

M. Reethammal and anr. Vs. State of Tamil Nadu and ors.

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Court : Chennai

Decided On : Jan-06-1992

Reported in : (1992)1MLJ440

Appellant : M. Reethammal and anr.

Respondent : State of Tamil Nadu and ors.

Advocate for Pet/Ap. : Mr. Pe

Judgement :

ORDER

Bakthavatsalam, J.

1. W.P.No.11762 of 1989 is filed for the issue of a writ of mandamus to direct the 4th respondent to promote the petitioner to the post of Assistant with effect from 23.8.1987 and consequently pay all the arrears of salary.

2. W.P.No.6693 of 1990 is filed by the petitioner college, who is the 4th respondent in W.P.No.11762 of 1989, for the issuance of a writ of declaration to direct that Rule 11(4)(i) and (ii) of the Rules framed under Tamil Nadu Private Colleges (Regulation) Act, 1976 is ultra vires Constitution of India, illegal and void in so far as the petitioner's institution, which claims as a minority institution, is concerned.

3. The short facts are: The petitioner is W.P. No. 11762 of 1989, who is the 4th respondent in W.P.No.6693 of 1990, has joined St. Jude's College (the 4th respondent in W.P. No. 1 1762 of 1989) as Typist in the year 1979. It is stated that she has passed the Account Test for Subordinate Officers Part I and she is fully qualified to hold the post of Assistant: It is further stated that by the power vested under Section 53 of the Tamil Nadu Private Colleges Act, Tamil Nadu Private Colleges (Regulation) Rules, 1976, were framed and Rule 11 of the said Rules provides for the conditions of service of teachers and other persons working in the private colleges. It is further stated that an amendment to Rule 11(4)(i) is brought in by G.O.Ms.No.60, Education Department, dated 20.1.1986 by which promotions in respect of non-teaching staff shall be made strictly on seniority basis. According to the petitioner in W.P.No.11762 of 1989, the said Rules are fully applicable to the 4th respondent college. It is further stated that in case of grievances of teachers and other persons working in private colleges, they are given the right of appeal under Section 20 of the Tamil Nadu Private Colleges (Regulation) Act, (hereinafter referred to as the 'Act'), that by virtue of Section 24(3) of the Act, the appeal provisions are exempted in respect of minority colleges and that the 4th respondent college is claiming protection as a minority college. It is further stated in the affidavit filed in support of the writ petition that the norms for the appointment of non-teaching staff in respect of private colleges were revised by the 1st respondent by G.O.Ms.No.796, Education, dated 25.7.1985, that as per the said revision of norms the 4th respondent is entitled to have two posts of Assistants, that the 3rd respondent herein approved two posts of Assistants in respect of the 4th respondent college in the year 1977, that consequent on the revision of norms an Assistant by name Gopalan Nair was promoted, that both posts of Assistants became vacant and that as per Rules 11(4)(i) of the Tamil Nadu Private Colleges (Regulation) Rules, 1976 (hereinafter referred to as 'Rules') the petitioner in W.P.No.11762 of 1989 is entitled to be promoted as she is the senior most non-teaching staff and fully qualified to hold that post. It is alleged in the affidavit that contrary to the provisions of the Act and Rules, the 4th respondent College recommended the name of the one J. Soosadima who was junior to the petitioner having joined the 4th respondent college on 5.8.1980 as Laboratory Assistant and subsequently got promoted as Junior Assistant on

9.2.1981 to the said post. It seems that coming to know of the said proposals, the petitioner sent a representation dated 23.4.1987 through proper channel to the 3rd respondent and ultimately approval was refused for both the names sent by the 4th respondent college and it was informed that the petitioner should be promoted in accordance with the seniority basis. It is further stated that even then, the 4th respondent college was not willing to abide by the Rules which were not only mandatory but fully binding on them. The petitioner, after having sent representation on 30.9.1987 and 7.9.1988 came to know that the 4th respondent College approached the 1st respondent Government for relaxation of Rules as a special case to the 5th respondent to appoint the 5th respondent directly to the post of Assistant. It is further stated in the affidavit that by G.O.Ms.No.1051, dated 11.8.1989, an order has been passed approving the appointment of the 5th respondent. On coming to know of the said fact, the petitioner has sent a petition to respondents 1 to 3 on 23.8.1989. It is further stated in the affidavit that actions of the respondents in appointing the 5th respondent directly to the post of Assistant is not only illegal but also ultra vires of the Rules. Since the Act does not provide for any appeal, in respect of such contingencies and in view of the exemptions granted, the petitioner, has come up before this Court with the prayer stated supra.

4. The 4th respondent college has filed WP.No.6693 of 1990 making the following allegations.

It is averred in the affidavit that the college was established and administered by the Latin Catholic Fisherman Educational Society and that the college has been recognised as a minority institution. It is further stated that the petitioner has appointed the 5th respondent as Assistant in the college with effect from 2.3.1987, that after considering the entire facts, the 1st respondent government has granted necessary relaxations in G.O. Ms. No. 105, dated 11.8.1989 approving the appointment of the 5th respondent with effect from 2.3.1987 and that the petitioner in W.P.No.11762 of 1989, who is now working as Typist in the college, has claimed that she ought to have been promoted as Assistant in the place of the 5th respondent. It is further stated in the affidavit that the petitioner in W.P.No.11762 of 1989, who is the 4th respondent in this writ petition, has made her claim based on Rule 11(4) of the Rules framed under the Act, 1976 and that since the 4th respondent has filed the writ petition praying to promote her to the post of

Assistant, the College is challenging Rule 11(4) of the Rules framed under the Act, 1976. It is further stated that under Article 30 of the Constitution all the minorities shall have the right to establish and administer educational Institutions of their choice, that to have a better and excellent administration, only those employees who will be of help to the institution can alone be selected and that the right to decide the suitable person for being appointed to any post should be with the right should not be with any other authority including the government. It is further stated that the appointment and promotions of the staff both teaching and non-teaching relate to the internal administration and management of the institutions and that such right of the minority institutions cannot be interfered with by the State or any other statutory authority. It is further stated that under Article 30(1) of the Constitution the right of the minority is to establish and administer the educational institution of its choice and that looking at that angle the said Rule 11(4) of the Rules is ultra vires Constitution and has to be struck down. In so far as Rule 11(4) of the Rules, it is stated that seniority alone is to be taken into consideration in respect of non-teaching staff and that it is discriminatory. It is further stated in the affidavit that the non-teaching staff like an Assistant or a Typist is also a very responsible post and that to deprive the management to choose an able person alone, the said Rule 11(4) has been adopted and that it is violative of Article 30 of the Constitution. It is further stated in the affidavit that similar sections in other enactments has been struck down by this Court and that the same reasons have to be adopted regarding Rule 11(4) of the Rules framed under the Tamil Nadu Private Colleges (Regulations) Act, 1976. It is also stated in the affidavit that in so far as there is no committee for minority institution, Section 11 of the Act and the provisions of Rule 11(4)(i) and (ii) will not apply. It is also pointed out that a Full Bench of this Court has held that the school committee referred to in Rule 15 of the Tamil Nadu Recognised Private Schools (Regulations) Act will not apply to minority educational institution and as such the same principles will have to be applied in so far as the petitioner institution is concerned. It is further stated that the 5th respondent was working in the college even before such approval was given and the government has passed orders that the ex-servicemen should be preferred in all jobs. In view of that, the petitioner prays for declaration declaring that Rule 11(4)(i) and (ii) of the Rules framed under the Act, 1976 is ultra vires

constitution,

5. Notice of motion has been ordered by I.C. Venkataswami, J. on 29.8.1989 in W.P. No. 11762 of 1989. W.P.No.6693 of 1990 has been admitted by S. Ramalingam, J. on 15.6.1990. A counter affidavit has been filed by the 4th respondent college in W.P. No. 11762 of 1989 and a counter affidavit has been filed by respondents 1 to 3 in W.P.No.6693 of 1990.

6. It is claimed in the counter affidavit filed by the 4th respondent college in W.P. No. 11762 of 1989 that with regard to the appointment of the 5th respondent, he is an ex-service man having put in 21 years of service in India Air Force having passed S.S.L.C. Account Test for Subordinate Officers Part I. It is also claimed that the 5th respondent was appointed as Assistant on 9.6.1986, that since the 5th respondent was directly appointed as Assistant, the matter was forwarded to the Government for ratification and that the Government after making a thorough enquiry with all concerned departments approved the appointment of the 5th respondent as Assistant in the 4th respondent college as a special case. It is further claimed in the counter affidavit that the approval of the college was accorded by the government in G.O.Ms. No. 1051, dated 11.8.1989 and as such the appointment of the 5th respondent is valid in law. It is further claimed in the counter affidavit that the 1st respondent has no jurisdiction or power to interfere with the administration of the college with regard to the appointment and promotion of teaching and non-teaching staff of the college, which is a minority institution.

7. In the counter-affidavit filed by respondents 1 to 3 in W.P. No. 6693 of 1990, it is claimed that the government has in G.O.Ms. No. 1051, Education, dated 11.8.1989 accorded permission to approve the appointment of the 5th respondent directly to the post of Assistant with effect from 2.3.1987 as a special case. It is pointed out in the counter affidavit that consequent to the promotion of one P. Gopalan Nair with effect from 2.3.1987, the said post has become vacant in the college, and that the college has to promote the Typist, the 4th respondent in W.P.No.6693 of 1990, in any one of the two vacancies if her claim that she is the senior most is correct. A reference to Rule 11(4)(i) of the Rules is also made in the

counter affidavit. It is further claimed in the counter affidavit that as per the existing Rule, a post in the non-teaching staff is to be filled up from senior most persons in the lower category, that the staff working in an institution will definitely have better knowledge of government and management Rules and as such the 5th respondent has been appointed.

8. Mr. Peppin Fernando, the learned Counsel appearing for the petitioner in W.P.No.6693 of 1990 refers to various provisions of Tamil Nadu Private Colleges Act, 1976. He also refers to Rule 15(4)(i) of the Rules, under which promotions in respect of teaching and non-teaching staff, shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal and in respect of non-teaching staff promotions shall be made on seniority basis provided other conditions regarding qualifications are satisfied. According to the learned Counsel for the petitioner, Chapter III of the Act, 1976 seeks of constitution of college committee and its functions. Section 11 of the Act states that every private college shall have a college committee which shall include the principal of the private college and this section will not apply to a minority college. According to the learned Counsel where there is no committee, Sub-rule (4) of Rule 11 will not apply to the concerned college. According to the learned Counsel, assuming for a moment that Rule 11(4) will apply, the principles laid down by a Division Bench of this Court in *Association of University Teachers v. State of Tamil Nadu* 1990 W L.R. (Supp.).51, will apply to the facts of the case. He further relies on the judgment in *Ethiraj v. State of Tamil Nadu* (1990)1 M.L.J. 284, to substantiate his contention that Rule 11(4)(i) offends Article 30(1) of the Constitution.

9. Mr. K. Chandru, the learned Counsel appearing for the petitioner in W.P.No.11762 of 1989 contends that Rule 11(4) of the Rules is framed in pursuance of Section 17 of the Act, 1976 and points out that this is a case of non-teaching staff whereas all cases decided by the Supreme Court as well as by this Court are with regard to teaching staff and as such the said Rule 11(4) will not offend Article 30 of the Constitution and it is perfectly valid. He also contends that the 5th respondent is not qualified to the post of Assistant. He further points out an unreported decision of a Division Bench of this Court in *L. Paulraj v. The District Educational Officer, Thanjavur and Ors.* WA. No. 922 of 1990 dated 22.1.1991, and contends that it is an appointment of a Headmaster and as such that principle

will not apply to the facts of this case. Learned Counsel further points out that in so far as conditions of services are concerned, Section 17 of the Act is not excluded by Sub-Section (3) of Section 24 so as not to apply to minority institution. He further contends that in so far as the said Rule has been made in pursuance of power conferred under Section 17 of the Act is concerned, it is valid. He relies upon the decision in *Frank Anthony Public School Employees' Association v. Union of India* : [1987]1SCR238 , and contends that statutory measures regulating terms and conditions of service of employees of minority educational institutions for maintaining educational standards and excellence would not offend Article 30(1) of the Constitution. The learned Counsel points out a passage in the abovementioned judgment at page 730 in support of his argument. He further relies upon the decision in *All Saints High School v. Government of Andhra Pradesh* : [1980]2SCR924 , with regard to scope and ambit of Article 30 of the Constitution. It is also pointed out by the learned Counsel that there is no provision in the Act enabling the government to relax any of the conditions as contended by the management in this case. It is further pointed out by the learned Counsel that the categories of teaching staff and non-teaching staff are entirely different and as such there is no question of violation of Article 30 of the Constitution as contended by the learned Counsel for the college. He relies upon the decision in *Mrs. M.B. Lourdes Menezes v. State of Goa* (1980)2 All. ISLJ 204, for the said proposition. He further argues that Rule 11(4)(i) of Rules is severable and points out that it excludes the minority institution in certain categories and that in so far as the second portion of Rule 11(4)(i) is concerned, it is severable for the earlier portion and it cannot be said that the latter portion is not valid. He further contends that Sub-rule (4)(i) of Rule 11 need not be applied in case of non-teaching staff.

10. I have considered the arguments of Mr. Peppin Fernando the learned Counsel appearing for the petitioner in W.P.No.9963 of 1990 and of Mr. K. Chandru, the learned Counsel appearing for the petitioner in W.P. No. 11762 of 1989.

11. The issue to be decided before this Court, on the facts and circumstances of the case, is whether Rule 11(4)(i) as amended is valid, in the light of Article 30 of the Constitution. Chapter 3 of the Act, 1976 provides for a college committee and its functions. Section 11 of the Act itself will not apply to a minority college

because every private college should have a college committee, except a minority college. Chapter IV of the Act provides for terms and conditions of service in colleges. Section 15 of the Act provides for qualifications of teachers and other persons (underlying is mine) employed in private colleges. Section 16 of the Act provides for appointment of teachers and other persons in private college (underlying is mine). Section 17 of the Act provides for conditions of service etc. of teachers and other persons employed in private colleges. So, the entire Chapter IV makes a distinction between teachers and other persons. Now coming to Section 24 of the Act, Sub-Section (3) of Section 24, Sub-Section (2) of Section 18 and Sections 19 to 22 shall not apply to a minority college. So, the effect is that Section 17 of the Act is applicable to a minority college and it reads as follows: The Government may make rules in consultation with the university regulating the number and conditions of service (including promotion, pay, allowances, leave, pension, provident fund, insurance and age of retirement and rights as respects disciplinary matters but excluding qualifications) of the teachers and other persons employed in any private college....

Under the power vested under Section 17 of the Act, Rule 11 of the Tamil Nadu Private Colleges (Regulation) Rules, 1976, is framed which provides for conditions of service etc. of teachers and other persons employed in private colleges (underlying is mine). Sub-rule (4) of Rule 11 speaks of promotion. In the latter part of Rule 11(4)(i) promotion of non-teaching staff is mentioned. It shall be made on seniority basis provided other conditions regarding qualifications are satisfied. Sub-rule (1) of Rule 11 states that the number of teachers employed in a college shall not exceed the number of posts fixed by the Director from time to time, with reference to the academic requirements and norms of work-load prescribed by the respective Universities and over-all financial considerations. I am not able to accept the arguments of Mr. K. Chandru, the learned Counsel appearing for the petitioner in W.P. No. 11762 of 1989 that in this case the question to be decided is with regard to non-teaching staff and that the principles laid down by Division Bench of this Court as well as Supreme Court will not apply, since no case has been decided so far regarding non-teaching staff. I am not able to accept the contention of the learned Counsel that there is a distinction between the case of a Headmaster and non-teaching staff. The right conferred by Article 30(1) of the

Constitution is the right to establish and administer educational institutions of their choice by the minorities. The expression 'administer' in the context of Article 30(1) means the right to man-age and conduct the affairs of the institution. If such a construction is made offend Article 30 of the Constitution. Maybe, the teaching staff and non-teaching staff are different categories. But that will not take away the right of the minority college to administer its affairs. Whether it is teaching staff or non-teaching staff all come under the administration of the college and the right to administer will include the right to manage and conduct the affairs of the institution including the appointment of non-teaching staff. In my view, the principles laid down in *Association of University Teachers v. State of Tamil Nadu* 1990 WL.R. (Supp.) 51, will squarely apply to the facts of this case also. It is true that the right conferred on the, religious and linguistic minorities to administer educational institutions of their choice is not an absolute right. The right to administer is not the right to mal-administer. However, in so far as the appointment of non-teaching staff is concerned, I am of the view that if the amendment is allowed to remain, it will be infringing the right guaranteed to the minorities under Article 30 of the Constitution. As pointed out by the Division Bench of this Court in W.A.No.972 of 1990 dated 22.1.1991 each case has to be decided on its own facts, taking note of the implication of the act, rule, regulation, order or proceeding which has come to be made and the impact, it may have on the right guaranteed to minority institutions under Article 30(1) of the Constitution of India. Here is a case where Rule 11(4)(i) of Rules contemplates that seniority alone has to be considered in matters of promotion for non-teaching staff, where merits and ability are approximately equal in a minority institution. Surely this imposition will curtail the freedom of choice of the minority institution, when it wants a person with merit and ability even in their non-teaching staff. I do not think a Rule can be made, curtailing the right of the minority institution, stating that seniority alone shall be considered in case of promotions. When a minority institution would like to go by certain standards and norms in appointing non-teaching staff, that right should be of the widest amplitude and is untrammelled. In my view, the Rule as framed with regard to non-teaching staff cannot stand for a minute for scrutiny of this Court in the light of Article 30 of the Constitution and also in view of the principles laid down in an unreported decision in W.A. No. 972 of 1990, dated 22.1.1991 which considered

the earlier decisions on this aspect of this Court and the apex court of the land. I am not convinced by the distinction sought to be made by Mr. K. Chandru, the learned Counsel appearing for the petitioner in W.P.No.11762 of 1989 between the teaching and the non-teaching staff, when considering the scope of Article 30 of the Constitution with regard to the right of a minority institution to administer a college. In view of my conclusion arrived at, the latter portion of Sub-rule (4)(i) of Rule 17, as amended in G.O.Ms.No.60, Education (RD) Department, dated 20.1.1986 has to be struck down in so far as it offends Article 30 of the Constitution. Accordingly, the W.P.No.6693 of 1990 will stand allowed.

12. Apart from that, it is found that the government has passed an order in G.O. Ms. No. 1051, Education, dated 11.8.1989 approving the appointment of the 5th respondent in both writ petitions. In so far that government order has not been challenged by the petitioner in W.P.No.11762 of 1989, I do not think a mandamus can issue in the W.P. No. 11762 of 1989. So, in view of the conclusion arrived at in W.P.No.6693 of 1990 with regard to validity of Rule. 11(4)(i) of Rules and the fact the government order in G.O.Ms.No.1051, Education, dated 11.8.1989 approving the appointment of the 5th respondent has not been challenged by the petitioner in W.P.No.11762 of 1989, nothing survives in this writ petition and accordingly W.P.No.11762 of 1989 will stand dismissed. However, there will be no order as to costs in both writ petitions.