

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10 / 09 / 2020

CORAM:

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

W.P.NO.12320 OF 2010
AND M.P.NOS.1 AND 2 OF 2010

A.Rajasekar

... Petitioner

Vs.

1.The Government of Tamil Nadu
Represented by its Principal Secretary
Higher Education (F2) Department
Secretariat, Chennai – 600 009.

2.The Director of Collegiate Education
DPI Compound, College Road,
Chennai – 600 006.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, to call for the records relating to the first respondent herein in Letter No.11930/F2/2007-4 dated 15.10.2008 and quash the same and consequently direct the first respondent herein to confer the post of Assistant Professor (formerly Lecturer) regularly in Government College by recruitment by transfer on par with petitioner's juniors and confer all the accrued benefits with due regards to his seniority.

For Petitioner : M/s.Anand and Suryas

For Respondents : Mr.S.Karthigai Balan
Government Advocate

ORDER

Aggrieved over the rejection of his representation dated 15.10.2008 for appointment to this post of Assistant Professor, the petitioner has approached this Court to quash the same and for a direction to appoint him.

2.The petitioner was appointed as Junior Assistant in 1975, he was promoted as Assistant, Superintendent and at the time of filing writ petition as Bursar in Government Arts College, Krishnagiri. He possesses the educational gratification of M.A Political Science, M.A. English, M.Ed and M.Phil and has passed State Level Screening Test (SLST) in the year 1990. As per Rule 2 of Special Rules for Tamil Nadu Collegiate Education Service Rules (hereafter referred to as Rules) the method of recruitment of Assistant professor is as follows :

<i>Class (1)</i>	<i>Category (2)</i>	<i>Designation (3)</i>
VII	1 2	Assistant Professors of Arts College Assistant Professors Training Colleges
2. Appointment		
(a) Appointment to the several classes and categories of the service shall be made as follows: Class and Category (1) Class VII		Method of recruitment (2)
1. Assistant Professors of Arts Colleges		(i) Direct recruitment, or (ii) Recruitment by transfer from among Tutors and Demonstrators in the Tamil Nadu Educational Subordinate Service; or (iii) Recruitment by transfer from the category of Headmaster in the Tamil Nadu Educational Subordinate Service; or (iv) Transfer from category 2 of the class; or (v) Recruitment by transfer from any other service, if no qualified and suitable candidates are available for appointment by methods (i) to (iv) above.
Extract of Rule 2(d) (d) In making appointments to the posts in categories 1 and 2 of class VI and categories 1 and 2 of class VII posts connected with a particular subject or language in each category shall be regarded as constituting one unit. Appointments to substantive vacancies arising in each such unit and in the post in class VII shall be made so as to ensure that the following proportion is maintained for persons in service in the said categories appointed by different methods of recruitment.		
Categories	Direct recruitment	Other methods of recruitment
1 and 2 of Class VI	1	2
1 and 2 of Class VII	1	1
Class VIII	1	1

3. As per Rule 2 (d) of the rules the ratio between Direct

Recruitment and other four methods of recruitment by transfer are to be filled up in the ratio of 1:1 i.e. 50% by Direct Recruitment and 50% by Recruitment by transfer.

4. According to the petitioner the categories specified in Rule 2(a)(vii) 7(ii) to (iv) fall under recruitment by transfer, and they have become obsolete.

Rule (ii) prescribes for transfer from the posts of Tutors and Demonstrators. There is no person holding the post and the posts were later abolished.

Rule (iii) Recruitment by transfer from Head Masters become obsolete as the pay structure of Head Masters is having better financial prospects and better status, none applies under this rule.

Rule (iv) transfer from Lecturers in training colleges and Art colleges. Both Lecturers and Assistant Professors do not form separate categories. The posts are interchangeable and treated on par with each other and placed in a combined seniority system and hence this mode of selection has also become inoperative.

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5.Further Government by absorbing all 10(a)(i) lecturers in the years 1981, 1988 and 324 contract lecturers in 1993, exceeded 50% of Direct Recruitment quota in violation of statutory rules. Since the method of recruitment through rule (ii) to (iv) become in operative the only remaining method of appointing under rule (v) transfer from non-teaching staff alone is available. In the year 1981 and 1982, three of the juniors of the petitioner were appointed. One Jaganathan approached Tamil Nadu Administrative Tribunal in O.A.No.64 of 1992 and was directed to be appointed as Assistant Professor by its order dated 26.07.1993. By G.O.Ms.No.1078 Education Department, dated 09.11.1994, the services of temporarily appointed Assistant Professor were regularised. The juniors of the petitioner got regularised. Hence, the petitioner made a representation on 11.01.1995 for considering him for appointment along with the said Jaganathan. But in G.O.Ms.No.236, dated 23.03.1995, the said Jaganathan was appointed in relaxation of rules. Again, the petitioner made a representation dated 27.11.1996 to pass orders in the light of G.O.Ms.No.236, dated 23.03.1995.

6.As per the list prepared by the Tamilnadu Collegiate Education Department Post Graduate Non-Teaching Employees Association, the petitioner's name was shown at Serial No.6. The above-said association, in which the petitioner is a member, filed O.A.No.5636 of 2000. The Tribunal considered the application along with the application filed by another non-teaching employees association and five other individuals and by its order dated 24.06.2002 directed the Government to consider them as a special case and pass orders within four months. Again, the petitioner made a representation on 02.01.2003 enclosing his previous appeals dated 11.01.1995, 30.03.1995 and 26.02.1998 to consider him on par with V.Jaganathan. But, the Government considered the applicants in O.A.No.5488 of 1995. Dr.S.Ignaci Clement and two others were appointed in G.O.Ms.No.323, dated 14.08.2003.

7.Thereafter, one B.Narayanasamy was appointed by G.O.Ms.No.16, Higher Education (F2) Department, dated 01.02.2007 with effect from 02.03.2006 pursuant to a Contempt Petition filed before this

Court in W.P.No.6006 of 2006, in relaxation of Rule 2 of Special Rules. Again, the petitioner made a representation dated 25.02.2007. Pursuant to a direction issued by this Court in W.P.No.26080 of 2007 dated 03.08.2007 his representation was rejected on 15.10.2008 by the Government. The petitioner issued a legal notice dated 6.12.2008 for reconsideration of the rejection order followed by petitions dated 28.4.2009 and 3.5.2010 and approached this Court by the above writ petition.

8.The learned counsel for the petitioner would contend that the action of the Government in singling out the petitioner amounts to discrimination Since the conditional clause holding validity period of State Level Screening Test for five years imposed in G.O.Ms.No.502 Higher Education Department, dated 25.9.2004 was removed by Government Letter (Ms) No.715, dated 28.5.1990, it is not a ground for rejecting his candidature. Further recruitment to the post through Direct Recruitment method in excess of 50% and not operating 50% recruitment by transfer quota is in violation of statutory rules. On these grounds he would pray to quash the impugned order

and a consequential direction to grant notional recruitment as the petitioner retired from service.

9.Per contra, learned Government Advocate would contend that the petitioner does not have any vested right to be appointed to the post of Assistant Professor, for, as per Rule 2(v) recruitment by transfer from any other service will arise only if no qualified and suitable candidates are available for appointment by methods (i) to (iv) of the Rules. When there are abundant qualified candidates are available and waiting in employment exchanges, this method can not be adopted and it is contrary to the judgments of Supreme Court.

10.Insofar as the appointment of three Assistant Professors made in the year 1980-83 is concerned, G.O.Ms.No.2406, Education dated 31.10.1981 permitted the Aided Colleges to promote qualified non-teaching staff as Assistant Professors. Aided Colleges are by themselves a separate unit and all Government Colleges form one unit. Therefore, appointment

made by Aided Colleges during the pendency of Tamil Nadu Private Colleges Education Rules will not apply to the petitioner.

11.In respect of the implementation of Tribunal's order by G.O.Ms.No.1078 dated 9.11.1994, it is the contention of the respondent that pursuant to a direction by the Tribunal to consider applicants in the light of regularising the 14 Assistant Professors are concerned, the petitioner is not a qualified person as per UGC regulation. As his pass in SLST in the year 1990 was valid only for five years. In W.P.No.20486 of 2007, this Court observed that the Government cannot be compelled to make appointment from residual category. Following the order of this Court only the impugned order was passed. The other appointment made in 2003 was after considering the candidates who have fulfilled the UGC norms. The petitioner cannot seek appointment after retirement and that too after a lapse of 10 years. The recruitments are made through Teachers Recruitment Board (TRB) for the past ten years, following the UGS norms. In a recent case after the direction of the Division Bench in W.A.(MD).No.1591 of 2016, dated 19.12.2016 also

the promotions from non teaching staff was rejected and it is not feasible to promote non teaching staff to the post of Assistant Professor.

12.He would further contend that the petition is hit by delay and laches and rely on the judgment of Hon'ble Supreme Court in ***State of Uttar Pradesh Vs. Arvind Kumar Srivastava [2015 (1) SCC 347]***. The similarly situated persons have approached the Court in 1994 and obtained orders in 2002 namely Dr.Ignaci Clement, A.Palanivel and R.Vendan and followed it up as per the order of the Tribunal dated 24.6.2002. But the petitioner waited for 16 years. In the subsequent writ petition filed by B.Narayanasamy in W.P.No.20486 of 2007, for retrospective appointment, it is categorically declared that the residual category is not entitled to any vested right. Hence, the petitioner is not entitled to claim equality in illegality and prayed for dismissal of this writ petition.

13. I have heard both sides.

14.Facts are admitted. At the outset, the petitioner as per his own statement became fully eligible to be considered in the year 1990 on passing the State Level Screening Test (SLST). One Jaganathan, whom the petitioner has treated as a similarly placed person, approached the Court in O.A.No.64 of 1992 and obtained orders on 26.07.1993 for appointment. The petitioner should have also approached the Court to establish his right to get appointed in the year 1990 much less on 26.07.1993 when orders were passed in favour of a similarly placed candidate. But he made representations after representations on 11.01.1995, 30.03.1995, 27.11.1996, 26.02.1998, 02.01.2003 and 25.05.2007 and finally approached the Court in the year 2010 after two years of rejection of his representations on 15.10.2008 on the eve of his retirement. The petitioner, as contended by the learned Government Advocate, has been a fence sitter, making repeated representations till the eve of his retirement. It is well settled that repeated representations will not give rise to fresh cause of action, but it will result in decaying the right to sue. The Hon'ble Supreme Court in *State of Uttar Pradesh Vs. Arvind Kumar Srivastava* [2015 (1) SCC 347] has held as follows:-

“22.2. However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.

*22.3. However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see *K.C. Sharma & Ors. v. Union of India* (supra)). On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who*

want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence.”

15.The petitioner after having passed the SLST in the year 1990 had become fully qualified to be considered for the post of Assistant Professor from the residual category. Even as per his contention, the categories fall under Rule (ii) to (iv) had become obsolete and inoperative and vested right accrued on him to pursue his rights, but he has not chosen to agitate his rights before the Court of law, but was making repeated representations. At least in the year 2002, when the Tribunal directed to consider those petitioners as a special case and when three of the candidates appointed pursuant to the order, which was applicable to him also, should have pursued his rights. On the one hand, the petitioner was concerned of his safety of his employment and on the other, desired for promotion without taking any risk. He did not even approach the Court, when one B.Narayanasamy obtained orders by filing W.P.No.6006 of 2006 for implementation of the orders of the Tribunal, in spite of an order passed by

the Tribunal in the application filed by the Association, in which, he was a member. Having slept over his rights for two decades and acquiesced with the orders, the petitioner is not entitled to maintain the writ petition for getting the benefit after three decades. In fact, it is a speculative litigation to take a chance for promotion after retirement. It is well settled that a person is not entitled to be considered for promotion or after his retirement, i.e. after he ceased to be a member of service.

16. Coming to the merits of the case, I need not traverse into the same as it has been discussed threadbare in W.P.No.20486 of 2007 in the order dated 05.02.2008. The relevant paragraph in the said judgment reads as under:

“9. However, it is the case of the respondent that such orders had become final as now indicated in the counter affidavit which is extracted above. But at the same time, it must be seen that the petitioner cannot by filing successive petitions to arm twist the Government from violating all the Special Rules in getting the appointment to the post of

Lecturers. It must be noted that the Lecturer post is a appointed in terms of the existing Special Rules. The petitioner's category is only a residual category and recruitment from such a category cannot be invoked as a matter of routine and only in exceptional cases, such a power can be invoked considering the fact that the post in which the petitioner is trying to get appointed is a teaching post. It is doubtful whether such a residual power can be invoked by the Government. Even in the residual power found in Rule 2(a)(5) of the Special Rule, there is a precondition and unless that condition is satisfied, the petitioner cannot get appointed to any post in a different service. When thousands of candidates are available in the open market, who are more qualified and are also waiting for a number of years, it is rather unfortunate to compel the Government to choose within the narrow campus of the categories of non-teaching staff merely because they have acquired some degrees and that too, Ministerial Staff are qualified and have aspiration to get posted as teaching staff, they should apply along with the direct recruitment

candidates and compete in the selection process and then get appointed to the said service and not by this ingenious method of getting the appointment through back door. In any event, the question of the petitioner being appointed as a Lecturer under the Tamil Nadu Collegiate Services will arise only when the Rules are relaxed in favour of the petitioner under Rule 48 of the General Rules. Such a power to relax any existing Service Rule can be made by the Government only in public interest and not placating any particular individual.

12.It is a real sad state of affairs that the person, who otherwise, is not qualified to enter into the post in Collegiate service, by ingenious method had now compelled the Government to relax a vital rule in his favour and also partially succeeded in getting the order. The petitioner ought to have been satisfied with the order impugned in the writ petition. His present attempt to further make an improvement, viz., to get his deemed appointment extended to ten years backwards and also arrears of salary for that

period is an exercise is futility and the writ petition is misconceived and devoid of any merits.....”

17.I do concur with the above findings. Appointment to the post as per Rule 2 of the Tamil Nadu Collegiate Educational Service Special Rules, can be made from category (v) the residual category, only in a circumstance where there are no qualified candidates available for appointment. There are thousands of qualified young graduates are waiting at the doors of employment exchange. At this juncture, order appointment in favour of the petitioner after his retirement will become a farce.

18.As held by the Hon'ble Supreme Court in ***STATE OF ORISSA VS. MAMATA MOHANTY [Civil Appeal No.1272 of 2011 dated 09.02.2011]*** a person is not entitled to negative equality. In other words, as contended by the learned Government Advocate, no one can claim equality in illegality. It is held as under:

“36. It is a settled legal proposition that [Article 14](#) is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief.”

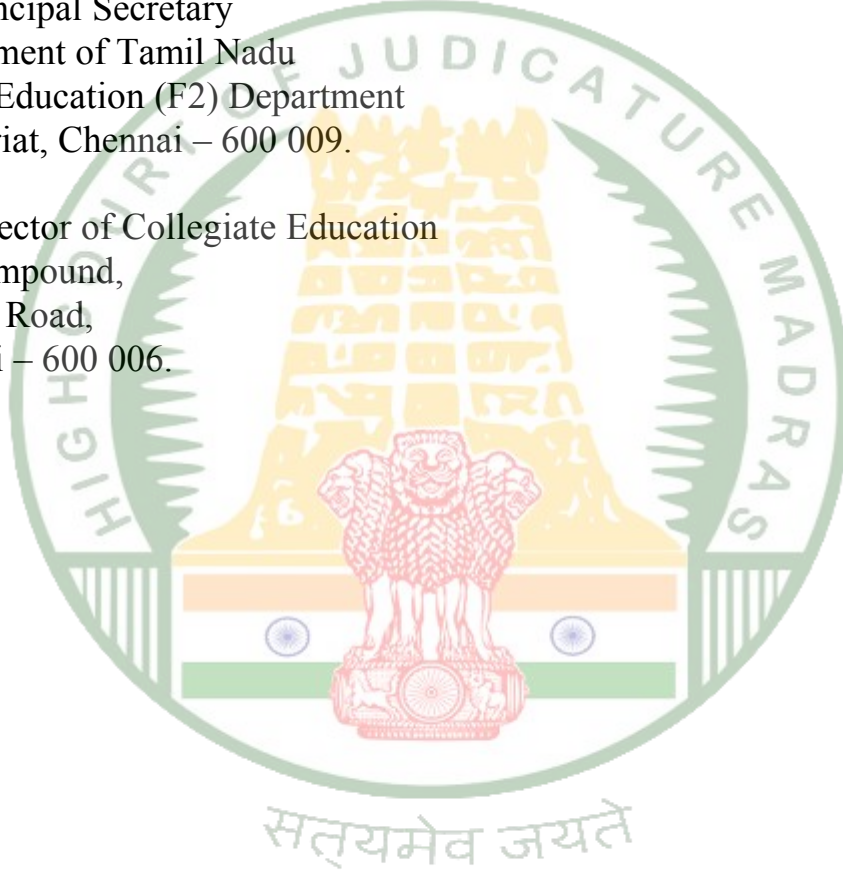
19.As such, the petitioner is not entitled to the relief granted in favour of similarly placed persons by mistake. As such, I do not find nay discrimination in the action of the respondent Government.

20.In view of the above discussions, the writ petition merits no consideration and accordingly, stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Index : Yes/No
Internet : Yes/No
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To

- 1.The Principal Secretary
Government of Tamil Nadu
Higher Education (F2) Department
Secretariat, Chennai – 600 009.
- 2.The Director of Collegiate Education
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