

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.03.2017

Coram

THE HONOURABLE MR. JUSTICE R.SURESH KUMAR

W.P.No.25216 of 2011

and MP Nos.1 and 2 of 2011

P.Jayalakshmi

.. Petitioner

vs.

1. The State of Tamil Nadu rep. by its Secretary to Government, Higher Education Department, Chennai-9.
 2. The Commissioner/Director of Technical Education, Chennai-25.
 3. The Deputy Secretary to Government, Higher Education Department, Chennai-9.
- ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records connected in Memo No.41287/P4/2004, dated 27.01.2005 of the second respondent and in Lr.No.22336/C2/2008-1, dated 23.9.2008 of the Third respondent and in letter No. 31766 /P2/2008-1 dated 14.7.2009 of the 2nd Respondent quash the same in so far as the petitioner is concerned and direct the respondents to promote the petitioner either as Instructor or as Lecturer based on the Tribunal orders dated 23.04.1993 in O.A.No.2044 to 2050 and 2244 of 1993 and High Court order dated 19.02.2010 in W.P.No.6321 of 2006.

For Petitioner : Mr.G.Elanchezhiyan

For Respondents : Mr.A.Zakir Hussain
Government Advocate

ORDER

The prayer in the writ petition is for a Writ of Certiorarified Mandamus to call for the records connected in Memo No.41287/P4/2004, dated 27.01.2005 of the second respondent

and in Lr.No.22336/C2/2008-1, dated 14.07.2009, of the second respondent and quash the same in so far as the petitioner is concerned and direct the respondents to promote the petitioner either as Instructor or as Lecturer based on the Tribunal orders dated 23.04.1993 in O.A.No.2044 to 2050 and 2244 of 1993 and High Court order dated 19.02.2010 in W.P.No.6321 of 2006.

2. The petitioner was appointed as Workshop Assistant on 28.07.1980 with the qualification of Diploma in Engineering. Thereafter, the petitioner qualified herself with B.E. Degree in the year 2000 and subsequently with M.E. Degree in the year 2009.

2.1. In the meanwhile, the petitioner got next promotion as Workshop Instructor on 20.05.2003. Thereafter, she was promoted as Electrical Foreman on 14.10.2009. In the said post, she had been continuously working.

2.2. As per the amendments made to the Special Rules for the Tamil Nadu Technical Educational Subordinate Service through the Government Order in G.O.Ms.No.1364, Education Department, dated 16.08.1988, the post of Instructor has to be filled up either by way of promotion or by way of direct recruitment. For the purpose of promotion, there are certain feeder categories, such as, Boiler Foreman, Electrical Foreman, Workshop Instructor, and also Draughtsman Grade-III.

2.3. Since the petitioner had already been working as Workshop Instructor from 2003 and had been working as Electrical Foreman from 2009 onwards, and the petitioner is also having requisite qualification and had more than two years experience, as required under the amended rule, in the post of Workshop Instructor, she become eligible to be promoted to the post of Instructor. Therefore, the petitioner had made request to the respondents for giving her promotion to the post Instructor by following the method of promotion, as has been provided under the amended Rules through the Government Order in G.O.Ms.No.1364, Education Department, dated 16.08.1988.

2.4. The said request of the petitioner has been rejected by the second respondent through his proceedings in Memo No.41287/P4/2004, dated 27.01.2005. In the said rejection order, the second respondent has stated that through the Government Order in G.O.Ms.No.1081, Education (J-1) Department, dated 19.08.1989, the appointment to the post of Instructor had been stopped and in view of the same, the request of the petitioner to give promotion and appointment to the post of Instructor cannot be complied with, and accordingly, her request was rejected.

2.5. Challenging the said rejection order dated 27.01.2005, the petitioner has approached this Court with the aforesaid prayer.

3. Mr.G.Elanchezhian, learned counsel appearing for the petitioner, would make a fundamental submission that the issue raised in the writ petition has already been decided by this Court in more than one decision. In this regard, he would submit that even though Rule got amended in G.O.Ms.No.1364, Education Department, dated 16.08.1988, by which, the post of Workshop Instructor, in which, the petitioner has already been working, has been brought as one of the feeder categories for promotion and appointment to the post of Instructor and the said amendment made in the rule being a statutory rule within the meaning of Article 309 of the Constitution, the right accrued on the eligible persons, like the petitioner, to get promotion to the post of Instructor cannot be taken away by any other method, much less, the issuance of the Government Order, like G.O.Ms.No.1081, dated 19.08.1989.

3.1. Learned counsel would also submit that the three lines found mentioned at paragraph 4 of the said G.O., i.e., G.O.Ms.No.1081, dated 19.08.1989, cannot take away the method of recruitment to the post of Instructor by way of promotion from among the eligible candidates in the feeder category. The relevant paragraph 4 of the said Government Order reads thus :

"4. Nomenclature and Pay Scales : The recruitment to Instructor (teacher) Cadre in Polytechnics and Special Diploma Institutions, will be discontinued. However, the existing Instructors shall be promoted as Associate Lecturers as and when they acquire the required Degree qualification."

3.2. In this regard, learned counsel for the petitioner would submit that by virtue of the issuance of G.O.Ms.No.1081, dated 19.08.1989, promotion to several persons, like the petitioner, had been denied. Some of them had approached this Court by filing writ petitions. In a number of writ petitions, orders have been passed, whereby, directions were issued by this Court to the respondents therein to give promotion to the respective candidates/petitioners therein, as per the recruitment rule, which was amended through G.O.Ms.No.1364, Education Department, dated 16.08.1988, without reference to G.O.Ms.No.1081, dated 19.08.1989.

3.3. In this regard, learned counsel for the petitioner would rely upon the decision of this Court made in W.P.No.848 of 2008, dated 23.02.2010, in the matter of D.Saralathan and others Vs. The State of Tamil Nadu rep. by the Secretary to Government, Department of Higher Education and two others.

3.4. Learned counsel would also rely upon the findings of the learned Judge in the Judgement cited supra, which are extracted hereunder for better appreciation of the issue :

"10. Further, an amendment has been made in respect of the post of Instructor (Engineering) by way of promotion and the relevant provision is as under:

".... Promotion from the categories of Foreman (Automobile) or Boiler Foreman or Electrical or Workshop Instructor or Draughtsman possessing Diploma Qualification in the respective branch of Engineering relating to the posts concerned, with service for a period of not less than two years."

However, G.O.Ms.No.1081, Education (J1) Department dated 19.8.1989 relates to certain instructions regarding revision of pay scales to teachers and that is not a statutory rule but only an executive instruction. In that, there is a term in Clause IV which is as follows:

"The recruitment to Instructor (teacher) cadre in Polytechnics and Special Diploma Institutions will be discontinued. However, the existing Instructors shall be promoted as Associate Lecturers as and when they acquire the requisite degree qualifications."

The said term about dispensing with the post of Instructor which is not being made as a statutory rule but as an executive instruction, has been made in a different context of revision of pay scales of teachers in Polytechnics and Special Diploma Institutions.

11. It is relevant to point out that in spite of the above said reference made in G.O.Ms.No.1081 dated 19.8.1989 in the subsequent G.O. passed by the Government in G.O.Ms.No.597 Higher Education Department dated 1.12.1997, for the purpose of appointment to the post of Lecturer, the appointment process is either by direct recruitment or recruitment by transfer from the category of Instructors in the Tamil Nadu Technical Subordinate Service Rules and the relevant rule is as follows:

"3. Appointment: Appointment to the post shall be made by,

i. direct recruitment

ii. Recruitment by transfer from the Category of Instructors in the Tamil Nadu Technical Educational Subordinate Service.

12.

13.

14.

15. By virtue of the said latest statutory rules framed by the Government, it is clear that the post of Instructor in the technical institutions, especially in polytechnics remains there as on date. Therefore, the contention that the post of Instructor has been dispensed with has no meaning. It is, in those circumstances, certain candidates who were holding the posts of Workshop Instructors or Draftsmen which are non-teaching cadres, have approached this Court by filing a writ of Mandamus to promote them as Instructors and not to give effect to G.O.Ms.1081 Education (J1) Department dated 19.8.1989 which is only an executive instruction and that was in W.P.No.9111 of 1997 which came to be disposed of by order dated 10.9.2004.

16.

17. That order came to be confirmed by the Division Bench in the following words:

"6. (i) We are unable to appreciate the contentions raised by the Learned Government Advocate on the ground that it is not the policy of the Government to make the recruitment. The Government itself as per the request made by the Correspondent passed the order dated 19.2.93 for recruitment to the post of Instructor with qualified persons of computer Science which is contrary to their own institutions. It is not the case of the any party that the writ petitioners are not qualified to hold the post of Instructor. When the Government has taken a policy decision not to go on recruitment to the post of Instructor, giving instructions to fill up the post of Instructor by a Computer Science candidate is contrary to their own policy decision and it is also not correct.

(ii) The amendment made to the Tamil Nadu Technical Educational Subordinate Services was by G.O.Ms.No.1364, Education Department dated 16.8.1988, but it was given retrospective effect from 1981. Therefore, the writ petitioners are qualified even prior to that. When the amendment was given retrospective

effect, it cannot be contended that the order of the learned single Judge to consider the case of the Writ petitioners promotion with effect from 1.7.1987 and 1.8.1986 is illegal.

(iii) When once the appellant Government has created the promotional avenues, ignoring the eligible candidates for promotion to the post of Instructor from the post of Draughtsman and permitting the institution to fill up the post of Instructor by a Computer Science candidate is illegal. Therefore, the learned Single Judge is right in setting aside the order.

7. Consequently, the writ appeals are dismissed. There will be no order as to costs."

18. It is relevant to point out that based on the judgment of the Division Bench as stated above, the Government has passed G.O.Ms.No.95, Higher Education (C1) Department dated 26.3.2008, promoting the persons who were working as Junior Drafting Officers as Instructors. It is also relevant to point out that the Madurai Bench of Madras High Court passed such an order in W.P.(MD) No.9428 of 2005 on 6.3.2008 and the Government, following the said series of judgments, implemented the orders by promoting various Junior Drafting Officers to the post of Instructors by creating supernumerary posts.

19.

20. In the result, it has to be necessarily construed that the post of Instructor which is a teaching post is still available to the Polytechnics and as per G.O.Ms.1081 Education (J1) Department dated 19.8.1989, which has been reissued in G.O.Ms.No.220, Higher Education (B1) Department, dated 6.7.2009, the petitioners are entitled to be considered for the posts of Instructors by promotion as and when they are eligible and vacancies arise. It is only after the petitioners are considered for the posts of Instructors as per the said Government Orders, their eligibility for the posts of Lecturers would come into effect and therefore, the relief as prayed for in the writ petitions for directing the respondents to promote the petitioners to the posts of Lecturers in polytechnic colleges cannot be granted except with a direction to the respondents to consider the case of the petitioners to promote them as Instructors as per the statutory rules stated above, based on the

availability of vacancies and pass appropriate orders within a period of eight weeks from the date of receipt of copy of this order."

3.5. Learned counsel would also submit that as against the said judgment of the learned Judge, an appeal was filed by the respondents in W.A.No.1909 of 2010. The said appeal was dismissed by the Division Bench of this Court, through the judgment dated 22.08.2011, wherein, the Division Bench, after having confirmed the order of the learned Judge, has passed the following order :

"..... 12. Though the employees have prayed for a positive direction to promote them to the post of Lecturers in Polytechnic Colleges, the said prayer was turned down and a direction was given to the appellants to consider their case as per the statutory rules based on the availability of vacancies. In fact, the direction given by the learned Judge was on the basis of the earlier order passed by this Court, which was confirmed by the Division Bench and resulted in issuing orders by the Government. Therefore, the employees were fully justified in their contention that they should also be treated similarly. The appellants cannot be heard to say that the promotion given to the earlier set of employees would not be given to others solely on the ground that they have approached the Court only at a later point of time. Therefore, we do not find any merit in the contention raised on behalf of the appellant.

13. In the upshot, we dismiss the writ appeal. Consequently, the connected MP is closed. No costs."

3.6. Learned counsel would rely upon yet another decision of this Court made in W.P.Nos.8327 and 8328 of 2011, dated 25.09.2012, in the matter of N.Nagarajan and another V. The Principal Secretary/Commissioner, Directorate of Technical Education and another. In the said order, the learned Judge, following the judgment of the Division Bench made in W.A.No.1909 of 2010, allowed those writ petitions. The relevant portion of the order of the learned Judge is reads as follows :

"..... 3. The matter was adjourned at the request of the learned Government Advocate, so as to enable her to take instructions. When the matter was taken up today, the learned Government Advocate very fairly submitted that the issue involved in these writ petitions are covered by the order passed in W.P.No.848 of 2008, as confirmed by the Judgement of the Division Bench in W.A.No.1909 of 2010.

4. I have carefully perused the order of the learned Single Judge as well as the judgment of the Division Bench in W.A.No.1909 of 2010 and I am of the view that the issues raised by the petitioners are covered by the judgement of the Division Bench.

5. Accordingly, by following the Judgment of the learned Single Judge in W.P.No.848 of 2008, as confirmed by the Judgment of the Division Bench in W.A.No.1909 of 2010, the above petitions are allowed and the impugned order is set aside. No costs. Consequently, connected Miscellaneous Petitions are closed."

3.7. Learned counsel would also submit that pursuant to the order passed by the learned Judge, as has been cited supra, the said orders have been implemented by the respondents and in this regard, G.O.Ms.No.168, Higher Education Department, dated 26.09.2014, has been issued.

3.8. Learned counsel would also submit that in view of these series of judgements of this Court and the compliance made pursuant to the said orders of this Court giving promotion to the other eligible persons to the post of Instructor in Government Polytechnics, the Government thought it fit to make amendments to the rules, namely, Special Rules for the Tamil Nadu Technical Educational Subordinate Service, and accordingly, issued G.O.Ms.No.184, Higher Education Department, dated 15.10.2014, whereby, the very post of Instructor has been deleted.

3.9. In this regard, learned counsel would submit that though by virtue of G.O.Ms.No.184, dated 15.10.2014, the post of Instructor has been deleted or dispensed with, it would not take away the accrued right on the persons like the petitioner, who are otherwise eligible to get the post of Instructor long back under the erstwhile rule, based on G.O.Ms.No.1364, Education Department, dated 16.08.1988. In other words, it is the submission of the learned counsel that if unamended rule is implemented, persons like the petitioner are eligible to get promotion and appointment to the post of Instructor.

3.10. In this regard, learned counsel appearing for the petitioner would also brought to the notice of this Court, yet another Government Order in G.O.Ms.No.20, Higher Education Department, dated 01.02.2016, whereby some of the persons had been given Instructor posting by way of promotion, after the amendment has been made in the year 2014, however, by way of notional promotion.

3.11. Therefore, learned counsel appearing for the petitioner would submit that even though amendment has been made in the year 2014, that would not stand in the way of the prospects of the petitioner to get appointment by way of promotion to the post of Instructor, as the petitioner had become eligible to get the said post long back, as some of her juniors, who had already approached this Court and got orders in their favour, had been considered for promotion and also had been given promotion. Hence, the learned counsel would submit that in view of such decisions of this Court and the subsequent compliance orders issued by the respondents, this petitioner is also entitled to be considered for the post of Instructor, as she has also been eligible for such posting by way of promotion, at least notionally, by creating a supernumerary post.

4. Per contra, Mr.A.Zakir Hussain, learned Government Advocate appearing for the respondents, would contend that though originally rule got amended by way of G.O.Ms.No.1364, dated 16.08.1988, immediately, G.O.Ms.No.1081, Education Department, dated 19.08.1989, was issued, whereby, it was specifically mentioned that recruitment to Instructor cadre in Polytechnics and Special Diploma Institutions will be discontinued. Even though, such a decision was taken by the Government long back, as early as in the year 1988 itself, because the said decision has not been reflected in the rule, as it was not amended, the Courts have taken the view that the said G.O.Ms.No.1081, would not override the statutory rule made under Article 309 of the Constitution, and therefore, only in this context certain writ petitions were allowed. Subsequently, the Government also issued amendment by way of G.O.Ms.No.184, dated 15.10.2014, and by virtue of the said amendment, since the very post of Instructor was deleted or dispensed with, the question of considering any more candidate for promotion to the post of Instructor does not arise. Therefore, the impugned order rejecting the request of the petitioner to give promotion as Instructor, is fully justifiable. Learned Government Advocate further submits that in view of the amendment to rule, which is in force now, there is no post of Instructor available, for which, the petitioner can be accommodated. Therefore, the learned Government Advocate would submit that the impugned order is fully justifiable and sustainable and requires no interference from this Court.

5. This Court has considered the rival contentions made by both sides.

6. As has been rightly contended by the learned counsel appearing for the petitioner, by quoting various decisions of this Court, the relevant parts of the said judgments, have also been extracted above, this Court feels that the issue raised by the petitioner as to whether the petitioner would be entitled to

get promotion to the post of Instructor by way of amended rule, pursuant to G.O.Ms.No.1364, dated 16.08.1989, has already been answered and the issue has been settled by a series of judgments and ultimately also confirmed by, at last, a Division Bench judgement, as has been referred to above.

7. The respondents have also acted upon, and that orders had also been issued in G.O.Ms.No.168, Higher Education Department, dated 29.06.2014 complying with the orders passed in W.P.Nos.8327 and 8328 of 2011. Therefore, the petitioner, being a similarly placed person, as she is having the requisite qualification and experience as per the Rule, she is also eligible to be considered for promotion to the post of Instructor, based on her seniority, as number of her juniors have already been promoted, of-course, pursuant to the direction issued by this Court.

8. In so far as the contention made by the learned Government Advocate appearing for the respondents, that by virtue of amendment made through G.O.Ms.No.184, dated 15.10.2014, the post of Instructor has been deleted or dispensed with, and therefore, the petitioner cannot be considered for promotion to the post of Instructor, is concerned, the answer is available in G.O.Ms.No.20, Higher Education Department, dated 01.12.2016.

8.1. It is relevant to note that through the said order, which was passed now in the year 2016, after the amendment made in the year 2014, promotions have been given for a number of persons, noting that the post of Instructors have already been deleted or dispensed with. The respondents therein have thought it fit to give promotion to those eligible persons, by creating supernumerary post of Instructor. If this logic is applied to the case of the petitioner, she shall also be entitled to claim promotion by way of creation of a supernumerary post of Instructor, as the petitioner is going to retire shortly.

8.2. Therefore, the said argument advanced on behalf of the respondents that the amendment now has been made in the year 2014, and therefore, by way of challenge before this Court, the petitioner could not be considered for promotion to the post of Instructor, cannot be accepted, as in their own order passed in the year 2016, promotions have been given to persons to the post of Instructor, by creating supernumerary posts. Therefore, this Court is of the considered view that the petitioner shall be entitled to claim promotion to the post of Instructor, from the date, when her immediate junior got promotion.

9. Resultantly, the following directions are issued in this writ petition :

(i) The impugned order, namely, Order in Memo No.41287/P4/2004, dated 27.01.2005, as well as the order in Letter No.31766/P2/2008-1, dated 14.07.2009 of the second respondent are quashed;

(ii) Since the learned counsel for the petitioner has submitted across the bar that the petitioner has given up the challenge to the another impugned order, namely, the order dated 23.09.2008 of the third respondent, no orders are required to be passed, in respect of the said order.

(iii) The respondents are directed to create supernumerary post of Instructor for the purpose of giving promotion to the petitioner for the said post and appoint her in the said post from the date of her immediate junior got promoted.

(iv) Even though, the petitioner is getting promotion to such supernumerary post, she shall be entitled to get all service benefits accordingly.

(v) The needful, as has been directed by this Court, shall be done within a period of eight weeks from the date of receipt of a copy of this order.

10. With these directions, the writ petition is allowed to the extent indicated above. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

gg

To

1. The Principal Secretary,
Government of Tamil Nadu,
Higher Education Department,
Chennai-9.

2. The Commissioner/Director of
Technical Education,
Chennai-25.

3. The Deputy Secretary to Government,
Higher Education Department,
Chennai-9.

+1cc to Mr. G. Elanchezhiyan, Advocate Sr. 18064

+1cc to the Government Pleader, Sr. 18705

W.P.No.25216 of 2011

KGK(CO)

VR(26/4/2017)