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IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

WRIT PETITION No.28165 of 2014

Between:

D.Raja Sampath

..... PETITIONER

And

The Govt. of Telangana rep. by its Secretary, Education Dept., Hyderabad
and four others

.....RESPONDENTS

DATE OF JUDGMENT PRONOUNCED: 29.09.2015

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE R. KANTHA RAO

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| 1 | <u>Whether Reporters of Local newspapers
may be allowed to see the Judgments?</u> | <u>Yes/No</u> |
| 2 | <u>Whether the copies of judgment may be
marked to Law Reports/Journals</u> | <u>Yes/No</u> |
| 3 | <u>Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment?</u> | <u>Yes/No</u> |

THE HON'BLE SRI JUSTICE R.KANTHA RAO

WRIT PETITION No.28165 of 2014

ORDER:

Heard the learned Counsel appearing for the petitioner and the learned counsel appearing for the respondents.

2. The petitioner was appointed as Attender in the 5th respondent's School in the year 2000 on compassionate grounds. He acquired the requisite qualifications for the post of Secondary Grade Teacher (SGT). He appeared for Ed.CET, 2003 examination and was selected vide proceedings dated 19.02.2004 issued by the second respondent. He was allotted to the College of Teachers Education (CTE), Warangal and study leave was granted to him. He successfully completed his B.Ed. course in the month of April, 2005. After acquiring B.Ed. qualification, the petitioner became fully qualified and eligible for the post of School Assistant.

3. One of the Secondary Grade Teachers (SGT) who is senior to the petitioner in the 5th respondent's school was promoted as School Assistant, as a result, the SGT post in the school fell vacant in the 5th respondent's school. He made an application to consider his case to effect promotion i.e. recruitment by transfer in the said vacancy. The SGT which fell vacant was grant-in-aid, the school management considered the name of the petitioner for the said post and appointed him in the said post in the existing vacancy by the process of recruitment by transfer. The proceedings appointing the petitioner as SGT were forwarded to the third respondent who is the competent authority to approve the said appointment.

4. It is submitted by the petitioner that as per the A.P. School Educational Subordinate Service Rules, the post of SGT comes under Class-3 category-II, any appointment to the said post can be made by direct recruitment or by transfer or recruitment by transfer and the candidate must possess the qualification at least intermediate examination conducted by the Board of Intermediate Education (BIE) or its equivalent, and must possess Teacher

Training Certificate issued by the Commissioner for Government Examinations or its equivalent and candidates with higher qualification may also be appointed. According to the petitioner, the same is clarified by the Government of Andhra Pradesh in G.O.Ms.No.167, dated 09.03.1984. Thus, the 5th respondent considered the case of the petitioner for promotion in the existing vacancy.

5. In response to the clarification sought by the Director General of School Education of Andhra Pradesh with regard to recruitment by transfer from the non-teaching to teaching cadre, the government have given a clarification vide Memo No.731/SS.2/92, dated 30.10.1992 mentioning therein that the recruitment by transfer from any other service, a non-teaching staff may be recruited from any other service for promotion to the teaching post, if they are fully qualified to hold the post. When there are no qualified persons in feeder categories in teaching staff if the persons working in non-teaching post are qualified to hold a particular post, they may be considered for promotion to the teaching category.

6. The 5th respondent school after getting clarification from the respondents 3 and 4 has promoted the petitioner as SGT in their school and the appointment of the petitioner is forwarded to Deputy District Educational Officer, Warangal and from there to the 3rd respondent. Meanwhile, the Government of Andhra Pradesh has issued a Memo No.8544/P5-1/05-2, dated 13.09.2005 imposing prohibition of promotions under Act 2 of 1994. Because of the ban, the appointment of the petitioner was kept pending. Aggrieved by the said action, the petitioner approached this Court and questioned the ban orders issued by the government in W.P.No.27743 of 2005. After hearing both sides, the writ petition was disposed of along with batch of writ petitions i.e. W.P.No.4207 of 2005 etc. by order dated 23.08.2004 directing the respondents that the case of the petitioner may be considered for absorption/appointment either SGT or School Assistant disregarding the government memo dated 20.10.2004.

7. It is further submitted by the petitioner that the first respondent issued G.O.Ms.No.21, dated 19.03.2012 with reference to the orders of the Apex Court by granting permission to the 3rd respondent for approval or certain selections/absorption/promotion where the process of recruitment had already been commenced prior to ban in Aided School pursuant to the initial permission granted. After the decision of this Court in batch of writ petitions, the respondents have given effect to promotions whose cases were considered prior to ban orders and were pending for approval. After receipt of the order from this Court in the batch of writ petitions, the 3rd respondent addressed a letter to the 2nd respondent for clarification on 30.11.2013 by referring the names of the candidates whose promotions are pending including the name of the petitioner. In response to the said letter, the 2nd respondent gave clarification and after getting clarification, the 3rd respondent approved the promotions of some persons except the promotion of the petitioner. The petitioner was singled out by applying the G.O.Ms.No.4, dated 09.01.2012. According to the petitioner, the said G.O. dated 09.01.2012 is totally irrelevant to his case. The version of the petitioner is that he was recruited by way of transfer from the post of Attender to the Secondary Grade Teacher in the year 2005 and the same was sent to the 3rd respondent for approval and as the ban orders were intervened, the petitioner's promotion was not approved in the year 2005 itself. Aggrieved by the same, the petitioner filed W.P.No.27743 of 2003 which ultimately decided in favour of the petitioner on merits. Therefore, it is submitted by the petitioner that instead of complying with the order of this Court, the 3rd respondent passed the impugned order mainly because the petitioner approached this Court by way of contempt proceedings complaining the non-implementation of the order in the aforementioned writ petition. According to the petitioner, as the respondents did not comply with the order passed in the aforementioned writ petition, he was compelled to file C.C.No.867 of 2014 and the same is pending as on today. While so, the petitioner issued the impugned order rejecting the case of the petitioner by referring four grounds viz.:

- *The post of S.G.T. can be filled up only by direct recruitment and no channel of promotion or appointment by transfer is available either to the management or the department especially in the absence of even any executive instructions. Hence, the promotion order given by the management to the individual from the post of Attender, based on mere educational qualifications is wholly erroneous and illegal.*
- *For recruitment to the post of S.G.T. one has to necessarily undergo a written examination and interview. In the instant case, no such procedure was undergone and the department cannot grant a seal of approval. Apart from that, there is absolutely no channel or provision under the existing rules for promotion.*
- *NCTE is central enactment and the provisions are having binding effect on the department as held by the Apex Court in a recent judgment reported in (2013) 2 SCC 671 – Maa Vaishno Devi Mahila Mahavidyala s. State of U.P.*
- *Now, that the department have issued G.O.Ms.No.4, dated 09.01.2012 based on the qualification prescribed by NCTE and as per the said requirement one has to necessarily hold diploma in teachers training apart from being intermediate and since the individual does not hold such a qualification, he is not eligible to be considered for the post of S.G.T.*

8. The version of the petitioner is that the impugned order was passed by the third respondent suppressing the existing provisions and also misquoting them. In this connection, it is submitted that the third respondent approved the promotions by transfer from non-teaching staff to teaching staff and therefore, the petitioner's case cannot be treated separately. He also submits that for the recruitment from a non-teaching post to the teaching post by way of transfer, no written test need be conducted as per the rules. It is true that the G.O.Ms.No.4, dated 09.01.2012 is prospective in operation but not retrospective and therefore, the said G.O. cannot be made applicable to the petitioner. The case of the petitioner is pending consideration for approval since 2005 and as on the said date, there is no course in Diploma in Education except TTC and B.Ed. The petitioner acquired the B.Ed.

qualification which is higher to the required qualification. Therefore, it cannot be said that the petitioner is not eligible for the post of SGT. In this connection, it is submitted by the petitioner that the person holding higher qualification is eligible to the post of SGT and in that regard the government has given clarification in G.O.Ms.No.167, dated 09.03.1984 as well as the Rules also provide for the same.

9. Nextly, it is submitted by the petitioner that the respondents 2 and 3 have also considered the candidates for promotion from non-teaching to teaching in Warangal and Ranga Reddy Districts, but intentionally rejected the case of the petitioner under the impugned proceedings since the petitioner approached this Court and filed writ petition and contempt proceedings against the respondents.

10. Therefore, the petitioner filed the present writ petition seeking a writ of mandamus declaring the order, dated 14.08.2014 issued by the 3rd respondent in rejecting the case of the petitioner in the post of Secondary Grade Teacher of 5th respondent school as illegal, improper, null and void and contrary to the A.P. School Educational Subordinate Rules in G.O.Ms.No.167, dated 09.03.1984 and consequently direct the respondents to approve the appointment of the petitioner as Secondary Grade Teacher in 5th respondent school forthwith with all consequential benefits from the date of his appointment.

11. The 3rd respondent-Regional Joint Director of School Education filed counter-affidavit on behalf of all the respondents contending *inter alia* as follows:

The petitioner might have completed the course of Bachelor of Education by applying leave but that does not mean that the petitioner is entitled to be appointed as SGT against the rules in force. Due to promotion of one senior-most SGT to the post of School Assistant and basing on the application made by the petitioner, his name has been considered by the 5th

respondent's school on 01.07.2005 and the petitioner was appointed in the said post by way of transfer completely ignoring the required qualifications and the rules in vogue. The proposals were sent to the District Educational Officer, Warangal for approval and the same were returned vide proceedings dated 02.12.2005 stating that the higher cadre will be permitted in cases where the promotion orders were issued by the concerned managements earlier to the ban orders i.e. before 20.10.2004, but the petitioner was appointed by the 5th respondent school to the post of SGT with effect from 01.07.2005 i.e. after imposition of ban on promotions. It is further contended that there is no channel of promotion or appointment by transfer available to the management or the department to any individual from the post of attender on mere educational qualifications and thus, the promotion given to the petitioner is wholly erroneous and illegal. Further, one has to necessarily undergo a written examination and interview for promotion to the post of SGT by transfer. As per G.O.Ms.No.4, dated 09.10.2012 one has to necessarily hold diploma in teachers training apart from being intermediate and since the individual do not hold such a qualification, he is not eligible to be considered for the post of SGT. The petitioner possess bachelor of education but not diploma in education as professional qualification and therefore, he is not eligible for the post of SGT. This court was pleased to pass common order in W.P.No.9503 of 2005 and batch on 23.08.2013 with a direction to consider the case of the petitioner and others without reference to the ban orders. It is further contended that there is no feeder category for the post of SGT awarding promotion, there is no provision which specifies appointment to the said post by way of transfer from other service. Even otherwise, the case of the petitioner should be rejected on the sole ground of his professional qualification. Contending as above, the respondents sought to dismiss the writ petition.

12. Under Rule 2 of the Andhra Pradesh School Educational Subordinate Service Rules the post of Secondary Grade Teacher is in Class III Category 2. The said Rule says that appointment to the Secondary Grade Teacher can

be made by direct recruitment or by transfer or recruitment by transfer. The qualifications prescribed are that the candidate must possess the qualifications of intermediate examination conducted by the Board of Intermediate Examination of A.P. or its equivalent. He must possess Teacher Training Certificate issued by the Commissioner for Government Examinations, A.P. or its equivalent and **that the candidates with higher qualifications may also be appointed.**

13. The petitioner was appointed much prior to the passing of G.O.Ms.No.4, dated 09.01.2012. The said G.O. cannot be said to be of retrospective operation. Several candidates who were promoted as Secondary Grade Teachers earlier to the said G.O. were confirmed in the said posts and they are continuing in the said posts. There is no denial to the said fact by the respondents.

14. Therefore, the sole question requires consideration is whether on the date of his promotion as the Secondary Grade Teacher, the petitioner possesses the requisite qualifications which were prescribed on the date of his promotion. Since the proposals for confirming him in the promotional post are kept pending by the respondents, the case of the petitioner cannot be examined in the light of the G.O.Ms.No.4, dated 09.01.2012. Rule 2 of the Andhra Pradesh School Educational Subordinate Service Rules clearly states that the candidates with higher qualifications may also be appointed. Therefore, the petitioner who possesses B.Ed. which is the higher qualification to that of D.Ed. cannot be denied promotion as per the rules prevailing on the date of his appointment as SGT by approval. On the date of the promotion of the petitioner as SGT, no written test was prescribed and the promotion was to be made basing only on the candidate fulfilling the requisite qualification and subject to the availability of the clear vacancy. The Government issued proceedings dated 03.10.1992 for promoting the non-teaching staff to teaching posts. In the proceedings, it has been stated that the recruitment by transfer from any other service to non-teaching staff may be recruited from any other service for promotion to the teaching posts if they are

fully qualified to hold the posts under the reference. Further, when there are no qualified persons in the feeder categories in teaching staff if the persons working in non-teaching posts are qualified to hold a particular post they may be considered for promotion to the teaching category.

15. From the aforementioned proceedings, it is clear that when there are no qualified persons in the feeder categories in teaching staff if the persons working in non-teaching posts are qualified to hold a particular post they may be considered for promotion to the teaching category. Therefore, there is no force in the argument that the petitioner who was attender though had requisite qualifications to be promoted as teacher could not have been considered for the teacher post by promotion. In the letter dated 30.11.2013 addressed by the Regional Joint Director of School Education, Warangal to the Commissioner and Director of School Education, A.P., Hyderabad while forwarding the proposals in respect of promotions which include the name of the petitioner, it is clearly mentioned that the government vide memo dated 03.10.1992 have clarified that when there are no qualified persons in the feeder categories in teaching staff if the persons working in non-teaching posts are qualified to hold a particular post they may be considered for promotion to the teaching category. In the said letter, the Regional Joint Director requested the Commissioner and Director of School Education to clarify as to whether the above non-teaching staff are eligible directly to the post of School Assistant/Secondary Grade Teacher/Drawing Master in Aided Management Schools. In response thereto, the Commissioner and Director of School Education clarified by proceedings dated 17.12.2013 stating that the Regional Joint Director of School Education has to take action as per Government memos dated 03.10.1992 and 18.09.2003 in the references. Thereafter, the Regional Joint Director of School Education approved all the names except that of the petitioner. The approval was made on the ground i.e. considering the promotees as non-teaching staff and not on any other ground. The petitioner also comes under non-teaching staff and no distinction can be drawn between the petitioner and the other candidates

whose promotions were confirmed. In this connection it is necessary to refer to the Memo, dated 18.09.2003 wherein the Regional Director of School Education, Warangal sought clarification as to whether the Attender can be considered for promotion, when there are no qualified persons are available in other categories i.e. teaching and ministerial categories, the Principal Secretary to the Government clarified in Memo dated 04.02.1999 that permission from SMPC is not required in case of recruitment by transfer from any other category service from non-teaching to teaching when rule permits subject to the fact that persons working in the feeder category is already in a grant-in-aid post. It is further clarified that in the above circumstances and keeping in view the clarification orders issued by the government in memo dated 08.10.1992 and memo dated 04.02.1999 after careful consideration it is hereby clarified that the promotion of Sri N.Naveen, Attender (Aided), A.V.V. Junior College (High School Wing), Warangal, as School Assistant (Arts) may be considered subject to condition that there are no qualified teaching/non-teaching staff in the feeder categories working in the same management.

16. If that is so, the respondents ought to have considered the case of the petitioner also as he comes under non-teaching staff and there were no qualified teaching/non-teaching staff in the feeder categories working in the same management were not available at that time. He was working in an aided post and that he fulfilled the requisite eligibility criteria prescribed on the date of his promotion.

17. Further, in the batch of writ petitions i.e. W.P.Nos.4207 of 2005 and batch, the learned single Judge made a specific observation that the only objection raised by the respondents was regarding the absorption of the petitioners while the ban orders were in force. The learned single Judge disposed of the writ petitions stating that as the ban orders were set aside by the orders of this Court the petitioners are entitled to be absorbed into the aided SGT or School Assistant vacancies or non-teaching posts as the case may be, allowed the batch of writ petitions and directed the respondents to

consider the case of the petitioners for absorption/appointment either SGTs or School Assistants, as the case may be, disregarding the Government Memo dated 20.10.2004 and granted four weeks time for complying with the orders. As the order was not complied with, the petitioner filed contempt case in C.C.No.867 of 2014 in W.P.No.27743 of 2003. While the contempt case is pending, the respondents passed the rejection order which is impugned in the present writ petition. In fact, the contention of the petitioner before the learned single Judge in the batch of writ petitions was that the promotions could not be approved on account of the ban orders issued by the government. No other contention was raised before the learned single Judge. The respondents are not now supposed to take all the new contentions since the order passed by the learned single Judge became final, the respondents cannot re-agitate the issues which they ought to have raised before the learned single Judge. Moreover, the case of the petitioner is not different from that of the cases wherein the promotions of several other candidates from non-teaching staff to the School Assistants and Secondary Grade Teachers were considered. The petitioner is therefore entitled for appointment as SGT and the rejection order dated 14.08.2014 passed by the 3rd respondent is illegal and is liable to be set aside in the present writ petition. Consequently, the order dated 14.08.2014 passed by the 3rd respondent is set aside. The respondents are directed to approve the appointment of the petitioner as SGT in 5th respondent's school within a period of eight weeks from the date of receipt of a copy of this order with all consequential benefits from the date of his appointment as SGT. The writ petition succeeds and it is allowed without any order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

R.KANTHA RAO,J

Date:29.09.2015
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THE HON'BLE SRI JUSTICE R.KANTHA RAO

WRIT PETITION No.28165 of 2014

Date:29.09.2015

ccm