



Writ Petition No.8175 of 2023

Writ Petition No.8175 of 2023

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D.BHARATHA CHAKRAVARTHY. J.,

Today, this matter is listed under the caption 'for being mentioned'.

2. It is represented that Mr.V.Kasinatha Bharathi, learned counsel appeared for the petitioner on 04.04.2024 and argued the matter. However, his name was not shown in the appearance portion of the order dated 04.04.2024.

3. Hence, the name of Mr.V.Kasinatha Bharathi, learned counsel for the petitioner has to be corrected instead of Mr.Mani Gangadaran, learned counsel for the petitioner.

4. Registry is directed to issue a fresh order copy.

30.04.2024

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Writ Petition No.8175 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.04.2024

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.P.No.8175 of 2023
and W.M.P.Nos.8400 & 8401 of 2023

J.Nakkeeran

.. **Petitioner**

Vs.

1.The Secretary to Government
School Education Department
Fort St George, Chennai 600 009.

2.The Commissioner of School Education
College Road, Nungambakkam
Chennai 600 006.

3.The Director of Elementary Education
College Road, Nungambakkam
Chennai 600 006.

4.The District Educational Officer (Primary)
Thiruvarur, Thiruvarur District

5.The Block Educational Officer
Koradacheri Union
Kodavasal taluk
Thiruvarur Distirct.

.. **Respondents**



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Prayer: Writ Petition filed under Article 226 of the Constitution of India seeking a Writ of Certiorarified Mandamus, calling for the records relating to the order passed by the 1st respondent in its letter No. 23350 / Thoka2 (1) / 2020 dated 10.02.2023 and quash the same consequently direct the respondent to give promotion as Headmaster of Elementary school with all consequential monetary benefits to the petitioner with effect from 06.07.2005 on par with petitioner's junior namely C. Suresh.

For the Petitioner

Mr.Mani Gangadaran

For the Respondents

Mrs.S.Mythreye Chandru

Special Government Pleader

ORDER

This Writ Petition is filed for issuance of Writ of Certiorarified Mandamus, calling for the records relating to the order passed by the 1st respondent dated 10.02.2023 and to quash the same and consequently direct the respondents to promote the petitioner as Headmaster of Elementary School with all monetary benefits to the petitioner with effect from 06.07.2005.

2. It is the case of the petitioner that she was working at Sri



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Saraswathi Aided Elementary School. Originally by G.O.Rt.No.1267 dated 10.09.1990, a Deputy Inspector was appointed to manage the said aided School. The Government Order mentions that the Deputy Inspector can sanction leave to teachers, sign applications for teachers in provident fund advances and sign papers relating to pension of teachers etc. It also empowers the Deputy Inspector to relieve the teaching and non-teaching staff upon resignation/retirement, to appoint a substitute to the post or vacant post on temporary posts etc. Thereafter, by G.O. Ms. No.589, Education Department (C2) dated 01.07.1992, the said School was taken over by the Government as the Government School. It is essential to extract paragraph Nos.1 and 2 of the said G.O.,

“நாகை, காயிதே மில்லத் மாவட்டம், நாகை கல்வி மாவட்டம், கொரடாச்சேரி சரகம், தேவர்கண்டநல்லூர் ஸ்ரீ சரஸ்வதி உதவிபெறும் துவக்கப் பள்ளியை அரசுப் பள்ளியாக மாற்ற அப்பள்ளி மேலாளர் 13.05.1987 நாளிட்ட கடிதத்தில் இசைவு தெரிவித்துள்ளார். ஊர் பொது மக்களால் சுமார் 200 குழந்தைகள் அமரக்கூடிய அளவில் கூரைக் கட்டிடம் ஒன்று கட்டித் தரப்படும் ஏற்கனவே உள்ள பக்கா கட்டிடத்திற்கு கூண்டு வேயப்படும் உள்ளது. அக்கட்டிடத்திற்கு உறுதிச் சான்றிதழ் பொதுப்பணித்துறை பொறியியல் வல்லுநரால் அளிக்கப்பட்டுள்ளது. வழக்கறிஞரும் மேற்படி பள்ளியை அரசால் ஏற்று நடத்தலாம் என்று கருத்து தெரிவித்துள்ளார். அரசாணை எண்.2010 கல்வி நாள் 19.10.1983 - ல் உள்ள இரு நிபந்தனைகளும் பூர்த்தி செய்யப்படுகின்றன. அதாவது பள்ளி நிர்வாகி பள்ளியை ஒப்படைக்க சம்மதித்துள்ளார். பொது மக்களால் கட்டிடம் கட்டப்பட்டுள்ளது. மேற்படி பள்ளியை அரசு ஏற்றால் கூடுதல் செலவினம் ஏற்படாது எனத்



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தொடக்கக் கல்வி இயக்குநர் தெரிவித்துள்ளார். எனவே அரசாணை எண்.1010 கல்வி நாள் 19.10.1983 - ல் உள்ள நிபந்தனைகள் பூர்த்தி செய்யப்பட்டுள்ளதாலும், இயக்குநர் பரிந்துரை செய்வதாலும், நாகப்பட்டினம் காயிதே மில்லத் மாவட்டம், நாகை கல்வி மாவட்டம், கொரடாச்சேரி சரகம், தேவர் கண்டநல்லூர் ஸ்ரீ சரஸ்வதி உதவிபெறும் துவக்கப் பள்ளியை அரசுப் பள்ளியாக மாற்றி ஆணையிடப்படுகிறது.

2. இப்பள்ளிப் பணியாளர்களை அரசுப் பணிக்கு உட்படுத்த தக்க கருத்துருவை அனுப்பும்படித் தொடக்கக் கல்வி இயக்குநர் கேட்டுக் கொள்ளப்படுகிறார்.”

Thus, it can be clear that the School was made as a Government School. The Director of Elementary Education was directed to send proposals to absorb all the employees of the said School as Government employees.

3. On 07.10.1993, the Deputy Inspector who was administering the School appointed the petitioner as a Secondary Grade Teacher. It is pertinent to point out that as of the said date, the School has become a Government School. Thereafter, by an order dated 15.04.1998, the said anomaly was rectified and the appointment of the petitioner was approved. However, it was approved with effect from 13.01.1997. It is essential to extract paragraph Nos.1 and 2 of the said order which reads as hereunder:-

“பார்வை (1) ல் காணும் ஆணைப்படி தேவர் கண்டநல்லூர்



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ஸ்ரீ சரஸ்வதி உதவிபெறும் துவக்கப் பள்ளியில் 8.10.93 முதல் இடைநிலை ஆசிரியராக நியமனம் செய்யப்பட்ட திரு.ஜெ. நக்கீரன் என்பாரது நியமனம் அரசாணை எண்.788 கல்வி (ஜி2) நாள்-31.7.1991 க்கு முரணாக இருப்பதால் பார்வை 4ல் காணும் நாகப்பட்டினம் மாவட்டக் கல்வி அலுவலர் கடிதத்தில் நியமன ஒப்புதல் மறுக்கப்பட்டுள்ளது.

அரசாணை எண்.788 கல்வி (ஜி 2) நாள்-31.9.1991 க்கு பார்வையில் காணும் உச்சநீதிமன்ற வழக்கில் இடைக்கால தடையாணை வழங்கப்பட்டுள்ளதால் பார்வை (2) ல் காணும் தொடக்கக் கல்வி இயக்குனரின் செயல்முறை தெளிவாணையின்படி தேவர்கண்டநல்லூர், ஸ்ரீ சரஸ்வதி உதவிபெறும் தொடக்கப் பள்ளியில் இடைநிலை ஆசிரியராக நியமனம் செய்யப்பட்டுள்ள திரு.ஜெ. நக்கீரன் என்பாரது நியமனம் உச்சநீதிமன்ற இடைக்கால தடையாணை வழங்கப்பட்ட நாளான 13.1.97 முதல் ஒப்புதல் வழங்கப்படுகிறது.”

4.Thus, it can be seen that the petitioner's appointment as a Government School Teacher is effective from 13.01.1997. Accordingly, the petitioner was also granted Selection Grade in the year 2007 and Special Grade in the year 2017. However, when the petitioner's turn came up for promotion to the next higher post of Primary School Headmaster, while the respondents formed the panel, for the year as of 01.01.2014, the petitioner's name did not find a place.

5. As a matter of fact, all the persons mentioned in the said panel are juniors, if the petitioner's original date of appointment is taken into account.



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Even if the date from which the petitioner's appointment is approved, i.e., on 13.01.1997 is taken into account, still the persons from Sl. No.14 onwards are junior to the petitioner. The immediate junior *Ms. K. Shanthi* whose name finds place in Sl. No.14 and also other juniors were all promoted as Headmaster of Primary School with effect from 23.07.2007. Thus, from the said panel, it can be seen that the person junior to the petitioner has been promoted in the year 2007 itself, while the petitioner has been left out. The petitioner, therefore, filed a W.P.No.6966 of 2015 with a prayer to consider his claim for promotion as Elementary School Headmaster. The said Writ petition was disposed of on 25.02.2020, after detailed consideration of the case of the petitioner as well as the counter affidavit filed by the respondents therein. It is essential to extract paragraph No.9 of the said order,

“9. Considering the facts and circumstances of the case and submissions made by the learned counsels appearing for the parties concerned, this Court issues the following directions;

(i). The Assistant Elementary Educational Officer, Koradachery Union/4th respondent herein shall re-submit the proposal to the District Elementary Education Officer, Thiruvavur/ 3rd respondent herein, within a period of two weeks from the date of receipt of a copy of this order.

(ii). On receipt of such proposal, the 3rd respondent



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shall forward the same to the Director of Elementary Education/ 2nd respondent. After taking necessary steps, the 2nd respondent shall forward the same to the Government.

(iii). The Government shall consider the proposal of the petitioner, in accordance with law, as expeditiously as possible, preferably within a period of four months, thereafter.”

6. Thus, it can be seen that this Court directed the authorities to send the proposal as per the original G.O., and directed the authorities to absorb the services of the petitioner. Even thereafter, no positive response was forthcoming from the respondents and the petitioner continues in the same state of affairs, hence the present Writ Petition.

7. Heard the learned counsel for the petitioner and the learned Special Government Pleader appearing on behalf of the respondents.

8. The learned counsel for the petitioner would submit that it can be seen from the 1st Government Order that the Government has taken over the school along with all the teachers and employees. It is nothing but an administrative lapse on the part of the Director of Elementary Education in



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not sending the proposal for absorption. For the said lapse, the petitioner cannot be put into prejudice. As a matter of fact, by their order, the petitioner's appointment has specifically been approved and the petitioner has been granted Selection Grade and Special Grade, etc. When the petitioner's appointment is deemed to be regular to extract duties from him, grant Selection Grand and Special Grade and thereafter, it cannot be termed as irregular for grant of promotion. The petitioner has been superseded from the year 2007 onwards and despite his continuous efforts, to date, the respondents have evaded performing their legal duty in declaring that the petitioner is a Government servant.

9. Per contra, the learned Special Government Pleader would submit that the Government took over only the School. The petitioner did not become a Government servant. It can be seen that the School was taken over in the year 1992. Thereafter, the appointment can only be made by the Government and not by the Deputy Inspector appointed to manage the School. Once the appointment is made by the Deputy Inspector, who was appointed to manage the School, then it would be clear that the petitioner is



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not in a Government service. The Government Order as well as the earlier order of this Court only directed absorption of the petitioner, unless such absorption is made, the petitioner is not in the cadre and therefore, he cannot claim promotion to the post of Primary School Headmaster. It must also be further noted that even at the inception, the appointment of the petitioner is irregular and therefore, unless and otherwise due orders have been passed to properly absorb the petitioner, the mere approval granted to him will not make the petitioner as a Government Servant. The services of the petitioner should only be considered as a service in an aided post and not as a Government Servant.

10.I have considered the rival submissions made on either side and perused the material records of the case.

11. Firstly from the relevant portion of the Government Order, by which the School was taken over by the Government, it would be clear that the Government intended to take over the School along with the Teachers and other employees. It is true that after the date of the Government Order, the Deputy Inspector could not have appointed the petitioner in service.



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However, it must be seen that the appointing authority was not any private management, but the Deputy Inspector appointed by the respondents themselves. Further, the Deputy Inspector also had sought for approval and pursuant to the approval alone the petitioner was appointed. In any event, it must be stated that the petitioner's case has been specifically considered and on 15.04.1998 the petitioner's appointment was approved with effect from 13.01.1997 and since the petitioner is working in a Government School, then the only conclusion that can be reached is that the petitioner is in Government Service.

(ii) The contention of the learned Special Government Pleader that the petitioner is still in an aided school service cannot be countenanced at all. An 'aided school', must be a private school. Once the school is taken over by the Government, the employment could never be deemed to be employment in a private aided school. The petitioner's appointment has been treated as regular for all practical purposes with effect from 13.01.1997. The respondents themselves have sanctioned selection grade, special grade pay etc. Therefore, the respondents are treating the

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appointment of the petitioner as valid with effect from 13.01.1997. The respondents are permitting the petitioner to teach the students in Saraswathi School, which is a Government School. The respondents are granting all the other service benefits due to the petitioner.

12. While treating the petitioner's appointment as valid and his service as valid service for all practical purposes, it would not be upon the respondents to contend that in the matter of promotion alone, the petitioner would not be considered since an express order of absorption is not passed. If the petitioner is notionally to be considered as Government service, such legal fiction in service law would entitle all benefits of service and the eyes of the respondent cannot boggle. In this regard, useful reference can be made to the Judgment of the Division Bench of this Court in ***Tamilnadu Electricity Board Vs. Sethuraman***¹:

“9. The writ petitioner was no doubt promoted as Executive Engineer by order dated 7.6.1996 but that order itself states that the promotion is retrospective from 9.6.1988. Thus, this promotion though granted by an order in the year 1996, is retrospective from the year 1988. Thus, the aforesaid order dated 7.6.1996 creates a legal fiction.

1 CDJ 2005 MHC 804



10. It is well settled in law that there are legal fictions under which the Court has to assume something to exist which does not really exist. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances, vide Gagraj Singh v. S.T.A.T, (1997) 1 SCC 650, K.Kamraj Nadar v. Kunju Thevar, AIR 1958 SC 687, etc.

11. For instance, in Section 43(3) of the Income Tax Act, 1961 the word "plant" has been defined to include a "book". Normally, a plant means a "factory". One would normally never call a "book" as a "factory". However, for the purpose of the Income Tax Act, the word "plant" includes a "book" for the purpose of depreciation.

12. As regards a legal fiction, it is well settled that full effect must be given to it and it should be carried to its logical conclusion, vide State of Bombay v. Pandurang Vinayak, AIR 1953 SC 244 (246), American Home Products Corporation v. Mac. Laboratories, AIR 1986 SC 137, Union of India v. Jalyan Udyog, AIR 1994 SC 88, P.E.K.Kalliani Amma v. K.Devi, AIR 1996 SC 1963 (1976), etc.

13. In an oft quoted passage in East End Dwelling Co. Ltd v. Finsbury Borough Council, (1951) 2 All.E.R 587, Lord Asquith observed : -

" If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs"

The above observation has been quoted with approval by the Supreme Court in several decisions e.g. Bhavnagar University v. Palitana Sugar Mills Pvt. Ltd., AIR 2003 SC



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511 (para-33), C.W.T v. Trustees of H. E.H. , (2003) 5 SCC 122 (para-20), Dipak Chandra Ruhidas v. Chandan Kumar Sarkar, (2003) 7 SCC 66 (para-12), etc.

14. In the present case, the legal fiction which has been created by order dated 7.6.1996 is that the writ petitioner is deemed to have been retrospectively promoted as Executive Engineer from 9.6.1988. Hence full effect must be given to this legal fiction, and for all purposes we have to treat it as if the writ petitioner had in fact been promoted as Class I officer from 9.6.1988, and our eyes should not boggle half way. For these reasons, we fully agree with the view taken by the learned single Judge in the impugned judgment.”

(emphasis supplied)

13. The petitioner is not working in any private school. By the takeover and by the subsequent orders of regularizing the petitioner, the petitioner is deemed to be a Government Servant for all practical purposes. Therefore, the same has to be given effect for all purposes and the eyes of the respondent cannot boggle halfway. This apart, earlier when the petitioner approached this Court, this Court by its Judgment dated 25.02.2020, specifically directed the respondents to comply with the said procedural formality and after that to consider the case of the petitioner.

14. There is no answer whatsoever from the learned Special Government Pleader as to why the direction of the Government in G.O.



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No.589, Education Department (C2) 01.07.1992, is not complied with and as to why even after the order passed by this Court, the petitioner's service was not expressly absorbed. Once the anomaly in the petitioner's initial appointment is rectified by the grant of approval, thereafter, the petitioner has to be deemed to be in government service. Therefore, the reasons stated in the impugned orders are unsustainable. As such, the petitioner would be entitled to promotion from 23.07.2007 from the date on which his immediate juniors were promoted. The petitioner will be entitled to all the service benefits and his service should be treated in the cadre of Primary School Headmaster with effect from 23.07.2007. As far as arrears of pay are concerned, the same shall be granted from March 2015, when the petitioner earlier approached this Court by way of W.P.No.6966 of 2015.

15. In view thereof, this Writ Petition is disposed of on the following terms:

(i) The respondents shall promote the petitioner as Primary School Headmaster with effect from 23.07.2007, with all service, monetary and other benefits;

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(ii) The petitioner can be accommodated in any existing vacancy or if no vacancy exists, the next vacancy which may arise;

(iii) As far as the arrears of pay upon grant of such notional promotion is concerned, the same shall be granted to the petitioner with effect from March 2015, i.e., from the date on which the earlier Writ Petition was filed by the petitioner;

(iv) The said exercise of granting notional promotion and granting of arrears of pay shall be carried out within 12 weeks from the date of receipt of a copy of this order;

(v) No costs. Consequently, connected miscellaneous petitions are closed.

04.04.2024

Index : Yes
Neutral Citation : Yes
Speaking order : Yes

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To
1.The Secretary to Government
School Education Department
Fort St George, Chennai 600 009.

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2.The Commissioner of School Education
College Road, Nungambakkam
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3.The Director of Elementary Education
College Road, Nungambakkam
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4.The District Educational Officer (Primary)
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