



W.A.(MD)Nos.1058 & 1101 of 2014

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 25.07.2023

PRONOUNCED ON : 29.09 .2023

CORAM:

**THE HONOURABLE DR.JUSTICE ANITA SUMANTH
AND
THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR**

W.A.(MD)Nos.1058 & 1101 of 2014
and
M.P.(MD)Nos.1 & 1 of 2014

The Secretary,
Z.K.M.Higher Secondary School,
Bodinayakkanur,
Theni District.

..Appellant in W.A.(MD)Nos.1058 of 2014
...R5 in W.A.(MD)Nos.1101 of 2014

/Vs./

1.K.Venkatesh Prabhu,
B.T.Assistant (Science),
Z.K.M.Higher Secondary School,
Bodinayakkanur,
Theni District.

2.The Joint Director (Higher Secondary),
Directorate of School Education,
DPI Campus, College Road,
Chennai.



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3.The Chief Educational Officer,
Theni District, Theni.

4.The District Educational Officer,
Uthamapalayam,
Theni District. ...R2 to R4 in both appeals

5.S.Kamaraj,
P.G.Assistant (Physics),
Z.K.M.Higher Secondary School,
Bodinayakkanur,
Theni District. ..Appellant in W.A.(MD)Nos.1101 of 2014
...R5 in W.A.(MD)Nos.1058 of 2014

COMMON PRAYER:- Writ Appeals - filed under Clause XV of Letters Patent Act, to set aside the order dated 25.07.2014 passed in W.P. (MD)No.3480 of 2011 on the file of this Court by allowing the writ appeals.

Appearance in W.A.(MD)Nos.1058 of 2014:

For Appellant : Mr.D.Srinivasaraghavan
for Mr.Rathina Asohan
For Respondents : Mr.M.Ajmal Khan, Senior Counsel
for M/s.Ajmal Associates (R1)
Mr.V.Om Prakash
Government Advocate (R2 to R4)
Mr.V.Rajasekar (R5)
for Mr.R.Suriyanarayanan



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Appearance in W.A.(MD)Nos.1101 of 2014:

For Appellant : Mr.V.Rajasekar
for Mr.R.Suriyanarayanan
For Respondents : Mr.M.Ajmal Khan, Senior Counsel
for M/s.Ajmal Associates (R1)
Mr.V.Om Prakash
Government Advocate (R2 to R4)
No appearance (R5)

COMMON JUDGMENT

(Judgment of the Court was made by **DR.ANITA SUMANTH, J.**)

Heard the detailed submissions of Mr.D.Srinivasa Raghavan, learned counsel for Mr.Rathina Asohan, learned counsel on record for the appellant in W.A.(MD)No.1058 of 2014, Mr.V.Rajasekar, learned counsel for the appellant in W.A.(MD)No.1101 of 2014, Mr.M.Ajmal Khan, learned Senior Counsel for the first respondent and Mr.V.Om Prakash, learned Government Advocate for Respondents 2 to 4 in both appeals.

2. The officials of the School Education Department, the Joint Director (Higher Secondary), the Chief Educational Officer and the



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District Educational Officer are referred to herein as R1, R2 and R3 as per their array in writ petition. The private respondent in the writ petition is hereinafter referred to as R5. The writ petitioner is arrayed as R1 in both appeals and hereinafter referred to as writ petitioner. Z.K.M.Higher Secondary School, Bodinayakkanur, Theni District, is hereinafter referred as 'school'. Thus to clarify, all parties are referred to as per their array in the writ petition that culminated in order dated 25.07.2014.

3. The submissions of the parties as relevant to decide these writ appeals, are as follows:-

(i)Writ petitioner was appointed as BT Assistant in the school on 02.11.2007.

(ii)He aspired for the post of BT Assistant (Physics) that fell vacant on 01.06.2010 being qualified to be appointed in that post.

(iii) Rule 15(4) of the Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974 (in short 'Rules') requires that a search must first be made within the School for eligible candidates and it is only in the absence of the same, that direct recruitment /appointment from other



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schools may be made.

(iv)R4, in violation of the procedure under Rule 15(4) of the Rules, delayed his appointment until such time R5 qualified himself and thereafter proceeded to appoint him.

(v)Several judgments were cited by the writ petitioner in support of his stand that the crucial and relevant date to determine eligibility of a candidate for appointment would be the date on which call/notification for appointment to the post was made.

(vi)In the present case, the post to which both writ petitioner and R5 aspired, fell vacant on 01.06.2010 and thus eligibility of the candidates as on that date must be determined.

(vii)It was the case of R5 that he had written the final of the qualifying exams in May 2010 and had passed in the examination obtaining his results on 29th September, 2010. Thus, he held the necessary qualification as on 01.06.2010.

(viii)The order of appointment was ultimately issued on 18.01.2011, by which admittedly R5 was admittedly fully qualified for the post.



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4. An application has been submitted by the writ petitioner on 23.08.2010 for appointment to the post of BT(Assistant). Even prior thereto, the school had made an application before the school authorities on 27.07.2010 seeking approval for filling the post, by way of direct recruitment and stating therein that there were no suitable candidates in the school who could be considered for appointment.

5. On 02.09.2010, R4 wrote to the school referring to the request of the School for recruitment and pointing out that the writ petitioner was in service of the school and had made a representation for promotion. They thus sought a clarification from the school as to whether the writ petitioner possessed the requisite qualification for the post of BT Assistant (Physics). Inter alia R3 also specifically refers to the statement of the School to the effect that there are no eligible candidates in the school.

6. In response thereto, the school wrote to R4 on 07.09.2010 stating that the request of the writ petitioner for promotion was under consideration by the Management. The argument of the writ petitioner is



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thus that the School was well aware that there was a qualified and appropriate candidate for appointment even as early as in August 2010 itself. While this is so, the school proceeded to appoint R5 in January 2011, ignoring the writ petitioner. The writ petitioner thus argues that the proceedings smacked of mala fides and that the appointment to the post of BT Assistant had been dragged on till January 2011 merely to accommodate R5 and ensure that he acquired necessary qualifications in the interim.

7. Order of appointment of R5 dated 08.01.2011 proceeds on the basis that it was only R5, who was fit for the post of BT Assistant and does not even consider the application of the writ petitioner notwithstanding that previous communications have admitted to the position that the case of the writ petitioner for promotion was pending consideration before the Management.

8. The writ Court, in a detailed order dated 25.07.2014 has accepted the case of the writ petitioner setting aside the appointment of R5 and directing R4 to permit the writ petitioner, since he was the only



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candidate eligible as on the crucial date, to be appointed to the post of BT Assistant (Physics). A time frame was fixed for that purpose.

9. The present writ appeals have been filed by the School and R5, and the legal question that arises is as to the crucial date for reckoning eligibility of a candidate for admission. The facts and sequence of dates and events as above matters of record.

10. Rule 15(4) of the Rules reads as follows:

“(4) (i) Promotion shall be made on grounds of merit and ability, seniority being considered only when merit and ability are approximately equal.

[(ii) Appointments to the various categories of teachers shall be made by the following methods: -

(i) Promotion among the qualified teachers in that school.

(ii) If no qualified and suitable candidate is available by method (i) above, -

(a) Appointment of other persons employed in that school, provided they are fully qualified to hold the post of teachers.

(b) Appointment of teachers from any other school.

(c) Direct recruitment. In the case of appointment from any other school or by direct recruitment the School Committee shall obtain the prior permission of the District Educational Officer in respect of Pre-primary, Primary and Middle School and that of the Chief Educational Officer in respect of High Schools and Higher Secondary Schools, Teacher Training Institutions setting out the reasons for such appointment. In respect of



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corporate body running more than one school, the schools under that body shall be treated as one unit for purpose of this rule.”

11. The procedure set out above requires the school to, at the outset, identify among its own faculty, qualified persons for filling in a post that falls vacant. It is only thereafter, and in the absence of a qualified candidate, the school is permitted to recruit from outside, either by transfer or by direct recruitment. In the first situation, in the event of more than one qualified candidate, the Rule stipulates that their seniority and merit shall be the deciding factor to resolve the tie.

12. In the present case, the position is crystal clear that as on 01.06.2010, there was no candidate barring the writ petitioner, who was adequately qualified. Notwithstanding this, the school has corresponded with the authorities on 27.07.2010 proposing to fill the post by direct recruitment. This move on their part is clearly contrary to the Rules. However, that the writ petitioner was being considered by the Management for the post, is also clear from their communication dated 07.09.2010. In all this, the school has clearly lost sight of Rule 15(4), which is mandatory and which procedure has compulsorily to be



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followed by the School in matters of appointment.

13. There appears to be some merit in the submission that the school has gone out of its way to accommodate R5. The school admits, on 07.09.2010 that the case of the writ petitioner is under consideration. The impugned order of appointment does not however find the writ petitioner unsuitable in any manner. Infact, it proceeds on the basis that the R5 is the only eligible / suitable candidate and no reasons are spelt out as to why. Thus, all is not well in the process of selection of candidate apart from the procedure being contrary to the Rule.

14. Learned counsel for R5 also places reliance upon the Fundamental Rules of Tamil Nadu Government (in short 'Fundamental Rules'). However, this submission has been considered and rejected by two Division Benches of this Court in *A.Ruckmani Vs. The Correspondent, Gandhiji Aided Middle School, Keeasiviri and Ors.*, [2003 (2) MLJ 4] and *Director of Elementary Education and another vs. K.Nedumaran* [W.A.No.803 of 2013 dated 27.02.2015].



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15. In the former, a Division Bench of this Court held that eligibility should be reckoned as on the date when the post fell vacant. The discussion on this aspect will tip the scales in favour of R1. In the present case, R5 would argue that he had written the qualifying examination in 2010 and since he had ultimately cleared it, his eligibility would stand fixed as in May 2010 itself prior to the post falling vacant. The argument relating to the Fundamental Rules has been specifically rejected for the reason that Rule 26 of the Fundamental Rules, the Bench states, only deals with increment and not promotion. Thus the Fundamental Rules would be inapplicable to private schools and hence, this argument does not advance the case of R5.

16. In *K.Nedumaran*, the prayer of the employee was for inclusion in the panel for promotion to the post of Assistant. The employee had been appointed as Junior Assistant in the department of School Education and was required to pass certain tests for promotion to the post of Assistant.



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17. The critical date for constitution of panel was 15th of March of every year and that employee missed the bus by one day as his results had been declared only on 16th of March of that year. He challenged the non inclusion on the ground that Rule 26(a)(2) of the Fundamental Rules states that where passing of examination or test confers on a Government Servant title to any right, benefit or concession, such title should be deemed to have accrued on the day following the last day of the examination or test which he passed.

18. While there is no quarrel on this proposition, as we have already noticed, the Fundamental Rules, though applicable to the department of School Education as applied in the case of K.Nedumaran, would not be applicable to the faculty of a private school. In the case of private schools, the Tamil Nadu Recognized Private Schools (Regulation) Act, 1973 and allied Rules of the year 1974 form a complete Code and do not envisage the applicability of the Fundamental Rules.

19. In *Mrs.Selvi vs. Director of Collegiate Education and Another*, a learned Judge considered the challenge to a suspension of a



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sweeper in an aided minority institution. One of the arguments advanced related to the applicability of the Fundamental Rules which came to be rejected on the ground that they apply only to Government Employees.

20. At paragraph 20 of the decision in *Mrs.Selvi's* case, the learned Judge also refers to a decision of the Division Bench in *P.Devadass vs.The District Elementary Educational Officer, Theni District and another* [Writ Appeal No.286 of 2005, dated 08.08.2005]. In that decision, when a private school sought to rely on Rule 17(e)(2) of the Tamil Nadu Civil Services (Qualification Control and Appeal) Rules, the Division Bench had held that the aforesaid Rules would be applicable to Government employees alone.

21. Para 20 of that decision reads as follows:-

“20. In my view, the argument of the learned counsel for the second respondent placing reliance on Fundamental Rules has no merit. Fundamental Rules are applicable to Government employees only and the same cannot be applied to the employees in private colleges. In fact, when the private school sought to rely on Rule 17(2) of the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules, a Division Bench of this Court



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in P.DEVADASS's case (cited supra) has held that the school was not correct in placing reliance on the rule, which is applicable to Government employees alone. In this regard, para 13 of said judgment is extracted hereunder:

3. Therefore, we are inclined to hold that when the power to suspend is governed specifically under Section 22(3) of the Tamilnadu Recognised Private Schools (Regulation) Act and any agreement which could have been executed between the appellant and the school, the power to suspend has to be dealt with only under those provisions and only in terms of those provisions. There can be no implied power of suspension beyond the specific regulations applicable to the appellant. Though no specific reference is made to Rule 17(2) of the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules, the respondent school attempts to import the very same principle in order to sustain the order of suspension. Apart from the fact that the said Rules are not applicable to the appellant, there is no question of importing any principle formulated in some other rule not applicable to the petitioner in the context of the power of the employer to keep the employee under suspension, more so in the light of the specific observations of the Supreme Court as above.””

Thus, our conclusion on this point, taking support from the aforesaid decision of this Court, is to the effect that the Fundamental Rules would



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apply only to Government Servants under the rule making control of the State Government.

22. In *Mr.P.Mohan Pillai Vs. State of Kerala and others* [AIR 2007 SC 2840], the Court reiterates at para 11, the proposition that ordinarily, Rules that were prevailing at the time when the vacancy arose would govern the filling up of that vacancy and qualification and eligibility criteria as were prevailing on the date of vacancy would be followed.

23. In *Smitha Johny vs Josny Varghese And Ors* [2010 13 SCC 414, referring to Kerala Education Rules, the Apex Court held that promotion under that Rule should be from persons possessing required qualifications at the time of occurrence of the vacancy. While our attention has not been specifically drawn to any equivalent Rule in Tamil Nadu, the settled position that is consistently followed is that a person who applies for a post must possess requisite qualification as on the date of the call/ notification /advertisement.



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24. In *Shankar K. Mandal & Ors vs State Of Bihar & Ors* [(2003) 9 SCC 519], the appointment of 2000 persons as Primary teachers in various districts of Bihar had been questioned. The legal issue that arose for consideration related to the age qualification of those teachers. Before the High Court, a concession had been made by some of those teachers that they had been over aged on the date of making of appointment.

25. However, the teachers drew a distinction, stating that while they may have been over aged as on the date of appointment, they had not been over aged as on the date of making of the application. The Court went on to consider the very question that arise before us, as to what would constitute the critical date when the qualification of a candidate was to be frozen or reckoned.

26. The Bench referred to the judgments in *Ashok Kumar Sharma and Others vs. Chander Shekhar and another* [1997 (4) SCC 18], *Bhupinderpal Singh vs. State of Punjab* [2000 (5) SCC 262] and *Jasbir Rani and others. vs. State of Punjab and another.* [2002 (1) SCC



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124] and culled out the principles that have been formulated in those judgments in the following terms.

(1) The cut off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules; (2) If there is no cut off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for applications; and (3) If there is no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received by the competent authority.

27. The first method is by reference to the relevant Service Rules. In the present case, the relevant Service Rules prescribe educational qualifications /eligibility, but do not provide clarity on when they would stand triggered/become operative. In such an event, where there is no cut-off date that has been appointed by the Rules, then such date shall be as appointed for the purpose in the advertisement/notification/call for applications or if there was no such date appointed, then it shall be by reference to the date by which applications were to be received by the competent authority.



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28. In the present case, the approach which the School ought to have followed, is by issuing a circular calling for applications from the faculty to fill the post of BT Assistant (Physics), which fell vacant on 01.06.2010. This was never done by the school, which proceeded to make a unilateral appointment several months later, and long after the date when the post fell vacant. It had also not bothered to ascertain and verify the existence of suitable candidates from within the ranks of its own faculty. Thus, and in a situation such as the present, the critical date for reckoning eligibility of a candidate would be that when the post fell vacant.

29. A Division Bench of this Court in *P. Thurai Pandian vs K. Subramanian and others* [2007 Writ L.R. 258] has emphasized the importance of the Rules and the procedures set out therein for selection and appointment of faculty. They observe that the mandate under Rule 15 (4) of the Rules is to maintain excellence in the standards of education.



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30. Thus, a post which falls vacant must first accommodate eligible candidates from within the school itself. This is a matter of discipline that the school must impose upon itself to ensure that its own candidates are encouraged to equip themselves with the skills necessary for promotion. It is only thereafter that the School must look outdoors to fill the vacancy. The case of *Jeyaselvi vs. the Government of Tamil Nadu* [1994 (1) MLJ 130] is yet another case, on this point.

31. This oft reiterated view is reiterated in *Karuppiah vs. Joint Director (Higher Secondary) and three others* [W.P.(MD)No.11922 of 2010 dated 02.12.2010], where the same school as before us now, was precluded from advertising the post prior to exhausting Rule 15(4). The post in question in that writ petition was PG Assistant (English) and the writ petition filed by Karuppiah came to be disposed in his favour by the aforesaid order. It seems apparent to us that this school is regularly in the habit of bypassing its own faculty in preference to faculty from outside.

32. In *Union of Indian and another Vs. Manprit Singh Poonam and others*, [2022 (6) SCC 105] the Supreme Court held that



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mere existence of a vacancy, perse, will not create a right in favour of an employee for promotion. Vacancies require to be filled up following selection process. In that case, the authority had granted retrospective promotion with effect from the date on which the actual vacancy arose.

33. Disciplinary proceedings had been initiated as against an employee, that had been cleared only on 17.04.2012 with effect from 01.07.2011. The Court thus held that there was no flaw in such retrospective grant of promotion. There was nothing to indicate that the candidate did not possess requisite qualification. It was for this reason, that once he was cleared of the disciplinary proceedings, that he was promoted with effect from the date when the vacancy arose. The facts in that case are not analogous to the case in point and this judgment is thus of no assistance to R5.

34. There are several other decisions referred to by the Writ Court to conclude that the date when the post fall vacant, 10.06.2010 would be the critical date, and we unhesitatingly confirm its order dated 25.07.2014.



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35. To sum up, the legal issue is answered stating that eligibility of a candidate for appointment must, in the facts and circumstances as in the present matter, be reckoned as on 01.06.2010, when the post fell vacant. The writ petitioner was fully qualified for appointment as BT Assistant (Physics) as on the date when that post fell vacant being 01.06.2010. He applied for the post on 23.08.2010. R5 had written qualifying exams only in May 2010. He applied for the post on 26.07.2010. Results were declared on 20.09.2010 and he was appointed on 18.01.2011. Hence, as on the date when the post fell vacant, he was not in possession of the requisite qualifications. His order of appointment is thus vitiated and has rightly been set aside by the Writ Court.

36. As a last ditch attempt, learned counsel for R5 would point out that order of appointment dated 13.01.2011 proceeds on the basis that he was the only candidate, who was qualified to the post. Admitting to the fact that the application of the writ petitioner was also pending, he would urge that the proceedings be remanded to the file of the authority for de novo consideration.



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37. This argument might have been accepted if there was any dispute on the qualifications of the writ petitioner. However, there is no material that has been placed before us either by the school or R5 that the writ petitioner did not possess necessary qualifications. With this there is no further necessity to remand the matter.

38. These writ appeals are hence, dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

**[A.S.M.J.] & [R.V.J.,]
29.09.2023**

NCC :Yes/No
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TO:

- 1.The Joint Director (Higher Secondary),
Directorate of School Education,
DPI Campus, College Road,
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DR.ANITA SUMANTH, J.
AND
R.VIJAYAKUMAR, J.

Pre-delivery Common Judgment made in
W.A.(MD)Nos.1058 & 1101 of 2014

Dated:
29.09.2023