

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.08.2020

CORAM

THE HONOURABLE **MR.JUSTICE R.SUBBIAH**

AND

THE HON'BLE **MR.JUSTICE C.SARAVANAN**

W.A.No.2264 of 2019

and

C.M.P.No.15030 of 2019

(Through Video Conferencing)

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 (El-1) Department,
Secretariat, Chennai – 600 009.

... Appellants

Vs.

B.Subbaiah Pandian

... Respondent

Writ Appeal filed under Clause 15 of Letters Patent, to set aside
the order dated 26.11.2018 passed by the learned Single Judge in
W.P.No.19325 of 2012.

For Appellants : Mr.S.R.Rajagopal,
Additional Advocate General, assisted by
Mrs.A.Srijayanthi, Spl. Govt. Pleader.

For Respondent : Mr.M.Ravi

J U D G M E N T

(Judgment of the Court was delivered
by **C.SARAVANAN, J.**)

The appellants are aggrieved by the impugned order dated 26.11.2018 passed by the learned Single Judge in W.P.No.19325 of 2012. By the impugned order, the learned Single Judge has allowed the writ petition and directed the appellants to appoint the respondent as Assistant Engineer (Industries) with effect from the date of vacancy with all benefits. In the above writ petition, the respondent had challenged the order dated 10.05.2012 of the 1st appellant, which reads as under:-

R.C.No.5603/EDS1/212

O/o Industries Commissioner and
Director of Industries and Commerce,
Raja annamalaipuram, Chennai- 600028

Date. 10.05.2012.

Memo

Sub: Establishment – Request for the post of Assistant Engineer (Industries) by the method of Recruitment by transfer of service – Regarding.

Ref: Your Representation, dated 25.03.2012.

Kindly refer to your representation cited above where in you have requested for appointment as Assistant Engineer (Industries). Your representation has been examined in detail. Your present post ie., Assistant in Tamil Nadu Ministerial Service is not a feeder category for appointment to the post of Assistant Engineer (Industries) in Tamil Nadu Industries Subordinate Service.

Hence as per Rules, your request for appointment to the post of Assistant Engineer (Industries) cannot be considered.

Industries Commissioner
Director of Industries and Commerce

2. The learned Single Judge has passed the above order by relying upon the decision of the Hon'ble Supreme Court in **N.L .Pankajakshan Nair Vs. P.V. Jayaraj and others**, 2002 (10) SCC 396. The operative portion of the impugned order reads as under:-

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 Judgment. 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.

3. There are no disputes in the facts. The respondent was appointed as an Assistant in the Industries Department in the year 2001. The respondent was governed by the provisions of the Tamil Nadu Ministerial Service Rules.

4. Vide circular dated 21.10.2003 bearing reference R.C.No. 9499/EDSI/03 the 1st appellant called upon the respondent to give his option for appointment to the post of Assistant Engineer (Industries) by transfer.

5. The respondent responded to the offer vide letter dated 20.11.2003. Since the respondent had not completed his probation, the option exercised by the respondent vide letter dated 20.11.2003 for appointment by transfer to the post of Assistant Engineer (Industries) was rejected by the appellants. The respondent thereafter completed the period of probation on 13.01.2005.

6. Vide circular dated 25.11.2008 bearing reference R.C.No.36912/EDSI/2008, the appellants once again called for

appointment to the post of Assistant Engineer (Industries). Vide letter dated 10.12.2008, the respondent once again responded and expressed his willingness.

7. However, the appellants did not consider the request of the respondent on the ground that there was a proposal to change the provisions of the Tamil Nadu Industries Subordinate Service Rules regarding the educational qualifications prescribed for the appointment to the post of Assistant Engineer (Industries).

8. Under these circumstances, appointments were made by direct recruitment of candidates to the aforesaid post and thereby denying the opportunity to the respondent. There is also no dispute that the amendment to the above Rules was made only in the year 2016 which came into force only in terms of G.O.(Ms).04, Micro, Small and Medium Enterprises [E1(2)] Department dated 20.01.2016.

9. By this amendment the qualification for the post of Assistant Engineer (Industries) was prescribed as any degree in Engineering except

Civil and Architectural Engineering. It is the contention of the learned Additional Advocate General that the learned that Single Judge erred in allowing the writ petition by giving a positive direction to appoint the respondent to the aforesaid post from the date of original vacancy.

10. It is submitted that all through the period, the provisions of Tamil Nadu Subordinate Service Rules prescribing the qualification was under suspension and therefore, the appellants were justified in not considering the respondent to the aforesaid post. It is further submitted that by allowing the writ petition, seniority of several persons who were directly recruited and who were more qualified than the respondent will be altered and therefore prejudice will be caused to them. It is further submitted that the respondent ought to have filed a writ petition at an early date instead of responding belatedly on 25.03.2012 by way of representation which was rightly rejected.

11. The learned counsel for the respondent submits that the impugned order was well reasoned and requires no interference and prays for dismissal of this Writ Appeal.

12. We have considered the arguments advanced by the learned Additional Advocate General Mr.S.R.Rajgopal appearing on behalf of the appellants and the learned counsel for the respondent Mr.Ravi.

13. Admittedly, the provisions of Tamil Nadu Subordinate Service Rules had not been amended in the year 2008 though there was a proposal. At that time, the respondent had expressed his willingness for being appointed to the post of Assistant Engineer (Industries) on temporary basis. Even though, the above rules were not amended, the appellants decided only to appoint candidates by direct recruitment. This was admittedly contrary to the rules as it stood during the material time. In the process, persons like the respondent, who were qualified under the Rules as it stood then were denied of the opportunity of being considered for appointment to the post of Assistant Engineer (Industries).

14. The decision of the Hon'ble Supreme Court in **N.L.Pankajakshan Nair Vs. P.V. Jayaraj and others**, 2002 (10) SCC

396 referred by the learned Single Judge falls within the four corners of the facts and circumstances of the case. Therefore, the conclusion arrived by the learned Single Judge cannot be faulted.

15. The amendment to the provisions of the Tamil Nadu Subordinate Service Rules prescribing higher qualification for the post of Assistant Engineer (Industries) was made only in the year 2016 vide G.O.(Ms).04, Micro, Small and Medium Enterprises [E1(2)] Department dated 20.01.2016. This was nearly after 7 years and 3 months after the respondent was asked to exercise his option pursuant to circular dated 25.11.2008 bearing reference R.C.No.36912/EDSI/2008 of the appellants.

16. In our view, denial of the right to be considered for appointment by transfer to the respondent was arbitrary, discriminative and unfair. We therefore find no reasons to interfere with the impugned order passed by the learned Single Judge.

17. Therefore, this Writ Appeal is dismissed. No cost.

Consequently, connected Miscellaneous Petition is closed.

(R.P.S.J.) (C.S.N.J.)
21.08.2020

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Index : Yes / No

Internet : Yes / No

Notes:-In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

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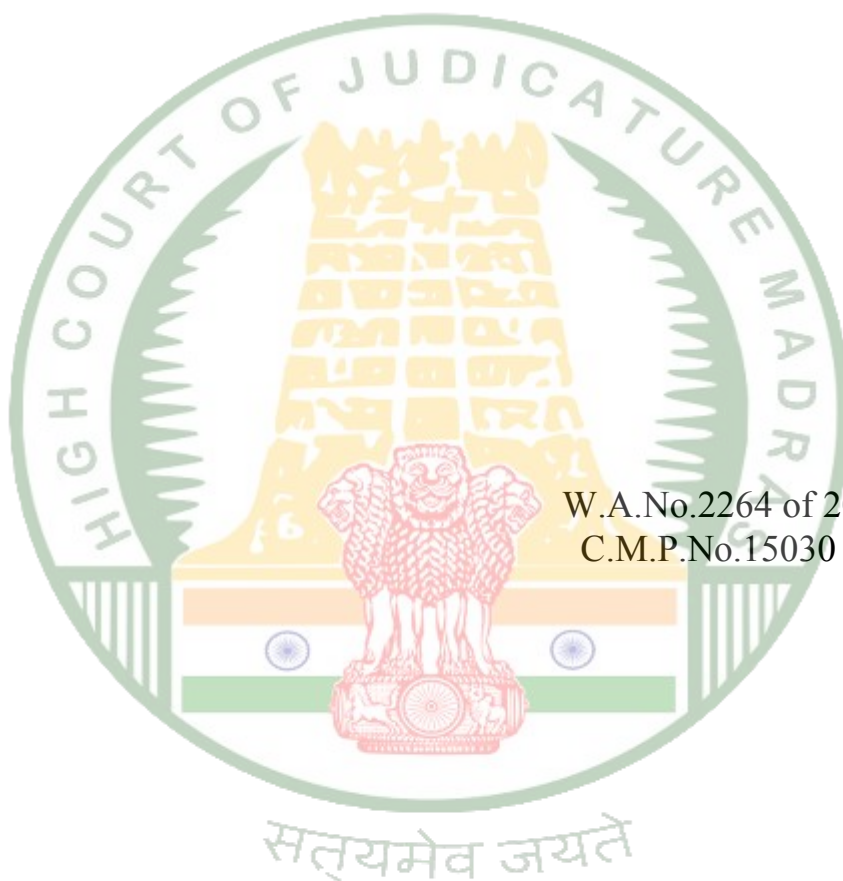
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