

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 9TH DAY OF NOVEMBER 2015/18TH KARTHIKA, 1937

WP(C).No. 20663 of 2012 (G)

PETITIONER(S):

**T.R. JAYAKUMARI AMMA, AGED 58 YEARS,
W/O.RAVINDRAN PILLAI, RETIRED PRINCIPAL,
KRGPM VOCATIONAL HIGH SECONDARY SCHOOL &
HIGH SCHOOL, ODANAVATTOM, KOTTARAKKARA, PIN-691 512,
RESIDING AT: "JAYA NIVAS", PADINJATTINKARA,
KOTTARAKKARA, KOLLAM DISTRICT.**

**BY ADVS.SRI.T.C.GOVINDA SWAMY,
SMT.KALA T.GOPI.**

RESPONDENT(S):

- 1. THE STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO
THE GOVERNMENT OF KERALA,
GENERAL EDUCATION DEPARTMENT,
STATE SECRETARIAT, THIRUVANANTHAPURAM-695 001.**
- 2. THE DIRECTOR OF PUBLIC INSTRUCTIONS,
GOVERNMENT OF KERALA,
DEPARTMENT OF GENERAL EDUCATION, JAGATHY,
THIRUVANANTHAPURAM-695 001.**
- 3. THE DISTRICT EDUCATIONAL OFFICER,
KOTTARAKKARA, KOLLAM DISTRICT, PIN-691 512.**
- 4. THE PRINCIPAL,
KRGPM VOCATIONAL HIGH SECONDARY SCHOOL &
HIGH SCHOOL, ODANAVATTOM, KOTTARAKKARA,
KOLLAM DISTRICT, PIN-691 512.**
- 5. THE ACCOUNTANT GENERAL (A&E),
KERALA, THIRUVANANTHAPURAM-695 039.**

WP(C).No. 20663 of 2012 (G)

**6. THE DEPUTY DIRECTOR OF EDUCATION,
GOVERNMENT OF KERALA, KOLLAM.**

R1 TO R3, R5 & R6 BY SR. GOVT. PLEADER SRI.E.M. ABDUL KHADIR.

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 09-11-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

rs.

APPENDIX

PETITIONER'S EXHIBITS:-

- EXT.P1 COPY OF THE PESNION PAYMENT ORDER BEARING NO.110945259 DATED 08/05/2009.
- EXT.P2 COPY OF THE GPO NO.120945259 DATED 06/07/2009 ISSUED BY THE 5TH RESPONDENT.
- EXT.P3 THE EXTRACT OF AUDIT OBJECTION RECEIVED FROM THE 2ND RESPONDENT BY THE PETITIONER.
- EXT.P4 COPY OF THE REPRESENTATION DATED 04/09/2010 ADDRESSED TO THE 3RD RESPONDENT.
- EXT.P5 COPY OF THE LETTER BEARING NO.120/2010 DATED 04/09/2010 BY THE 4TH RESPONDENT.
- EXT.P6 COPY OF THE REPRESENTATION DATED 21/09/2010 ADDRESSED TO THE 2ND RESPONDENT.
- EXT.P7 COPY OF THE COMMUNICATION ALONG WITH ITS ENCLOSURE LETTER BEARING NO.B1-5902/10 DATED 18/10/2010 ISSUED FROM THE OFFICE OF THE 3RD RESPONDENT ADDRESSED TO THE 2ND RESPONDENT.
- EXT.P8 COPY OF THE ORDER BEARING GO (MS) NO.104/69/EDN. DATED 06/03/1969.
- EXT.P9 COPY OF THE ORDER BEARING NO.GO(MS) NO.164/69/EDN. DATED 17/04/1969.
- EXT.P10 COPY OF THE REPRESENTATION DATED 22/12/2010 ADDRESSED TO THE 2ND RESPONDENT.
- EXT.P11 COPY OF THE REPRESENTATION DATED 02/02/2011 TO THE INCUMBENT OF THE OFFICE OF THE 2ND RESPONDENT.
- EXT.P12 COPY OF THE REPRESENTATION DATED 06/04/2011 ADDRESSED TO THE INCUMBENT OF THE OFFICE OF THE 2ND RESPONDENT.
- EXT.P13 COPY OF THE AFFIDAVIT DATED 6TH APRIL 2011 SUBMITTED BY THE PETITIONER.

WP(C).No. 20663 of 2012 (G)

- EXT.P14** COPY OF THE ORDER NO.D4/4771/09 DATED 18/08/2011 ISSUED FROM THE OFFICE OF THE DEPUTY DIRECTOR OF EDUCATION, KOLLAM.
- EXT.P15** COPY OF THE ORDER GOVT. PLEADER (O) NO.121145259 DATED 31/10/2011.
- EXT.P16** COPY OF THE NOTICE NO.A1/1019/09 DATED 15/11/2011 ISSUED FROM THE OFFICE OF THE 3RD RESPONDENT.
- EXT.P17** COPY OF THE PPO DATED 11/07/2012 ISSUED FROM THE OFFICE OF THE 5TH RESPONDENT.
- EXT.P18** COPY OF THE ORDER BEARING C.V.P.NO.130945259-1 DATED 10/07/2012 ISSUED FROM THE OFFICE OF THE 5TH RESPONDENT.

RESPONDENT'S EXHIBITS:- NIL.

//TRUE COPY//

P.S. TO JUDGE

rs.

A.M. SHAFFIQUE, J.

=====

W.P. (C) No. 20663 of 2012

=====

Dated this, the 9th day of November, 2015

J U D G M E N T

Petitioner challenges Exts.P14 to P18 by which orders had been issued by the respondent authorities revising her pay, pension and gratuity by treating 47 days in her service as leave without allowance for personal purposes and excluding the said period for computation of the pecuniary benefits, pay fixation etc.

2. The short facts involved in the writ petition would disclose that the petitioner was appointed as a High School Assistant against leave vacancy from 30/9/1976 to 31/3/1977. Her appointment was regularised on 1/6/1977. She was treated as a surplus teacher giving the status of protected teacher on 15/7/1981 and was redeployed in a Government school from 18/11/1981 to 31/3/1982. She was repatriated to the parent school on 01/4/1982. Her absence from 15/7/1981 to 1/10/1981 was regularised as half pay leave and the period from 1/10/1981 to 17/11/1981 was treated as leave without pay. She superannuated from service on 31/3/2009. She was granted

pension in terms with Ext.P1 order dated 8/5/2009. She was also paid gratuity based on the emoluments actually drawn. According to the petitioner, subsequently on the basis of audit query, proceedings were taken in terms of Ext.P14 by which sanction was accorded for releasing an amount of ₹2,97,000/- being 90% of DCRG amount, by withholding 10% of the said amount until finalisation of the proceedings. By Ext.P15, the petitioner was paid gratuity of ₹2,97,000/-. Ext.P16 is the communication from the District Educational Officer calling upon the petitioner to remit the excess amount drawn from 1/7/1982 to 31/3/2009 amounting to ₹68,166/-. Ext.P17 is the revised pension payment order and Ext.P18 is the details regarding pension by which her pension has been reduced to ₹9,788/-. The main contention urged by the petitioner is that there was no reason to exclude the aforesaid 47 days from her service and to rework the pay and allowances. It is contended that the audit objection was not supported by any material. The contention that the petitioner had availed of leave without allowance from 2/10/1981 to 17/11/1981 on private affairs is absolutely baseless and further there was no reason to rework the entire fixation of pay and salary after a long period of

time and that too after three years from the date on which the petitioner had retired.

3. Counter affidavit has been filed by the 5th respondent supporting the stand taken by the respondent authorities. Learned counsel for the petitioner submits that to the audit objection, the District Educational Officer, who is the competent authority had already given a valid explanation and it is without reference to the said explanation that Exts.P14 to P18 orders have been passed. He also relied upon the judgment of the Supreme Court in ***Sushil Kumar Singhal v. Pramukh Sachiv Irrigation Department & Ors.*** (2014 (3) All India Services Law Journal 62), in which the Supreme Court has held that an order of recovery made after several years after fixation of the salary is not permissible. That was a case in which there was a Government Order which permitted the Government to correct mistakes in the pay fixation within a period of 34 months. Supreme Court held that when the appellant retired on 31st December, 2003 and the mistake is alleged to be committed in 1986, much prior to the retirement of the appellant, by virtue of the Government Order dated 16/1/2007, no recovery could be

made in respect of the salary paid by mistake nor the pension can be reduced. Yet another judgment relied upon is **State of Punjab and Others v. Rafiq Masih (White Washer) and others** [(2015) 4 SCC 334]. That was a case in which the Supreme Court after considering the entire law laid on the subject opined in para 7 to 10 as under;

"7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.

8. *As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the concerned employee. If the effect of the recovery from the concerned employee would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.*

9. *The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality, can be found in Articles 14 to 18, contained in Part III of the Constitution of India, dealing with "Fundamental Rights". These Articles of the Constitution, besides assuring equality before the law and equal protection of the laws; also disallow, discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracized section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The*

-:6:-

embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "Directive Principles of State Policy". These Articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice - social, economic and political, by inter alia minimizing monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.

10. In view of the aforestated constitutional mandate, equity and good conscience, in the matter of livelihood of the people of this country, has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent, that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens

-:7:-

of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India”.

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

5. A reference to Ext.P7 would show under what circumstances the authorities had issued Exts.P14 to P18. From the objection raised by the auditor, it was stated that the period of leave without allowance, i.e., 47 days from 2/10/1981 to 17/11/1981 was sanctioned for private affairs. It is mentioned that as per the rules, the leave without allowance period of 47 days cannot be counted for the benefit of increment, grade etc., and therefore, after excluding the leave without allowance period of 47 days, increment date has to be changed and based on that the pay fixation etc., has to be worked out. A reply has been given by the District Educational Officer indicating that Smt.T.R.Jayakumary Amma was appointed as HSA (NS) in KRGPMHS, Odanavattom from 1.6.77 vide Order No.K.Dis.22549/77/B3 dt.16.10.79 by the DEO, Kottarakkara.

While continuing as such she was retrenched from service on 15.7.81 (S.F.81-82) then she was reinstated in service vide Order No.B3-9384/81 dt.14.7.81 of the DEO, Kottarakara on protection and posted at Govt.HS. Chithara in the light of G.O.(MS) 104/69/G.Edn. dt.6.3.1969 and G.O(MS) 64/69/Edn.dt.17.4.69 and joined in GH S, Chithara on 18.11.81. Then she was recalled to parent school on 31.3.82. In G.O.104/69/G.Edn dt 6.3.69 Govt. have issued direction to treat the period during which she is out of job will be treated as eligible leave and leave on loss of pay.

The teacher was on out of job from 14.7.81 to 17/11/81 (126 days) and it is presumed that the reason for granting leave was not mentioned in the Service Book only due to clerical error.

6. It is apparent from Exts. P14 to P18 orders that there is no material to indicate that the clarification issued by the District Educational Officer has been considered or rejected by the authorities. It is not in dispute that petitioner has availed of leave without allowance for 47 days from 2/10/1981 to 17/11/1981. It is stated that the said leave was granted for the teacher for the purpose of regularising the period as per direction issued in Government Orders dated 6/3/1969 and 17/4/1969. It is also

indicated that *"it is presumed that the reason for granting leave not mentioned in the S.B. was only due to clerical error"*.

7. Learned counsel also relied upon Ext.P8 Government Order dated 6/3/1969 which also indicates as under;

"The retrenched teacher will not be entitled to salary and allowances for the period he is out of job. But as this may constitute a break in service the period during which he is out of job will be treated as eligible leave and leave on loss of pay."

The same is the position as far as the Government Order dated 17/4/1969 is concerned.

8. It is therefore apparent that no steps have been taken by the competent authority to take a decision based on the reply given by the District Educational Officer. Under such circumstances, I am of the view that after the period of three years from the date of retirement and after two three decades from the date when the pay fixation has been made and ignoring the clarification issued in terms of Ext.P7, there was no reason to issue Exts.P14 to P18 orders.

9. Under such circumstances, Exts.P14 to P18 are quashed and petitioner shall be paid pension in terms with Ext.P1

W.P(C) No.20663/12

-:10:-

and she will also be entitled for the balance of gratuity, which shall be paid within a period of two months from the date of receipt of a copy of this judgment. Though the learned counsel for the petitioner prays for interest for the delayed payment, in the facts and circumstances of the present case, no interest need be mulcted on the respondents. Accordingly, the claim for interest is rejected.

Writ petition is allowed as above.

Sd/-
A.M. SHAFFIQUE, JUDGE

Rp
11/11/2015

//True Copy//

P.S to Judge