



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 29.11.2019

Pronounced on : 02.06.2020

CORAM

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

WEB COPY

W.P.(MD) No.14938 of 2013

and

M.P.(MD)No.2 of 2013

S.Muthumanickaraja

...Petitioner

Vs.

1.The Managing Director,
Tamil Nadu Civil Supplies Corporation,
No.12, Thambusamy Road,
Kilpauk, Chennai - 10.

2.The Assistant Director,
Professional and Executive Employment Office,
Santhome,
Chennai - 04.

3.R.Sudharsun Babu

4.G.Muthuvelan

... Respondents

PRAYER: Writ petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the records relating to the impugned order of the first respondent in Rc.No.AE7/66288/2008, dated 02.03.2010 and quash the same and consequently direct the first respondent to appoint the petitioner as Assistant Manager in the office of the first respondent as against the MBC Male (priority) quota .

For Petitioner : Mr.K.Esakki

For Respondent 1 : Mr.K.Chellapandian,
Additional Advocate General
assisted by Mr.D.Mayarajan
Standing Counsel

For Respondent 2 : Mr.M.Jeyakumar,
Additional Government Pleader

For Respondent 3 : Mr.V.Jegadees Pandian

For Respondent 4 : Mr.T.Palanisamy



ORDER

The petitioner has completed his Master's degree in M.Com., and later acquired M.B.A. He belongs to Most Backward community. It is the case of the petitioner that he hails from a family of freedom fighter. It is now admitted that the petitioner's grand-father was a freedom fighter.

2.It is admitted that the petitioner has registered his educational qualification in the employment exchange. 13 posts of Assistant Managers in the office of first respondent, Tamil Nadu Civil Supplies Corporation fell vacant and the first respondent requested to sponsor eligible candidates from the second respondent by notifying the vacancies to be filled up. It is admitted that one post was reserved for Schedule Tribe and six posts were reserved each for Schedule Caste and Most Backward Class. Out of six posts reserved for Most Backward Class category, five posts were reserved for male (non priority) category and one post was reserved for male (priority) category.

3.The first respondent issued a call letter to the petitioner on 27.11.2009. The petitioner appeared in the written test conducted on 13.12.2009. He was called for interview and certificate verification on 29.01.2010. The petitioner secured 56.23 marks by adding the marks secured by the petitioner in the written examination and oral interview which was for 15 marks. The petitioner filed a Writ Petition earlier in W.P.(MD)No.782 of 2011 for issuing a Writ of Mandamus directing the first respondent to give him appointment under the priority of freedom fighter's quota (MBC). It is admitted that the first respondent filed a counter in the earlier Writ Petition stating that the third respondent herein was selected under priority quota as if he is a person, physically challenged. Later, the petitioner found that the third respondent was selected only on the basis of merit in the general category. Therefore, he filed the present Writ Petition to quash the impugned order of the first respondent dated 02.03.2010 by which the fourth respondent was appointed as Assistant Manager and consequently, to direct the first respondent to appoint the petitioner as Assistant Manager against M.B.C. male (priority) category.

4.The first respondent has filed a counter affidavit and an additional counter affidavit. In the original counter affidavit, it is stated by the first respondent that as per service regulations, the method of recruitment to the post of Assistant Manager (General) is by way of direct recruitment and by promotion. It is further stated that every fourth vacancy should be by direct recruitment of M.B.A. Qualified candidates. It is admitted in the counter that the notification was to fill up 13 backlog vacancies in the cadre of Assistant Manager. The number of posts reserved for Schedule Tribes/Schedule Caste and Most Backward Class is not disputed. It is the case of the first respondent that a merit list was prepared



and the first respondent selected six candidates in M.B.C. Category on merit basis including the third respondent, who according to the first respondent, was selected under priority category. Since the petitioner secured only 56.23 marks, it is contended that the selection of the third respondent who secured 59.55 marks and the selection of fourth respondent who secured 59.28 marks cannot be questioned by the petitioner. However, it was reiterated in the counter affidavit that the third respondent was selected under priority category (physically challenged). However, in the additional counter affidavit filed by the first respondent, the petitioner's eligibility to apply for the post under the priority quota under freedom fighters category was specifically disputed. Stating that the petitioner is only a grand-son of Late Thiru.Manickam Pillai, a freedom fighter and that a grand-son is not entitled to apply for the post under priority category, the first respondent seriously opposed the writ petition. The first respondent also relied upon certain decisions of this Court wherein it has been held that grand-son of freedom fighters are not eligible under the special category/priority quota. Since the petitioner has no legal right to seek appointment under priority category of freedom fighters, the respondents prayed for dismissal of the Writ Petition. It is also contended by the respondents that the petitioner filed a Writ Petition earlier in W.P.(MD)No.782 of 2011 and the said Writ Petition was dismissed for non-prosecution. It is stated that a second Writ Petition is not maintainable for the same cause of action questioning the selection process. Since six Most Backward Class posts were filled up with meritorious persons who have secured more marks than the petitioner, it is contended by the respondents that the Writ Petition is also liable to be dismissed on merits.

5.During the course of hearing, it is demonstrated by the petitioner's counsel that the third respondent was not selected under priority category. The learned Counsel appearing for the third respondent also submitted that the selection of third respondent was not under priority category and that the third respondent never applied under any priority category. In the said context, the learned Counsel appearing for the petitioner submitted that the petitioner is the only candidate who is entitled to get appointment under the priority category.

6.Though the contention of the first respondent that the third respondent was selected under priority quota is not correct and this Court has also accepted the contention of the petitioner that the third respondent never applied under priority category, the petitioner may not get relief since the petitioner's eligibility to apply under priority category is in dispute. The petitioner admits that he is only the grand-son of a freedom fighter. The petitioner is not a dependent of a freedom fighter. In the said circumstances, this Court is required to consider whether the petitioner is



issued G.O.Ms.No.188, Personnel and Administrative Reforms Department, dated 28.12.1976. As per the Government Order, the priority with regard to the provision of employment assistance through employment exchanges is given in the annexure. From the annexure, three groups were categorised. Legal heirs of freedom fighters and Tamil servants were shown in Group - 2, giving preference to those who come under Group 3 wherein physically handicapped persons were categorised.

7.The learned Additional Advocate General appearing for the first respondent produced before this Court the communication dated 29.09.2016 issued by the Secretary to Government, Labour and Employment Department clarifying the position that the grand children of a freedom fighter cannot be treated under priority category. A judgment of this Court in a Writ Petition in W.P.(MD) No.23104 of 2014, dated 10.10.2014 was referred to wherein it has been held as follow:

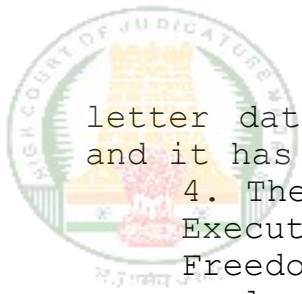
"Any right of this nature cannot be allowed to remain in perpetuity. The Government was not obliged to create an inheritable right. Therefore, insofar as the exclusion of the grandchildren of freedom fighters is concerned, it is validly made by the Government and the same cannot be found fault with. But, at the same time, I should point out that the category itself should be removed from the prospectus in future years, since no such person has been available in the past 15 years. If no child of a freedom fighter eligible for admission was available in the past 15 years, they are not going to be available hereafter also. Therefore, the challenge of the petitioner to Clause 41(i) fails and the writ petition is dismissed. However, in future, this category itself shall be removed by the respondents so that no confusion is created. No costs. Consequently, connected miscellaneous petitions are closed."

In the communication of the Secretary to Government, the Secretary to Government has clarified the position as follows:

"மேற்கண்ட சூழ்நிலையில், பார்வை 2-ல் கண்ட தங்களது மனு, அரசால் ஆய்வ செய்தப்பட்டதில், மேற்குறிப்பிட்ட தீர்ப்புகளின் அடிப்படையில், சுதந்திரப் போராட்டத் தியாகிகளின் வாரிசுகளான பேரன் /பேத்திகளுக்கு வேலைவாய்ப்பில் முன்னுரிமை வழங்க இயலாது என்பதை தங்களுக்கு தெரிவித்துக் கொள்ளப் பணிக்கப்பட்டுள்ளன."

Thus it is seen that the position is now clarified by the Government on the representation of the association of the legal heirs of the freedom fighters.

8.The learned Additional Advocate General relied upon the judgment of the Hon'ble Mr.Justice V.RAMASUBRAMANIAN, J. as he then was, in a Writ Petition in **W.P.(MD)No.19076 of 2010** in the case of **V.Anbuvalavan v. The State of Tamil Nadu rep. by its Secretary, Labour & Employment Department, Fort St. George, Chennai - 9, and three others**, wherein the Hon'ble Judge had an occasion to deal with a letter dated 02.02.2010 which is in line with the



letter dated 29.09.2016 issued by the Secretary above referred to and it has been held as follows:

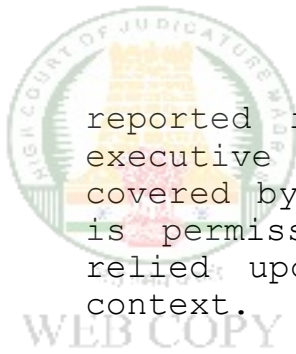
4. The petitioner has not produced any Government Order or Executive Instructions to show that the grand-children of Freedom fighters are accorded priority in the matter of employment. On the contrary, the Government had issued a letter bearing No.33413/T2/2009-3, Labour and Employment dated 2.2.2010 to the effect that no such priority can be granted. The said letter is under challenge.

5. Reservation for the children of freedom fighters in the matter of public employment, cannot be traced to the provisions of the Constitution. Any priority accorded to the grandchildren of freedom fighters in the matter of public employment, is by way of Executive Instructions only. Therefore, the petitioner will have to succeed or fail only on the strength of any provision contained in any scheme. In the absence of a scheme providing for according priority to the grandchildren of the freedom fighters, the petitioner cannot make any claim. The decision of the Full Bench of this Court in Aarthi M (Minor) vs. State of Tamil Nadu [2002 (4) CTC 449] will not go to the rescue of the petitioner, since the Full Bench was concerned in that case with a provision made in the prospectus for admission to Medical Colleges. In other words, the whole dispute in that case arose out of a provision contained in the prospectus.

6. Moreover, in a decision in T.T.Saravanan vs. State of Tamil Nadu [2004 (5) CTC 704] Prabha Sridevan, J, pointed out that what applies to the children of Freedom fighters need not apply to grand-children. Therefore, the claim of the petitioner cannot be accepted.

7. Heavy reliance is placed by the learned counsel for the petitioner on the judgment of another learned Judge of this Court in S.Sree Nirajanaa Bose vs. Government of Tamil Nadu [W.P.(MD) No.5050 of 2009 dated 24.9.2009], wherein the learned Judge was considered with the validity of a Government Order taking away the benefit already made available to the grand-children of Freedom fighters. But the said decision is of no assistance to the petitioner. In that case, a benefit which was earlier made available was taken away by a Government Order. In this case no benefit was ever made available to the grand-children of the Freedom fighters. Therefore, the reliance placed on the said decision is of no avail. 8. Hence, the writ petition is dismissed. There will be no order as to costs. Consequently, M.P.Nos. 1 and 2 of 2010 are closed."

9. The learned Counsel appearing for the petitioner relied upon the judgment of a Full Bench of this Court in **M.Arthi (Minor) represented by her mother and two others v. The State of Tamil Nadu**

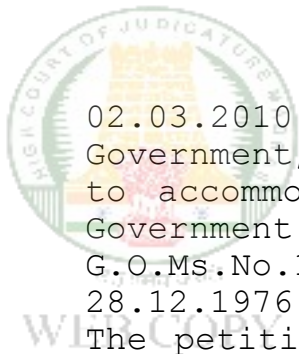


reported in **2002 (4) CTC 449**. The Full Bench has held that executive power can be resorted to when a particular matter is not covered by legislative enactment. It is observed that reservation is permissible for children of freedom fighters. The judgment relied upon by the petitioner is not relevant in the present context.

10.The learned Additional Advocate General relied upon yet another judgment of the learned Single Judge of this Court in **T.T.Saravanan (Minor) represented by his father and State of Tamil Nadu** reported in **2004 (5) CTC 704**. That was a case where the petitioner as Grand-son of freedom fighter prayed for reservation of seat in M.B.B.S., course under special category. After referring to some of the judgments, it is concluded therein that the object of creating a special category of children/award/dependent of freedom fighters as per several decisions referred to in the judgments cannot apply to grand-children or great grand children of freedom fighters.

11.A Division Bench of this Court wherein I am also a Member in **S.Visalakshi v. The Government of Tamil Nadu and another in W.A.No.954 of 2013** considered the claim of legal heirs of freedom fighters and Tamil scholars and held that the Government cannot be directed to fix any quota or priority over others in all the cases of recruitment irrespective of mode of recruitment. Though the prayer in the Writ Petition therein was for issuance of Writ of Certiorarified Mandumas to quash the recruitment notification and for consequential direction to the respondents to implement the policy of the Government by giving priority and fixing quota for the legal heirs of the freedom fighters in recruitment for the posts of Assistant Professors, one of the points that was reiterated by the Bench was that reservation in public employment is a matter of informed choice within the exclusive domain of the Government and the Court cannot interfere with the wisdom of Government or give directions for framing recruitment rules in a particular manner. From various judgments and principles followed, the petitioner's contention that he, as a grand son of freedom fighter, is entitled to be considered under priority category cannot be accepted.

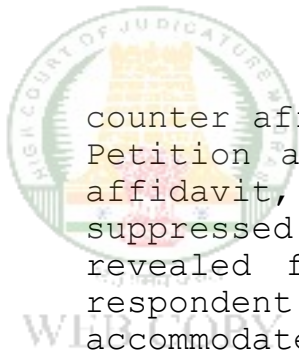
12.The learned Counsel appearing for the petitioner then submitted that the petitioner's name was sponsored by the employment exchange under priority category and he was selected in that category. It was, therefore, submitted that the first respondent is estopped from denying the benefit to the petitioner. It is also contended by the Counsel appearing for the petitioner that the letter of Principal Secretary to Government dated 02.03.2010 was after the recruitment notification in the present case and that therefore, the letter dated 02.03.2010 cannot be relied upon to plead that the petitioner is not entitled to be considered under priority category. From the context in which the letter dated



02.03.2010 was issued and the subsequent clarification of the Government, it is seen that the policy of the Government was never to accommodate the grand children of a freedom fighter. In the Government Order that was relied upon by the petitioner namely G.O.Ms.No.188, Personnel and Administrative Department, dated 28.12.1976 the legal heirs of freedom fighters alone was specified. The petitioner being the grand son of a freedom fighter cannot be considered as a legal heir of the freedom fighter by applying Section 8 of the Hindu Succession Act. The clarification of the Government is relevant. It is acceptable that a clarificatory letter was issued by the State only to explain the term 'legal heirs' used in the Government orders. Merely because the clarificatory letter came after the recruitment notification in the present case, the argument that it cannot be applied in the petitioner's case does not hold good. The contention that the petitioner's name was sponsored by the employment exchange under the special category as the legal heirs of freedom fighter may be true. Even then, the non-selection of the petitioner cannot be considered as illegal in the present case in view of the clarification of the Government in the earlier letter in 2010 and the subsequent orders in 2016. Legal heirs of freedom fighters can mean only the dependents of freedom fighters. As it was held by this Court, a right of this nature cannot be allowed to remain in perpetuity.

13. One of the submissions of the learned Additional Advocate General is that the Writ Petition is not maintainable as it is barred by principles of constructive *res judicata*, in view of the fact that the earlier Writ Petition filed by the petitioner on the same cause of action was dismissed for default. It was pointed out by the learned Counsel appearing for the petitioner that the petitioner was not aware of the fact that the third respondent did not apply under priority category when he filed the earlier writ petition. In the counter affidavit filed by the respondent in W.P. (MD) No.782 of 2011, there was no reference to the appointment of third respondent under priority category. Therefore, this Court had no occasion to deal with the issue regarding the appointment of third respondent under priority category. In the said circumstances, the dismissal of earlier writ petition in W.P. (MD) No.782 of 2011 will not affect the present Writ Petition by applying the principles of constructive *res judicata*.

14. The present Writ Petition is filed challenging the appointment of fourth respondent. The fourth respondent has secured only lesser marks than the marks of the third respondent. Since the third respondent is eligible to be considered under Most Backward Class non-priority category, the petitioner's contention that the fourth respondent cannot be appointed is right. The contention of the first respondent that the third respondent was appointed under priority category is only for the purpose of accommodating the fourth respondent as he would not have been selected but for the non-selection of third respondent under priority category. From the



counter affidavit filed by the first respondent, in the earlier Writ Petition and the present Writ Petition and the additional counter affidavit, this Court is of the view that that first respondent has suppressed material facts with oblique motive. Any way, as it is revealed from the pleadings, this Court can see that the first respondent has taken a plea which is contrary to truth only to accommodate the fourth respondent who could not have been appointed otherwise. This Court is of the view that this is a fraud in public employment and therefore, this Court has no hesitation to hold that the appointment of the fourth respondent is illegal. Though the petitioner is not entitled to any relief in the present Writ Petition, the appointment of the fourth respondent cannot be approved as fraud has been played by appointing fourth respondent. Since it is well settled that fraud vitiates any solemn transaction, the appointment of fourth respondent should also be treated as void. The learned Counsel appearing for the fourth respondent has only adopted the arguments of the learned Additional Advocate General who had no acceptable or reasonable explanation for the statement of the first respondent in the earlier Writ Petition and the present Writ Petition as to the status of the third respondent. The third respondent never applied under priority category and his name was never considered under priority category till the process of selection was over. The Counsel appearing for the third respondent also revealed the fact. Hence, the impugned order dated 02.03.2010 appointing the fourth respondent to the post of Assistant Manager is quashed. It is open to the first respondent to go for fresh recruitment to fill up the post of Assistant Manager following the regulations as per law and the Writ Petition is dismissed insofar as the mandamus part of the prayer in the Writ Petition is concerned. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AD II)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

SRM

To

1.The Managing Director,
Tamil Nadu Civil Supplies Corporation,
No.12, Thambusamy Road,
Kilpauk, Chennai - 10.



2.The Assistant Director,
Professional and Executive Employment Office,
Santhome,
Chennai - 04.

+1 CC to M/s.D.MAYARAJAN, Advocate (SR-13043[F] dated 03/06/2020)

+1 CC to M/s.T.PALANISAMY, Advocate (SR-13024[F] dated 02/06/2020)

Order made in
W.P.(MD) .No.14938 of 2013
02.06.2020

SRM

KK/10.06.2020/ 9P- 5C