

Madras High Court

R. Parthiban vs The State Of Tamilnadu on 30 October, 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:30-10-2009

CORAM

THE HON'BLE MRS. JUSTICE PRABHA SRIDEVAN
and
THE HON'BLE MR.JUSTICE M. SATHYANARAYANAN

W.P.No.3858 of 2008
and
M.P.NO.1 of 2008

R. Parthiban
vs

.... Petitioner

1. The State of Tamilnadu
rep by the Secretary to Government
Department of Education
Fort St. George

2. The Teachers recruitment Board
rep by its Chairman
E.V.K. Sampath Maligai
College Road
Chennai-600 006

... Respondents

Writ Petition filed under Article 226 of The Constitution of India praying to issue a W

For petitioner : Mr.A. Arulmozhi
For 1st respondent : Ms.C.N.G. Ezhil Arasi

For 2nd respondent : Mr.P.S. Raman,
Advocate General for
Mr.G. Sankran, Spl.G.P

ORDER

(The Order of the Court was made by PRABHA SRIDEVAN,J.) The prayer in the writ petition is to issue a Writ of Certiorified Mandamus to call for the records of the 2nd respondent pertaining to the selection of the candidates for appointment as lecturer, the impugned order in OM No.4426/AA4/2007 dated 27.12.2007 and quash the same and direct the respondents to appoint

the petitioner to the post of lecture in physics under the handicapped reservation.

2. The writ petitioner is Orthopaedically challenged having post polio residual paralysis in the left lower limbs. He is also a Post Graduate Degree holder in Physics having secured I class and he belongs to backward community.
3. The grievance of the petitioner is that though he is entitled to be appointed as a lecturer in physics under the reservation for persons with disability, the respondent, by its Order dated 27.12.2007 informed the petitioner that there was no availability of vacancy based on the communal rotation and none of the physically challenged candidates were selected in the recruitment.
4. The learned counsel for the petitioner submits that this is contrary to the Constitutional rights, the provisions of Equal opportunities Act, the convention on Rights of Persons with Disabilities, the Central and State guidelines and decided case.
5. The learned Advocate General, who was present in Court , produced the G.O.Ms.No.87 dated 17.7.2008, by which, the State has adopted 200 point roster for persons with disabilities amongst the Government Department, Corporations and Boards and divided the roster into six blocks, distributing it among the three categories of disabilities visual, hearing and Orthopaedically and as far as possible in the ration of of 1:1:1 for e.g., "(1 - 33, 34 - 66, 67 - 100, 101 - 133, 134 - 166 and 167 - 200)" and selecting him/her as against his/her community in the communal roster.
6. He also submitted that the next roster point for backward community, to which, the petitioner admittedly belongs and therefore, subject to him fulfilling the other qualifications there might not be any difficulty for appointment.
7. The learned Government Advocate also submitted that it is true that no person with disability has been appointed in this year .
8. In spite of the Persons with Disabilities Act and the Rules framed by the State, there seems to be some difficulty in implementing the provisions of the Act fully either because of lack of awareness or perhaps lack of will. The State is duty bound to implement the Act fully since the Act uses the word "shall" while giving protection to the Disability Rights. It does not give any escape route to the employer from accommodating the persons with disability whenever a vacancy arises.
9. The relevant sections, G.Os and Memos are as follows:

GOVERNMENT OF INDIA MINISTRY OF PERSONNEL, P.G AND PENSIONS DEPARTMENT OF PERSONNEL & TRAINING Office Memorandum F.No.36035/16/91- Estt (SCT) Sub: Reservation of posts for the physically handicapped persons in Group "C" and "D" posts/services in Government revised procedure for filling up the vacancies

1	Blind	1%
2	hearing impaired	1%
3	Orthopaedically handicapped	1%

2. The Government of India in its Memorandum Fifth read above gave instructions to the Ministries and Departments. That with the enactment of the Persons with Disabilities (Equal opportunities protection of Rights and Full Participation) Act, 1995 the reservation to physically handicapped stood extended to identified groups "A" and "B" posts filled through Direct Recruitment.

3. In the letters Sixth read above the Director of Rehabilitation of the Disabled requested the Government to issue a notification by ordering a reservation of "A" and "B" posts to the benefit of disabled persons. The Director recommended for the constitution of an expert committee to identify the posts which can be suitable for the disabled persons.

4. In the G.O, Seventh read above the Government constituted an Expert Committee to identify certain posts under A and B groups. The Expert Committee submitted its report. In the G.O eighth read above the Government constituted an another committee to examine further report furnished by the Expert Committee. The State Special Commissioner for Disabled subsequently was requested to identify most suitable posts from out of the posts identified in consultation with concerned H.O.Ds. In his letter 9th read above the State Special Commissioner for the Disabled has furnished a finalized list of 117 posts most suitable for disabled persons under A and B groups.

5. The Hon'ble Chief Minister has announced on the floor of the Assembly under 110 of the Assembly rule on 16.3.2005 that the Government have identified 117 types of posts which are the most suitable posts for the disabled in "A" and "B" groups of posts; that the Government will notify the list in the Gazette and that during the recruitment, 3% of the posts will be reserved for the disabled.

6. Based on the announcement made by the Hon'ble Chief Minister the Government approve the list of 117 posts identified under group A and B categories under the purview of Teachers recruitment Board and the TNPSC for the persons with Disabilities. The Government also direct that 3% of the vacancies in direct recruitment for the identified posts of A and B groups, where the rule of reservation is applicable for the Scs/STs, B.Cs and other communities, shall be reserved for the disabled persons. If only one post is available for recruitment in these categories, the usual procedure for recruitment will be followed. In so far as executive posts are concerned the individual shall produce a certificate of physical fitness from the Medical Board to the effect that their handicap will not affect the performance of the job to which he/she has been selected, before appointment.

ANNEXURE

LIST OF POSTS IDENTIFIED UNDER GROUP A AND B CATEGORIES COMING UNDER THE PURVIEW OF TEACHERS RECRUITMENT BOARD FOR THE PERSONS WITH DISABILITIES

Name of the Post and Department	Physical require-	Categories of disabled	Group
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ments persons
suitable for
the job

Lecturer ST.H B/PB/ORTHO A
a)Govt Arts/
b)Science Colleges
c)Govt.Engg Colleges
d)Govt.Polytechnis

Abberations

S.No Code Physical Requirements 1 ST Work performed by standing

2 H Work performed by hearing/
speaking

S.No Code Functional Classification

1 B Blind
2 PB Partially Blind
3 Ortho Orthopaedically Handicapped

No.36035/3/2004-Estt (Res)

GOVERNMENT OF INDIA

MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES AND PENSIONS
DEPARTMENT OF PERSONNEL AND TRAINING

New Delhi, the 29th December, 2005

OFFICIAL MEMORANDUM

Subject: Reservation for the Persons with Disabilities

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2. QUANTUM OF RESERVATION

(i) Three percent of the vacancies in case of direct recruitment to Group A,B,C and D posts shall be reserved for persons with disabilities of which one percent each shall be reserved for persons suffering from (i)blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the post identified for each disability;

(ii) Three percent of the vacancies in case of promotion to Group D and Group C posts in which the element of direct recruitment, if any, does not exceed 75% shall be reserved for persons with

disabilities of which one percent each shall be reserved for persons suffering from (i) blindness or low vision, (ii) hearing impairment and (iii) locomotor disability or cerebral palsy in the post identified for each disability;

.....

15. EFFECTING RESERVATION MAINTENANCE OF ROSTERS:

(a) All establishments shall maintain separate 100 point reservation roster registers in the format given in Annexure II for determining /effecting reservation for the disabled one each for Group "A" posts filled by direct recruitment, Group "B" posts filled by direct recruitment. Group "C" posts filled by direct recruitment, Group "C" posts filed by promotion, Group "D" posts filled by direct recruitment and Group "D" posts filled by promotion.

(b) Each register shall have cycles of 100 points and each cycle of 100 points shall be divided into three blocks, comprising the following points:

1st Block Point No.1 to Point No.33 2nd Block Point No.34 to Point No.66 3rd Block - Point NO.67 to Point NO.100

(c) Points 1, 34 and 67 of the roster shall be earmarked reserved for persons with disabilities one point for each of the three categories of disabilities. The head of the establishment shall decide the categories of disabilities for which the points 1,34 and 67 will be reserved keeping in view all relevant facts.

(d) All the vacancies in Group C posts falling in direct recruitment quota arising in the establishment shall be entered in the relevant roster register. If the post falling at point No.1 is not identified for the disabled or the head of the establishment considers it desirable not to fill it up by a disabled person or it is not possible to fill up that post by the disabled for any other reason, one of the vacancies falling at any of the points from 2 to 33 shall be treated as reserved for the disabled and filled as such. Likewise a vacancy falling at any of the points from 34 to 66 or from 67 to 100 shall be filled by the disabled. The purpose of keeping points 1, 34 and 67 as reserved is to fill up the first available suitable vacancy from 1 to 33, first available suitable vacancy from 34 to 66 and first available suitable vacancy from 67 to 100 by persons with disabilities.

10. Guidelines also provide that if the nature of vacancies in an establishment is such that a person of a specific category of disability cannot be employed, the vacancies may be interchanged among the three categories.

11. There are also provisions for relaxation in age limit. By G.O.Ms.No.241 dated 29.10.2006 the Government directed that the 200 point roster shall be given effect to with effect from 15.9.2007 and the vacancies arising on and from the 15th September 2007 shall be filled up as per the 200 point roster and all selections for appointment shall be started afresh from serial number one of the 200 point with effect on and from the said date.

12. G.O.Ms.NO.200 dated 22.12.2006 ordered as follows:

.....

VERNACULAR (TAMIL) PORTION DELETED

13. In letter Dated 4.8.2006 issued by the Secretary, Social Welfare and Nutritious Meal Programme to the Secretary, Tamil Nadu Public Service Commission, there is reference to G.O.Ms.Nos.53 dated 11.5.2005, 213 dated 15.9.2005 and other letters and paragraph-2 of the letter dated 4.8.2006 reads as follows:

2. Regarding the clarifications sought for by the Tamil Nadu Public Service Commission in the letters fourth and fifth cited the Government examined the issue carefully in consultation with the State Commissioner for the Disabled. Accordingly, the Government issue the following clarification:

1. If the vacancy notified is identified for all the 3 categories (viz., Ortho, Deaf and Blind) of disabled persons then all the 3 categories of disabled persons may be accommodated against their turns earmarked as per the reference first cited.

2. If the vacancies notified are identified as suitable for only one category, then all the 3% vacancies may be allotted to that particular category as other two categories are not eligible.

3. If the vacancies notified are identified for only two of the three categories (say-blind & deaf & Ortho (or) blind & Ortho) then the total number of vacancies meant for the ineligible category of the disabled should be distributed equally between the two eligible categories of disabled (if the total number is even). If the total number is odd, the extra vacancy should go to that disability which has higher population as per the 2001 census (This can be adopted till next census) According to the Census 2001, the disabled population distribution in Tamil Nadu is as follows:

1. Visually Handicapped	9,64,063
2. Orthopaedically Handicapped	3,53,798
3. Speech impaired	1,24,479
& hearing impaired	72,636
	1,97,115

As per this census, the number of visually impaired persons is greater than the number of Orthopaedically handicapped persons which in turn is more than the number of the hearing and speech impaired persons (blind > Ortho > deaf) Thus if there are odd number of vacancies, the extra vacancy should go to blind (if the eligible categories are blind and Ortho or blind and deaf) and should go to Ortho (if the eligible categories are ortho and deaf) The Step-by step procedure for formulating the above principle where only 2 out of 3 disabled categories are eligible would be as follows:

- (i) Apply the 100 point roster as G.O.Ms.No.105, Personal & Administrative Reforms Department dated 20.6.2000 for the total number of vacancies
- (ii) Arrive at the number of vacancies reserved for disabled categories. All the three categories would be present but one of them is no eligible.
- (iii) Arrive at the total number of vacancies earmarked for this ineligible category of disabled
- (iv) Allot the first vacancy as per (ii) above to that a category of eligible disabled which has the higher population (blind>ortho>deaf)
- (v) Allot the second vacancy to the other eligible disable category and the remaining vacancies alternatively between the two eligible categories.

Three illustrations in this regard and guidelines for utilizing the turns reserved for the disabled categories for selection of Veterinary Assistant Surgeon are given in the annexure to this letter, which is as undersigned ANNEXURE Illustration:1 If the eligible categories for a post (say Agriculture Officer are deaf & Ortho and if there are 7 vacancies for the ineligible category of "blind" when the roster of G.O.Ms.NO.105 P&AR Dept. Dated 20.6.2000 is applied, then the first of these 7 vacancies should go to "ortho" (because the population of Orthopaedically handicapped persons is greater than that of deaf). The second vacancy should go to "deaf" the third vacancy to "ortho" and so on alternatively as follows:

- i) Ortho
- ii) Hearing impaired
- iii)Ortho
- iv)Hearing impaired v)Ortho
- vi)Hearing Impaired
- vii)Ortho (4 Ortho and 3 hearing impaired) Illustration 2:

If the eligible categories for the post (Say Lecturer) are blind and Ortho and if there are 5 vacancies for the ineligible category of deaf, when the roster of G.O.Ms.NO.105 Personnel and Administrative Reforms Dept., dated 20.6.2000 is applied, then the first of these, 5 vacancies should go to blind because the population of blind person is greater than that of Ortho. The second vacancy should go to "ortho" the third vacancy to "blind" and so on alternatively as follows:

- i) Blind
- ii) Ortho

iii) Blind

iv) Ortho

v) Blind (3 blind and 2 Ortho) If the vacancies of the ineligible disabled category are in even numbers, the vacancies should be distributed between the other two eligible categories equally. The first vacancies of the ineligible category should go to the disability which has the greater population. The second vacancy should go to the other eligible category and the remaining vacancies should be filled alternatively;

Illustration 3:

If the eligible categories for a post are "blind" and "deaf" and if there 6 vacancies (even number of vacancies) for the ineligible category of "ortho" when the roster of G.O.Ms.No.105, P&AR Dept, dated 20.6.2000 is applied, then the first of these 6 vacancies should go to blind (because the population of blind persons is greater than that of deaf). The second vacancy should go to "deaf" the third vacancy to "blind" and so on alternatively as follows:

i) blind

ii)hearing impaired

iii)blind

iv)hearing impaired

v)blind

vi)hearing impaired (3 blind and 3 hearing impaired) This letter makes it clear and give suitable examples.

14. In the case of Prof.I. Elangovan, Vellore vs Govt. Of Tamil Nadu and others reported in (2008) 3 MLJ 481, the First Bench held as follows:

8. With a view to realize the objective that people with disabilities have same right, hopes and aspirations as every one else, and they are to be provided with equal opportunities and rather better incentives for their rehabilitation in the society, a meeting was held in Beijing on 1st to 5.12.1992 called the "Meet to Launch the Asian and Pacific Decade of Disabled Persons". A proclamation was adopted by the Asian an Pacific countries to ensure "full participation and equality of people with disabilities in the Asian and Pacific regions"India was a signatory to teh said proclamation and with a view to implement the same, the persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act,1995 was enacted, which came into force on 1.1.1996.

9. The Statement of Objects and Reasons to this Act, which was appended to the Bill before it was enacted, reads as under:

"The Meeting to launch the Asian and Pacific Decade of the Disabled Persons 1993-2002 convened by the Economic and Social Commission for Asian and Pacific Region, held at Beijing on 1st to 5.12.1992 adopted the proclamation on the full participation and equality of people with Disabilities in the Asian and Pacific Region. India is a signatory of the said proclamation and it is necessary to enact a suitable legislation to provide for the following

(i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provisions of medical care, education, training employment and rehabilitation of persons with disabilities.

(ii) to create barrier free environment for persons with disabilities;

(iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-a-vis, non-disabled persons,

(iv) to counteract any situation of abuse and exploitation of persons with disabilities

(v) to lay down a strategies for comprehensive development of programmes and services and equalisation of opportunities for persons with disabilities; and

(vi) Accordingly, it is proposed to provide inter-alia for the constitution of Co-ordination Committees and Executive Committees at the Central and State Levels to carry out the various functions assigned to them. Within the limits of their economic capacity and development the appropriate Governments and the local authorities will have to undertake various rehabilitation services etc., The Bill also provides for education, employment and vocation training, reservation in identified posts, research and man power development and establishment of homes for persons with severe disabilities etc., For effective implementation of the provisions of the Bill appointment of the Chief Commissioner for persons with disabilities at the Central level and Commissioners for persons with disabilities at the State level clothed with powers to monitor the funds disbursed by the Central and State Governments and also to take steps to safeguard the rights of the persons with disabilities is also envisaged.

10. Easily, employment rights of persons with disabilities covered by Chapter-VI of the Act containing Sections 32 to 41 (except Section 39) which relates to education)comprise the most empowering provisions of the Act as they yield the most tangible and substantial rights to persons with disabilities. Sec.32 of the Act provides that in case a vacancy is not filled up due to non-availability of a suitable person with disability, the vacancy is to be carried forward in the succeeding recruitment year.

12. Indisputably the Tamil Nadu State and Subordinate Service Rules, which provide for reservation in the State and Subordinate Services in favour of the persons with disabilities, is a piece of

legislation traceable to Entry 41 List II. Its legislative competency cannot be doubted. It is essentially a legislation in respect of State services. It contemplates that the rule of reservation shall apply separately to each departmental unit,.

20. We have therefore no hesitation to hold that the provisions of Sec.33 read with Section 2(k) of the Act would prevail over the Tamil Nadu State and Subordinate Service Rules and the respondents are duty bound to provide reservation of not less than 3% in every establishment i.e., department for persons with disabilities in accordance with Sec.33 of the Act.

21. On behalf of the TNPSC, the charts showing the vacancy positions, as per Section 33 read with Section 2(k) of the Act, are filed on record. As per the charts 80 vacancies are liable to be reserved for the post of Typist and 8 vacancies for the post of Steno-Typist for persons with disability under Notification/Advertisement No.135. As regards Notification No.142, 99 vacancies are liable to be filled up from among the persons with disabilities. We are informed that for the post of Typist and Steno-Typist, the TNPSC has received in all 2151 applications and for the post of Junior Assistants, Bill Collectors etc., falling under Grade-IV service, 524 applications have been received in disabled category. Accordingly, we direct the TNPSC to fill up the said 187 vacancies exclusively by appointing eligible disabled candidates. The writ petitions are disposed of accordingly. No costs. Consequently, connected miscellaneous petitions are closed.

15. Therefore, this squarely comes to the aid of the writ petitioner. In addition, the recent judgment of the Hon'ble Supreme Court in (2007) 8 SCC 621 (Mahesh Gupta vs Yashwant Kumar Ahirwar and Ors), the Apex Court held as follows:

10. The State in terms of Article 16 of the Constitution of India may make two types of reservations vertical and horizontal. Article 16(4) provides for vertical reservation; whereas Clause (1) of Article 16 provides for horizontal reservation.

11. The State adopted a policy decision for filling up the reserved posts for handicapped persons. A special drive was to be launched therefor. The circular letter was issued only for the said purpose. A bare perusal of the said Circular Letter dated 29-3-1993 would clearly show that the State had made 3% reservation for blinds and 2% for other physically handicapped persons. Such a reservation falling within Clause (1) of Article 16 of the Constitution has nothing to do with the object and purport sought to be achieved by reason of Clause (4) thereof.

12. Disability has drawn the attention of the world wide community. India is a signatory to various international treaties and conventions. The State, therefore, took a policy decision to have horizontal reservation with a view to fulfil its constitutional object as also its commitment to the international community. A disabled is a disabled. The question of making any further reservation on the basis of caste, creed or religion ordinarily may not arise. They constitute a special class. The advertisement, however, failed to mention in regard to the reservation for handicapped persons at the outset, but, as noticed hereinbefore, the vacant posts were required to be filled up for two categories of candidates; one for Scheduled Caste and Scheduled Tribe candidates and other for handicapped candidates. Handicapped candidates have not been further classified as belonging to Scheduled

Castes, Scheduled Tribes and general category candidates.

13. It is a travesty of justice that despite the State clarified its own position in its order dated 1-1-2004 and stated that the posts were vacant under the handicapped quota but it completely turned turtle and took a diagonally opposite stand when a contempt petition was filed. In its reply in the said proceedings, reference was made to the aforementioned order dated 1-1-2004 but within a short time viz. on 4-2-2004 it opined on a presumption that as the word 'handicapped' was not mentioned in the heading of advertisement they were meant only for Scheduled Caste and Scheduled Tribe candidates. Rule of executive construction was given a complete go-by. Reasonableness and fairness which is the hallmark of Article 14 of the Constitution of India was completely lost sight of. The officers of the State behaved strangely. It prevaricated its stand only because a contempt proceeding was initiated. If the State was eager to accommodate the writ petitioner-respondent, it could have done so. It did not take any measure in that behalf. It chose to terminate the services of some of the employees who had already been appointed. Such a course could not have been taken either in law or in equity. The State is expected to have a constitutional vision. It must give effect to the constitutional mandate. Any act done by it should be considered to have been effected in the light of the provisions contained in Part IV of the Constitution of India. The State in terms of the provisions contained in Part IV should have given effect to the principles embodied in Article 39 of the Constitution of India. Whereas a reasonable reservation within the meaning of Article 16 of the Constitution of India should not ordinarily exist (sic exceed), 50%, as has been held by this Court in Indra Sawhney v. Union of India¹, reservation for women or handicapped persons would not come within the purview thereof.

14. Furthermore, when the decision was taken, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short the 1995 Act) had come into force. In terms of the 1995 Act, the States were obligated to make reservations for handicapped persons. The State completely lost sight of its commitment both under its own policy decision as also the statutory provision.

15. For the reasons aforementioned, we not only set aside the judgment of the High Court but also direct that the persons whose services have been terminated in terms of order dated 4-2-2004 should be continued in service. We furthermore direct that they should be paid back wages as also other service benefits. Respondent 1 could have been considered both as handicapped persons as also Scheduled Castes and Scheduled Tribes. If all the vacancies meant for Scheduled Castes and Scheduled Tribes had not been filled up, the State may consider appointing him. If he has already been appointed, the State may consider the desirability of creating a supernumerary post and continue his service therein.

16. On 30th March, 2007 India also joined the community of 82 countries to have signed the UN Convention on Rights of Persons with Disabilities (CRPD) on the very day it was adopted and opened for signature. India has now ratified the Convention on 1st October, 2007.

17. CRPD is the first comprehensive human rights treaty of the 21st century and though it does not create any new right for persons with disabilities, it seeks to contextualize existing rights for the

specific circumstances of persons with disabilities. Apart from universal fundamental rights like equality, non-discrimination, life, liberty, the Convention covers a number of key areas of life that are critical to persons with disabilities such as accessibility, personal mobility, health, education, employment, habilitation and rehabilitation, participation in political life. The Convention marks a shift in viewing disability from a social welfare concern to a human rights issue, which involves acknowledging that societal barriers and prejudices are themselves disabling. Article 12 is the core of Convention and guarantees equal recognition as persons before the Law for persons with mental and intellectual disabilities.

The salient features of CRPD are, (1) the shift in the paradigm of disability rights from one of welfare to one of human rights agenda;

(2) the mainstreaming of intellectual and mental disabilities within the disability scheme and with other citizens;

(3) it is an undivided package of rights i.e. health rights are not delinked from economic, civil and other rights;

(4) All disabled persons have the capability to exercise their rights because the CRPD grants them equality of legal capacity irrespective of their mental capacity.

18. Therefore, on this ground also, the petitioner herein is entitled for the relief sought for.

19. Therefore, the impugned order passed by the 2nd respondent in OM No.4426/AA4/2007 dated 27.12.2007 is hereby quashed and the writ petition stands allowed. The petitioner shall be appointed to the post of Lecturer in Physics under the handicapped reservation. Since the writ petitioner belongs to a backward community, which is the next roster point, shall be considered subject to the fulfilling of the other qualifications required for such appointment. The respondents are granted three months time from the date of receipt of copy of this order to complete this exercise. No costs. Consequently, connected MP is closed.

sr To The Secretary to Government The State of Tamilnadu Department of Education Fort St. George

2. Chairman, The Teachers recruitment Board E.V.K. Sampath Maligai College Road, Chennai 600 006