

CASE NO.:
Appeal (civil) 2533 of 2007

PETITIONER:
S. Sethuraman

RESPONDENT:
R. Venkataraman & Ors

DATE OF JUDGMENT: 15/05/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 2533 of 2007
[Arising out of S.L.P. (C) No. 16627 of 2006]

S.B. SINHA, J.

1. Leave granted.

2. Recruitment/Promotion to the post of Headmaster in an aided or unaided school in the State of Tamil Nadu is governed by Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 and Tamil Nadu Private Schools (Regulation) Rules, 1974 (Rules), Rule 15(4) whereof reads as under:-

"15(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 from 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, Teachers' Training Institutions setting out the reasons for such appointment. In respect of corporate body running more than one school, the schools under that body shall be treated as one unit for purpose of the rule.

(d) Appointment to the post of Headmaster of Higher

Secondary School shall be made by the method specified in clause (ii) either from the category of Headmasters of High Schools or Teachers' Training Institutes or from the category of Post-Graduate Assistants in academic subjects or Post-Graduate Assistants in Languages provided they possess the prescribed qualifications."

3. Rule 15(4) of the Rules provides that promotion shall be made on ground of merit and ability, seniority being considered only when merit and ability are approximately equal. Admittedly, the Managing Committee of the School made comparative evaluation of merit and ability of the appellant vis-à-vis respondent no. 1 and opined that the merit and ability of the former is better than the latter. Some other factors including the one that the first respondent was holding the post of Secretary and correspondent in another school were also taken into consideration. Appellant was, therefore, appointed to the post of headmaster in the school.

4. An appeal was preferred thereagainst before the Joint Director of School Education by the said respondent. The said appeal was, however, dismissed.

5. A writ petition bearing No. 20183 of 1992 was filed by the first respondent which was allowed by reason of a judgment and order dated 21.12.1998 by a learned Single Judge of the High Court.

6. In an appeal preferred thereagainst viz., Writ Appeal No. 2058 of 1999, however, a Division Bench remitted the matter back to the Joint Director of School Education (Higher Secondary) by an order dated 14.07.2000 stating:-

"The learned counsel appearing on behalf of the fourth respondent had made such a specific statement in the Court and therefore by consent of both the counsel, the matter is being remanded to the Joint Director of School Education (Higher Secondary), Directorate of School Education, College Road, Chennai. He will now go into the question of the inter se merits alone strictly within the scope of Rule 15 of the Tamil Nadu Recognized Private Schools (Regulation) Act, 1973 (Tamil Nadu Act 29 of 1974). If the parties so feel they shall be entitled to be heard by the first respondent. The first respondent shall decide the question with reference to the date of the availability of the post i.e. 23.07.1992 and shall proceed to decide whether on that date it was the petitioner or the fourth respondent who could be appointed as a Headmaster on the basis of inter se merits etc."

7. By an order dated 2.11.2000, the second respondent opined that the merit and ability of both the appellant and the first respondent were equal and, therefore, since the first respondent was senior, he should be selected for the post of Headmaster as per the provisions of the Act and the Rules.

8. Aggrieved by and dissatisfied with the said order, the appellant filed a writ petition marked as WP No. 19445 of 2000. The learned Single Judge allowed the said writ petition holding that except under extraordinary circumstances the authorities under the Act should be slow in interfering with the selection made by the school management to the post of headmaster the same being very vital for the day-to-day management of the school.

9. The learned Judge was of the view that the second respondent had omitted to deal with the overwhelming materials which were considered by the school committee while selecting the appellant for the post of

headmaster.

10. The Court further held that the opinion of the Managing Committee should not ordinarily be set aside by the authority stating:-

"10. When the case on hand is considered in the light of the above stated principles laid down by the Supreme Court, there can be no two opinion that except under extraordinary circumstances where it is demonstrated to the satisfaction of the authorities concerned that the selection was made giving a complete go by to the normal method in the assessment of merit and ability of the different claimants, the authorities should be very slow in interfering with the selection so made by the school management to the post of head master as that would be very vital for the day-to-day management of the school as the role of a Head Master involves the administration of the school including the supervision and control of teaching and non teaching staff, students and other aspects concerning the school."

It was held:-

"The order of the first respondent in attempting to equate the status of the petitioner and the 4th respondent by considering certain factors alone being the relevant factor namely the dual role of the 4th respondent in order to ultimately hold that since because the 4th respondent is senior, his appointment should be made cannot be accepted. In fact, in the proceedings of the selection committee dated 3.8.1992, a detailed consideration has been made as regards the merits of the petitioner on various aspects. Unfortunately, the first respondent has omitted to deal with such superfluous and overwhelming materials which were considered by the third respondent school committee while selecting the petitioner for the post of head master. When such consideration which weighed with the school committee had been really considered by the first respondent in their proper perspective, certainly there would have been no scope for the first respondent to equate the 4th respondent with the petitioner. So, in view of the above said reasons and in the light of the fact that the 4th respondent was holding the position of Secretary and Correspondent of another middle school during the relevant point of time, the non consideration of the impact of such a position held by the 4th respondent in the event of he being appointed to the post of head master by the first respondent would be a detrimental factor making the impugned order invalid in law....."

11. The Writ Petition of the appellant was, thus, allowed.

12. The Order of the learned Single Judge, however, was set aside by a Division Bench of the said High Court inter alia opining:-

(i) As the interference with the decision of the selection committee was made at the instance of the High Court, the appellant could not claim that the statutory authority is not entitled to interfere with the decision of the committee very lightly.

(ii) Although in the first round of battle, appellate authority did not choose to interfere with the decision of the school committee, it was constrained to interfere in the second round of the battle, on account of the order of remand passed by this court.

(iii) Having invited such an assumption on merits through directions of this Court, it is not open to the first respondent to question the jurisdiction of the second respondent to go into the merits of the

case.

(iv) Parties hereto having submitted themselves to the jurisdiction of the appellate authority to assess their relative merits, the appellant is estopped from contending that the decision of the school committee cannot be lightly interfered with.

(v) After having submitted themselves to an assessment by the second respondent, it is also not open to the parties to assail the final decision taken by the second respondent, on merits.

(vi) The learned Judge was also carried away by the fact that the appellant functioned as the Correspondent of another middle school only at the relevant point of time in 1992. This fact has also been taken into account by the second respondent, in his order dated 2.11.2000. Therefore the second respondent has actually taken into account all relevant factors in coming to the conclusion in his order dated 2.11.2000.

(vii) After finding that both the appellant and the first respondent are equally well placed in the matter of merit and ability, the second respondent naturally applied the principle of seniority, since Rule 15(4)(i) enables him to consider seniority where merit and ability are equal. Therefore, the order of the second respondent does not suffer from any illegality.

(viii) Respondent No. 1 was aged 50 years at the time of the writ petition was filed in the year 2000 whereas the appellant was aged 44 years. And in view of the pending litigation for the past 14 years, no penalty could reach in the matter of promotion, the post of headmaster in the fourth respondent's school and the appellant is now left with two years of service.

13. Mr. K. Parasaran, learned senior counsel appearing on behalf of the appellant in assailing the said judgment submitted that the Division Bench of the High Court committed a serious error insofar as it failed to take into consideration that the appellate authority in arriving at its decision not only failed to take into consideration the relevant facts, but in fact based its decision on irrelevant factors.

14. Mr. T.L.V. Iyer, learned senior counsel appearing on behalf of respondent No. 4, on the other hand, urged that although ex-facie the order of the appellate authority dated 2.11.2000 would show that he had taken into consideration some factors which may not of much relevance but the real consideration therefor is evident from following findings arrived at by it. "Regarding special merit, R. Venkataraman though a Tamil Teacher had undergone computer training. He obtained a certificate in Health and Hygiene from Poona. He obtained many certificates in the subject Tamil in which he teaches. He served as an editor for the monthly magazine "Thondu" by the Gandhi Peace Foundation, Chidambaram. He participated as a spectator in the fifth World Tamil Conference held in 1981. He conducted Literary Association meetings. He won prizes in essay and recitation competitions. He involved himself in religious service, musical service and sarvodaya service and human relation service. He served in Home-guards. He acted in dramas.

Similarly, the science teacher Thiru Sethuraman participated in many District level, State level and Southern India level science and Technology exhibitions and won many prizes. He participated in many researchers organized by Indian Science Congress Association and similar organizations. He had undergone Inservice-Training, Scout Training and Computer Training. He wrote many books. He has also served as Assistant Commissioner of Bharath Scouts and Guides. After registration as a Ph.D

Scholar he submitted the synopsis. He acted in dramas.

Based on special merit and ability each one excels in his specific field. The Tamil teacher Thiru R. Venkataraman has a special ability in his field. He has speaking and writing skills. Similarly Thiru Sethuraman has done researches on science related projects and excels in that field by obtaining many credits. Both of them had undergone computer training. As science teacher, Thiru Sethuraman has developed a Computer Software on "How to teach Chemistry through Computer". Thiru Venkataraman, similarly conducted Literary Association meetings and literary improvement meetings. This literary service and teaching chemistry through computer are special features in class-rooms. Just like Thiru Sethuraman possessing many titles and appreciations in the field of science Thiru Venkataraman possesses titles and appreciations in the field of Tamil literature. Thiru Sethuraman served as Assistant Commissioner in Scouts, served in Homeguards for five years. Thiru Sethuraman and Thiru Venkataraman acted in dramas and won appreciation. Just like Thiru Sethuraman excelled in the field of science and related researches Thiru Venkataraman excelled in social service, literary service, musical service and religious service.

Thiru Sethuraman got Doctorate degree after 1992.

Thiru Venkataraman served as Secretary/Correspondent in some other school obtained concurrence from the Secretary of National Higher Secondary School (in 1992). This did not divert his attention as a Postgraduate Teacher which is understood from the results in Tamil (100%). Passing of Accounts Test is not applicable to aided school teachers.

Considering the pass-percentage in their subjects Thiru Venkataraman had served better than Thiru Sethuraman.

Thiru S. Sethuraman

1987-88
1988-89 Five years
1989-90 98%
1990-91
1991-92

Thiru R. Venkataraman

1987-88
1988-89 Five years
1989-90 100%
1990-91
1991-92"

15. Mr. L.N. Rao, learned senior counsel appearing on behalf of the management of the School brought to our notice that a charge memo has been issued against the appellant herein for alleged commission of serious misconduct during the period when he was occupying the post of Headmaster.

16. The terms and conditions of service of the teachers of an aided school are governed by the Act and the Rules framed thereunder. The Managing Committee of the School in terms of Rule 15 of the Rules are enjoined with a duty to fill up the post of Headmaster primarily on the basis of 'merit and ability'. Indisputably, the Committee while appointing a person must take into consideration the merit and ability of the candidate

alone and only when the respective merit and ability of two candidates are equal, seniority will have some role to play. Respondent No. 1 is senior to the appellant only by 13 days. At the relevant point of time, the appellant had passed the prescribed Accounts test for Headmasters conducted by the Tamil Nadu Public Service Commission in the year 1989. Before us various other factors have been placed for the purpose of showing that apart from the fact that the appellant was more qualified, the respondent No. 1 having regard to his past services should not have been considered suitable for appointment to the said post.

17. While exercising the appellate jurisdiction, the appellate authority has indisputably a plenary power. It may not only consider the respective educational qualifications and other activities of the respective candidates for the purpose of arriving at a decision as to which of the two candidates had better merit and ability, but it should exercise its jurisdiction keeping in view the views of the Managing Committee. If two views are possible, ordinarily, the view of the Managing Committee should be allowed to prevail.

18. It is unfortunate that the High Court failed to apply the correct principles of law in this case. Each one of its reasons, in our considered opinion, is wholly untenable. It suffers from misdirection in law.

19. As noticed hereinbefore, the matter was remitted to the Joint Director of School Education by the High Court with the consent of the parties but the High Court in its Order categorically directed the said Authority to consider the matter strictly within the scope of Rule 15 of Rules. The High Court did not and could not enlarge the scope of the appeal.

20. If the Appellate Authority thought otherwise, its order would not be sustainable. It was, therefore, obligatory on the part of the High Court to apply its mind on the jurisdictional question raised by the appellant. It should have been tested the orders of the Appellate Authority and consequently the learned Single Judge of the High Court on their own merits and not de'hors the same.

21. When the extant rule operating in the field was referred to by the High Court, it should have applied the same. What, therefore, could have been done by the appellate authority was to follow the provisions of the Rules and not to act de'hors the same. He was exercising a quasi judicial function. As an appellate authority and acting under a statute, indisputably he could not have failed and/or refused to take into consideration the relevant factors and base its decision on irrelevant factors or on extraneous consideration.

22. Such a decision keeping in view the scope and ambit of the power of judicial review vested in the High Court under Article 226 of the Constitution of India could have been interfered with on the ground that the order impugned before it contained errors apparent on the face of the records. Whereas the learned Single Judge of the High Court in passing its Order took the said principle into consideration, the Division Bench in our opinion failed to do so, Not only despite its attention having been drawn to a number of grounds leading to passing of the Order impugned before it became vitiated, the High Court applied the principle of estoppel against the appellant and opined that having submitted himself to the jurisdiction of the appellate authority, he could not be permitted to question the legality of the same. The approach of the High Court in our opinion was wholly erroneous. Principle of estoppel has no application in a case of this nature. Appellant did not and in fact could not confer upon an authority a jurisdiction which he did not derive under the statute. If jurisdiction cannot be conferred by consent, it cannot clothe the authority to exercise the same in an illegal manner. The jurisdiction of the appellate authority pursuant to the order of the Division Bench, which it will bear repetition to state, was passed on consent of the parties is not in dispute but only because the appellant consented to re-examination of the matter by the appellate authority, which it was otherwise entitled to, the same by itself could not have been found to

be a ground for his becoming ineligible to challenge the final order passed by the appellate authority when a large number of jurisdictional errors were committed by it and were otherwise apparent on the face of the records. The Division Bench of the High Court in our opinion, therefore, was not correct in taking the aforementioned view.

23. We may notice that the appellate authority while judging the merit and ability of the first respondent, took into consideration the following:-

- "1. Though a Tamil Teacher, had undergone computer training.
2. Obtained certificate in Health and Hygiene from Poona.
3. Obtained many certificates in the subject of Tamil in which he teaches.
4. Served as Editor for the monthly magazine "Thondu" by the Gandhi Peace Foundation, Chidambaram.
5. Participated as a spectator in the fifth World Tamil Conference held in 1981.
6. Conducted Literary Association meetings.
7. Won prizes in essay and recitation competitions.
8. Involved himself in religious service, musical service, sarvodaya service and human relation service.
9. Served in Home-guards.
10. Acted in dramas.
11. Has special ability in his field.
12. Has speaking and writing skills.
13. Undergone computer training.
14. Conducted Literary Association meetings and literary improvement meetings.
15. Possesses titles and appreciations in the field of Tamil literature.
16. Acted in dramas and won appreciation.
17. Excelled in social service, literary service, musical service and religious service.
18. Served as Secretary/Correspondent in some other school after obtaining concurrence from the Secretary in 1992, which did not divert his attention as a Postgraduate Teacher, which is understood from the results in Tamil (100%).

19. Passing of Accounts Test is not applicable to aided school teachers.

20. Passing percentage in his subject of Tamil for 5 years (i.e. 1987-88 \026 1991-92) is 100%."

24. Most of the considerations which weighed with it were irrelevant.

25. In Narinder Mohan Arya v United India Insurance Co. Ltd. and Others [(2006) 4 SCC 713], this Court held:-

"44. The judgment and order of the learned Single Judge suffers from several infirmities. He had observed that "the disadvantages of an employer as such acts are committed in secrecy and in conspiracy with the person affected by the accident". No such finding has been arrived at even in the disciplinary proceedings nor was any charge made out as against the appellant in that behalf. He had no occasion to have his say thereupon. Indisputably, the writ court will bear in mind the distinction between some evidence or no evidence but the question which was required to be posed and necessary should have been as to whether some evidence adduced would lead to the conclusion as regards the guilt of the delinquent officer or not. The

evidence adduced on behalf of the management must have nexus with the charges. The enquiry officer cannot base his findings on mere hypothesis. Mere ipse dixit on his part cannot be a substitute of evidence.

45. The findings of the learned Single Judge to the effect that "it is established with the conscience (sic) of the Court reasonably formulated by an enquiry officer then in the eventuality" may not be fully correct inasmuch as the Court while exercising its power of judicial review should also apply its mind as to whether sufficient material had been brought on record to sustain the findings. The conscience of the court may not have much role to play. It is unfortunate that the learned Single Judge did not at all deliberate on the contentions raised by the appellant. Discussion on the materials available on record for the purpose of applying the legal principles was imperative. The Division Bench of the High Court also committed the same error."

26. In *Indian Airlines Ltd. v Prabha D. Kanan* [2006 (12) SCALE 58], this Court held:-

"46. A judicial review of such an order would be maintainable. In a case of judicial review, where no appeal is provided for, the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India would not confine its jurisdiction only to the known tests laid down therefor, viz., illegality, irrationality, procedural impropriety. It has to delve deeper into the matter. It would require a deeper scrutiny.

47. We may notice that keeping in view the situational changes and, particularly, outsourcing of the sovereign activities by the State, this Court has been expanding the scope of judicial review. It includes the misdirection in law, posing a wrong question or irrelevant question and failure to consider relevant question. On certain grounds judicial review on facts is also maintainable. Doctrine of unreasonableness has now given a way to doctrine of proportionality.

48. In *S.N. Chandrashekar v State of Karnataka* [(2006) 3 SCC 208], this Court observed:

"33. It is now well known that the concept of error of law includes the giving of reasons that are bad in law or (where there is a duty to give reason) inconsistent, unintelligible or substantially inadequate. (See de Smith's *Judicial Review of Administrative Action*, 5th Edn., p. 286.)

34. The Authority, therefore, posed unto itself a wrong question. What, therefore, was necessary to be considered by BDA was whether the ingredients contained in Section 14-A of the Act were fulfilled and whether the requirements of the proviso appended thereto are satisfied. If the same had not been satisfied, the requirements of the law must be held to have not been satisfied. If there had been no proper application of mind as regards the requirements of law, the State and the Planning Authority must be held to have misdirected themselves in law which would vitiate the impugned judgment.

35. In Hindustan Petroleum Corpn. Ltd. v Darius Shapur Chenai this Court referring to Cholan Roadways Ltd. v G. Thirugnanasambandam⁶ held : (SCC p.637, para 14)

"14. Even a judicial review on facts in certain situations may be available. In Cholan Roadways Ltd. v. G. Thirugnanasambandam this Court observed: (SCC p. 253, paras 34-35)

'34. It is now well settled that a quasi judicial authority must pose unto itself a correct question so as to arrive at a correct finding of fact. A wrong question posed leads to a wrong answer. In this case, furthermore, the misdirection in law committed by the Industrial Tribunal was apparent insofar as it did not apply the principle of *res ipsa loquitur* which was relevant for the purpose of this case and thus, failed to take into consideration a relevant factor and furthermore took into consideration an irrelevant fact not germane for determining the issue, namely, that the passengers of the bus were mandatorily required to be examined. The Industrial Tribunal further failed to apply the correct standard of proof in relation to a domestic enquiry which is "preponderance of probability" and applied the standard of proof required for a criminal trial. A case for judicial review was, thus, clearly made out.

35. Errors of fact can also be a subject matter of judicial review. (See *E. v. Secy. of State for the Home Deptt.*) Reference in this connection may also be made to an interesting article by Paul P. Craig, Q.C. titled "Judicial Review, Appeal and Factor Error" published in 2004 Public Law, p. 788."

49. Yet again in *State of U.P. v Sheo Shanker Lal Srivastava* [(2006) 3 SCC 276], this Court observed:

"24. While saying so, we are no oblivious of the fact that the doctrine of unreasonableness is giving way to the doctrine of proportionality.

25. It is interesting to note that the *Wednesbury* principles may not now be held to be applicable in view of the development in constitutional law in this behalf. See, for example, *Huang v Secy. of State for the Home Deptt.* wherein referring to *R. v Secy. of State of the Home Deptt.*, ex p. *Daly* it was held that in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely more intrusive than *Wednesbury*, but involves a full-blown merit judgment, which is yet more than ex p. *Daly* requires on a judicial review where the court has to decide a proportionality issue."

27. For the purpose of judging the respective merit and ability of the candidates, their extra-curricular activities may be taken into consideration, but evidently the appellate authority took into consideration a large number

of irrelevant factors, we may notice some of them, which are only illustrative in nature.

- (i) Participated as a spectator in the fifth World Tamil Conference held in 1981.
- (ii) Conducted Literary Association Meetings.
- (iii) Involved himself in religious, musical service and human relation service.
- (iv) Served in Home-guards.
- (v) Acted in dramas
- (vi) Undergone computer training.

28. It also failed to take into consideration the relevant fact which inter alia weighed with the Managing Committee of the School as also the Order of the appellate authority that as he had served as a Secretary and Correspondent in some other schools and, thus, he had not been giving all the attention to his teaching works.

29. The Appellate Authority failed to take into consideration the fact that the appellant had passed the Accounts test. Even if the same was not relevant, although there existed a Government Order in this behalf, if other activities can be treated to be acts of merit, we fail to understand as to why acquisition of a higher qualification for the purpose of holding the post of Headmaster which would be helpful to him in his functioning as a head of an educational institute would not be relevant. Similarly, the question as to whether the 'passing percentage' of the students in the subjects taught by the appellant or the respondent No. 1 for five years was 98% or 100% may not be of much significance.

30. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The matter is remitted to the Joint Director of School Education for consideration of the matter afresh strictly in accordance with law.

31. Although in terms of the High Court's Order, the appellate authority was required to consider the respective merit and ability of the appellant/first respondent at the relevant point of time namely when the post fell vacant, we are of the opinion that the same would not debar it from taking into consideration the question as to whether he has disqualified himself by any misconduct committed by him during his tenure as Headmaster of the School. The judgment of the High Court is set aside.

32. This appeal is allowed. In the facts and circumstances of the case, however, there shall be no order as to costs.