

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.11.2018

CORAM:

THE HON'BLE Dr. JUSTICE S.VIMALA

Writ Petition No.29453 of 2018
& WMP Nos.34417, 34418 & 34421 of 2018

R.Thamaraiselvi

... Petitioner

..vs..

- 1 The State of Tamil Nadu,
Rep. by its Secretary to Government,
School Education Department
Fort St. George Chennai - 9
- 2 The Joint Director of School Education
DPI Compound, College Road, Chennai - 6
- 3 The Chief Educational Officer
Nagapattinam District Nagapattinam
- 4 The Commissioner, Commissionerate for the welfare of the
Differently Abled, Jawaharlal Nehru, Inner
Ring Road, K.K.Nagar, Chennai - 600078 ... 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 pertaining to the transfer order passed by the 2nd respondent in Na.Ka.No.59205/C1/E1/2018 dated 22.10.2018, quash the same and consequently direct the respondents to transfer and post the petitioner as headmistress to the Thazhancheri High School which is situated near her residence in accordance with Government Letter (MS) No.92/S/09 dated 22.07.2009 Personnel and Administrative Reforms Department.

For Petitioner : Mr. K.C.Karl Marx
For R-1 to R-3 : Mrs. P.Kavitha, Govt. Advocate (Edn.)
For R-4 : Mr. R.Selvam, Govt. Advocate.

O R D E R

"There is no greater disability in society, than the inability to see a person as more." - Robert M.Hensel.

2. Alleging that the employer did not understand that people with disability also would have hopes and aspirations in society wanting to showcase their talent and when the petitioner expected no barrier and discrimination, she faced only apathy towards her problem, this writ petition has been filed by the petitioner.

3. The petitioner herein is a person with 50% locomotor disability (a person's inability to execute distinctive activities associated with movement of self and objects resulting from affliction of musculoskeletal or nervous system or both, including other deformities). She is a M.Sc., (Mathematics) B.Ed., graduate. She was appointed as B.T.Assistant on 04.12.1997 in the Mathamatics subject. In the year 2018, i.e., on 02.08.2018 she got promoted as Headmistress and joined in Government High School, Korkai.

4. By G.O.Ms.No.165, School Education Department, dated 07.08.2018, 95 middle schools were upgraded as high schools and by G.O.Ms.No.166, dated 07.08.2018, 95 high schools were upgraded as higher secondary schools. The High School where the petitioner was working was also upgraded as Higher secondary school, by the same Government Order, dated 07.08.2018. Anticipating the transfer, the petitioner made a representation on 10.08.2018 requesting that she may be transferred to Thazhancheri High School, which is 10 Kms away from her residence, taking into account her disability. The petitioner was put in additional charge of Thazhancheri High School, (on 20.08.2018) which is also an upgraded high school, by virtue of G.O.Ms.No.165, dated 07.08.2018. Though she was given assurance that she will be posted to Thazhancheri High School during transfer counselling, it did not happen and she was transferred to Periathumpur High School.

5. It is the grievance of the petitioner that her claim should have been considered in the light of G.O.(1D) No.403, dated 29.05.2018 which provides that when more than one person is claiming transfer to the same place, priority shall be given to teachers suffering with 50% or more disability and that the counselling for transfer of disabled teachers shall be held first before counselling for normal teachers.

6. It is the contention of the learned counsel appearing for the petitioner that during transfer counselling no such priority was given to her; Thazhancheri High School which was near to the residence of the petitioner was chosen by one teacher, by name, Kannagi and therefore, when the turn of the petitioner came without any option, she was posted to Periathumpur High School, which is 104 Kms away from her residence.

7. The learned Government Advocate appearing for the respondents would contend that the petitioner herself has chosen the place of Periathumbur High School in the counselling and therefore, she is not entitled to go back against her own choosing and therefore, the claim of the petitioner has to be thrown out.

7.1. The second contention is that the transfer was only in accordance with the seniority, which is the rule, therefore, when the transfer is in accordance with the rule, it cannot be challenged.

8. The contentions of the learned Government Advocate for the respondents have generated two questions, namely, (i) whether when there is a clash between seniority and disability, which will prevail? (ii) Whether the petitioner actually opted for the transferred place or she was forced by circumstances to opt for the transferred place?

9. The learned counsel appearing for the petitioner would submit that on an earlier occasion, there was an opportunity for the petitioner for promotion, but fearing that she has disability and she would not be able to travel 104 Kms away from her residence, she relinquished her promotion and that is why, her juniors became seniors to her and now the claim is made on the ground of seniority and this ground would be adding fuel to the fire.

9.1. This factor would go to show that the situation in which the petitioner had been driven on account of her disability. Even in case of clash between seniority and disability, it is only the disability which should gain over seniority.

10. Only with a view to create an enabling environment for social inclusion of the Persons with Disabilities in all fields of life by providing equal opportunities, equity & social Justice and to ensure confidence building in them so that, they can realise their aspirations, the law on disability has been enacted. To what extent and with what spirit the law is enforced is the issue that is raised in this case.

10.1. The implementation should be with a view to enforce the protection given under the Disabilities Act. To what extent there is an implementation is also a question. The way in which the counselling has been conducted would show that counselling is a farse and that has led to injustice to the petitioner.

11. As at the time of counselling, the procedure to be followed is that preference should have been given to the petitioner herein so that she would have an option to choose.

At the time when the petitioner was given option, there was no choice for her at all. When there was no choice and when a person is compelled to choose what is available, then it cannot be said that the act of the petitioner is voluntary and it is out of her own choice. When the choice is out of compulsive situation then the word choice has no meaning. Therefore, the contention that it was the choice of the petitioner has no basis.

12. In the representation, the petitioner claims that she must be given Thazhancheri High School, which is very nearby to her residence, considering her disability.

12.1. This contention takes us to the provisions of G.O. (1D) No.403, dated 29.05.2018, issued by the first respondent. Clause 9 of the said Government Order provides that in respect of a particular clause if more than one person seeks transfer, the following priorities should be taken into account:

1. Persons with total blindness.
2. Persons, who have undergone Kidney transplantation surgery and the persons, who is undergoing dialysis.
3. Persons suffering from severe cancer.
4. Physically challenged persons with 50% or more than 50% disablement. etc.,

13. From the above, it is clear that out of two persons when the petitioner is suffering from 50% disability, then the petitioner is entitled to preference and the impugned order neglecting the preference is liable to be set-aside.

14. Yet another contention raised by the learned Government Advocate for the respondents is that the transfer was on the administrative ground on account of upgradation of schools and only in general counselling the priority as mentioned in G.O. (1D) No.403 has to be followed.

14.1. This contention also is not correct as the problems on account of the disablement would not remain under suspended animation, when the transfer is made on the basis of administrative reasons.

15. The learned Government Advocate appearing for the respondents would submit that the transfer order is passed only in accordance with the wish of the petitioner, and therefore, the representation made for reconsideration of the transfer cannot be entertained.

15.1. This contention, obviously, as per the reasons stated supra, is not correct. The petitioner is repeatedly making representation raising a question as to when she had been put in additional charge of Thazhancheri High School for some time and why not for some other time.

16. The transport system as well as the population using the general transport system are alarming and accidents are escalating each day. The population travelling over the top of the bus cannot be forgotten while considering the transfer request of a disabled person.

17. Under the stated circumstances, the transfer order issued to the petitioner, dated 22.10.2018 is quashed and the second respondent is directed to post the petitioner as Headmistress in Thazhancheri High School, within a period of one week from the date of receipt of a copy of this order.

17.1. Normally, place of posting is left to the discretion of the administrators, but, in this case, this Court did not have the hope that the administrators would take care of the interest of the differently abled person, namely, the petitioner.

17.2. When the law is so concerned for the disabled persons and makes provision, it is the obligation of the law executing authorities to ensure implementation in quite promptitude.

17.3. This Court also wishes to point out Section 89 of The Rights of Persons with Disabilities Act, 2016, which reads thus:-

"89. Any person who contravenes any of the provisions of this Act, or of any rule made thereunder shall for first contravention be punishable with fine which may extend to ten thousand rupees and for any subsequent contravention with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees."

17.4. It is made clear that if this order is not complied with, proceedings under Section 89 of the said Act would follow.

17.5. In order to avoid future neglects and future indifferences to the provisions of the said Act, the authorities, who are making entries in the Confidential Report of their subordinates, shall also make an entry regarding their approach towards disabled persons.

18. With the above directions, this writ petition is disposed of. No costs. Consequently, the connected WMP is closed.

Sd/-

Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

srk

To

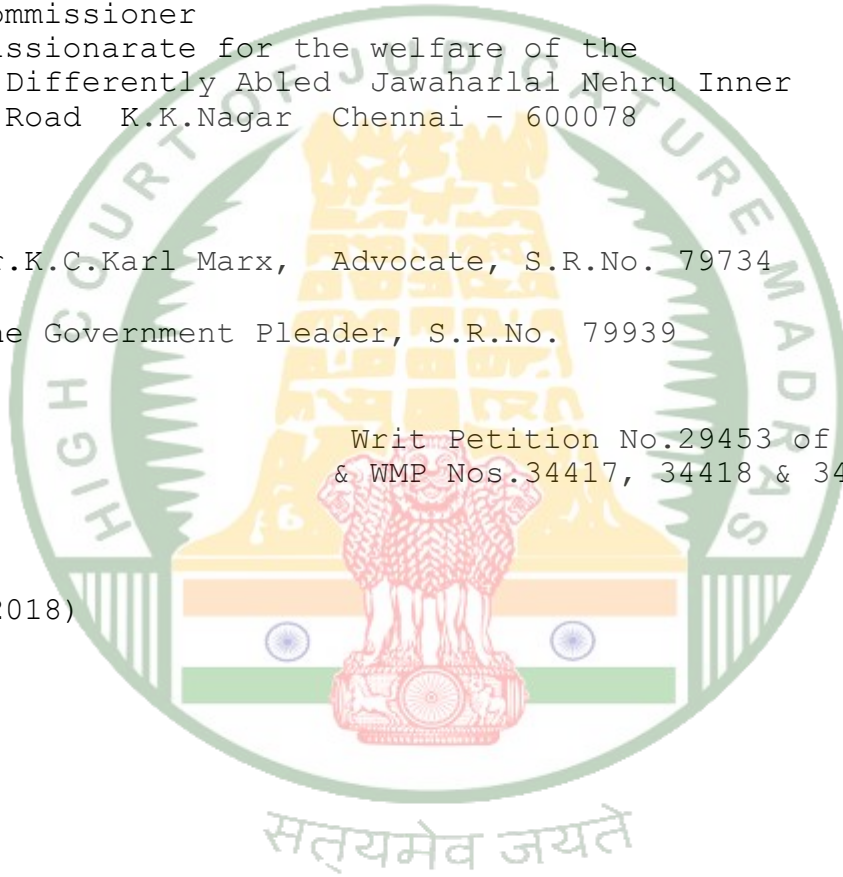
- 1 The Secretary to Government, State of Tamil Nadu
School Education Department
Fort St. George Chennai - 9
- 2 The Joint Director of School Education
DPI Compound College Road Chennai - 6
- 3 The Chief Educational Officer
Nagapattinam District Nagapattinam
- 4 The Commissioner
Commissionerate for the welfare of the
Differently Abled Jawaharlal Nehru Inner
Ring Road K.K.Nagar Chennai - 600078

+1cc to Mr.K.C.Karl Marx, Advocate, S.R.No. 79734

+1cc to the Government Pleader, S.R.No. 79939

Writ Petition No.29453 of 2018
& WMP Nos.34417, 34418 & 34421 of 2018

PA (CO)
GN(28/11/2018)



WEB COPY