



W.A.No.1168 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.04.2023

CORAM :

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

and

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

W.A.No.1168 of 2012 and

M.P.No.1 of 2012

1. The Secretary to Government,
Home Department (Police),
Fort St. George, Chennai 600 009.

2. The Director General of Police/Chairman,
Tamil Nadu Uniformed Service Recruitment Board,
Anna Salai, Chennai-2.

3. The Director General of Police,
Dr.Radhakrishnan Salai, Mylapore,
Chennai-4.

... Appellants

Vs.

K.Maheswari

... Respondent

Prayer: Writ Appeal filed under Clause 15 of Letters Patent to set aside the order dated 09.03.2010 made in W.P.No.4746 of 2010 on the file of this Court.



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For Appellants : Mr.P.Kumaresan, Addl.Advocate General
Assisted by Mr.J.Daniel, Govt.Advocate

For Respondent : No appearance

J U D G M E N T

(Judgment of the Court was delivered by D.KRISHNAKUMAR, J.)

Challenging the order passed in W.P.No.4746 of 2010 dated 09.03.2010, this Intra Court Appeal has been filed.

2. The brief facts of the case, leading to file the present appeal is as follows.

The second appellant herein had called for application from eligible candidates for the post of Sub Inspector of Police (Men and Women) during July 2006 and the writ petitioner/ respondent herein had applied to the said post and participated in the selection process. The cut off marks for the BC category is 58 marks and the petitioner secured 57 marks.

2.1. The question paper contained 70 questions, which was divided into 2 parts, namely part A and part B. Part A contained 45 questions and part B contained 25 questions. There was a mistake in question No.7 in Part



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A, for which one mark was allotted to all the candidates. According to the writ petitioner, all the answers given in question No.38, in Part A, are correct and she has chosen key answer 'C', which is also correct. The selection process began during the year 2006 and appointment were given during the end of the year 2008, however, key answers were not published. Similarly placed persons filed writ petition and this Court allowed W.P.No.4509/2008 batch cases in A.Eswaramoorthy Vs. Secretary to Government, Home (Police IV) Department, by order dated 04.11.2009. Therefore, since the petitioner is also entitled to get one mark, she filed the writ petition, seeking writ of mandamus directing the 2nd appellant to award one mark and appoint her as Sub Inspector of Police.

2.2. The Writ Court, by referring the order passed in W.P.No.4509/2009 dated 04.11.2009, has disposed the writ petition, holding that the writ petitioner will also have the same benefit, as ordered by this Court in the covered judgment. Aggrieved by the same, the Government as well as the Tamil Nadu Uniformed Services Recruitment Board (herein after referred to as 'Board) has filed the present appeal.



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3. The learned Additional Advocate General submitted that the Writ Court has allowed the writ petition based on the order passed in W.P.4509/2019 batch cases dated 04.11.209 (Eswaranmoorthy case), as the petitioner stands on the same footing as that of the writ petitioners in the above said batch cases. He further submitted that the Government has preferred appeals in W.A.No.1719/2010 batch cases as against W.P.No.4509/2019 batch cases, and a Division Bench of this Court, vide order dated 23.12.2010, has allowed the writ appeals. As the learned Single Judge has allowed the writ petition relying upon the covered Judgment, and in the light of the order passed in W.A.No.1719/2010 batch cases, the impugned order passed in W.P.No.4746/2010 are also liable to be set aside and hence, prayed to allow the writ appeal.

4. Despite notice has been served to the respondent, none appeared on behalf of her.

5. Heard the learned counsel for the appellants and perused the materials available on record.



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6. A Division Bench of this Court, in its common judgment dated 23.12.2010 in W.No.1719/2010 batch cases, has discussed the matter elaborately and allowed the writ appeals on the ground of delay and laches and also, since the writ petitioners are treated as fence sitters, they are not entitled to the relief. The relevant paragraphs are reiterated as follows:

29. As found in the impugned order that letter dated 30.1.2009 itself would show that the second respondent did not verify the answers even after the examination. This court found that there was bonafide mistake committed in setting key answers, and the verification was not done only to prevent leakage of question papers. If any direction is to be issued, it would certainly un-settle the selection process which was already completed, and it would give room for many claims from various parties making the issue very complicated. At this point of time, if the directions of the learned single judge are given effect, more candidates would possibly be eligible for appointment, and it would compel the government to make appointments more than advertised and it would be against settled position of law. In *Union of India vs. Easwersingh Khatri* reported in 1992 Suppl. 3 SCC 84. *Gujarat Deputy Executive Engineer Association vs. State of Gujarat* reported in 1994 Supp. SCC 591, *Kamaleshkumar Sharma vs. Yogeshkumar Gupta* reported in AIR 1998 SCC 1021 and *State of U.P. And others vs. Rajkumar Sharma and others* reported in 2006 (3) SCC 330 it has been held that filling up vacancies over and above the number of vacancies advertised could be violative of fundamental rights guaranteed under Article 14 and 16 of Constitution of India. Therefore the directions (i) to (v) given para 24 of the impugned order are set aside.



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"FENCE SITTERS"

30) No doubt the petitioners had legitimate expectation about the selection and they are also not responsible for the problem. However, the petitioner approached the Court only in 2009 for the first time. The Hon'ble Supreme Court in Shiba Shankar Mohapatra and Ors vs. State of Orissa and Ors. Reported in AIR 2010 SC 706 held as follows:

"28 It is settled law that fence-sitters cannot be allowed to raise the dispute or challenge the validity of the order after its conclusion. No party can claim the relief as a matter of right as one of the grounds for refusing relief is that the person approaching the Court is guilty of delay and the latches. The Court exercising public law jurisdiction does not encourage agitation of stale claims where the right of third parties crystallises in the interregnum.(vide Aflatoon and Ors. v. Lt.Governor, Delhi and Ors. MANU/SC/0437/1974: AIR 1974 SC 2077; State of Mysore v. V.K.Kangan and Ors. MANU/SC/0429/1975: AIR 197 SC 2190; Municipal Council, Ahmednagar and Anr. v. Shah Hyder Beig and Ors. MANU/SC/0022/2000; AIR 2000 SC 671; Inder Jit Gupta v. Union of India and Ors. MANU/SC/0447/2001; (2001) 6 SCC 637; Shiv Dass v. Union of India and Ors. MANU/SC/7032/2007; AIR 2007 SC 1330; Regional Manager, A.P.SRTC v. N.Satyanarayana and Ors. MANU/SC/8097/2007; (2008) 1 SCC 210 and City and Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwalla and Ors. MANU/SC/81250/2008; (2009) 1 SCC 168)". (emphasis supplied).



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Hence the petitioners who approached the court for the first time are definitely "fence sitters". In view of that the writ petitions filed by those petitioners who approached the court for the first time in 2009 are dismissed on the ground of delay.

7. The writ petitioner is also one of the candidates, who applied and appeared in the examination for the post of Sub Inspector of Police for the year 2006. For the above recruitment, notification was issued in the year 2006 and results were published on 17.07.2007 and provisional selection list was published on 20.12.2007. However, the writ petitioner filed the writ petition only in the year 2010, i.e. after a lapse of three years from the date of publishing the result in the year 2007. Further, the earlier round of litigations reached finality, vide order dated 28.03.2008 passed in W.A.No.194 of 2007. Despite, some of the candidates filed W.P.No.4509 of 2009 etc., batch to award marks for the wrong key answers. In the above writ petitions, the learned Singled Judge passed an order on 04.11.2009 in favour of the writ petitioners, giving various directions to the appellants/government. Challenging the same, the Government filed W.A.No.1719 of 2010 etc. batch. It is to be noted that, pending batch of above appeals, the writ petitioner filed the writ petition to award marks for wrong key answers. The above batch of writ appeals were decided in favour



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of the Government, vide order dated 23.12.2010 .

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8. The above background of the case, clearly shows that, the writ petitioner has not filed writ petition immediately after publication of results on 17.07.2007 and he had been watching the proceedings of batch of writ cases in W.P.4509 of 2009 etc., and only after knowing the result of the batch cases, which ended in favour of the writ petitioners on 04.11.2009, he filed the instant writ petition, citing the order of the above W.P.No.4509/2009 as covered judgment. Therefore, the above act of the writ petitioner is definitely treated as fence sitters, as per the decisions of *the Delhi High Court in Union Of India And Ors. vs Sandeep Kumar Swaroop And Ors.* dated 01.09.2017, in which, it is stated as follows.

45. Recently, the Supreme Court in State of Uttar Pradesh and Ors. Vs. Arvind Kumar Srivastava & Ors., (2015) 1 SCC 347 had examined this issue on the question of judgments in service law which lay down a principle and, therefore, are treated as judgments in rem in the second sense. Several decisions on both sides were referred to and the following legal principles were set out:-

"22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under.

22.1. The normal rule is that when a particular set of



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employees is given relief by the court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.

22.2. However, this principle is subject to well-recognised 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



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persons. 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 v. Union of India [K.C. Sharma v. Union of India, (1997) 6 SCC 721 : 1998 SCC (L&S) 226]). 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."

A careful reading of the aforesaid principles reveals that the principle of in rem in the second sense is not absolute. It is preferable to follow the said principle so that there is no discrimination or violation of Article 14 in service matters for all similarly situated persons should be treated alike and not differently. However, delay and laches as well as acquiescence can be a ground to deny benefit to fence sitters. Those who do not approach the Court in a timely and prompt manner can be denied "equal treatment". Thus, it will be right to hold that doctrine of in rem in the second sense is not unconditional or unimpeachable. However, this exception would not apply where the earlier judgment pronounced by the Court is with the intent to give benefit to all similarly situated persons, whether they had approached the Court or not. Benefit should not be extended when the said intent is not there and the judgment expressly or impliedly states that the benefit of the judgment would be extended to those, who had sought to enforce their rights and their petitions were not stale on account of delay and laches or acquiescence.



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9. In the light of aforesaid decision as well as the order passed by a Division Bench of this Court in W.A.No.1719/2010 etc. batch dated 23.12.2010, we are of the view that the writ petitioner is not entitled to the relief as granted by the learned Single Judge, as she has not approached the court within a reasonable time. Therefore, the writ petitioner is fence sitter and hence, the order passed by the learned Single Judge warrants interference by this Court.

10. Accordingly, the Writ Appeal is allowed. The order passed by the learned Single Judge in W.P.No.4746/2010 dated 09.03.2010 is set aside.
No costs.

(D.K.K.J.) (K.G.T.J.)

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