

T. Devi and 12 Others Vs. State of Tamil Nadu and Others

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Court : Chennai

Decided On : Aug-28-1991

Reported in : (1993)IILLJ59Mad

Judge : Mishra and; S. Janarthanam, JJ.

Appeal No. : W.A. No. 929/1991

Appellant : T. Devi and 12 Others

Respondent : State of Tamil Nadu and Others

Advocate for Def. : K. Duraiswamy, Adv.

Advocate for Pet/Ap. : A.L. Somayaji, Adv.

Judgement :

ORDER

Mishra, J.

1. We dismiss this appeal in limine because we find no error committed by the learned single Judge in upholding the impugned amendment of the service regulation of the respondent/Housing Board. How and why the amendment with retrospective effect has been made is available in detail in the impugned judgment. To note, however, one of the essential facts, we may state that the respondent/Board after its constitution, adopted a resolution on March 20, 1963

laying down a certain minimum qualification for recruitment in its clerical service followed by another resolution dated December 8, 1965 under which the qualification of being a graduate was reduced to S.S.L.C. The Act, however, required under S. 161(3) thereof approval of the Service Regulations by the State Government. The Board accordingly forwarded its Service Regulation Resolution dated March 20, 1963 to the State Government for approval as well as its resolution dated December 8, 1965. The Government accorded its approval to the Service Regulation Resolution of the Board dated March 20, 1963 on May 14, 1969 followed however by the approval dated June 17, 1975 of the Service Regulation Resolution of the Board dated December 8, 1965. It appears, however that there were certain appointments including that of the respondents in the interregnum, which were required to be regularised. Other wise they could not be found to be in conformity with the Service Regulation Resolution of the Board dated December 8, 1965 in the absence of the approval there of by the State Government. The Board accordingly resolved on March 31, 1980 to amend the service regulations afresh reducing the qualification for initial recruitment for the post of Junior Assistant with retrospective effect which resolution was approved by the State Government on October 22, 1981. This was challenged by one Shantha Kamalanathan in W.P. No. 10943 of 1981. The said writ petitions was dismissed. But in appeal, this Court held that on March 31, 1981 when the Government Order was issued approving the resolution of the Board dated October 22, 1981, the State Government was not competent to make regulations retrospectively. The Supreme Court affirmed the said judgment in S.L.P. (C) No. 9284 of 1989. In the meanwhile, however, thus faced with a serious predicaments, steps were taken to amend the Act and obtain the assent of the President of India and after the assent of the President of India was obtained to amend the regulations with retrospective effect. After complying thus all, the first respondent issued G.O. Ms. No. 347, Housing and Urban Development Department, dated April 3, 1990.

2. This amendment has only extended de jure recognition to what exists de facto for decades. We have already taken notice of the delay in the approval of the resolution of the Board dated March 20, 1963 by the State Government, which approval came only on May 14, 1969 as well as the approval of the resolution of the Board dated December 18, 1965, which came only on June 17, 1975. It was

the period in which there was no statutory service regulation in existence. Nonetheless, the Board had in its hand first resolution dated March 20, 1963 followed by another resolution dated December 8, 1965. It was of course after May 14, 1969, the resolution of the Board date March 20, 1963 had received the Government's approval and thus a statutory force. But then the amendment of the resolution of the Board dated March 20, 1963 by its resolution dated December 8, 1965 was still awaiting approval which came on June 17, 1975. There were several appointments in the meanwhile made, which were in the teeth of the resolution of the Board dated March 20, 1963, if that be taken as the service regulation, but were in consonance with the resolution of the Board dated December 8, 1965 was still awaiting approval which came on June 17, 1975. There were several appointments in the meanwhile made, which were in the teeth of the resolution of the Board dated March 20, 1963, if that be taken as the service regulation, but were in consonance with the resolution, but were in consonance with the resolution of the Board dated December 8, 1965. In fact all those who were appointed in accordance with the regulations in the resolution of the Board dated December 8, 1965 faced the consequence of being branded as appointed illegally. That is how the petitioners have chosen to describe them. The petitioners have contended that even though to-day after a lapse of many years of their initial appointment, it may not be proper to declare their appointment invalid, at least it will not be improper to deny to them any promotion on the basis of the qualification for the reason of their appointment in the service because the petitioners and others, who held valid appointments strictly in accordance with the resolution of the Board dated March 20, 1963 which was duly approved by the State Government on May 14, 1969 would suffer if such irregularly appointed persons are granted any promotion.

2A. This Court in *Thirunavukkarasu v. State of Tamil Nadu* 1974 1 LLJ 323 considered the case of the person, who had entered into Government Service without possessing the minimum educational qualification prescribed under the statute for appointment and remained in such capacity for nearly 20 years. The Court said that it was a case in which the employer, the State of Tamil Nadu was estopped from treating the appointment as invalid on the ground that the appointee did not possess the minimum educational qualification.

3. In the case of *Narendar Chadha v. Union of India* : [1986]1SCR211 , the Supreme Court considered the case of promotion of the employees governed by the Indian Economic Service Rules or the Indian Statistical Service Rules, 1961. After the initial constitution of the two services was completed, it was found that a number of posts carrying economic/statistical functions could not be considered for inclusion in the Officer Grade due either to misunderstanding or to inadvertence. Further the process of formation of the Indian Economic Service was prolonged for a number of years and the need for appointing more officers in the department concerned during that lengthy period also arose. Gradually several posts carrying economic and statistical functions were created. Such posts were required to be filled in accordance with the rules. But a large number of persons were appointed in the feeder posts and thereafter promoted also, although temporarily, and allowed to continue for 15 to 20 years. Such promotions were challenged on the ground that they were recruited in violation of the rules. The Supreme Court said that initial invalidity of the appointment was of no consequence and it may not be possible to say that such promotions were not permissible.

4. One of us in the case of *Shamsuddin* 1991 W. L.R. 471 has considered the case of a person, who was appointed in the feeder category of the Tamil Nadu Judicial Ministerial Service in the State of Tamil Nadu on temporary basis without following the procedure for recruitment. He was continued in the said post, given all the benefits of the service and promoted to the higher grades of the same service from time to time. When, however, his case for promotion as *Sarishtadar* came up, the so called validity of his initial appointment was used against him to deny promotion to *Sarishtadar*. This Court said, 'It is a case in which there is no dispute thus to the *de facto* status of the petitioner. The respondent has chosen to dispute his *de jure* status. It is not a case in which there is even a remote suggestion that the petitioner had any role to play in the matter of his selection for appointment as Head Clerk, on promotion in the year 1961 and confirmation in the year 1965 or thereafter in the upgradation of the post held by him and his continuance in the upgraded post without any break. It is a case, therefore, entirely of the petitioner's ineligibility never allowed to stand in his way except until the respondent found it reasonable to reject his candidature first while he was the Chief Metropolitan Magistrate and again, when he happened to be the Principal

Judge, City Civil Court, Madras. One of the Principles which is firmly established is that no person in authority would be allowed to use any alleged infirmity in the initial appointment to exclude any person from the field of consideration when otherwise there is nothing to show that the person concerned is not qualified for consideration. It is also not the case of the respondent that the petitioner is not presently holding or was not holding a post in Class 3 of Category 1 and that in that category his position was for any reason below any other person selected for promotion to the post of Sarishtadar. R. 6(b) states that appointments to categories 1 to 4 of Class I shall be made from a consolidated seniority list maintained for all City Courts and Offices governed by these rules. Where was the option to him to go beyond the seniority list and find out otherwise eligibility of the petitioner Except for something oblique no one is expected to go behind the field of choice and the rules that govern the selection for promotion. I, however, do not propose to make anything adverse to the respondent as on this, on two settle principles.

(1) that factum valet is a rule already extended by the Court to a de facto situation in relation to a contract of service existing for a period more than one decade, and

(2) that a person holding a post without any valid appointment may be removed from the said post by a competent authority, but so long as he holds such post he cannot be said to be ineligible to hold that post for the purpose of consideration of his case for future promotion, the respondent's order has to be quashed.'

5. Coming to this case, the learned single Judge has rightly held that the Act empowered the State Government to frame regulations with retrospective effect, a finding which has not been challenged before us. The impinged order of the Government, however, has only, as observed by us above, recognised the de facto existence of persons, who were qualified under the Board's resolution dated December 2, 1965 in the service of the Board but not under the Service Regulations approved by the State Government on May 14, 1969 (Board's resolution dated December 8, 1965 was however approved on June 17, 1975). Such employees were recruited by the Board on a clear representation that they fulfilled the requisite qualification. There is no infirmity thus in the impugned order.

The learned single Judge has rightly dismissed the writ petition. There is no merit in this appeal.

6. The appeal is accordingly dismissed.

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