IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

FRIDAY, THE 27TH DAY OF MARCH 2015/6TH CHAITHRA, 1937

WP(C).No. 31419 of 2012 (B)

PETITIONER(S):

C.P.BABY,
LOWER PRIMARY SCHOOL ASSISTANT
ST.MARY'S LOWER PRIMARY SCHOOL, EDATHIRINJI
IRINJALAKUDA, TRICHUR DISTRICT, PINCODE - 680 122.

BY ADVS.SRI.V.M.KURIAN
SRI.MATHEW B. KURIAN
SRI.K.T.THOMAS

RESPONDENT(S):

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1. STATE OF KERALA
REPRESENTED BY SECRETARY TO GOVERNMENT
GENERAL EDUCATION DEPARTMENT
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM- 695 001.

2. THE DEPUTY DIRECTOR OF EDUCATION
THRISSUR - 680001.

3. THE ASSISTANT EDUCATIONAL OFFICER
IRINJALAUDA - 680 121.

4. THE HEADMISTRESS,
ST.MARY'S LOWER PRIMARY SCHOOL,
EDATHIRINJI, IRINJALAKUDA- 680 122.

R1-R3 BY GOVERNMENT PLEADER SRI.NOUSHAD THOTTATHIL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23/03/2015
THE COURT ON 27-03-2015, DELIVERED THE FOLLOWING:

PJ

WP(C).No. 31419 of 2012 (B)

APPENDIX

PETITIONER(S) EXHIBITS

EXHIBIT-P1 - **TRUE COPY OF THE OBJECTION DATED NIL RAISED BY THE DEPUTY DIRECTOR OF EDUCATION, THRISSUR.**

EXHIBIT-P2 - **TRUE COPY OF THE LETTER DATED 8-11-2011 SUBMITTED BY THE ASSISTANT EDUCATIONAL OFFICER TO THE DEPUTY DIRECTOR OF EDUCATION, THRISSUR.**

EXHIBIT-P3 - **TRUE COPY OF THE LETTER DATED 11-01-2012 ISSUED BY THE DEPUTY DIRECTOR OF EDUCATION TO THE ASSISTANT EDUCATIONAL OFFICER**

EXHIBIT-P4 - **TRUE COPY OF THE LETTER DATED 2-3-2012 SENT BY ASSISTANT EDUCATIONAL OFFICER TO THE HEADMISTRESS**

EXHIBIT-P5 - **TRUE COPY OF THE REPRESENTATION DATED 31-7-2012 SUBMITTED BY PETITIONER BEFORE 1ST RESPONDENT**

EXHIBIT-P6 - **TRUE COPY OF THE LETTER DATED 1-9-2012 OF THE ASSISTANT EDUCATIONAL OFFICER**

EXHIBIT P7 - **TRUE COPY OF THE RELEVANT EXTRACT OF G.O.(P) NO.600/93/FIN.TRIVANDRUM DATED 25/9/93 (PAY REVISION ORDER-1992)**

EXHIBIT P8 - **TRUE COPY OF THE JUDGMENT DATED 7/2/2008 IN OP.34168/2000**

RESPONDENTS' EXHIBITS

NIL.

/ TRUE COPY /

P.S. TO JUDGE

PJ

A.V. RAMAKRISHNA PILLAI, J.

W.P.(C) No. 31419 of 2012

Dated this the 27th day of March, 2015

J U D G M E N T

The petitioner has come up before this Court seeking the following reliefs;

> "a. issue a writ of mandamus or other appropriate writ, order or direction commanding the 3rd respondent to accept original of Ext.P5 application and to forward the same to the 1st respondent;
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> b. issue a writ of mandamus or other appropriate order or direction commanding the 1st respondent to consider and pass orders on Ext.P5 application expeditiously as and when the same is received from the 3rd respondent;
>
> c. issue appropriate writ order or direction directing the respondents to keep in abeyance all further proceedings for recovery pursuant to Ext.P6 letter issued by the 3rd respondent, till the disposal of Ext.P5 representation.
>
> d. grant such other and further reliefs as this Hon'ble Court deems fit to grant in the facts and circumstances of the case.
>
> e. To declare that the respondents are not entitled to refix the pay or to effect any recovery from the petitioner on the basis of the objections raised in Exhibit-P4 proceedings.
>
> f. To declare that the petitioner is entitled to the benefit of stepping up of pay equal to the pay of the junior on 01.07.1992 and grant of increment on 01.12.1992.

> g. To issue a writ of certiorari or other appropriate writ order or direction quashing Exhibit-P4 proceedings issued by the 3rd respondent.”

2. The petitioner was working as LPSA in St.Mary's LP School, Edathirinji, which is an aided school. As part of the Pay Revision Order, 1992, the petitioner opted 01.03.1992 as her option date for availing pay revision benefits. The petitioner alleges that one K.A.Mary, an LPSA, who was junior to the petitioner, was getting basic salary of the petitioner with effect from 01.07.1992 whereas the petitioner could get the same pay only with effect from 01.12.1992. The pay scale of both were equalized by fixing the basic salary at ₹1,410/- (1350-2200) with effect from 01.07.1992. The next increment due to the petitioner was granted with effect from 01.12.1992. On the basis of the above fixation, increments were being granted to the petitioner in December every year; and further, the time bound grades and other pay revision benefits were also granted in December every year. The petitioner has to demit her office in March 2014. The Deputy Director raised

objection with regard to the date of grant of increments to the petitioner. Clarification furnished was not accepted and more than ₹1,25,000/- was sought to be recovered. Though the petitioner submitted Ext.P5 representation before the 1st respondent requesting to grant permission for exercising re-option in respect of the option date availed by the petitioner, the 3rd respondent returned the same stating that re-option can be allowed only on the basis of Government Order.

3. In the counter affidavit filed by the 2nd respondent, they have contended as follows;

> The petitioner was working as LPSA in the St.Mary's LP School, Edathirinji under the jurisdiction of Assistant Educational Officer, Irinjalakkuda. As part of the pay revision 1992, the petitioner opted 1.3.1992 as option date for availing pay revision benefits. Subsequently, it was found that Smt.K.S.Mary, LPSA, who was junior to the petitioner, was getting basic salary of the petitioner earlier (i.e.) with effect from 01.07.1992, whereas the petitioner could get the same pay only with

effect from 01.12.1992. According to the 2nd respondent, this anomaly could be rectified in terms of Rule 6(11) of GO(P) No.600/93 Fin dated 25.09.1993 by refixing the pay of the petitioner. It was contended that the 3rd respondent is the competent authority for the above refixation pay and instead of obtaining his order, the 4th respondent herself granted the refixation of pay.

The next increment due to the petitioner was granted wrongly as ₹1440 + 10 instead of 1410 with effect from 01.07.1992 and the next increment was sanctioned erroneously as 1480 instead of 1440 with effect from 01.07.1993. The increment date is seen again changed to 01.12.1994 and pay raised to 1520. Subsequent increments were also granted to the petitioner in December every year. The admissible and granted pay of the petitioner with effect from 01.03.1992 in the scale 1350-1720 are as follows;

Date	Admissible	Granted
01.03.1992	1380	1380
01.07.1992	1410	1440 + 10 (Page 26+27 of Service Book Vol.I)
01.07.1993	1440	1480
01.07.1994	1480	1520 (w.e.f. 01.12.1994)
01.07.1995	1520	1560 (w.e.f. 01.12.1995)

Further, the time bound grades and other pay revision benefits were also granted in December every year.

The Deputy Director of Education, Thrissur verified the fixation of pay and raised an objection with regard to the date of grant of increments to the petitioner. It is pointed out that as the increments granted were not correct, the Assistant Educational Officer, Irinjalakkuda was directed to rectify the defects by taking appropriate action. Based on the direction of Deputy Director of Education, Thrissur, the service books of the petitioner and junior teacher along junior-senior fixation statement were submitted by the Assistant Educational Officer, Irinjalakkuda for further action. Service book and fixation statement were returned to the Assistant Educational Officer as per letter dated 11.01.2012 with a direction to resubmit the statement approved by the Assistant Educational Officer.

The Assistant Educational Officer, Irinjalakkuda as per letter no.E-2899/11 dated 02.03.2012 issued a notice to the Headmaster of the school stating that the petitioner has obtained excess amount by virtue of the wrong sanction of increment and pay fixations and accordingly, directed to regularize the fixation of pay with effect from 01.07.1992 and refund the excess amount claimed. As the defect has crept in the year 1992, the excess drawn may be large. However, all the later fixation has been sanctioned on the basis of the declaration of the teacher that the excess drawn will be refunded if the fixation found wrong in further verification. If she got a chance for re-option, the fixation can be corrected without much monitory loss. But, it is categorically specified in the Pay Revision orders that request of re-options will not be entertained.

The re-option proposal of the petitioner submitted to the Assistant Educational Officer by the Headmaster and the same was returned by the Assistant Educational Officer stating that re-option can be allowed only on the basis of the Government Order. In the similar case, the Deputy Director of Education sought explanation of the Assistant Educational Officer for forwarding an application without Government Order. As the Deputy Director of Education has returned another application for re-option, the application of the petitioner was also not forwarded to the Government.

While approving the equalization of pay (Junior-Senior fixation), the 3rd respondent noticed the irregular sanction of increments and pay fixation. So, the Headmaster was directed to regularize the increments, to submit the proposal for regularizing pay revision and to refund the excess drawn by the petitioner. The petitioner has been enjoying undue benefits since 01.07.1992 and she is bound to refund the excess drawal owing to the declaration filed by her.

4. Arguments have been heard.

5. The petitioner was permitted to exercise the option with effect from 01.03.1992. The learned counsel for the petitioner would argue that due to the wrong grant of pay revision benefits and increments with effect from 01.12.1992, huge amounts are sought to be recovered from the petitioner. According to the learned counsel, there is no mistake on the part of the petitioner. The 3rd respondent is the authority competent to approve

the equalization of pay. It was argued that instead of approving the same, the 3rd respondent has directed the Headmistress to regularize the pay fixation of the petitioner and to effect recovery.

6. Admittedly, the petitioner retired in March 2014. Due to no fault of the petitioner, the official respondents are trying to recover huge amounts from the petitioner. If such orders are implemented, the petitioner would be deprived of the substantial portion of her pensionary benefits. She has submitted Ext.P5 application through proper channel. The learned counsel for the petitioner points out that the 3rd respondent, who is the competent authority and duty bound to forward the application to the Government, has failed to forward the application.

7. It is crucial to note that the objection was raised in the year 2012, i.e., after 20 years. Here, it is profitable to have a look at the relevant provision, which covers the situation. Rule 28A Chapter IV Part I of the Kerala

Service Rules reads as follows;

> "28A. Notwithstanding anything contained in these rules, where an Officer holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to another post carrying a higher time-scale of pay, his initial pay in the higher time-scale of pay shall be fixed at the stage next above the pay notionally arrived at in the lower time-scale of pay by increasing the actual pay, drawn by him in the lower time-scale by one increment. He shall be given opportunity to opt any date for fixation of pay in the higher time scale of pay from the following options, namely:-
>
> Option (a) - Pay will be fixed in the higher time scale of pay, on the date of promotion, under this rule. Next increment in the higher time scale will fall due only on completion of one year from the date of such fixation of pay.
>
> OR
>
> Option (b) - Pay on the date of promotion will be initially fixed at the stage of higher time scale of pay of the promoted post next above the pay in the lower time scale of pay. Thereafter, fixation of pay under the rule will be allowed based on the pay in the lower post on the date opted by the promotee, i.e., on the date of increment in the lower post. Next increment will fall due only on completion of one year from the date of fixation of pay under this rule. If the fixation of pay under this rule on the date of option does not make any change in the pay in the higher time scale, the pay will remain at the same stage till completion of one year from the date of initial fixation (date of promotion) of pay in the higher time scale. Next increment in such cases will be allowed on the completion of one year from the date of initial fixation of pay in the higher time scale of pay.
>
> The competent authority shall incorporate in

the promotion order a provision to the effect that the officer shall exercise option within one month from the date of order of promotion or of taking charge in the promoted post whichever is later. The option under this rule shall be in Form No.18:

Provided that the provisions of this rule shall not apply to promotions to posts carrying a scale of pay, the minimum pay of which exceeds Rs.20,700/-.

Provided also that where a Government servant is immediately before his promotion or appointment to a higher post, drawing pay at the maximum of the time-scale of the lower post, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by an amount equal to the last increment in the time-scale of the lower post.

Provided that if he has either previously held substantively or officiated in (i) the same post or (ii) a permanent or temporary post on the same time-scale or (iii) a permanent post on an identical time-scale, or a temporary post on an identical time-scale, such post being on the same time-scale as a permanent post, then the initial pay shall not be less than the pay which he drew, on the last such occasion and he shall count for increment the period during which he drew that pay on such last or any previous occasions.

This amendment shall be deemed to have come into force with effect from 21st July 1964.

[G.O.(P) 710/70/Fin., dated 5th October 1970]

RULING No.1

In cases where the application of the rule would give rise to anomalies in as much as an officer Officiating in a higher post could get his pay refixed at a stage higher than the pay drawn by another who stands confirmed in the higher post on the same scale of pay, the anomaly will be removed by

> refixing the pay of the senior officer at the stage equal to that fixed for the junior officer in the higher post, the orders of refixation being issued by the Competent Authority under Rule 34, Part I, Kerala Service Rules. The refixation of pay in such cases will be made subject to the following conditions:-
>
> (a) Both the junior and senior officers should belong to the same cadre and the post in which they have been promoted or confirmed, as the case may be, should be identical and in the same cadre.
>
> (b) The scale of pay of the lower post in which they would have drawn their pay but for their promotion or confirmation should be identical.
>
> (c) The anomaly should be directly as a result of the application of Rule 28 A. **For example**, if the junior officer draws from time to time a higher rate of pay than the senior by virtue of fixation of pay under the normal rules or any advance increment granted to him, the provision contained in this ruling should not be invoked to step up the pay of the senior officer.
>
> (d) The refixation of pay of the senior officer should be done with effect from the date of refixation of pay of the junior officer. The next increment of the senior officer will however be drawn on the date on which it would have fallen due but for this refixation of pay."

The petitioner's case falls within Clause (d) referred to above.

8. The apex court has occasion to consider the question of recovery of payment mistakenly given to the employee in **State of Panjab** v. **Rafiq Masih (White Washer)** [2015 (1) KLT 429 (SC)]. The apex court

summarized the following few situations, wherein recoveries by the employers would be impermissible in law;

> “(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
>
> (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”

The petitioner's case falls squarely within Clauses (ii) and (iii) referred to above.

9. Ext.P4 proceedings is issued on the basis that the stepping up of pay granted to the petitioner is not correct and that the grant of the subsequent increment is also wrong. The said finding is not sustainable in view of

Rule 6 of Annexure III to G.O.(P) No.600/93/Fin. Thiruvananthapuram dated 25.09.1993 (Pay Revision Order - 1992). Rules 6 & 7 of Annexure III to the said Government Order read as follows;

> “6. Date of Increment
>
> (i) The next increment of an employee in the revised scale shall be granted on the date he would have drawn increment had he continued in the existing scale.
>
> (ii) If an employee draws his next increment in the revised scale under sub rule (i) above and thereby becomes eligible for higher pay than his senior whose next increment falls due at a later date, then the pay of such senior shall be refixed equal to the pay of the junior from the date on which the junior becomes entitled to higher pay.
>
> Note:- In case where the pay of an employee is stepped up in terms of Clause (ii) above and Rule 7 below, the next increment shall be granted after completing the requisite qualifying service for the next increment.
>
> 7. In case where a senior employee promoted to a higher post before 1st March, 1992 draws less pay in the revised scale than his junior who is promoted to the higher post on or after 1st March, 1992, the pay of the senior employee will be stepped up to that of the Junior with effect from the date on which the junior draws more pay, provided that;
>
> (i) the Senior and the Junior employee should belong to the same category and should have been promoted to the same category of post;
>
> (ii) the pre-revised and revised scales of pay of the lower and higher posts in which they are entitled

> to draw pay should be identical and
>
> (iii)The anomaly should have arisen directly as a result of the introduction of the revised scale of pay.
>
> Note:- If in the lower post, the junior employee was drawing more pay in the pre-revised scale than the senior by virtue of any advance increment granted to him, the seniors to such junior have no claim over the pay of the junior."

10. The intention of the above rule is to protect the pay of the senior and step it up to the pay drawn by the junior. The aforesaid position would show that the petitioner is entitled to have her pay stepped up so as to equate it with the pay of the junior. The petitioner is having the requisite qualifying service for the next increment, which fell due on 01.12.1992. Therefore, the objection raised by the Department against the refixation of pay granted to the petitioner does not stand the test of law and is not reasonable. On a consideration of the entire materials now placed on board, this Court is of the view that the petitioner is entitled to succeed.

In the result, the writ petition is disposed of as follows;

- Ext.P4 issued by the 3rd respondent is quashed.
- It is hereby declared that the petitioner is entitled to get the benefit of stepping up of pay equal to the pay of the junior on 01.07.1992 and grant of increment with effect from 01.12.1992.

Sd/-
A.V. RAMAKRISHNA PILLAI
JUDGE

bka/-