

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.10.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MS.JUSTICE P.T.ASHA

WP.No.17624 of 2018

L.K.Venkat alias Venkatesan.L ... Petitioner

vs.

The Secretary,
Union of India,
Ministry of Human Resource Development,
Shastri Bhawan,
Dr.Rajendra Prasad Road,
New Delhi - 110 001.

... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Mandamus, directing the respondent to provide some reservation for the children born to the physically challenged parents even if they are normal children, by considering the representation of the petitioner dated 22.06.2018.

For Petitioner : No appearance.

For Respondent : Mr.S.Janarthanam
Central Government Counsel.

ORDER

(Order of the Court was made by S.MANIKUMAR, J)

On 05.10.2018, there was no representation for the writ petitioner. Today, also there is no representation. Claiming himself to be a public interest litigant, petitioner seemed to have made a representation dated 22.06.2018 to the Secretary, Ministry of Human Resource Development, Government of India, New Delhi, to provide reservation to the children, born to differently abled.

2. Contending inter alia that representation remained unanswered, instant writ petition has been filed for a mandamus to provide reservation to the abovesaid children, by considering the representation of the petitioner dated 22.06.2018.

3. On two occasions, the petitioner did not represent. Though, this Court could dismiss the writ petition for non prosecution, we deem it fit to dispose of the writ petition on merits.

4. Representation dated 22.06.2018, is reproduced.

"Respected Sir,

Sub: In the matter of admission - Kendriya Vidhyalaya

Schools - Reg.

I am L.K.Venkat, son of Lakshmanan, presently residing at No.F-47, Pushpa Nagar, Nungambakkam, Chennai - 600 034 submitting this representation to your goodself for consideration and implementation of the same at the earliest point of time. I am suffering from disability permanently since childhood. Inspite of disability, I have taken social cause in various forums for the upliftment of persons afflicted with partial / permanent disability and as well as for the cause of downtrodden community. In the past I have filed Public Interest Litigation before the Hon'ble High Court of Madras in the interest of those deprived community at large.

In the present issue I am concerned with the Kendriya Vidhyalaya Institution in the case of admission of students which follow certain norms that includes reservations for BC, SC and for physically disadvantageous group. Notwithstanding the above, these institutions further give concessions by way of admissions in respect of grand children of Member of Parliament, PSU Employees, KVS Employees, both for serving and retired people. Similarly in respect of couple having only one girl child, they are also given admission by way of preference in these institutions.

I wish to bring it to your notice, that I appreciate those steps taken by these institutions for providing admission of the children falls under these categories. However, it is pertinent to state that in respect of children born to physically handicapped persons no such preference is given.

I further wish to state that it is very difficult for physically challenged persons to leads a normal life. The disability is not only related to physical condition alone but as well mental condition too.

That apart even after coming up in life it is impossible for them to get married and settle in life. They do not have any social security and family support and they are left in lurch to take care of themselves for the rest of their lives. Hardly only a fraction of physically challenged people are getting

married and out of their wedlock they are blessed with children. Unfortunately under the present system of admissions, those children are not given any favourable treatment and this cause severe mental agony in the minds of their parents and to their children. Unlike normal parents these parents are unable to support their children like taking them to schools and even to give personal attention.

Hence these children don't have any other option but to take care of themselves even at the early stage of their lives. Unless until they are encouraged by given preference in the admission in the schools, many of those children will not have any stream with regard to education and more so welfare to these unfortunate children both to physically challenged parents.

It is the duty of the Government and this Ministry to take urgent steps to address this problem and see that no children born out to those physically challenged people are left out in the inclusive development of the society.

Hence in the above circumstances, I request you to consider my representation and issue appropriate direction and guidelines for admission of those children born to the physically challenged parents and given effect to the current academic year."

5. Statement of objects and reasons of The Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016) are as follows:

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, was enacted to give effect to the proclamation on the Full Participation and Equality of the People with Disabilities in the Asian Pacific Region. The Act defines Persons with Disabilities as those having not less than forty per cent. disability and identified seven categories of disabilities, namely, blindness, low vision, hearing impairment, locomotor disability, mental retardation, mental illness and leprosy - cured.

2. Over a period of time, the conceptual understanding of the rights of persons with disabilities has become more clear and there has been world-wide change in approach to handle the issues concerning persons with disabilities. The United Nations adopted its Convention on the Rights of Persons with Disabilities laying down the principles to be followed by the States Parties for empowerment of persons with disabilities. India signed the said convention and subsequently ratified the same on the

1st day of October, 2007. The convention came into effect on the 3rd day of May 2008. Being a signatory to the Convention, India has an international obligation to comply with the provisions of the said Convention which required an entirely new legislation.

3. In 2010, an Expert Committee constituted under the Chairmanship of Dr.Sudha Kaul, Vice-Chairperson, Indian Institute of Cerebral Palsy, Kolkata submitted its report in 2011, suggesting a Draft Bill relating to the Rights of Persons with Disabilities. The draft Bill was extensively debated upon at various levels invoking State Governments and Union territories and various stakeholders.

4. The salient features of the Rights of Persons with Disabilities Bill, 2014, inter alia, are:-

- (i) Nineteen specified disabilities have been defined;
- (ii) the persons with disabilities enjoy various rights such as right to equality, life with dignity, respect for his or her integrity, etc., equally with others;
- (iii) duties and responsibilities of the appropriate Government have been enumerated;
- (iv) all educational institutions funded by appropriate Government shall provide inclusive education to the children with disabilities;
- (v) a National Fund is proposed to provide financial support to persons with disabilities;
- (vi) stakeholders' participation in the policy making through Central and State Advisory Boards;
- (vii) increase in reservation in posts from existing three per cent, to five per cent, in the vacancies for persons or class of persons with benchmark disabilities in every establishment and reservation of seats for students with benchmark disabilities in higher educational institutions;
- (viii) setting up of National Commission and State Commission to act as Grievance Redressal Mechanism, monitor implementation of the proposed legislation replacing the Chief Commissioner and State Commissioners for persons with disabilities, respectively;
- (ix) guidelines to be issued by the Central Government for issuance of certificates of specified disabilities;
- (x) penalties for offences committed against persons with disabilities; and
- (xi) Court of Session to be designated as

Special Court by the State Government in every district to try offences.

5. The Bill seeks to achieve the above objects."

6. Act 46/2016 has been repealed and a new Act "The Rights of Persons with Disabilities Act, 2016 (Act 49/2018), has received the assent of the President on 27.12.2016 and published in Government Gazette dated 28.12.2016.

7. Chapter VI, deals with the Special Provisions for Persons with Benchmark Disabilities.

8. Section 31 of the Act 49/2018, deals with Free education for children with benchmark disabilities and the same reads thus.

31. (1) Notwithstanding anything contained in the Rights of Children to Free and Compulsory Education Act, 2009, every child with benchmark disability between the age of six to eighteen years shall have the right to free education in a neighbourhood school, or in a special school, of his choice.

(2) The appropriate Government and local authorities shall ensure that every child with benchmark disability has access to free education in an appropriate environment till he attains the age of eighteen years.

9. Section 32 of the Act 49/2018, deals with Reservation in higher educational institutions and the same is extracted.

32. (1) All Government institutions of higher education and other higher education institutions receiving aid from the Government shall reserve not less than five per cent. seats for persons with benchmark disabilities.

(2) The persons with benchmark disabilities shall be given an upper age relaxation of five years for admission in institutions of higher education.

10. Section 33 of the Act 49/2018, deals with Identification of posts for reservation and the same is reproduced.

33. The appropriate Government shall— (i) identify posts in the establishments which can be held by respective category of persons with benchmark disabilities in respect of the vacancies reserved in accordance with the provisions of section 34;

(ii) constitute an expert committee with representation of persons with benchmark disabilities for identification of such posts; and

(iii) undertake periodic review of the identified posts at an interval not exceeding three years.

11. Section 34 of the Act 49/2018 deals with General reservation in Government establishments and the same reads thus.

34. (1) Every appropriate Government shall appoint in every Government establishment, not less than four per cent. of the total number of vacancies in the cadre strength in each group of posts meant to be filled with persons with benchmark disabilities of which, one per cent. each shall be reserved for persons with benchmark disabilities under clauses (a), (b) and (c) and one per cent. for persons with benchmark disabilities under clauses (d) and (e), namely:-

- (a) blindness and low vision;
- (b) deaf and hard of hearing;
- (c) locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;
- (d) autism, intellectual disability, specific learning disability and mental illness;
- (e) multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities:

Provided that the reservation in promotion shall be in accordance with such instructions as are issued by the appropriate Government from time to time:

Provided further that the appropriate Government, in consultation with the Chief Commissioner or the State Commissioner, as the case may be, may, having regard to the type of work carried out in any Government establishment, by notification and subject to such conditions, if any, as may be specified in such notifications exempt any Government establishment from the provisions of this section.

(2) Where in any recruitment year any vacancy cannot be filled up due to nonavailability of a suitable person with benchmark disability or for any other sufficient reasons, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with benchmark disability is not available, it may first be filled by interchange among the five categories and only when there is no person with disability available for the post in that year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the five categories with the prior approval of

the appropriate Government.

(3) The appropriate Government may, by notification, provide for such relaxation of upper age limit for employment of persons with benchmark disability, as it thinks fit.

12. Thus in all the Government institutions of higher education and other higher education institutions, receiving aid from the Government, 5% of the seats, are reserved for persons with benchmark disabilities. In Government establishments, the percentage of reservation is 4%, and the details are set out in Act 49/2018.

13. The erstwhile Act 1/1996 and Act 49/2018 are to give effect to the United Nations Convention on the Rights of Persons with Disabilities and for matter connected therewith or incidental thereto. India has adopted the convention and enacted The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, which has underwent changes and consequently, the new enactment, The Rights of Persons with Disabilities Act, 2016 (Act 49/18), Objects of the enactment are

(a) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(b) non-discrimination;

(c) full and effective participation and inclusion in society;

(d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(e) equality of opportunity;

(f) accessibility;

(g) equality between men and women;

(h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities;

AND WHEREAS India is a signatory to the said Convention;

AND WHEREAS India ratified the said Convention on the 1st day of October, 2007;

AND WHEREAS it is considered necessary to implement the Convention aforesaid."

14. Government have intended to adopt the convention of the rights of persons with disabilities and not the rights of the persons (normal children) born to differently abled persons. There is a distinction between above. Object of the legislation is to bring empowerment of all persons with disabilities, and

not to others, (normal children born to differently abled persons).

15. Mandamus sought for, is contrary to the very object of the statute. Petitioner has no constitutional or statutory right to seek for a mandamus, directing the respondents to provide reservation to the children born to the differently abled persons, even though they are normal children. At this juncture, we also consider few decisions on the aspect as to when mandamus can be issued.

(i). In *State of Kerala v. A.Lakshmi Kutty* reported in 1986 (4) SCC 632, the Hon'ble Supreme Court held that a Writ of Mandamus is not a writ of course or a writ of right but is, as a rule, discretionary. There must be a judicially enforceable right for the enforcement of which a mandamus will lie. The legal right to enforce the performance of a duty must be in the applicant himself. In general, therefore, the Court will only enforce the performance of statutory duties by public bodies on application of a person who can show that he has himself a legal right to insist on such performance. The existence of a right is the foundation of the jurisdiction of a Court to issue a writ of Mandamus.

(ii) In *Raisa Begum v. State of U.P.*, reported in 1995 All.L.J. 534, the Allahabad High Court has held that certain conditions have to be satisfied before a writ of mandamus is issued. The petitioner for a writ of mandamus must show that he has a legal right to compel the respondent to do or abstain from doing something. There must be in the petitioner a right to compel the performance of some duty cast on the respondents. The duty sought to be enforced must have three qualities. It must be a duty of public nature created by the provisions of the Constitution or of a statute or some rule of common law.

(iii) Writ of mandamus cannot be issued merely because, a person is praying for. One must establish the right first and then he must seek for the prayer to enforce the said right. If there is failure of duty by the authorities or inaction, one can approach the Court for a mandamus. The said position is well settled in a series of decisions.

(a) In the decision reported in (1996) 9 SCC 309 (*State of U.P. and Ors. v. Harish Chandra and Ors.*) in paragraph 10, the Apex Court held as follows:

10. ...Under the Constitution a mandamus can be issued by the court when the applicant establishes that he has a legal right to the performance of legal duty by the party against whom the mandamus is sought and the said right was subsisting on

the date of the petition....

(b) In the decision reported in (2004) 2 SCC 150 (Union of India v. S.B. Vohra) the Supreme Court considered the said issue and held that 'for issuing a writ of mandamus in favour of a person, the person claiming, must establish his legal right in himself. Then only a writ of mandamus could be issued against a person, who has a legal duty to perform, but has failed and/or neglected to do so.

(c) In the decision reported in (2008) 2 SCC 280 (Oriental Bank of Commerce v. Sunder Lal Jain) in paragraphs 11 and 12 the Supreme Court held thus,

11. The principles on which a writ of mandamus can be issued have been stated as under in The Law of Extraordinary Legal Remedies by F.G. Ferris and F.G. Ferris, Jr.:

Note 187.-Mandamus, at common law, is a highly prerogative writ, usually issuing out of the highest court of general jurisdiction, in the name of the sovereignty, directed to any natural person, corporation or inferior court within the jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty. Generally speaking, it may be said that mandamus is a summary writ, issuing from the proper court, commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is entitled of legal right to have performed.

Note 192.-Mandamus is, subject to the exercise of a sound judicial discretion, the appropriate remedy to enforce a plain, positive, specific and ministerial duty presently existing and imposed by law upon officers and others who refuse or neglect to perform such duty, when there is no other adequate and specific legal remedy and without which there would be a failure of justice. The chief function of the writ is to compel the performance of public duties prescribed by statute, and to keep subordinate and inferior bodies and

tribunals exercising public functions within their jurisdictions. It is not necessary, however, that the duty be imposed by statute; mandamus lies as well for the enforcement of a common law duty.

Note 196.-Mandamus is not a writ of right. Its issuance unquestionably lies in the sound judicial discretion of the court, subject always to the well-settled principles which have been established by the courts. An action in mandamus is not governed by the principles of ordinary litigation where the matters alleged on one side and not denied on the other are taken as true, and judgment pronounced thereon as of course. While mandamus is classed as a legal remedy, its issuance is largely controlled by equitable principles. Before granting the writ the court may, and should, look to the larger public interest which may be concerned-an interest which private litigants are apt to overlook when striving for private ends. The court should act in view of all the existing facts, and with due regard to the consequences which will result. It is in every case a discretion dependent upon all the surrounding facts and circumstances.

(iv). When a Writ of Mandamus can be issued, has been summarised in Corpus Juris Secundum, as follows:

"Mandamus may issue to compel the person or official in whom a discretionary duty is lodged to proceed to exercise such discretion, but unless there is peremptory statutory direction that the duty shall be performed mandamus will not lie to control or review the exercise of the discretion of any board, tribunal or officer, when the act complained of is either judicial or quasi-judicial unless it clearly appears that there has been an abuse of discretion on the part of such Court, board, tribunal or officer, and in accordance with this rule mandamus may not be invoked to compel the matter of discretion to be exercised in any particular way. This principle applies with full force and effect, however, clearly it may be made to appear what the decision ought to be, or even though its conclusion be disputable or, however, erroneous the conclusion reached may be, and

although there may be no other method of review or correction provided by law. The discretion must be exercised according to the established rule where the action complained has been arbitrary or capricious, or based on personal, selfish or fraudulent motives, or on false information, or on total lack of authority to act, or where it amounts to an evasion of positive duty, or there has been a refusal to consider pertinent evidence, hear the parties where so required, or to entertain any proper question concerning the exercise of the discretion, or where the exercise of the discretion is in a manner entirely futile and known by the officer to be so and there are other methods which it adopted, would be effective." (emphasis supplied)

16. A writ of Mandamus, can be issued by a court, in its discretion, for which, it must be shown that, there is a legal duty cast upon the authority against whom, relief is sought for and that there is a failure to discharge the duty cast upon. Person approaching the High Court under Article 226 of the Constitution of India, has to prove that he has a legal right to be enforced against the authority, and for the failure of performance of a statutory duty, by the authority, relief can be sought for. Object of the Act, is to provide assistance and reservation to the differently abled persons, and not to the children of such differently abled persons, with no disabilities, Court cannot legislate.

17. It is well settled that Courts cannot run Governments. The Hon'ble Supreme Court, has time and again, reminded that the Judges must not try to perform legislative or executive function.

18. In Narmada Bachao Andolan Vs. Union of India and Others, reported in {2000 (10) SCC - 664}, the Hon'ble Supreme Court observed as follows:-

"232. While protecting the rights of the people from being violated in any manner utmost care has to be taken that the Court does not transgress its jurisdiction. There is, in our constitutional framework a fairly clear demarcation of powers. The Court has come down heavily whenever the executive has sought to impinge upon the Court's jurisdiction.

233. At the same time, in exercise of its enormous power, the Court should not be called upon to or undertake governmental duties or functions. The Courts cannot run the Government nor can the administration indulge

in abuse or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under values of the Constitution and the rights of Indians. The Courts must therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the Court will not interfere. When there is a valid law requiring the Government to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words, the Court itself is not above the law.

234. In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in public interest to require the Court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation, the Court should not refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the Court to go into the matter afresh and, in a way, sit in appeal over such a policy decision."

19. The above mentioned observations have been quoted with approval by the Hon'ble Supreme Court in BALCO EMPLOYEES' UNION (REGD) Vs. UNION OF INDIA AND OTHERS {2002 (2) SCC - 333}.

20. In DIVISIONAL MANAGER, ARAVALI GOLF CLUB AND ANOTHER {2008 (1) SCC - 683}, in paragraphs Nos.17, 19, 20 and 22, the Hon'ble Supreme Court held thus:-

"17. Before parting with this case, we would like to make some observations about the limits of the powers of the judiciary. We are compelled to make these observations because we are repeatedly coming across cases where judges are unjustifiably trying to perform executive or legislative functions. In our opinion this is clearly unconstitutional. In the name of judicial activism judges cannot cross their limits and try to take over functions which belong to another organ of the State.

19. Under our Constitution, the legislature, the executive and the judiciary all have their own broad spheres of operation. Ordinarily, it is not proper for any of these three organs of the State to encroach upon the domain of another, otherwise the delicate balance in the Constitution will be upset, and there will be a reaction.

20. Judges must know their limits and must not try to run the Government. They must have modesty and humility, and not behave like emperors. There is broad separation of powers under the Constitution and each organ of the State - the legislature, the executive and the judiciary - must have respect for the other and must not encroach into each other's domains.

22. In Tata Cellular Vs. Union of India (vide AIR para 113 : SCC para 94), this Court observed that the modern trend points to judicial restraint in administrative action. The same view has been taken in a large number of other decisions also, but it is unfortunate that many Courts are not following these decisions and are trying to perform legislative or executive functions. In our opinion adjudication must be done within the system of historically validated restraints and conscious minimisation of the Judges' preferences. The Court must not embarrass the administrative authorities and must realise that administrative authorities have expertise in the field of administration while the Court does not. In the words of Neely VJ (Scc p.681, para 82).

"82.... I have very few illusions about my own limitations as a Judge ... I am not an accountant, electrical engineer, financier, banker,

expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation."

It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator."

21. In COMMON CAUSE (A REGD. SOCIETY) VS. UNION OF INDIA AND OTHERS, {2008 (5) SCC - 511}, wherein at paragraph No.40, the Hon'ble Supreme Court, held thus:-

"The justification given for judicial activism is that the executive and legislature have failed in performing their functions. Even if this allegations is true, does it justify the judiciary in taking over the functions of the legislature or executive? In our opinion it does not: firstly, because that would be in violation of the high constitutional principle of separation of powers between the three organs of the State, and secondly, because the judiciary has neither the expertise nor the resources for this. If the legislature or executive are not functioning properly it is for the people to correct the defects by exercising their franchise properly in the next elections and voting for candidates who will fulfil their expectations, or by other lawful means e.g., peaceful demonstrations and agitations, but the remedy is surely not by the judiciary in taking over the functions of the other organs."

22. In the light of the above discussion and decisions, statutory provisions, prayer sought for cannot be issued and instant writ petition is liable to be dismissed and accordingly, dismissed. No Costs.

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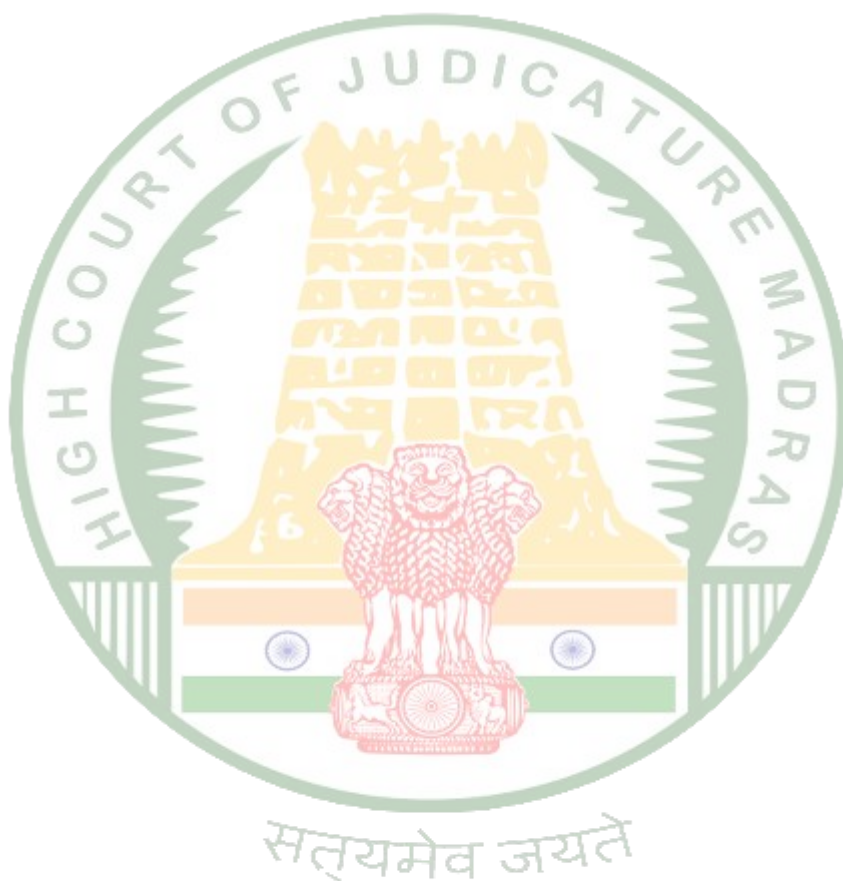
Sub Assistant Registrar

ars/dm
To
The Secretary,

Union of India,
Ministry of Human Resource Development,
Shastri Bhawan,
Dr.Rajendra Prasad Road,
New Delhi - 110 001.

WP No.17624 of 2018

GMV (30/10/2018)



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