



Citation : CDJ 2012 MHC 2204

Court : High Court of Judicature at Madras

Case No : W.P.No.28941 of 2011 and M.P.Nos.1 and 2 of 2011

Judges : THE HONOURABLE MR. JUSTICE VINOD K. SHARMA

Parties : P.M. Malathi Versus State of Tamil Nadu, rep. by its Secretary, Department of School Education & Others

Appearing Advocates : For the Petitioner : Isac Mohanlal, Advocate. For the Respondents: R. Ravichandran, Additional Government Pleader.

Date of Judgment : 28-02-2012

Head Note :

Comparative Citation:
2012 (3) MLJ 669

Judgment :

1. The petitioner prays for issuance of a writ in the nature of mandamus, directing the Teachers Recruitment Board to consider petitioner's candidature for appointment to the post of Secondary Grade Teacher under Schedule Caste or General turn as per its Notification No. 2 of 2011 dated 9.11.2011 by calling the petitioner for certificate verification.
2. The petitioner passed S.S.I.C. in the year 2000 and got her name registered with the District Employment Office, Vellore under registration No. VLD2000F006030. The petitioner passed higher secondary course in the year 2002 and Diploma in Teacher Education (D.T.Ed.) in the year 2004. The additional qualifications were also registered in the District Employment office, Vellore on 26.7.2002 and 11.10.2004 respectively. The petitioner therefore is eligible for appointment as a Secondary Grade teacher under the Tamil Nadu Elementary Educational Subordinate Service Rules. The petitioner belongs to Hindu Adi-dravida community which is notified schedule caste.
3. The Teachers Recruitment Board vide notification No. 2 of 2011 dated 9.11.2001, invited applications from the eligible candidates for recruitment to 1743 Secondary Grade Teachers (1394 under Non-priority category and 349 under Priority category). Out of which, 18% of the total number of posts reserved for schedule caste, 15% for SC and 3% for SC Arunthathiyar).
4. It was clarified in the notification, that, the State Government had directed the Teachers Recruitment Board, to recruit Secondary grade teachers under the Special Rules for the Tamil Nadu Elementary educational Subordinate Services for Standards I to V in Elementary/Middle Schools vide Govt. orders dated 10.11.2008 and 3.6.2010. The qualification prescribed for the post was S.S.L.C upto 31.5.1989 and HSC from 1.6.1989 along with D.T.Ed. from the Govt. of Tamil Nadu or its equivalent.

5. It was also notified that, only those candidates who are registered their names in the employment exchange in the State and had the registration updated alone would be eligible to apply for the post.

6. It was stipulated that Commissionerate of Employment, and Training would sponsor the qualified candidates according to their registration seniority as per the Government order. The last date for submission of the application was 23.11.2011.

7. It was also notified that the Commissionerate of Employment and Training had already sponsored the names of eligible candidates at the ratio of 1:5 for certificate verification.

8. It was further stipulated that in case candidate's name was not found in the list, but his/her date of registration was within the cut off date in the respective communal turn, he/she shall immediately approach the concerned Employment exchange and get the certificate regarding the data of registration/seniority and community and produce the same to the D.E.E.O. and get the I.C.R. Application form.

9. It was notified that the names of the senior candidates would be published in the D.E.E.O.'s office of the respective districts and those candidates should approach the D.E.E.O. and fill up application forms and submit the same to the D.E.E.O. for being forwarded to the Teachers Recruitment Board.

10. The case of the petitioner is that name of the petitioner was found in the list and therefore, was given an application form which was filled and submitted to the D.E.E.O. Office on 19.11.2011.

11. It was also notified that the candidates were to be called for certificate verification on 3rd and 4.12.2011 at Shri Venkateswhara Higher Secondary School, Vellore.

12. The case of the petitioner is that the petitioner was not issued appointment letter- When an enquiry was with the D.E.E.O., the petitioner was instructed to approach Teachers Recruitment Board. The Teachers Recruitment Board in turn directed the petitioner to approach the Commissionerate of Employment Exchange Guindy, where the petitioner was informed that the names of 40 candidates were excluded from the certificate verification process including the petitioner.

13. The reason for non inclusion of name of the petitioner was that she did not join duty in the previous selection held in 2009. The petitioner therefore challenged the action of the respondents in excluding the name of the petitioner to be arbitrary and illegal.

14. In support of this contention, reliance has been placed on the G.O. Ms. No. 721 (Labour and Employment) dated 25.5.1990 stipulating therein that the candidates who an account of difficulty could not take the employment, would be entitled to retain the original seniority.

15. The relevant, clause of Govt., order reads as under:

“2(ii) Cases where due to medical and other reasons candidates sponsored by the Employment Exchanges and offered appointment by the employer do not join duty?

.....

4. In respect of cases mentioned in para 2(ii) above, the Government direct that the one year time limit mentioned in the rule be removed and the original seniority be allowed to such candidates, if they report for the next renewal either in the month of renewal or the succeeding two months allowed for renewals along with the certificated from their employers to the effect that they have not joined

duty. If, however, such candidates fail to report within the above period, they need not be allowed the benefit of original seniority in registration.”

16. The petitioner submitted a certificate front the department of Adi-Dravida Welfare to the effect that she could not join service in pursuant to her previous selection due to child birth. The registration of the petitioner was thereafter restored to original position.

17. The case of the petitioner is that no intimation of counselling held on 25.5.2010 was given to the petitioner. The Teachers Recruitment Board had also informed the Commissioner of Adi-Dravida Welfare vide letter dated 10.3.2011 that the candidates who did not join service, their names would be deleted from the Live Register and that names of such candidates will not be not recommended for the academic year 2010-2011.

18. However, the Secretary of Adi-Dravida Welfare vide letter dated 29.7.2011, instructed the Director of Employment and Training to take into consideration, the future of the candidates, who did not join service and to renew their registration without affecting the seniority. In pursuance to the recommendation of the Principal Secretary, Labour and Employment, the name of the petitioner was restored to original position.

19. The case of the petitioner is that inspite of restoration of seniority, her name was not sponsored for counselling held on 20.12.2011. The petitioner claims that she is entitled to get employment as Secondary grade teacher for the following reasons:

(a) The petitioner possess the required qualification prescribed for the post by the TRB.

(b) The petitioner is having sufficient seniority to get the appointment.

(c) The State Government, taking note of the difficulties faced by the candidates who were offered appointment but not able to take it up due to valid personal reasons, issued G.O. Ms. No. 721 (Labour and Employment) dated 25.5.1990 to the effect that such candidates could retain their original seniority.

(d) Accordingly, the petitioner got her name restored and renewed and placed on the website of the Department of Employment and Training with the same seniority.

(e) The petitioner did not receive any intimation with regard to the stated counselling on 25.5.2010 and she was not aware of the same on the date of filing.

(f) The Secretary of Adi-Dravida Welfare instructed the Director of Employment and Training to take into consideration the future of the candidates who did not join and to renew their registration without affecting the seniority vide Government letter No. 9792/AaThi.Na/2011 dated 29.7.2011.

(g) Thereafter, the Principal Secretary of Labour and Employment informed the Director of Employment, and Training that no separate Government order was needed for renewal of registration vide Government Letter No. 9833/T2/2011 - 3 dated 15.11.2011.

(h) It could be seen from the website of the Directorate of Employment and Training that her registration and seniority had been restored to the original position.

(i) The TRB has no power of its own to omit or delete the names of persons like the petitioner.

20. The petitioner therefore, has approached this Court for issuance of a writ in the nature of mandamus, as referred to above.

21. In support, of the contention, that the petitioner is entitled to be considered for appointment, reliance was placed has placed on the judgment of this Court in W.P. No. 28562 to 28572 of 2011 decided on 23.12.2011 (V. Suresh and 10 Others v. Chairman, Teachers Recruitment Board, Chennai 6 and 4 Others) laying down as under:

“6. In this case, though the petitioners were selected for the Secondary Grade Teacher post in the recruitment held during 2009-2010, they did not join. The Commissioner Adidravida department - second respondent by communication dated 25.1.2011 addressed to the first respondent stated that the petitioners did not join the post, though they were recruited during 2009-2010 and sought the first respondent to appoint the petitioners as secondary grade teacher. By communication dated 29.7.2011 addressed to the 5th respondent, it was informed that the petitions is did not join, during earlier recruitment and therefore their seniority in the employment exchange was sought to be kept alive. Therefore, the petitioners, having not joined in the post though recruited during the year 2009-2010, their seniority is to be kept alive and they are entitled to be considered a per G.O. Ms. 721 dated 25.5.1990 for the selection. To that effect the communication dated 25.1.1991 as well as the communication dated 29.7.2011 were given to the respondent. That apart, in an identical circumstances, this Court in W.P. No. 27325 of 2011 on 7.12.2011 directed the authorities to sponsor the name of the petitioner therein. In view of that also, similar direction is to be issued.

7. Hence, 5th respondent is required to keep the seniority of the petitioners alive and sponsor their names far the recruitment to be made as per advertisement No. 2 of 2011 dated 9.11.2011 subject to the other conditions as mentioned in the said advertisement. For the above reasons, the 5th respondent is directed to consider and sponsor the names of the petitioners, if they are otherwise eligible, within a period of two weeks for recruitment as Secondary Grade Teacher to the first respondent.

8. With the above direction, the writ petition is disposed of. No costs. Consequently, connected miscellaneous petitions are closed.”

22. The Hon‘ble Supreme Court in the State of Tamil Nadu and Another v. Unemployed Secondary Grade Teachers Welfare Association and Others (S.L.A. (Civil) Nos. 18227 of 2008 was pleased to lay down an under:

“Leave granted.

Insofar as the applications for impleadment, they shall be brought up along with the main matters.

Having regard to the fact that a large number of vacancies in the State have remained unfilled, the State Government sought leave to fill the posts. On the submissions made, we make the following interim order, accepting the State’s proposal:

“Appointment to the post of Secondary Grade Teachers may be made by the State Government, by calling the list of eligible persons from all the District Employment Exchange and by newspaper Public Advertisements throughout the State so that any willing candidate even though registered in different districts can participate in the selection. It shall be made clear in the Public Advertisement that the selection would based on the Employment Exchange seniority. It shall also be made clear that any person selected and appointed in a particular School within a District cannot aspire for or seek transfer to another School outside the District.”

This aforesaid arrangement will apply far any recruitment to be made pending disposal of these appeals.”

23. Though the petitioner deserves to succeed, in view of the judgments referred to above, it may be necessary to point out here, that the State Government has no right to deny the right of consideration, to all the eligible candidates for appointment and cannot restrict the selection process, only to the persons sponsored through the Employment Exchange based on their seniority, in view of the law laid down by the Hon'ble Supreme Court in State of Bihar v. Upendra Narayan Singh and Others 2011 (1) S.C.T. 208 wherein it has been laid down as under:

“23. Clauses (4-A) and (4-B) were added to Article 16 by the Constitution (Seventy- seventh Amendment) Act, 1995. Article 16 in its present form reads as under:

“16. Equality of opportunity in matters or public employment.- (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union Territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under Clause (4) or (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.”

24. In E.P. Royappa v. State of T.N. the Constitution Bench negated the appellant's challenge to his transfer from the post of Chief Secretary of the State to that of Officer on Special Duty. P.N. Bhagwati, J. (as His Lordship then was) speaking for himself, Y.V.Chandrachud and V.R. Krishna Iyer, JJ. considered the ambit and reach of Articles 14 and 16 and observed:

“ Article 14 is the genus while Article 16 is one of its species. Article 14 declares that the State shall not deny any person equality before the law or equal protection of the laws within the territory of India. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all

citizens in matters relating to employment or appointment to any office under the State. No citizen shall be ineligible for or discriminated against irrespective of any employment or office under the State on the grounds only of religion, race, caste, sex, descant, place of birth, residence or any of them. Though, enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose., J., “a way of life”, and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be “cribbed, cabined and confined” within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to politics logic and Constitutional law and is therefore violative of Article, 14, and if it affects any matter relating to public employment, it is also violative of Article 16 . Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.”

25. The equality clause enshrined in Article 16 mandates that every appointment to public posts or office should be made by open advertisement so as to enable all eligible persons; to compete for selection on merit. *Umesh Kumar Nagpal v. State of Haryana*, *UPSC v. Girish Jayanti Lal Vaghela*, *State of Manipur v. Y. Token Singh and Municipal Corpn., Hyderabad v. P. Mary Manoranjani*. Although, the Courts have carved out some exceptions to this rule, for example, compassionate appointment of the dependent of deceased employees, for the purpose of this case it is not necessary to elaborate that aspect.

26. In *UPSC v. Girish Jayanti Lal Vaghela* (supra) this Court, while reversing an order passed by the Central Administrative Tribunal which had directed the Union Public Service Commission to relax the age requirement in the respondents case, elucidated the meaning of the expression “equality of opportunity for all citizens in matters relating to public employment” in the following words:

“12. Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a Constitutional right to equality of opportunity and employment in public offices. The words ‘employment of appointment’ cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation, etc. The appointment, to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates, and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution.”

27. For ensuring that equality of opportunity in matters relating to employment becomes a reality for all, Parliament enacted the Employment Exchanges (Compulsory Notification of Vacancies) Act,

1959 (for short “the 1959 Act”). Section 4 of that Act casts a duty on the employer in every establishment in public sector in the State or a part thereof to notify every vacancy to the employment exchange before filling up the same.

28. In *Union of India v. N. Hargopal* a two Judge Bench of this Court considered the question whether persons not sponsored by the employment exchange could be appointed to the existing vacancies. The High Court of Andhra Pradesh had ruled that the provisions of the 1959 Act are not applicable to government establishments that the Act does not cast duty either on the public sector establishment or on the private sector establishment, to make the appointments from among candidates sponsored by the employment exchanger only, and that instructions issued by the Government of India that candidates sponsored by the employment exchanges alone should be appointed are contrary to Articles 14 and 16. This Court referred to Sections 3 and 4 of the 1959 Act, adverted to the reasons enumerated in the counter-affidavit filed on behalf of the Union of India before the High Court to justify the appointments only from among the candidates sponsored by the employment exchange and held:

“9. ... The object of recruitment to any service or post is to secure the most suitable person who answers the demands of the requirements of the job. In the case of public employment, it is necessary to eliminate arbitrariness and favouritism and introduce uniformity of standards and orderliness in the matter of employment. There has to be an element of procedural fairness in recruitment. If a public employer chooses to receive applications for employment where and when he pleases, and chooses to receive appointments as he likes, a grave element of arbitrariness is certainly introduced. This must necessarily be avoided if Articles 14 and 16 have to be given any meaning. We, therefore, consider that insistence on recruitment through employment exchanges advances rather than restricts the rights guaranteed by Articles 14 and 16 of the Constitution. The submission that employment exchanges do not reach everywhere applies equally to whatever method of advertising vacancies is adopted. Advertisement in the daily press, for example, is also equally ineffective as it does not reach everyone desiring employment. In the absence of a better method of recruitment, we think that any restriction that employment, in government departments should be through the medium of employment exchanges does not offend Articles 14 and 16 of the Constitution.”

29. In *Excise Supdt. v. K.B.N. Visweshwaro Rao* a three-Judge Bench while reiterating that the requisitioning authority/establishment must send intimation to the employment exchange and the latter should sponsor the names of candidates, observed:

“6. ... It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the employment exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the employment exchange. Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the requisitioning authority/establishment to intimate the employment exchange, and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins; and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates.”

30. The same principle was reiterated in *Arun Kumar Nayak v. Union of India* in the following words:

“9. This Court in Viswashwara Rao, therefore, held that intimation to the employment exchange about the vacancy and candidates sponsored from the employment exchange is mandatory. This Court also held that in addition and consistent with the principle of fair play, justice and equal opportunity, the appropriate department or establishment should also call for the names by publication in the newspapers having wider circulation, announcement on radio, television and employment news bulletins and consider all the candidates who have applied. This view was taken to afford equal opportunity to all the eligible candidates in the matter of employment. The rationale behind such direction is also consistent with the sound public policy that wider the opportunity of the notice of vacancy by wider publication in the newspapers, radio, television and employment news bulletin, the better candidates with better qualifications are attracted, so that adequate choices are made available and the best candidates would be selected and appointed to subserve tints public interest better.”

31. The ratio of the abovenoted three judgments is that in terms of Section 4 of the 1959 Act, every public employer is duty-bound to notify the vacancies to the employment exchange concerned so as to enable it to sponsor the names of eligible candidates and also advertise the same in the newspaper a having wider circulation, employment news bulletins, get announcement made on radio and television and consider all eligible candidates whose names may be forwarded by the employment exchange concerned and/or who may apply pursuant to the advertisement published in the newspapers or announcements made on radio/television.

32. Notwithstanding the basic mandate of Article 16 that there shall be equality of opportunity for all citizens in matters relating to employment for appointment to any office under the State, the spoils system which prevailed in America in the 17th and 18th centuries has spread its tentacles in various segments of public employment apparatus and a huge illegal employment market has developed in the country adversely affecting the legal and Constitutional rights of lakhs of meritorious members of younger generation of the country who are forced to seek intervention of the Court and wait for justice for years together.”

24. Again the Hon‘ble Supreme Court in the State of Orissa and Another v. Mamata Mohanty 2011 (2) S.C.T. 718 : (2011) 4 MLJ 692 was pleased to lay down as under:

“Appointment/employment without, advertisement

35. At one time this Court had been of the view that calling the names from employment exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, it came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words, there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from employment exchange, in addition thereto it is mandatory on the part of the Employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in radio and television as merely calling the names from the employment exchange does not meet the requirement of the said article of the Constitution. (Vide Delhi Development Horticulture Employees Union v. Delhi Admn., State of Haryana v. Piara Singh, Excise Supdt. v. K.B.N. Visweshwara Rao, Arun Tewari v. Zila Mansavi Shikshsk Gangh, Binod Kumar Gupta v. Ram Ashray Mahoto, National Fertilizers Ltd. v. Somvir Singh, Telecom District Manager v. Keshab Deb, State of Bihar v. Upendra Narayan Singh andState of M.P. v. Mohd Abraham.)

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without, inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the notice board, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are

eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.”

25. In view of the declaration of law by the Hon‘ble Supreme Court, it is not open to the respondents to deny the right of consideration, by restricting the employment through employment exchange alone.

26. Any rule of the State Government restricting the right of consideration of the eligible candidates for public employment is un Constitutional, being contrary to Article 14 and 16 of the Constitution of India.

27. Therefore, once it is not disputed that the petitioner is eligible and qualified, she could not be denied right of consideration.

28. Consequently, this writ petition is allowed as prayed for and the respondents are directed to consider the case of the petitioner for appointment.

Connected miscellaneous petitions are closed.

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