



W.P(MD)No.16879 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.03.2023

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P(MD)No.16879 of 2020

and

W.M.P.(MD)No.14115 of 2020

V.Pathrakali

... Petitioner

Vs.

- 1.The Director of School Education,
DPI Campus,
Chennai-6.
- 2.The Joint Director of School Education (Higher Secondary),
DPI Campus,
Chennai-6.
- 3.The Chief Educational Officer,
O/o.the Chief Educational Officer,
Virudhunagar,
Virudhunagar District.
- 4.The District Educational Officer,
O/o.the District Educational Officer,
Sivakasi,
Virudhunagar District.
- 5.S.N.G.Girl's Higher Secondary School,
Rep.by its Secretary,
Thiruthangal-626 130,
Virudhunagar District.



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6.C.Manickam,
The Secretary,
S.N.G.Girl's Higher Secondary School,
Thiruthangal-626 130,
Virudhunagar District.

7.R.Poongodi
PG Assistant (English),
S.N.G.Girl's Higher Secondary School,
Thiruthangal-626 130,
Virudhunagar District.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Declaration, to declare the proceedings in L.R.No.112/2019-20, dated 20.09.2019 and the proceedings in L.R.No. 134/19-20, dated 09.10.2019 and the Recruitment Advertisement insofar as the PG Assistant (English) Post in the 5th Respondent School issued by the fifth respondent and the consequential appointment of the 7th respondent in the post of Post Graduate Assistant (English) in the 5th respondent school as illegal and consequently, for a direction, directing the fifth respondent to promote the petitioner in the post of PG Assistant (English) in accordance with the Rule 15(4) of Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974 within a time period stipulated by this Court.

For Petitioner : Mr.Aswin Rajasimman
for Mr.T.Lajapathi Roy

For Respondents : Mr.N.Satheeskumar
Additional Government Pleader for R1 to R4
: Mr.N.Dilipkumar for R5 & R6
: Mr.R.Murali for R7



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ORDER

Heard the learned counsel on either side.

2. The writ petitioner joined the 5th respondent school as B.T.Assistant (English) on 25.04.2018. Vacancy arose in the post of P.G.Assistant (English) in the said school in August 2018. The management appointed the 7th respondent in the said vacancy vide order dated 01.11.2019. Challenging the same, the present writ petition has been filed.

3. The learned counsel appearing for the petitioner reiterated all the contentions set out in the affidavit filed in support of the writ petition and called upon this Court to set aside the order appointing the 7th respondent as P.G.Assistant (English). He wanted this Court to direct the Management to promote the petitioner to the said post.

4. Reliance is placed on Rule 15(4) of Tamil Nadu Recognized Private Schools (Regulation) Rules, 1974 in this regard. The respondents have filed a counter affidavit. The learned counsel for the Management as well as the learned counsel for the 7th respondent submitted that there is no merit in this writ petition and that it deserves to be dismissed. They point out that the



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petitioner had not completed her probation when the 7th respondent was appointed and that therefore, she cannot invoke Rule 15(4).

5. I carefully considered the rival contentions and went through the materials on record.

6. The first question that calls for consideration is whether the petitioner had completed her probation when the 7th respondent was appointed on 1.11.2019. It is not in dispute that the petitioner was appointed as B.T.Assistant in the 5th respondent school only on 25.04.2018. The learned counsel appearing for the petitioner draws my attention to Form VII-A annexed to the statutory rules. Clause 2 of the said Form reads that a teacher appointed in a private school shall be on probation for a period of one year from the date of taking charge of his/her appointment and the School Committee may however extend it to a further period not exceeding one year or two years, as the case may be for reasons to be recorded in writing.

7. The argument of the petitioner's counsel is that when the petitioner had completed her one year on 24.04.2019, her probation should be deemed to have been completed, since the school committee did not pass any order



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extending the period of probation. I cannot endorse the said contention. As rightly pointed out by the learned counsel appearing for the Management and the 7th respondent, Rule 15(A) of Tamil Nadu Recognized Private Schools (Regulation) Rules, 1974 is otherwise. Rule 15(A) is as follows:-

Rule 15-A Probation- Every person appointed to a category shall, from the date on which he joins duty, be on probation for a total period of two years on duty within a continuous period of three years.

Provided that persons who had already commenced their probation in aided educational institutions prior to the 2nd May 1977 shall however be required to complete initial probation for one year and subsequent probation in the case of those who migrate to another aided school, be on probation for one more year.

Rule 15(A) was inserted by G.O.Ms.No.2234, Education, dated 03.12.1979. When Rule 15(A) was introduced, Clause 2 of Form-VII should have been correspondingly amended. It was not done. Merely because a corresponding amendment was not statutorily made, it would not mean that a teacher appointed in a private school should be deemed to have completed her probation on completion of one year of service, if the Management had not passed an order extending the period of probation. The Hon'ble Apex Court in *Ispat Industries Ltd., vs. Commissioner of Customs, Mumbai (2006) 12 SCC 583* observed as follows:-



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“... it may be mentioned that according to the theory of the eminent positivist jurist Kelsen (The Pure Theory of Law) in every legal system there is a hierarchy of laws, and whenever there is conflict between a norm in a higher layer in this hierarchy and a norm in a lower layer the norm in the higher layer will prevail (see Kelsen's' The General Theory of Law and State).

In our country, this hierarchy is as follows:-

- (1) The Constitution of India;
- (2) The Statutory Law, which may be either Parliamentary Law or Law made by the State Legislature;
- (3) Delegated or subordinate legislation, which may be in the form of rules made under the Act, regulations made under the Act, etc.,
- (4) Administrative orders or executive instructions without any statutory backing.”

Applying the above principle, one has to hold that if Form-VII annexed to statutory rule is not in consonance with the statutory rule, then the statutory rule will prevail over the Form. I therefore hold that on the date, when the 7th respondent was appointed as P.G.Assistant (English) in the 5th respondent school, the petitioner had not completed her probation as BT Assistant (English). The next question that arises for consideration is whether a teacher on probation is entitled to claim benefit under Rule 15(4). Rule 15(4) is as follows:-

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

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



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- (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.

It is relevant to note here that the expression employed in Rule 15(4) is 'promotion'. In other words, a qualified teacher working in a private school will have the first claim in the matter of appointment when vacancy arises in a higher post. The petitioner indeed possesses the requisite educational qualification prescribed for the post. The relevant question here is whether she could have been promoted to the post of P.G.Assistant when she had not completed her probation.

8. The learned standing counsel for the Management as well as the appointee would strongly urge that a person who had not completed probation cannot claim promotion to a higher post. Of-course, there is no direct provision in the Tamil Nadu Recognized Private Schools (Regulation) Act or the Rules framed thereunder. However, my attention is drawn by the learned counsel appearing for the respondents to Section 41 of the Tamil Nadu Government Servants (Conditions of Service) Act, 2016. Section 41(1) of the Act is as follows:-



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41.Promotion-(1) No member of a service or class of a service shall be eligible for promotion from the category in which he was appointed to the service unless he has satisfactorily completed his probation in that category.

Provided that a member of a service or class of a service who having satisfactorily completed his probation in the category in which he was appointed to the service, has been promoted to the next higher category shall, notwithstanding that he has not been declared to have satisfactorily completed his probation in such higher category be eligible for promotion from such higher category.

Provided further that if scales of pay or pay band of posts in the feeder categories are different, the persons holding carrying a higher scale of pay or pay band in the feeder category shall be considered first and that, if no qualified and suitable persons holding post in that feeder category are available, the persons holding post carrying the next higher scale of pay or pay band in descending order in other feeder categories shall be considered.

A careful reading of the aforesaid provision would indicate that a promoted government employee can be further promoted even if she had not completed her probation. But a Government employee will not be eligible for promotion in the first instance unless he or she had satisfactorily completed probation in his or her post. Even though there is no corresponding provision in respect of the private school employees, I can very well apply the principle of “Atidesha”. I had already referred to this principle vide order dated 16,09.2022 in W.P. (MD)No.18626 of 2020 in the following terms:-

10. There is a reference to Principle of “Atidesha. It means that a rule found to be good with regard to one case is applicable to other analogous cases. Of course, this principle of analogy should not be strained or forced. The book contains a judgment of His Lordship rendered in ***C.M.W.P. No.8249 of 1990, dated***



11.10.1992 (Sardar Mohammad Ansar Khan v. State of U.P.). The writ petitioner therein invoked Rule 3(1)(b) of the U.P. Intermediate Education Rules, 1983 which stated that if two or more teachers are appointed on the same date, their *inter se* seniority shall be fixed on the basis of age. Though the rule applied to teachers, the Hon'ble Judge observed that the rule is sound and fair and applied it to non-teaching employees also, particularly since there was no rule applicable to non-teaching employees for fixing seniority of employees appointed on the same day. The said decision runs thus:-

“2. In my opinion we can use the Atidesh Principle of Mimansa in this connection.

3. I have already pointed out in some earlier judgments of mine, as well as in an article published in November 1992 issue of All India Reporter, that the Mimansa Principles of interpretation were our traditional system of Interpretation used regularly by our jurists. These principles originated from the religious difficulties found in interpreting and understanding the texts in the Shrutis pertaining to performance of the various Yogyas Thus the Mimansa principles were originally meant for religious purposes, but since they were rational and scientific they gradually became of universal application, and began to be used in law, in grammar In philosophy etc. our great commentators like Vijnaneshwar, Jimutvahan, Vachaspati, Nanda Pandit, etc were all profound scholars of Mimansa. In fact those who wished to study law had first to undergo a course in Mimansa, for it was realized that without knowledge of the Mimansa principles there could be no real understanding of the law as laid down in the smritis.

4. The Mimansa Principles were first laid down by Jaimini in his sutras written around 500 B.C. The main commentary on it is the Bhashya of Shabar, written around 200 A.D. kumarila Bhatta's Tantravartika is the famous commentary on the Shabar Bhashya written around 300 A.D. Prabhakar is the founder of the Prabhakar schools of Mimansa (while Kumaril's school is known as the Bhatta School).

5 . The first six chapters of Jamini's sutras deal with upadesha, or express injunction while chapters 7 and 8 deal with atidesh or injunction by reference and it is this principle which we shall examine here.



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6. Jaimini defines Atidesh as follows "if what is prescribed as a duty with regard to one object applies to another object this is called Atidesh".

7. There are various sacrifices (Yagya) for various purposes, and these are mentioned in the Brahmanas, which are prose texts attached to the vedas. The procedure of some sacrifices is given in great detail and these are known as Prakriti (or model). Thus the rules of the Darshapurnamasi Yagya, which is one of the main Vedic Yagyas, is given in great detail in the Shatapatha Brahmana, and hence darshapurnamasi is a Prakriti. On the other hand, there are other sacrifices whose details have not been given anywhere, and hence the question arose how these are to be performed. These are known as Vikriti and the Mimansa rule of Atidesh was created which laid down that the rules of the prakriti will also apply to the Vikriti.

8. Thus, for example, while the rules of the daily agnihotra have been given in detail in the shrutis, as regards the monthly Agnihotra there is only an injunction that it should be performed (Maasam Agnihotram Juholi). No further details are given anywhere as to how the monthly agnihotra is to be performed. Hence the Atidesh Principle is used and the rules of the daily Agnihotra are also applied to the monthly agnihotra Similarly, the parvana Shraddha for the paternal ancestors is the Prakriti for the Paravana Shraddha for the maternal ancestors, which is the Vikriti of the former (This is of great importance In the Dayabhaga school in which the number of pindas given is relevant for determining the order of succession).

9. Jaimini confined atidesh to yagyas, but the later mimansaks extended the principle to various other matters too, and various sub categories of atidesh were laid down (see K.L. Sarkar's Mimansa Rules of Interpretation, PP-203-204).

10. The Atidesh Principle has been used extensively by our jurists. Thus, the Dattaka chandrika using the atidesh principle, applies the same rules to Dattaka (adopted) sons which applies to Kshetrajia (natural) sons This is because a natural (begotten) son is to the adopted son like a Prakriti Yagya to a Vikriti Yaga. As regards the begotten son there are detailed rules regarding his rights and duties, but there are very few rules expressly related to adopted



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sons. Hence by the Atidesh principle the rules regarding begotten sons are also applied to adopted sons.

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11. In the present case we notice that there is no express rule as to how the seniority of non-teaching employees in educational institutions who are appointed on the same day is to be reckoned. Hence using the atidesh principle of Mimansa we can hold that it is to be reckoned in accordance with the rule for teachers, and the senior in age should be deemed to be senior. Thus there is no infirmity in the impugned order and the petition is accordingly dismissed. The stay order is vacated. No order as to costs."

9. I therefore hold that a private school employee who has not completed his or her probation will not be eligible to claim the benefit under Rule 15(4) of Tamil Nadu Recognized Private Schools (Regulation) Rules, 1974. The order impugned in the writ petition does not warrant interference.

10. The Writ Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

30.03.2023

Index : Yes / No
Internet : Yes/ No
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To
1.The Director of School Education,
DPI Campus,
Chennai-6.



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G.R.SWAMINATHAN, J.

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