

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 19.03.2018

Delivered on : 04.04.2018

CORAM

THE HONOURABLE THIRU JUSTICE **V. PARTHIBAN**

W.P.No.20942 of 2011

V.Suresh Kumar .. Petitioner

versus

1. The Commissioner of Sugar,
E.V.R.Periyar Maaligai,
No.690, Anna Salai,
Nandanam,
Chennai-600 035.

2. The Administrator,
M.R.Krishnamurthy Co-operative Sugar Mills Limited,
Sethiathope-608 702,
Cuddalore District.

.. Respondents

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of Writ of Mandamus, to direct the respondents to consider the candidature of the petitioner to the post of Junior Engineer (Mechanical) under the 2nd respondent as per the relevant provisions contained in Special Bye-laws relating to service conditions of persons employed by the society of the 2nd respondent-mill within a time frame fixed by this Court.

For Petitioner : Mr.S.Sathia Chandran

For Respondents: Mr.L.P.Shanmughasundaram,
Spl.G.P.for R1
Mrs.G.Thilagavathi for
Mr.R.Gopinath for R2

ORDER

The petitioner has approached this Court, seeking the following relief:

"To issue Writ of Mandamus, to direct the respondents to consider the candidature of the petitioner to the post of Junior Engineer (Mechanical) under the 2nd respondent as per the relevant provisions contained in Special Bye-laws relating to service conditions of persons employed by the society of the 2nd respondent-mill within a time frame fixed by this Court."

2. The petitioner belongs to Adi Dravidar Community which is a scheduled caste community. He has completed his higher secondary course in 1996. His father was originally provided employment in second respondent mill on the basis that a small piece of land owned by him was acquired for establishing the mill.

While working, he died in harness in July, 1998 and upon his demise, the petitioner joined the second respondent mill originally as Mazdoor. After obtaining due permission from the second respondent mill, the petitioner joined Diploma course in Mechanical Engineering and successfully completed the said course in 2007. On acquiring the Diploma in Mech.Engineering, the petitioner was posted as Part-time Junior Engineer in-charge in July, 2007 and ever since his posting as Junior Engineer, the petitioner is discharging the duties to the satisfaction of everyone concerned.

3. In August, 2007, the petitioner joined B.Tech.Mechanical Engineering part time course in SRM University, Kattankulathur and completed the degree successfully in 2011. The second respondent mill is a co-operative organization registered under the Tamil Nadu Co-operative Societies Act. Therefore, it is under the administrative control of the State of Tamil Nadu and as such, it is bound to follow rule of reservation as enshrined in the Constitution of India and also various rules and instructions issued from time to time by the Government of Tamil Nadu.

According to the petitioner, the second respondent mill has not been following the rule of reservation as mandated by the Constitution and other rules and regulations regarding promotional appointment of various employees in the second respondent mill. According to the petitioner, of all the existing posts of Junior Engineer (Mechanical), one post was reserved for SC and ST candidates and right from the inception of the mill in 1989, the second respondent has never filled up the post of Junior Engineer (Mechanical) (SC) and the result of which, the said post remained vacant throughout. The petitioner would submit that he is fully eligible to be considered for appointment as Junior Engineer (Mechanical) by virtue of his acquiring educational qualifications during his tenure as Mazdoor in 2007 and 2011. In the said circumstances, the petitioner submitted a representation on 6.9.2010 and 29.9.2010 to both the respondents requesting them to appoint him as Junior Engineer (Mechanical) which was lying vacant all along in view of his educational qualification and experience. As per the provisions of the special by laws relating to the service conditions of the persons employed by the second respondent society, the

qualification required for appointment to the post of Junior Engineer (Mechanical) was Diploma in Mechanical with one year as apprentice in Engineering Department of a sugar factory. As far as the petitioner was concerned, admittedly, he acquired Diploma in Engineering in April 2007 itself and had put in more than four years of service as Junior Engineer In-charge in the second respondent mill and as such, he was fully qualified for regular appointment in the same post.

4. As per the provisions of the Special Bye laws, the method of recruitment to the post of Junior Engineer among other posts, is provided as under:

"Method of Recruitment: 6. No appointment by direct recruitment to the post under several categories of service of the society except those who are employed on the basis of daily or weekly wages shall be made without notifying the vacancies to the Employment Exchange concerned and if suitable persons are not sponsored by the Employment Exchange by inviting application

by advertisement in atleast one leading daily newspaper."

5. In spite of existence of four vacancies in the post of Junior Engineer (Mechanical), out of which, one post has been earmarked for SC candidate and the post reserved for SC candidate had never been filled up by SC candidate and when a qualified person is available in the SC category, the second respondent mill ought to have initiated steps to fill up the post of Junior Engineer (Mechanical) and consider the claim of the petitioner for regular appointment particularly in the teeth of the fact that the petitioner had already been working as Junior Engineer In-charge right from 2007 without any break. Although he was employed as Junior Engineer (Mechanical) all along, he has been paid salary only for the post of Mazdoor, thereby denying the petitioner not only regular promotion as Junior Engineer (Mechanical), but also salary applicable to the said post. Since the representations made seeking regular appointment as Junior Engineer (Mechanical) had not evoked any response, the petitioner is before this Court, seeking a direction to the second

respondent to consider the petitioner for regular appointment as Junior Engineer (Mechanical).

6. Upon notice, Mr.L.P.Shanmughasundaram, Special Govt.Pleader entered appearance for respondent No.1, Mr.R.Gopinath, learned counsel entered appearance for respondent No.2 who is contesting the claim of the petitioner. Initially the counter affidavit resisted the claim of the petitioner on the ground that one post of Junior Engineer earmarked for scheduled caste candidate (Arundathier) and only in the absence of any eligible candidate belonging to Arundathier community, the candidates belonging to regular scheduled caste will be considered. Arundathier is a part of scheduled caste community, but a special reservation is provided within the scheduled community as the the community was considered as the most backward of all the scheduled castes community. The counter affidavit further states that two posts of Junior Engineer are vacant and the the petitioner cannot claim any appointment against those posts, in view of reservation of one post for Arundathier community and one post for other community.

7. This statement of the respondents was countered by the petitioner by filing additional typed set of papers and reply affidavit. In the reply affidavit in para 4, it is stated that the reservation for Arundathier community was only with reference to Junior Engineer (Electrical) post and not Junior Engineer (Mechanical) and therefore, the facts have not been properly presented before this Court. In support of his contention, the learned counsel appearing for the petitioner would draw the attention of this Court to the communication dated 24.10.2011 issued by the respondents announcing the recruitment of posts on regular basis for certain categories among the persons who were employed in the second respondent mill, i.e. for the posts of Junior Engineer (Electrical), of which, one post is earmarked for Arundathier and another one is for general category. Therefore, the statement made in the counter affidavit filed on behalf of the second respondent is contrary to the records and the same is incorrect. On being confronted by the Court on factual aspect, Mrs.G.Thilakavathy, learned senior counsel appearing for the second respondent, has admitted the above fact that it was

inadvertently mentioned in the counter affidavit as Junior Engineer without referring to the subject, namely, Electrical.

8. Mr.S.Sathia Chandran, learned counsel appearing for the petitioner would strenuously contend that for the past 10 years, the petitioner has been employed as Junior Engineer (Mechanical) and the work as that of the Junior Engineer has been extracted by the second respondent from the petitioner. Therefore, continued inaction on the part of the second respondent in not initiating any steps for filling up of backlog posts in the cadre of Junior Engineer (Mechanical) with SC candidate when a candidate was very much available fulfilling all eligibility criteria, namely, the petitioner herein, cannot be countenanced in law and on facts. The resultant consequence of continued inaction for about 10 years by the second respondent is injustice caused to the petitioner who is fully qualified for regular appointment as Junior Engineer (Mechanical) and who has been employed as Junior Engineer (Mechanical), has been denied regular promotion and pay scale as Junior Engineer (Mechanical).

9. The fact that the petitioner being qualified for regular appointment as Junior Engineer (Mechanical) has not been disputed by the respondents. However, the bone of contention between the parties is that any recruitment in the second respondent mill is only through Employment Exchange and as on date, there are no posts available in the cadre of Junior Engineer (Mechanical).

10. The learned senior counsel appearing for the second respondent would draw the attention of this Court that by latest communication dated 12.8.2014 issued by the first respondent which is filed in the additional typed set of documents, there are 'nil' posts of Junior Engineer (Mechanical) and therefore, the petitioner cannot stake any claim for he being appointed against the post of Junior Engineer (Mechanical) on regular basis. In any event, as stated above, as per the bye laws, namely, the method of appointment which is extracted supra, the appointment to the post of Junior Engineer is always through the Employment Exchange and only in the absence of eligible candidates, the second respondent mill can resort to any other form of

recruitment as provided under the bye laws. The learned senior counsel would in fact also rely upon the latest instructions issued by the Government in this regard in G.O.Ms.No.44, dated 11.3.2015, contending that all the recruitments in Government departments, institutions, co-operative societies must be through Employment Exchange. However, from the contents of the said Government Order, it could be seen that the Government has issued direction to all Secretaries of the Departments to comply with the directions issued by this Court in its judgment delivered in W.A.No.1027 of 2013 dated 9.6.2014. The direction of the Government as found in para 7 of the said G.O., is reproduced as hereunder:

"7. The Government have examined this issue in detail. After careful examination, the Government have decided to implement the Judgment of the Hon'ble High Court in W.A.No.1027 of 2013 and M.P.No.1 of 2013 dated 9.6.2014 (W.P.No.26162 of 2010 and M.P.No.1 of 2010). Accordingly, all the Additional Chief Secretaries/Principal Secretaries/ Secretaries of the Departments of

Secretariat are directed to adhere to the judgment delivered in the W.A.No.1027 of 2013 and M.P.No.1 of 2013 dated 9.6.2014 (W.P.No.26162 of 2010 and M.P.No.1 of 2010) while filling up the posts under their control."

11. However, the learned senior counsel has lost sight of the fact that the recruitment as provided under the G.O. can also be done through advertisement in local newspapers apart from the candidates sponsored by the Employment Exchange. In fact, this position is made clear by the first respondent's own communication dated 24.10.2011 in which, it was proposed to fill up the vacancies of various posts including Junior Engineer (Electrical) in the second respondent mill from among the employees who were on temporary posts, as regular employees. In fact, applications were invited from them as per the communication dated 24.10.2011. This position cannot be contested validly by the learned senior counsel appearing for the second respondent.

12. Be that as it may, the point for consideration before this Court is whether the subsequent notification dated 12.8.2014 declaring 'nil' vacancy in the post of Junior Engineer (Mechanical) can be taken into consideration in the light of the fact that admittedly, the petitioner had been employed as Junior Engineer (Mechanical) from 2007 continuously. This fact is also established by proceedings of the second respondent dated 1.2.2013 wherein, certain persons were asked to work as Junior Engineer including the petitioner herein who were also given additional charge as Assistant Engineer (Mechanical). From the said proceedings, it could be seen that including the petitioner, there were four Junior Engineers (Mechanical) and they were all directed to work as Assistant Engineers. In the teeth of this document issued by the second respondent itself, it does not lie in the mouth of the second respondent to contend that by communication dated 12.8.2014, there was 'nil' vacancy in the post of Junior Engineer (Mechanical). It may be due to fact that already four persons working in the post of Junior Engineer (Mechanical) and therefore, communication has been issued on 12.8.2014 stating that there was no post of Junior Engineer

(Mechanical). However, the fact of the matter is that the petitioner was indeed employed as Junior Engineer (Mechanical) not for a short period, but for a period of 10 years continuously and in fact, he was put in-charge to work as Junior Engineer (Mechanical).

13. In the backdrop of the above facts and circumstances whether there is an iota of justification for the second respondent to contend that the petitioner was not entitled to be appointed on regular basis as Junior Engineer (Mechanical) despite his eligibility and qualification and despite his experience as Junior Engineer for all these years?. The answer is 'no'. This Court does not see any iota of justification for keeping the petitioner on temporary basis for 10 years as Junior Engineer (Mechanical) when admittedly one post is marked for SC community and the only eligible person available, is the petitioner himself. The objections raised on behalf of the second respondent by the learned senior counsel that unless a candidate is sponsored by the Employment Exchange, the second respondent cannot go in for regular recruitment in the category of Junior Engineer, such

argument in the fact of the facts as narrated above, is invalid and preposterous for the reason that once the second respondent has chosen to employ the petitioner as Junior Engineer (Mechanical) and continued him in the said post uninterruptedly for 10 long years, today cannot turn around and take refuge under a technical plea that his name was not sponsored by the Employment Exchange. Such argument has to be rejected outright as being made without any constitutional consideration. The right to 'equality' is a constitutional right bestowed upon the citizens of the country under Article 14 of the Constitution of India and that right is enviable and is to be protected at all times and in all the circumstances. When admittedly, the second respondent has resorted to recruitment of various posts including Junior Engineer (Electrical) vide communication dated 12.8.2014 by calling for applications from the employees in the mill, this Court does not see as to why for filling up of the post of Junior Engineer (Mechanical), the second respondent is adopting a different method of recruitment. Such stance on the part of the second respondent in the face of facts and circumstances, lacks bona fides and has to be rejected as invalid and unsustainable.

14. In the additional counter affidavit filed on behalf of the second respondent, it is stated in paragraph 3 that the post in question is being a direct recruitment post and the same could be filled up subject to the first respondent granting permission to fill up the same. Granting permission by the first respondent is only a procedural formality since four persons were admittedly working as Junior Engineer (Mechanical) including the petitioner herein for so many years and it is not open to the second respondent to cite the procedural requirement for negating the substantive right of the petitioner herein. Once the petitioner has established his right to be considered for regular appointment, whatever procedural requirement, will have to be adopted by the second respondent in order to fulfill its obligation towards upholding the right of the petitioner.

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15. The learned counsel for the petitioner has submitted that the statements made on behalf of the respondents that today there is no vacancy in the post of Junior Engineer (Mechanical) cannot be countenanced in law for the simple

reason that when the petitioner was appointed as Junior Engineer (Mechanical) in 2007, there was a clear vacancy available and therefore, the petitioner could be accommodated. He would rely upon a decision reported in "CDJ 1983 SC 174 (**Y.V.Rangaiah & others versus J.Sreenivasa Rao & others**)", wherein, the Hon'ble Supreme Court has clearly held that the vacancies which occurred prior to the amended rules, would be governed by the old rules and not by the amended rules. Therefore, he would submit that today it is not open to the second respondent to discountenance the claim of the petitioner on the prevailing circumstances, but the claim of the petitioner has to be considered with reference to the date when he was appointed as Junior Engineer (Mechanical) and even as on date, the petitioner's services have been utilized only as Junior Engineer (Mechanical) which fact has not been disputed anywhere both in the original counter affidavit as well as in the additional counter affidavit and not disputed even during oral arguments advanced on behalf of the second respondent.

16. For all the foregoing reasons, this Court is of the

considered view that the petitioner has made out a clear case for grant of the relief. Therefore, this Court has no hesitation in allowing the Writ Petition. Accordingly, the Writ Petition is allowed. The second respondent is directed to forthwith initiate steps to fill up the post of Junior Engineer (Mechanical) by considering the candidature of the petitioner for regular appointment and obtain necessary approval from the first respondent if any such requirement is necessary and appoint the petitioner as regular Junior Engineer (Mechanical) and grant him all attendant benefits including pay and arrears as admissible to the post of Junior Engineer (Mechanical) from the date of his original appointment. The above exercise shall be initiated and completed by the second and first respondents within a period of 12 weeks from the date of receipt of a copy of this order. No costs.

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04-04-2018

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Index: Yes/No

Internet: Yes/No

To

1. The Commissioner of Sugar,
E.V.R.Periyar Maaligai,
No.690, Anna Salai,
Nandanam,
Chennai-600 035.

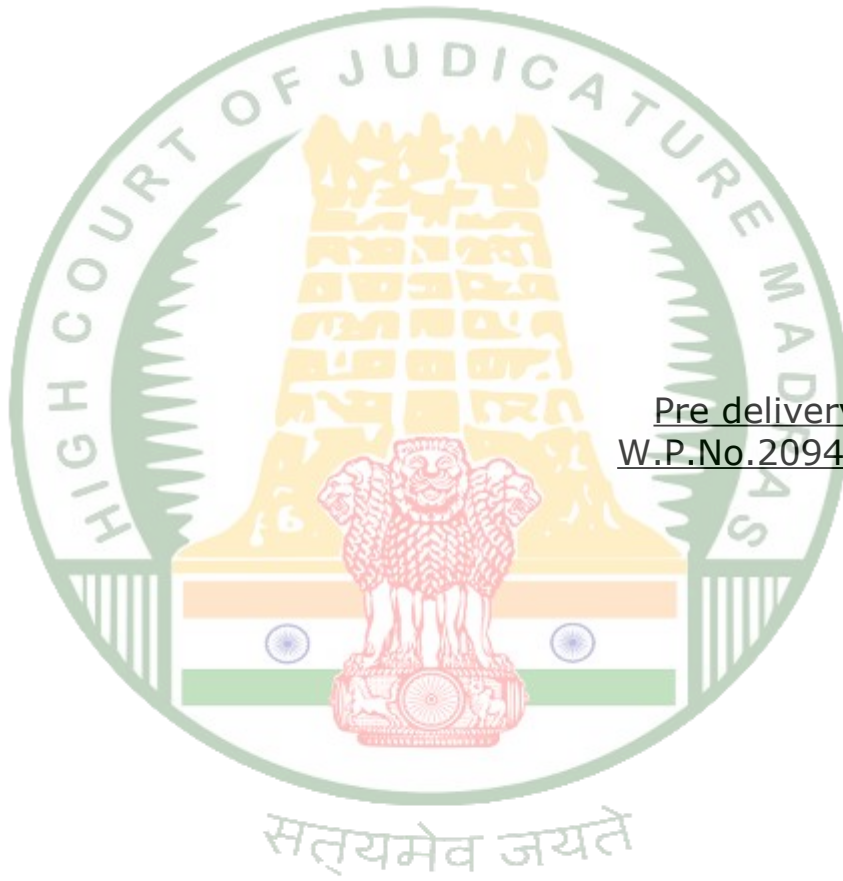
2. The Administrator,
M.R.Krishnamurthy Co-operative Sugar Mills Limited,
Sethiathope-608 702,
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V.PARTHIBAN, J.

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Pre delivery Order in
W.P.No.20942 of 2011

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