existing Government orders, rules and regulations.

Therefore, the 2nd respondent having no option except to reject the retrospective approval of the transfer order of the petitioner due to the reason

on the date of passing impugned order on 30.01.2009 whereas it was already declared on 01.08.2008 as surplus therefore, for any reason

approval cannot be granted. Until the petitioner relieving order approved by the 1st respondent, who passed approval of relieving on 8.9.2009 that

too after the transferred post become surplus....

6. The petitioner's contention that they have right to transfer a teacher from one school to another school as it is fully guaranteed by Article 30(1)

of the Constitution of India itself, cannot be accepted in the light of the Full Bench judgment of this Court in *Correspondent, Malankara Syrian*

Catholic School Marthandam v. J. Rabinson Jacob and Ors. reported in 1998 (4) LLN 804. In the present case, this Court is not dealing with a

mere transfer order. Even assuming without admitting that fifth and sixth respondents are entitled to transfer from one school to another school the

services of a teacher that order must presuppose the existence of post in both schools. Merely because one teacher had voluntarily retired from the

sixth respondent school, that itself is not a ground to presume the existence of a post and that a person can be transferred to that school.

7. It must be noted that each school is separately assessed for grant. Posts are sanctioned with reference to the requirement of that school by

taking note of the economic strength of the students. Under the Tamil Nadu

Minority Schools (Recognition and Payment of Grant) Rules, 1977, it

has been stipulated that the post will be sanctioned depending upon the students strength. Even when vacancies arise due to retirement or

resignation, the Act or rules requires prior approval for sanction of post and further approval for any one appointed to the said post.

8. It is a definite stand of the official respondents that the school in which the petitioner was transferred, there is surplus in the school and therefore,

even if a teacher had retired voluntarily, that will not automatically enable fifth and sixth respondents to transfer as a matter of course from one

school to another school, where there is no requirement for a teacher. As accepted by fifth and sixth respondents in their counter affidavits, this is

not a case of migration, but one of transfer.

9. As to whether any prior approval is required for filling up of the said post itself came to be considered by the Supreme Court in a very recent

decision 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. It must also be noted that even minority schools do not have complete right to do whatever they want to do and their right is not absolute.

Though a division bench of this Court in a batch of cases in W.P. No. 4478 of 1974, dated 17.12.1975 held that several provisions of the Tamil

Nadu Recognised Private Schools (Regulation) Act, 1973 and 1974 Rules were an inroad into the minority's right to administer the institution, the

said matter was taken to the Supreme Court. The Supreme Court set aside the order of the division bench and remanded the matter for a fresh

disposal by this court. In that order it was held as follows:

The several questions raised in these matters are covered by the decision of a Constitution Bench of this Court in Writ Petition No. 317/1993-

T.M.A. Pai Foundation and Ors. etc. v. State of Karnataka and Ors. etc. and connected batch decided on 31st October, 2002. Since larger

questions have been decided by this Court, it becomes necessary for the High Courts to re-examine the matters which have been decided and

which are in appeal before this Court. The orders of the High Court are,

therefore, set aside without expressing any opinion on merits and the matters are remitted to the High Court for fresh consideration in accordance with law.

Status quo shall continue unless the High Court so decides to modify the same by an appropriate application made to it by any of the parties. The parties are at liberty to file fresh pleadings, if any, within the period fixed by the High Courts. It is made clear that all statutory enactments, orders, schemes, regulations will have to be brought in conformity with the decision of the Constitution Bench of this Court in T.M.A. Pai Foundation's case decided on 31.10.2002. As and when any problem arises the same can be dealt with by an appropriate Forum in an appropriate proceeding.

The appeals are disposed of accordingly.

11. Subsequently, a division bench of this Court in A. Belavendran v. The Joint Director of School Education reported in 2010 (1) CWC 343

after referring to the order of remand, in paragraph 18 observed as follows:

18. ...the Supreme Court, in the same order, observed that the questions raised were covered by the decisions in T.M.A. Pai Foundation v. State

of Karnataka 2002 (5) CTC 201 (SC). Since the larger questions have been decided, the High Court had to examine the matter in the light of

what is stated by the Supreme court..... We are informed that the school did not challenge it. But, however, the Supreme Court has observed that

all statutory enactments, orders, schemes, regulations will have to be brought in conformity with the decision of the Constitution Bench of this Court

in T.M.A. Pai Foundation's case decided on 31.10.2002.

12. Therefore, any challenge regarding Constitutionality of a provision will have to be tested in the light of T.M.A. Pai Foundation's case. In

T.M.A. Pai Foundation's case, the Supreme Court framed 11 questions and answered the same in paragraph 161. Question No. 5(c) as found in

paragraph 161 as well as answers found therein may be usefully extracted below:

Q. 5. (c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing

bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their

service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a judicial officer of the rank of District Judge.

The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State, without interfering with the overall administrative control of the management over the staff.

Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee.

13. In the present case, the petitioner did not satisfy that there was any contract of service for effecting such transfer. Even if there was one that could be done only in a case where the posts are available for a teacher to be transferred. But, in the present case, the stand of the respondents was that there was no post available in the sixth respondent school to accommodate the petitioner. Therefore, in the absence of prior approval for filling up the post in the sixth respondent school, the action of the fifth and sixth respondents in making routine transfer of the petitioner to the sixth respondent school is clearly impermissible. The respondent are well within their right to refuse to grant approval of petitioner holding the post. The petitioner cannot enforce the right which is not based upon a rule framed by the

department. Hence no case is made out and the writ petition is liable to be dismissed and accordingly dismissed. No costs. Consequently, all miscellaneous petitions shall stand closed.

14. However, by the action of the fifth and sixth respondents, the petitioner cannot be allowed to go high and dry. Because of their unilateral transfer, they will have to bear the burden of paying the petitioner her salary for the last four years. In this context, it is necessary to refer to the decision 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.

15. In the light of the above, the fifth and sixth respondents are hereby directed to pay salary due to the petitioner for the interregnum period and also re-transfer the petitioner to the fifth respondent school without fail.