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W.A.Nos.251 & 252 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.08.2023

CORAM

**THE HONOURABLE MR. JUSTICE R.SURESH KUMAR
AND
THE HONOURABLE MR. JUSTICE K.KUMARESH BABU**

**W.A.Nos.251 & 252 of 2017
and C.M.P.Nos.3955 to 3957 of 2017, 24397 & 24652 of 2019**

M.Swaminathan ...Appellant in W.A.No.251/2017

P.Sathyanathan ...Appellant in W.A.No.252/2017

Vs

1.The Principal Secretary to Government,
Municipal Administration and Water
Supply Department,
Fort St. George, Chennai - 600 009.

2.The Secretary to Government,
Personnel and Administration
Reforms Department
Fort St. George, Secretariat,
Chennai.

3.The Secretary,
Tamil Nadu Public Service Commission,
No.1, Frazer Bridge Road, VOC Nagar,
Park Town, Chennai - 600 003.



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4.The Director of Municipal Administration,
6th Floor, Chepauk,
Chennai - 600 006.

... Respondents in both Was

COMMON PRAYER: Writ Appeals filed under Clause 15 of the Letter Patent Act to set aside the order dated 19.12.2016 made in W.P.Nos.24847 and 24848 of 2016.

For Appellants : Mrs.AL.Ganthimathi, Sr. Counsel
(in both WAs) for Mr.A.Ramkumar

For R1, R2 & R4 : Mr.S.Silambanan, AAG
assisted by Mr.Kumaravel, AGP
and Mr.Babu Barveez, GA

For R3 : Mr.R.Bharanidharan

COMMON JUDGMENT

(Judgment of the Court was made by R.SURESH KUMAR.,J.)

Since the issue raised in these two writ appeals is one and the same, as it arises out of a common order passed by the Writ Court dated 19.12.2016 made in W.P.Nos.39480 of 2015 and 24846 to 24849 of 2016, both these writ appeals were heard together and are disposed of by this common judgment.

2.The appellants before us were working as Superintendents in the



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Directorate of Municipal Administration and their next avenue of promotion is Municipal Commissioner, Grade-II. In this context, the relevant rule is called 'Special Rules for the Tamil Nadu Municipal Commissioners Subordinate Services' and it has come into effect from 15.03.1993. The services governed by the Rule shall consist of Municipal Commissioner Grade-II.

3.In the said Rule, Rule 2(a) deals with Appointment and for better appreciation, the relevant portion of the Rule is extracted hereunder:

“1.CONSTITUTION:-

The service shall consist of the Municipal Commissioner Grade-II.

2.APPOINTMENT:-

Appointment to the service shall be made:-

- a) By direct recruitment from among persons, who have served as Manager of all Municipal Office or as Accountant and Revenue Officer of all Municipalities except the Second Grade Municipalities for a total period of not less than three years on duty in the Tamil Nadu Municipal General Services;
- b) From Open Market; and



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c) By recruitment by transfer from among the holders of the post of:-

(i) Executive Officer [Selection Grade Town Panchayats] in the Tamil Nadu Town Panchayats Subordinate Service;

(ii) Assistant Section Officer from the Tamil Nadu Secretariat Service who has served as Assistant Section Officer for a period of not less than five years in the Department of Secretariat under one unit system out of which two years working knowledge in Municipal Administration and Water Supply Department and

(iii) Superintendent from the Directorate of Municipal Administration in the Tamil Nadu Ministerial Service in the ratio of 6:5:9 in the following cycle.

- | | | |
|-------------------|---|--|
| 1.First Vacancy | : | Municipal employee in the prescribed categories |
| 2.Second Vacancy | : | Graduate in Open Market |
| 3.Third Vacancy | : | Executive Officer [Selection Grade Town Panchayat] |
| 4.Fourth Vacancy | : | Assistant Section Officer of Secretariat |
| 6.Sixth Vacancy | : | Municipal employee in the prescribed categories |
| 7.Seventh Vacancy | : | Graduate in Open Market |



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- 8.Eighth Vacancy : Municipal employee in the prescribed categories
- 9.Ninth Vacancy : Assistant Section Officer of Secretariat
- 10.Tenth Vacancy : Superintendent from the Directorate of Municipal Administration
- 11.Eleventh Vacancy : Municipal employee in the prescribed categories
- 12.Twelveth Vacancy : Graduate in Open Market
- 13.Thirteenth Vacancy : Executive Officer [Selection Grade Town Panchayat]
- 14.Fourteenth Vacancy : Assistant Section Officer of Secretariat
- 15.Fifteenth Vacancy : Municipal employee in the prescribed categories
- 16.Sisteenth Vacancy : Graduate in Open Market
- 17.Seventeenth Vacancy : Superintendent from the Directorate of Municipal Administration
- 18.Eighteenth Vacancy : Assistant Section Officer of Secretariat
- 19.Nineteenth Vacancy : Graduate in Open Market
- 20.Twentieth Vacancy : Municipal employee in the prescribed categories



Provided that where for any such turn an officer of the required category is not available, the turn will lapse and the vacancy shall be filled in by an incumbent from the other category.”

4.The appointment to the post of Municipal Commissioner Grade-II will be under three methods. Under Rule 2(a), it is by direct recruitment from among persons who have served as Manager of Municipal Office or as Accountant and Revenue Officer of Municipalities. Under Rule 2(b) it is from Open Market and under Rule 2(c) it is by recruitment by transfer from among the holders of the post of (a) Executive Officer [Selection Grade Town Panchayats] in the Tamil Nadu Town Panchayats Subordinate Service, (2) Assistant Section Officer from the Tamil Nadu Secretariat Service and (3) Superintendent from the Directorate of Municipal Administration in the Tamil Nadu Ministerial Service.

5.If there are 20 posts for which appointment is made under Rule 2 under these three methods, appointment shall be made with the ratio of 6:5:9.



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6.Six posts would be filled up by direct recruitment from among persons who have served as Manager, etc. as per Rule 2(a), five posts will be filled up from Open Market under Rule 2(b) and nine posts would be filled up under Rule 2(c) by recruitment by transfer from among the three categories mentioned above.

7.Among the three categories, nine vacancies would again be distributed as 2:4:3, that means, two posts for Executive Officers, four posts for Assistant Section Officers and three posts for Superintendents.

8.Since these appellants were the Superintendents and they become eligible to be considered for promotion for the panel year 2015-2016, they were under expectation that they would be considered for such promotion to the post of Municipal Commissioner Grade-II.

9.However, in the year 2015-2016 panel the respondents have filled up the posts from various feeder categories as mentioned above where



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insofar as Superintendent from the Directorate of Municipal Administration is concerned, they have not allotted any such posts and no one was promoted. This become evident in the order dated 21.08.2015 in G.O.3D.No.17 Municipal Administration and Water Supply Department, thereby the promotion opportunity to these appellants were denied even though they had been eligible to be considered under the feeder category Superintendent for whom three posts are earmarked out of 20 posts for the year 2015-2016.

10.The said issue was put under challenge before the Writ Court by the appellants herein as well as two other persons who are similarly placed by filing writ petitions. The writ petitions filed by these appellants in W.P.Nos.24847 and 24848 of 2016 were heard along with three other writ petitions and a common order was passed by the Single Bench on 19.12.2016 whereby the learned Judge having considered the plea raised on behalf of the writ petitioners had rejected the said writ petitions and those writ petitions were dismissed through the said impugned order.



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11.Assailing the said impugned order, the learned senior counsel Mrs.A.L.Gandhimathi, would submit that insofar as to fill up the post of Municipal Administration Grade-II is concerned, how such appointment shall be made has been clearly demarcated in the Rule and as per Rule, nine posts since are earmarked for recruitment by transfer from among the holders of various posts like Executive Officer, Assistant Section Officer and Superintendent and among the nine posts, three are earmarked for feeder category Superintendent and the fifth, tenth and seventeenth vacancy of the 20 posts are earmarked, wherein only the eligible candidates from the Superintendent cadre alone shall be selected and filled up.

12.Despite this rule position, even though the appellants/writ petitioners were eligible to hold the post by recruitment by transfer, the appellants have not been considered for the panel year 2015-2016 and in that year, there has been no posts to the Superintendent feeder category. By thus the chance of getting promotion even though provided under the Rule to these appellants have been denied by the respondents through G.O.3D.No.17 Municipal Administration and Water Supply Department



dated 21.08.2015. When this was questioned, the learned Judge who heard the matter has not considered this aspect in proper perspective by considering the Rule position and the learned Judge has accepted the reason given by the Government that in order to maintain the cadre strength as earlier more number of Superintendents already been given recruitment and other categories have not been given, therefore, such a cadre strength have to be maintained only based on which the respondents had not given any posting to the Superintendent cadre for the particular panel year i.e., 2015-2016 and the next panel year since that has been given in order to maintain the cadre strength only that was denied. This reason stated by the Government was accepted by the learned Judge unmindful of the Rule position. Therefore, the said judgment which is impugned herein is liable to be interfered with and as per the rule, promotion is to be given for which a direction must be given to the respondents, she contended.

13. On the other hand, Mr.S.Silambanan, learned Additional Advocate General appearing for the respondent State would submit that even though the Rule says that out of the nine posts, under Rule 2(c) three posts are to be



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earmarked to the Superintendent from the Directorate of Municipal Administration in the Tamil Nadu Ministerial Service, insofar as the three posts earmarked for the Superintendents are concerned if we calculate cadre strength at the time of preparing the panel for the year 2015-2016, the cadre strength of Superintendent who got promotion as is already over flowing than the actual cadre strength, therefore, in order to maintain the same in a particular year we decided to give such promotion to other two categories i.e., Executive Officer and Assistant Section Officer and not to the Superintendents. Therefore, the said action taken by the Government to maintain the cadre strength cannot be found fault with.

14.In this context, the learned Additional Advocate General has relied upon the written instructions given by the respondent State where the respondents has given the following written instructions:

2.In G.O.(3D).No.8, MA&WS (ME.1) Department dated 10.04.2014 orders have been issued approving the Estimate of Vacancies for the post of Municipal Commissioner Grade-II for the year 2014-15 as 18 (eighteen) and apportioned to various categories as below:



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- i) Under Rule 2(a) - 8 (Municipal Employees)
- ii) Under Rule 2(b) - Nil (Direct Recruit - TNPSC)
- iii) Under Rule 2(c) - 10 (Recruitment by transfer)
 - (ASOs - 5 Nos.
 - Superintendents - 3 Nos.
 - E.O.(TP) - 2 Nos).

3.In G.O.(2D) No.117, MA&WS (ME.1) Department, dated 14.10.2014, it has been stated as below:-

Since, no candidates were found eligible from the category of ASOs for appointment as Municipal Commissioner Grade-II in 2014-15, the five vacancies earmarked for that category, are being allotted to be filled up by the eligible candidates from the category of Superintendents (3 additional vacancies in addition to 3 vacancies already apportioned = Total 6 vacancies) and Executive Officers of Town Panchayats (2 additional vacancies in addition to 2 vacancies already apportioned = Total 4 vacancies) under Rule 2 of Tamil Nadu Municipal Commissioners Subordinate Service, **without exceeding their prescribed cadre strength in respect of such categories.**

4.The factual position is as below during 2015-2016:-



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S. No.	Category	Cadre strength as per ratio	Existing cadre strength as on date	Promotion + Retirement in 2015-16	Cadre strength after getting promotion/Retirement	Estimate of Vacancy proposed by the DMA for the year 2015-16	Estimate of vacancy approved by the Govt. for the year 2015-16	Cadre strength at the end of the Estimate year 2015-16
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
1.	Municipal Employees	14	14	1+5=6	8	6	7(6+1)^	14+1^
2.	Open Market through TNPSC	12	18	5+0=5	13	5	5 ^s	13+5 ^s
3.	Recruitment by transfer	21	13	--	13	9	5	21
	i.E.O.s of Town Panchayat	5	5	--	5	2	0 [#]	5
	ii.ASO.s of Secretariat	10-1*=9	1	--	1	4	8	9
	iii.Superintendents of O/o.DMA	7	7	--	7	3	0 [#]	7
	Total	47	45	17	34	20	20	47
*	one post of MC GrII sanctioned as PA to Commissioner, Thanjavur is to be surrendered this year consequent to the upgradation of the Thanjavur Municipality as Corporation and action is now being pursued separately. That post is vacant as on date.							
#	Cadre strength of the respective category is full during 2015-16 and hence vacancies re-apportioned to other category.							



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S. No.	Category	Cadre strength as per ratio	Existing cadre strength as on date	Promotion + Retirement in 2015-16	Cadre strength after getting promotion/Retirement	Estimate of Vacancy proposed by the DMA for the year 2015-16	Estimate of vacancy approved by the Govt. for the year 2015-16	Cadre strength at the end of the Estimate year 2015-16
\$	Cadre strength of the respective category already exceeds and hence no direct recruitment from open market can be made during the estimate year until the category falls below the prescribed cadre strength.							
^	one vacancy to be filled up in the cadre when such unexpected contingency arises due to the vacancies arising in any of the category.							

5.The Hon'ble Madurai Bench of Madras High Court in its order dated 28.01.2015 in W.P.(MD).No.16728 of 2014 filed by Thiru.S.Janakiraman has observed that the number of candidates under the Open Market Quota are above the prescribed ratio viz., 20 against 12, which necessitated the Authorities to restrict the present vacancies for the categories other than the Open Market Quota and further, in the light of the clarification made before this Court by the learned Additional Advocate General that quota under the Open Market would be duly allocated in the next panel year i.e., 2015-16 owing to the fall down of the Open Market Category candidates below the permitted limit



of 12 at the time, the petitioner cannot have any grievance and this Court finds no error or illegality in the impugned Government Order for setting aside the same.

6.Hence in order to maintain equal representation from various categories viz., Open Market through TNPSC, Municipal Employees, Superintendents of office of the Director of Municipal Administration, Assistant Section Officer of Secretariat, Executive Officer of Town Panchayats, the Government fixed the estimate of vacancy as per the ratio prescribed in rule 2 of Tamil Nadu Municipal Commissioner's Subordinate Services.

15.Relying upon these instruction, the learned Additional Advocate General would contend that since the cadre strength were excess in respect of Superintendent feeder category, to maintain the same only Superintendents were not given such three posts as contemplated under the Rule. Therefore, such an action on the part of the respondents is to be justified only with regard to the maintenance of cadre strength. Therefore, the approach of the learned Judge who rejected the plea raised by the appellants, of course rightly, cannot be found to be an erroneous one.



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16.We have considered the said submissions made by both sides and have perused the materials placed before this Court.

17.Insofar as filling up of vacancy of Municipal Commissioner Grade-II is concerned, it is governed by the Special Rules for the Tamil Nadu Municipal Commissioners Subordinate Services which we have extracted hereinabove. The relevant rule in Rule 2 under the heading 'Appointment' and in entirety the said Rule 2 has also been extracted hereinabove.

18.Where there were three methods to fill up the post. If the vacancies are 20, it shall be distributed as 6:5:9 is also has been mentioned in the Rule. Therefore, nine posts would be given for recruitment by transfer from among the holders of the post of Executive Officer, Assistant Section Officer and Superintendent from the Directorate of Municipal Administration.

19.Out of these nine posts, it would be again distributed as 2:4:3 i.e.,



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two posts for Executive Officer, four posts for Assistant Section Officer and three posts for Superintendent.

20.Upto the panel year 2014-2015 there was no quarrel as the necessary quota has been given to the Superintendent cadre. From the panel year 2016-2017 onwards there has been no quarrel and subsequently such a quota has been given for the Superintendent cadre.

21.Only for the relevant year, namely, 2015-2016 this quota of three posts earmarked for Superintendent cadre has not been given. The reason cited by the respondents was that, earlier years since there has been excess posts given to the Superintendent cadre for want of candidates in other categories, in order to maintain the equilibrium they had to deny such giving of three posts to the Superintendent cadre in a particular panel year and that they decided to have it in the year 2015-2016 purely to maintain the cadre strength.

22.However, if we look at the Rule, Proviso to Rule 2 makes it clear



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that for any such turn an officer of the required category is not available, the turn will lapse and the vacancy shall be filled in by an incumbent from the other category.

23.If there are no officer available eligible to be considered for such recruitment by transfer either in the Executive Officer category or in the Assistant Section Officer category or in the Superintendent category, that vacancy or their turn would get lapsed in that panel year itself and it would be filled up by an incumbent from other category.

24.Illustratively if the two posts are earmarked for Executive Officer and in a particular panel year, there were no eligible candidates available, then the post can be given either to the Assistant Section Officer cadre or Superintendent cadre.

25.This is what exactly been done in the year 2014-2015 which we have mentioned in the written instructions where they have stated that in G.O.(2D).No.117 MA&WS (ME.1) Department dated 14.10.2014 it was



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stated that since no candidates were found eligible from the category of Assistant Section Officer for appointment of Municipal Commissioner Grade-II in 2014-2015, five vacancies earmarked for that category, are being allotted to be filled up by the eligible candidates from the category of Superintendents (3 additional vacancies in addition to 3 vacancies already apportioned i.e., total 6 vacancies) and Executive Officers of Town Panchayats (2 additional vacancies in addition to 2 vacancies already apportioned i.e., total 4 vacancies) under Rule 2 of Tamil Nadu Municipal Commissioners Subordinate Service, without exceeding their prescribed cadre strength in respect of such categories.

26.This has been mainly quoted by the respondents stating that in the previous panel year in 2014-2015 since there were no eligible candidates available in the Assistant Section Officer cadre, the said vacancies were distributed among other two categories, namely, Executive Officer and Superintendent and in this regard, already three vacancies eventhough were earmarked and allotted to Superintendent, additional three vacancies taken from Assistant Section Officer cadre are also given to Superintendent,



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totally six vacancies were filled up from among the feeder category of Superintendent.

27.This kind of excess post already given to the Superintendent according to the respondents have been set off in the next panel year for maintaining the cadre strength. That is how they have come to the conclusion that in the year 2015-2016 even though eligible candidates are available in the Superintendent cadre for the three posts earmarked for them, those three posts were denied to them and it shall be given to Assistant Section Officer whose quota already taken in the earlier year or previous panel year.

28.This action on the part of the respondents is totally against the Rule position, especially the Proviso to Rule 2 of the Special Rules.

29.Even though it is quoted by the respondents that they have made this arrangement in the previous year under Rule 2 of Special Rules for the Tamil Nadu Municipal Commissioners Subordinate Services, they have



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actually not undertaken this exercise strictly in consonance with Rule 2 of the Special Rules.

30.The reason being is, that Proviso to Rule 2 has made it very clear as stated supra, that, once an Officer of the required category is not available, the turn will lapse. Therefore, it cannot be carried forward to the next panel year and the question of set off the said vacancy caused due to want of candidates in the previous year does not arise. Hence the question of maintaining the cadre strength on that basis also would never arise because once the turn will lapse, the vacancy shall be filled in by an incumbent from other category. The word 'shall be' occurred in the said Proviso has made it mandatory that the employer must fill up the vacancy and it cannot be kept vacant for want of candidates at any costs. That is the endeavour that has been given by the rule making authority in the said Proviso and if that is interpreted the vacancy that has been filled up in the previous year i.e., 3+3= totally 6 vacancies from the Superintendent cadre would no way entitle the employer to take the quota of three in the next panel year, that is what exactly been done in this case for the year 2015-



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31.The said method adopted by the respondents cannot be approved by this Court because of the Rule position as we have discussed hereinabove.

32.In view of the same, we are inclined to hold that the appellants herein are entitled to earn the promotion to the post of Municipal Commissioner Grade-II for the panel year 2015-2016 and the denial made to them to that effect by the impugned communication before the Writ Court is against the Rule and therefore, it is bad in law.

33.Accordingly, these writ appeals are allowed with the following order:

- 1) That the order rejecting the writ petitions filed by the appellants herein made by the Writ Court in the impugned order is hereby set aside. As a result, there shall be a direction to the respondents to give promotion to these appellants as Municipal Commissioner Grade-II



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from the panel year 2015-2016.

- 2) Out of these appellants, if one already retired he shall be entitled to get such promotion notionally and the other person would be eligible to get functional promotion, but he is not entitled to get salary difference for such promotion. However, from his eligible date of promotion as indicated above, both are eligible to get service benefits including the pensionary benefits.
- 3) The needful as indicated above shall be undertaken by the respondents within a period of eight weeks from the date of receipt of a copy of this order.
- 4) It is made clear that in view of this promotion now going to be given by virtue of our direction, if any promotion already given in the year 2015-2016 for other feeder categories like Assistant Section Officer and Executive Officer, their promotions need not be disturbed.

34. With the above directions, both the writ appeals are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

(R.S.K.,J.) (K.B., J.)
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To

- 1.The Principal Secretary to Government,
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