

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.11.2004

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE S. ASHOK KUMAR

WRIT PETITION NO.44038 OF 2002

1. Government of Tamilnadu,
rep. by its Secretary to Government,
Education Department (School),
Fort St. George, Chennai 9.
2. The Member-Secretary,
Teacher's Recruitment Board,
4th Floor, EVK Sampath Building,
College Road, Nungambakkam,
Chennai 6.
3. The Director of School Education,
College Road, Chennai 6.
4. The Assistant Director,
Professional & Employment Office,
Mandaveli, Chennai 28. .. Petitioners

Vs.

1. S. Prabakar,
S/o.S.Sivalingam
2. The Registrar,
Tamil Nadu Administrative Tribunal,
Chennai 600 104. .. Respondents

Petition filed under Article 226 of the Constitution of India for
the issuance of Writ of Certiorari as stated therein.

For Petitioners : Mr.S. Gomathinayagam
Special Govt. Pleader

For Respondent-1 : Mr.K. Selvaraj
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O R D E R

(The Order of the Court was made by P.K. MISRA, J)

The present writ petition has been filed by the State of Tamil Nadu and other Subordinate Officers challenging the order passed by the Tribunal in O.A.No.570 of 2000 dated 23.8.2001.

2. The facts giving rise to the filing of the present writ petition are as follows :-

The Teachers' Recruitment Board had notified recruitment of 153 posts of P.G. Assistant (Commerce) for the year 1998-99. Respondent No.1 was one of the candidates. The Teachers' Recruitment Board selected 149 candidates and also prepared a waiting list of successful candidates. The present Respondent No.1 was at S.No.3 of such waiting list. Since 153 posts had been advertised for and only 149 candidates had been appointed, the present Respondent No.1, who was at S.No.3 of the waiting list, filed O.A.No.570 of 2000 for a direction to the present petitioners to appoint him as P.G. Assistant (Commerce) in any Higher Secondary School under the Directorate of School Education. By order dated 31.1.2000, the Tribunal had issued a direction to keep one post of P.G. Assistant (Commerce) vacant. Subsequently, after hearing both sides, the Tribunal disposed of the Original Application by giving a direction to the present petitioners to appoint the present Respondent No.1 against the vacant post, which had remained unfilled on account of the said order. Such direction of the Tribunal is under challenge.

3. The main contention of the Special Government Pleader appearing for the petitioners is to the effect that even though a person is kept in the select list or in the waiting list, such a person has got no absolute right to claim appointment, and therefore, the Tribunal should not have issued any direction giving appointment to the present Respondent No.1. In support of such contention, learned Special Govt. Pleader has placed reliance upon a decision of the Supreme Court reported in (1997)5 SCC 170 (K. JAYAMOHAN v. STATE OF KERALA AND ANOTHER).

4. We have carefully gone through the aforesaid decision. In our opinion, the ratio of the aforesaid decision would not be applicable to the peculiar facts and circumstances of the present case. In the aforesaid decision of the Supreme Court, the advertisement was for two posts of Lecturers. The appellant before the Supreme Court was at S.No.10 of the Select List. Since other vacancies had arisen, he made a representation to appoint him. Such representation was rejected

on the ground that in the meantime Kerala Collegiate Education Service Special Rules, 1994 had come into force with retrospective effect from 13.3.1990 prescribing higher qualifications and the appellant did not have the requisite qualification. The writ petition filed by the appellant was rejected by the learned single Judge which was confirmed by a Division Bench on the ground that merely because such a person was kept in the select list, he had not acquired any right for appointment. The Supreme Court emphasised the fact that the advertisement was in respect of two posts only. It was further stated that the person who was in the waiting list had no right of appointment. It was observed as follows :-

"5. It is settled legal position that merely because a candidate is selected and kept in the waiting list, he does not acquire any absolute right to appointment. It is open to the Government to make the appointment or not. Even if there is any vacancy, it is not incumbent upon the Government to fill up the same. But the appointing authority must give reasonable explanation for non-appointment. Equally, the Public Service Commission / recruitment agency shall prepare a waiting list only to the extent of anticipated vacancies. In view of the above settled legal position, no error is found in the judgment of the High Court warranting interference."

5. In the present case, the facts are entirely different. The advertisement was issued for 153 posts and 149 successful candidates, who were in the select list, were appointed and 4 posts were not filled up. The present Respondent No.1 was at S.No.3 in the waiting list, obviously, therefore, he was coming within 153 successful candidates commensurate with number of vacancies advertised for. Even if he had no absolute right to be appointed, obviously he had a legitimate expectation of being appointed and such legitimate expectation was belied by the present petitioners without any valid justification, as observed by the Supreme Court. In the decision of the Supreme Court, it was emphasised that even though it was not incumbent upon the Government to fill up the posts, the appointing authority should give reasonable explanation for non-appointment. In the present case, the petitioners had not given any explanation as to why 4 posts were not filled up and as to why Respondent No.1, who was at S.No.3 in the waiting list, was not appointed. In the absence of any such specific explanation, far less any reasonable explanation, the Tribunal was justified in giving a direction for appointment of Respondent No.1, particularly when one post had been directed to be kept vacant by the Tribunal. As such, it cannot be said that the order of the Tribunal suffers from any error of law or infirmity.

6. Learned Special Govt. Pleader has contended that four posts had remained vacant because those posts were meant for reserved category and in the absence of suitable candidates, those posts were kept vacant.

7. We have carefully gone through the stand of the present petitioners before the Tribunal in the counter affidavit filed by them and we do not find any such plea had been specifically averred in the counter affidavit filed before the Tribunal. For the first time, such an assertion has been made in the writ petition and as a matter of fact, such assertion is also denied by the present Respondent No.1 in the counter filed in the present writ petition.

8. Ordinarily while dealing with a writ of certiorari, the High Court is required to find out as to whether the order passed by the inferior Tribunal suffers from any error of law on the basis of the materials on record available before such inferior Tribunal and the validity of the order of the inferior Tribunal is not to be tested in the light of any new assertion, particularly any factual assertion.

9. In such view of the matter, the point now raised by the Special Government Pleader on behalf of the petitioners for the first time in the present writ petition, cannot be countenanced.

10. Apart from the above, we find that the present Respondent No.1 had already crossed the normal age fixed for recruitment, and therefore, he will not have any further avenue for appointment in future. Since the legitimate expectation of the present Respondent No.1 has been buttressed by an order of the Tribunal in his favour, which is in aid of substantial justice, we are not inclined to interfere with the order of the Tribunal even assuming that there was technical flaw in the order.

11. For the aforesaid reasons, the writ petition is dismissed. No costs.

Sd/-

Asst. Registrar.

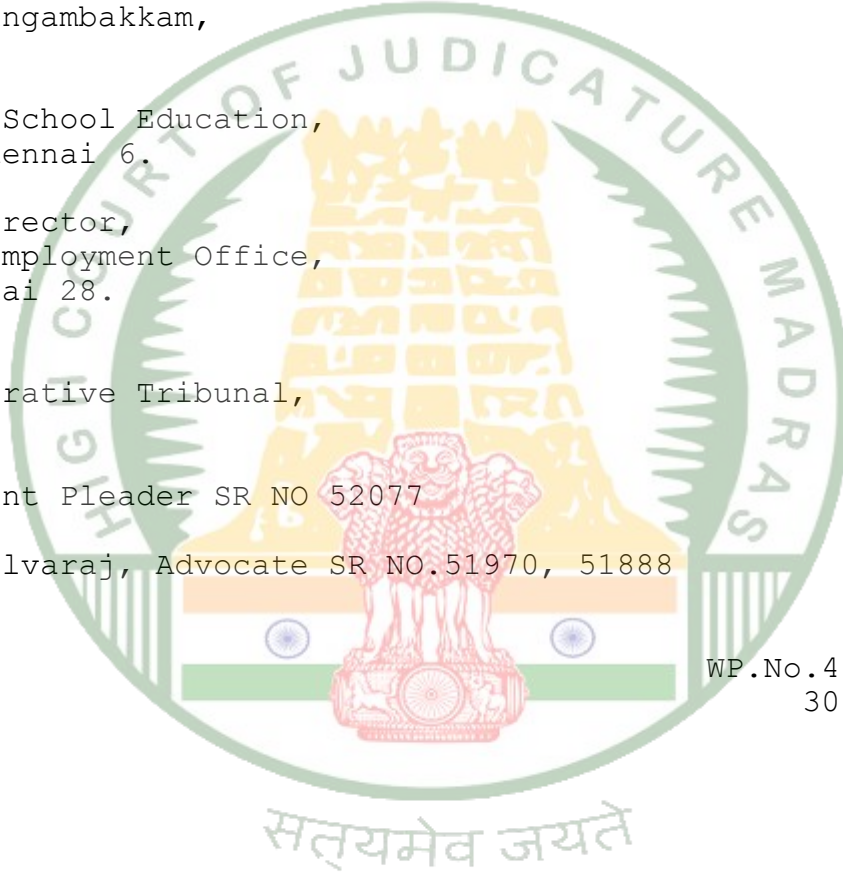
/True Copy/

Sub Asst. Registrar

dpk

To

1. Secretary to Government,
Education Department (School),
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Professional & Employment Office,
Mandaveli, Chennai 28.
 5. The Registrar,
Tamil Nadu Administrative Tribunal,
Chennai 104.
- + 1 CC to Government Pleader SR NO 52077
- + 2 CCs to Mr.K.Selvaraj, Advocate SR NO.51970, 51888



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