

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.11.2018
Pronounced on : 26.11.2018

CORAM

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

W.P.No.19325 of 2012

B.Subbiah Pandian

..Petitioner

Versus

1. The Industries Commissioner and Director
of Industries and Commerce,
No. 36, South Canal Bank Road
Mandavelipakkam
Raja Annamalaipuram,
Chennai - 600 028.

2. The Secretary to Government
Small Industries (EI-1) Department
Secretariat
Chennai - 600 009.

..Respondents

PRAYER: Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified Mandamus, calling for the records of the first respondent relating to the order in Rc.No. 5603/EDSI/2012 dated 10.05.2012, to quash the same and issue consequential directions to the respondents to appoint the petitioner as Assistant Engineer (Industries) by recruitment by transfer with effect from the date of vacancy with all benefits.

For Petitioner :: Mr. M.Ravi

For Respondents :: Mrs. Sri Jayanthi

Special Government Pleader

ORDER

The Writ Petition has been filed in the nature of the Certiorarified Mandamus, calling for the records of the first respondent, namely, the Industries Commissioner and Director of Industries and Commerce, Chennai, relating to the order in Rc.No. 5603/EDSI/2012 dated 10.05.2012 and to quash the same and issue consequential directions to the respondents to appoint the petitioner as Assistant Engineer (Industries) by recruitment by transfer with effect from the date of vacancy with all benefits.

2. The petitioner is a Graduate in Mechanical Engineering. He had experience as Trainee Engineer in Indian Refrigerator Company Limited, Hosur, having served from 19.02.1997 to 18.02.1998. He joined service on 07.11.2011 as Assistant in the Industries Department, having been recruited by the Tamil Nadu Public Service Commission. He completed the period of probation on 13.01.2005. He stated that he was qualified and eligible for appointment as Assistant Engineer (Industries) by recruitment by transfer from other services. The qualifications prescribed with regard to recruitment by transfer from any other service were possession of a degree in Mechanical or Electrical or Automobile or Chemical Engineering or Chemical Technology of any University and practical experience in General Purpose Engineering Industry or in a recognised concern for a period of not less than six months.

3. The first respondent by circular RC No. 9499/EDSI/03 dated 21.10.2003 had called for option for appointment as Assistant Engineer (Industries) by transfer from other service. The petitioner submitted his willingness on 20.11.2003. It was not considered.

4. The petitioner stated that one Junior Assistant and one Assistant, who were graduates in Mechanical Engineering were however appointed as Assistant Engineers (Industries) by recruitment by transfer from other services. Their appointment were also ratified. Later in Pro. No. 31798/EDSI/04 dated 22.05.2007, the Industries Commissioner appointed two Assistants to the post of Assistant Engineer (Industries) by transfer from other service overlooking the petitioner. Since one of the candidates were not qualified, having had a degree in another branch of Engineering, the respondents took steps for amendment of the existing sub Rules for Tamil Nadu Industries Subordinate Service. Subsequently, by circular RC.No. 36912/EDSI/2008 dated 25.11.2008, the first respondent again called for willingness for temporary appointment to the post of Assistant Engineer (Industries).

5. The petitioner submitted his willingness on 10.12.2008. It was also forwarded through proper channel to the first respondent. However, there was no response. The petitioner therefore submitted a detailed representation dated 25.03.2012 to the first respondent requesting consideration for appointment as Assistant Engineer (Industries) by recruitment by transfer from the Tamil Nadu Ministerial service. The first respondent passed the impugned order on 10.05.2012 stating that the post held by the petitioner was not a feeder category for appointment to the post of Assistant Engineer (Industries) in Tamil Nadu Industries Subordinate Service. Challenging this order, the petitioner had filed the Writ Petition.

6. In the counter affidavit filed by the first respondent, it was stated that during the recruitment in response to circular No. 9499/EDSI/04 dated 21.10.2003, the petitioner was not considered since he had not completed his period of probation for the post of Assistant in Tamil Nadu Ministerial Service. Two Assistants were appointed and it was made clear that it was only a temporary appointment. It was further stated the recruitment pursuant to Circular No. 36912/EDSI/2008 dated 25.11.2008, could not be processed since the issue of amendment of the Sub Rules for Tamil Nadu Industries Subordinate Service in respect of educational qualifications prescribed for appointment to the post of Assistant Engineering (Industries) had not yet been accomplished. It was stated that the petitioner had submitted a representation dated 25.03.2012. It was stated that since the amendment had not been accomplished, he could not be considered. Moreover, the post he held was not a feeder category for the post of Assistant Engineer (Industries). It was also stated that two appointees V. Santhi and M. Asha Devi were reverted back and they had filed W.P.Nos. 12886 & 12887 of 2011 and had obtained stay order. It was stated that the petitioner cannot be granted the reliefs sought and that consequently, the Writ Petition should be dismissed.

7. The second respondent, Secretary to Government, Small Industries (EI-1) Department, Chennai, had filed a counter adopting the counter affidavit of the first respondent.

8. Heard arguments advanced by Mr.M.Ravi, learned counsel for the petitioner and Mrs.Sri Jayanthi, learned Special Government Pleader for the first and second respondents.

9. The petitioner had been recruited through the Tamil Nadu Public Service Commission and joined duty as Assistant in the Industries Department on 07.11.2011. Even earlier, he had worked as Trainee Engineer in Indian Refrigerator Company Limited between 19.02.1997 to 18.02.1998. He was a Graduate in Mechanical Engineering. He completed the period of probation on 13.01.2005. The post of Assistant comes under the Tamil Nadu Ministerial Service, whereas the post of Assistant Engineer (Industries) in the first respondent Department comes under the Tamil Nadu Industries Subordinate Service. The Tamil Nadu Public Service Commission is the Recruitment agency for the above said two posts for appointment by the method of Direct Recruitment for which it conducts separate Recruitment exam for each category of these posts. The following methods of appointment are prescribed for appointment to the post of Assistant Engineer (Industries) which is governed by the Special Rules for Tamil Nadu Industries Subordinate Service.

1. By promotion

2. By Direct Recruitment
3. By Recruitment by transfer from any other class or category
4. By Recruitment by transfer from any other service.

10. The Educational qualifications prescribed for appointment to the post of Assistant Engineer (Industries) by any of the aforesaid methods of recruitment as per the Special Rules for the Tamil Nadu Industries Subordinate Service are as follows: B.E Degree in the following disciplines:

1. Mechanical Engineering
2. Electrical Engineering
3. Automobile Engineering
4. Chemical Engineering
5. Chemical Technology (or)
6. Diploma in Automobile Engineering issued by Madras Institute of Technology Chennai.

11. The petitioner had submitted his willingness for appointment to the post of Assistant Engineer (Industries) through the method of recruitment by transfer from any other service in response to Circular No. 9499/EDSI/04 dated 21.10.2003. However, he was not considered since he had not completed the period probation. Again, Circular No. 36912/EDSI/2008 dated 25.11.2008 had been issued calling for willingness for temporary appointment to the post of Assistant Engineer (Industries). The petitioner again submitted his willingness.

12. The stand of the respondents is that the qualification prescribed was proposed to be amendment and till the period the amendment was actually effected, recruitment by transfer was put on hold. Recruitment by promotion alone was being conducted. The petitioner was therefore informed that since his post of Assistant in the Tamil Nadu Ministerial was not a feeder post for promotion to the post of Assistant Engineering (Industries), he could not be considered.

13. The said stand of the respondents does not conveyed any meaning. The petitioner had not sought permission for promotion to the post of Assistant Engineer (Industries). He only sought recruitment by the method of transfer from any other service. He was eligible for such posting. He had the necessary educational qualifications. The respondents have not stated that by the proposed amendment they had sought to de-list the qualification of degree in Mechanical Engineering from being considered as a condition for the post Assistant Engineer (Industries).

14. During the course of hearing, the learned Special

Government Pleader also forwarded the actual amendment which had been passed in G.O.Ms.No. 51 Micro, Small Medium Enterprises (E1(2)) Department dated 26.11.2015. By this amendment, the educational qualification prescribed were any degree in engineering except Civil and Architectural Engineering. This naturally means that the petitioner, who had the degree in Mechanical Engineering was always qualified for the post.

15. The petitioner had stated that the recruitment by transfer was put on hold only to facilitate the earlier recruits, who did not have the necessary educational qualification. I find much force in the stand of the petitioner. He is a degree holder in Mechanical Engineering. In the first instance when willingness was called in the year 2003, it was stated that he was not qualified since he had not been completed the period of probation. In the year 2008, he was eligible and fully qualified. He had completed his probation. The amendment proposed was not to remove the degree in Mechanical Engineering as a pre-requisite qualification. I hold that the respondents have deliberately not passed any order on his representation. Even in the impugned order, the first respondent had stated that the petitioner's post is not a feeder category. The petitioner had never sought for appointment through promotion. He only sought for recruitment by transfer from other service which is an accepted method for appointment.

16. In N.L.Pankajakshan Nair Vs. P.V. Jayaraj and others reported in 2002 (10) SCC 396, the Hon'ble Supreme Court was concerned with the case for appointment to the post of Deputy Superintendent of Police. Very similar to the present Writ Petition, there were three different sources, namely, (a) by direct recruitment; (b) by promotion from Circle Inspector; and (c) by appointment from second Commandant Adjutant and Assistant Commandant, NSI - and Special Armed Battalions and Assistant Director, Armed Reserve Police. The appellant before the Supreme Court fell under the category 'c'. This was similar to the present case of recruitment by transfer from some other service. The appellant therein had given his willingness for appointment as Deputy Superintendent of Police. He had the prescribed qualification. Since he was not considered, a writ petition was filed. A learned Single Judge gave directions to consider his representation. The Division Bench on appeal, revised that Judgement. A further appeal was preferred before the Supreme Court. In the Supreme Court, the stand was taken that a suggestion had been given to the Government to delete the provision of appoint by transfer from other service and a draft Sub Rule for such deletion, and proposal had been forwarded and was under consideration of the Government. The Hon'ble Supreme Court in those circumstances held as follows:-

"8. It is undisputed that the executive

order issued in the year 1962 still continues to remain in force being amended from time to time but the relevant clause of that executive order contained in Clause (d) has not been touched. The statutory rules which came into force on 14-6-1966, no doubt, stipulate that it is in supersession of the rules and orders on the subject. Necessarily, therefore, if the statutory rule provides any provision corresponding to Clause (d) of the executive instructions, then the said executive instructions must give way. But if the statutory rule is silent on the same and there is no provision which can be held to be contrary to the executive instructions, then the executive instructions will continue to operate in the field for which there is no provision in the statutory rule. The executive instructions must be held to be supplemental to the statutory rules.

9. Having examined the provisions of the Recruitment Rules of 1966 as well as the executive instructions of the year 1962, we are unable to find any provision in the statutory rules which can be said to be repugnant to the earlier executive order. That apart, the said executive order continues to remain in force by various amendments though the very clause has not been amended. In this view of the matter the executive order of 1962 must be held to be continuing in force and remains operative. We are not examining the question as to whether Clause (d) really is in the nature of a quota meant for a particular category of the employee as contended by Mr Ramachandran, since in our view, on construction of the relevant provisions of the statutory rules providing different sources of recruitment for filling up the post of DSP read with the so-called administrative order of the year 1962, the appellant can certainly claim a right of consideration and in fact such right did emanate when the Director General of Police wanted his option for being considered and finally he was excluded from consideration on the basis of Ext. P-10, a suggestion to the Government for deletion of Clause (c)

from the statutory rules. There cannot be any manner of doubt that the provisions of statutory rules cannot be taken away by a suggestion of the executive until and unless the rules are appropriately amended. In this view of the matter, we are of the considered opinion that in the facts and circumstances of the present case, the appellant's right of consideration has been infringed under Article 16 of the Constitution. The Division Bench of the High Court, therefore, was in error in interfering with the judgement of the learned Single Judge. We accordingly set aside the Judgement of the Division Bench and affirm the judgement of the learned Single Judge. These appeals are allowed."

17. In the present case also, the stand of the first respondent that an amendment was proposed and therefore recruitment by transfer from other services was not processed cannot be accepted. Even after the amendment the qualification of degree in Mechanical Engineering had not been removed as a qualifying degree. It was still recognised as a qualifying degree. The petitioner had that qualification atleast when the willingness was called for in the year 2008 by Circular No. 36912/EDSI/2008 dated 25.11.2008. I hold that he had been deliberately overlooked by a flimsy reason by pointing out the proposal for amendment which actually recognised his qualification. I therefore have no hesitation in allowing the Writ Petition. The impugned order is quashed and the first respondent is directed to appoint the petitioner as Assistant Engineer (Industries) by recruitment by transfer with effect from the date of vacancy with all benefits.

18. With the above direction, this Writ Petition is allowed. No costs.

-s/d-

Deputy Registrar

True Copy

Sub-Assistant Registrar

vsg

To

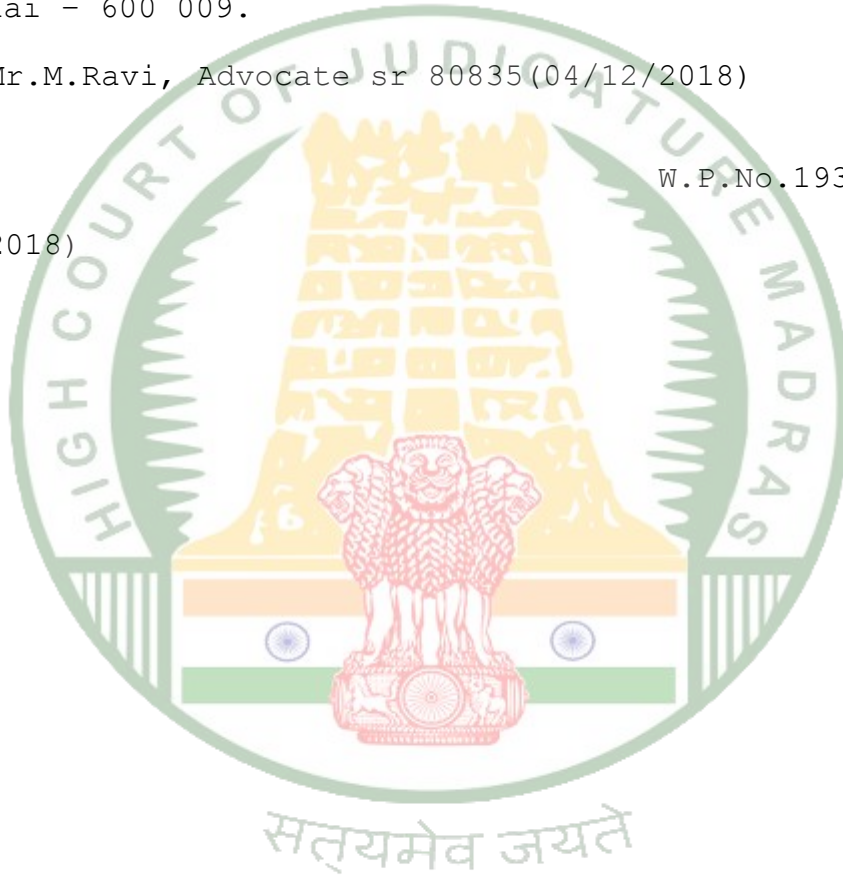
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+1 CC to Mr.M.Ravi, Advocate sr 80835(04/12/2018)

W.P.No.19325 of 2012

SP(28/11/2018)



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