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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Coram :29.04.2016

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

Writ Appeal (MD) No.1274 of 2014

and

M.P. (MD) No.1 of 2014

- 1.P.L.W.A.Higher Secondary School Committee,
Vicramasingapuram-627 425,
Tirunelveli District,
rep.by its Secretary.
 - 2.M.Panneerselvam ,Headmaster
P.L.W.A.Higher Secondary School,
Vickrasinghapuram,
Tirunelveli-627 425
- Appellants/Respondents 3&4
vs.
- 1.A.S.Edwin Sudhan
- Respondent-1/Petitioner
- 2.The Chief Educational Officer,
Tirunelveli, Tirunelveli District.
 - 3.The District Educational Officer,
Cheranmahadevi at Tirunelveli,
Tirunelveli-627 001.
- ... Respondents 2&3/
Respondents 1 and 2

Appeal filed under Clause 15 of Letters Patent, against the order made in W.P(MD)No.1849 of 2009 dated 28.08.2014.

Prayer in WP(MD)No.1849/2009:- Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus calling for the records relating to the impugned order of termination issued by the 3rd respondent secretary dated 20.02.2009, QUASH THE SAME, and further direct the 3rd respondent to reinstate the Petitioner forthwith into service as Physical Education Teacher with all attendant benefits including salary, allowances and continuity of service.

For Appellants : Mr.G.Prabhu Rajadurai for
Mr.M.P.Senthil.
For Respondent-1 : Mr.Isaac Mohanlal
For Respondents 2& 3 : Mr.V.R.Shanmuganathan,
Spl.Govt.Pleader.

JUDGMENT

(Judgment of the Court was delivered by Mr.Justice S.MANIKUMAR)

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Challenge in this writ appeal, is to the order, made in W.P (MD)No.1849 of 2008, dated 28.08.2014, by which, a learned single



Judge, has allowed the writ petition filed by the first respondent herein and issued directions to the first appellant herein to reinstate the first respondent, within a period of four weeks from the date of receipt of a copy of the order. The learned Judge also issued further directions to the effect that the first respondent is entitled for continuity of service and all other attendant benefits. A specific direction has also been issued by the learned Judge that the backwages from the date of termination till reinstatement be paid by the first respondent School Management. Aggrieved by the same, the present appeal by the School Management.

2.Short facts, necessary for the disposal of this writ appeal, are that the first appellant school is private aided school, governed by the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 (in short "the Act"). After due selection process, the first respondent herein was appointed as a Physical Education Teacher on 01.12.2008 and seeking approval for his appointment, the first appellant school submitted proposals to the educational authorities. When the said proposals were pending, on 02.02.2009, the Headmaster of the School (arrayed in his personal capacity as 2nd appellant) issued a charge memo, containing as many as five charges, to the first respondent. To this extent, there is no dispute with regard to the facts.

3.It is claimed by the first respondent that he submitted his explanation to the charges. But, the first appellant claimed that no explanation was received from the first respondent. Material on record discloses, the Secretary of the first appellant school, by letter dated 14.02.2009, has directed the first respondent to appear the School Committee on 19.02.2009 at 4.00 p.m. and accordingly, the first respondent appeared before the Committee. It is claimed by both sides that there was some enquiry. Thereafter, on the next day, i.e. on 20.02.2009, the Secretary of the School, issued an order terminating the first respondent from service. Challenging the same, the first respondent filed W.P.(MD)No.1849 of 2009, inter alia raising the following grounds:

(i)The Headmaster of the School has no authority to issue charge memo to the petitioner and it is the School Committee alone, which is competent to initiate any disciplinary proceedings.

(ii)Though the first respondent submitted his explanation, no enquiry was conducted and no witness was examined and thus there is violation of principles of natural justice.

(iii)In the decision making process held on 19.02.2009, the second appellant was also present and participated in the process, effectively and thus he is highly biased against the first respondent, as his attempt in the selection process to bring his own man could not be fructified.



(iv) The termination order has been issued without getting prior approval, as required under Section 22 of the Act and therefore the order of termination is liable to be set aside.

4. On Notice, the first appellant has filed a counter affidavit, contending that though the Headmaster issued the charge memo, it was issued only on the instructions of the School Committee and therefore it cannot be contended that no charge memo has been issued. Further, since the first respondent has not submitted his explanation, he was asked to appear before the School Committee on 19.02.2009, for an enquiry and based on the materials placed before the Committee, it was decided to terminate him from service and accordingly an order was issued on 20.02.2009. As it was only a simple termination order, it does not amount to punishment. Further, when his appointment itself was pending approval, there was no necessity to get prior permission from the educational authorities for termination. It is further stated that after the impugned order came to be issued, one Mr. M. Parthasarathy Selvaganesan, has been appointed in the place of the first respondent on 07.10.2009 and his appointment has also been approved by the District Elementary Educational Officer, by his proceedings in Na.Ka.No.5211/A2/2012, dated 02.01.2013 and therefore, if the first respondent is ordered to be reinstated in service, at this length of time, on any technical ground, it would materially affect the services of Mr. M. Parthasarathy Selvaganesan also.

5. After considering the rival contentions and after adverting to the facts of the case, a learned Single Judge allowed the writ petition and issued directions as stated above. Aggrieved by the same, the present appeal by the School Committee, raising, inter alia, the following grounds.

(i) The writ court ought not to have entertained the writ petition under Article 226 of the Constitution of India, when there is efficacious alternative remedy is available under Section 23 of the Tamil Nadu Recognized Private Schools (Regulations) Act, 1973.

(ii) The writ court has failed to see that prior approval from the competent authority is not necessary to terminate the 1st respondent/writ petitioner, as Section 22 of the Act does not apply to the present case, when his appointment itself has not been approved by the competent authority.

(iii) The writ court has failed to see that admittedly when the 1st respondent/writ petitioner is only a probationer, the question of conducting enquiry does not arise.

(iv) The writ court has completed overlook the subsequent development that one Parthasarathy Selvaganesan has been appointed in the place of the 1st respondent/writ petitioner on 07.10.2010, which appointment has also been approved by the competent authority vide proceedings in Na.Ka.No.5211/A2/2012, dated 02.01.2013.



(v) The Writ Court has directed payment of backwages, without advertent to the principle "No work, No pay".

6. On 20.01.2015, when this writ appeal came-up for hearing, this Court passed the following order:

"3. Learned counsel appearing for the first respondent herein drew the attention of this Court to the impugned order dated 28.08.2014, which is available at page No.116 of the typed set of papers, whereby the Learned Single Judge has observed as follows:

13. Next, it is brought to the notice of this Court that in the place of the petitioner, as against the said vacancy, already a person by name M.Parthasarathy Selvaganesan was appointed by the Management as early as on 07.10.2009. But in the counter filed by the second respondent, it is stated that for making such appointment, no prior permission was obtained from the second respondent by the School Management. It is also stated that the appointment of M.Parthasarathy Selvaganesan, when the writ petition is pending before this Court, cannot be approved.

14. The learned counsel for the petitioner would bring to my notice that after the change of officer at the office of the second respondent, somehow approval of appointment of M.Parthasarathy Selvaganesan was obtained. The learned counsel would further submit that as against the same, the petitioner raised an objection to the Chief Educational Officer and the Chief Educational Officer, Tirunelveli, by his Proceedings in Na.Ka.No.12898/B2/2009 dated 29.04.2013, has issued a show-cause notice to the School Management to show-cause as to why the approval granted by the District Educational Officer should not be cancelled. In my considered opinion, the appointment of M.Parthasarathy Selvaganesan in the place of the petitioner, when the writ petition is pending before this Court, cannot cloth M.Parthasarathy Selvaganesan with any right, since I could see from the records that the approval of appointment of M.Parthasarathy Selvaganesan itself is illegal. Therefore, it is for the Education Department to take a decision to withdraw the said approval after affording sufficient opportunity. In this writ petition, all that I can direct is to reinstate the petitioner in service with continuity of service and with back wages to be paid by the Management. I do not intend to direct the Educational Department to pay back wages to the petitioner, because, the Educational Department has paid wages to the said M.Parthasarathy Selvaganesan. Therefore, it is for the school Management to pay the back wages. "



Learned Single Judge while allowing the Writ petition, set aside the order of termination and also directed the first appellant/P.L.W.A.Higher Secondary School Committee, Vickramasingapuram, Tirunelveli District, the third respondent in the Writ petition to reinstate the first respondent herein within a period of four weeks from the date of receipt of a copy of this order and further, held categorically that the Writ petitioner is entitled for continuity of service, all the other attendant benefits and the back wages from the date of termination till the date of reinstatement.

4.Learned counsel appearing for the appellants submitted that the appellants have approached the Government for sanctioning additional post of Physical Education Teacher on the ground of total strength of students studying in the school and the same is being considered by the Government. The said submission made by the appellants is not legally acceptable.

5.Learned Special Government Pleader appearing for the respondents 2 and 3 has submitted that it is not a matter of right for the appellants for seeking any additional sanction of post as there is a direction by the Learned Single Judge in the order passed in the Writ petition. According to the learned Special Government Pleader, there is only one sanctioned post for the school and therefore, additional post cannot be granted and that the request could be decided based on the materials and other relevant factors such as availability of funds from the Government.

6.The only point for consideration herein is whether the first appellant could by-pass the order dated 28.08.2014 passed in the Writ petition, though there was direction given to the first appellant to reinstate the first respondent herein within the time frame. Merely, filing a Writ Appeal would not be a stay against the order. As there is no stay granted, the direction issued by this Court could have been complied with in its letter and spirit. As the order passed by the Learned Single Judge is still in force, the non compilation of the order would be construed as Contempt of Court.

7.The appellant school being a Government aided school, has no authority to make any appointment or promotion against the guidelines given by the Government and seek regularisation or payment of salary from the Government for the post of unauthorised appointment.

8.On the aforesaid circumstances, we are of the considered view that the non compliance of the order passed by the Learned Single Judge is not only amounts to Contempt, but also would make this Writ Appeal not



maintainable and the Court can also suo motu take Contempt action for disobeying the order. Hence, we direct the first appellant to comply with the direction given by the Learned Single Judge by order dated 28.08.2014 passed in W.P.(MD)No.1849 of 2009 forthwith.

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For reporting compliance or for passing appropriate further orders post the matter on 03.02.2015."

7. Pursuant to the above order, the first appellant has passed the following order, dated 10.02.2015:

"To

Mr.A.S.Edwin Suthan,
S/o.Mr.Arul Selvaraj,
7/131, Avudaisivanpatti,
Avudaiyanoor-627808,
Tenkasi Taluk.

Sir,

Ref:W.A.(MD)No.1274 of 2014 - Pending on the file of
Madurai Bench of Madras High Court, Madurai.

With reference to the above, you are directed to report for duty with effect from 16.02.2015. The management has issued this order without prejudice to any of its right and contention in the above pending writ appeal including the pending stay application in M.P.No.1 of 2014 in W.A.(MD)No.1274 of 2014."

8. Perusal of the order of the writ court shows that the appellants have taken the very same grounds, which were pressed into service before the writ court, in assailing the order of the writ court. In order to appreciate the grounds raised in the writ petition, it is useful to reproduce the relevant portions of the order of the writ court, which reads as hereunder:

"7. The order of termination in this case, right at the outset on the issue, I have to say, is illegal. There are many reasons for the same. Though it is contended before this Court that the termination order, at the worst, may be termed only as irregular because there were certain procedural irregularities, I hold that the order is certainly an illegal order. The reasons are as follows:

First of all, it is the admitted legal position that the competent authority to initiate disciplinary proceedings is the School Committee. In this case, the charge memorandum does not indicate that the same was issued by the School Committee. Even now, no record has been produced to show that such decision was taken by the School Committee in its meeting to initiate disciplinary proceedings against the petitioner.

Therefore, I have to hold that initiation of disciplinary proceedings by issuing charge memorandum



Management could claim that enquiry was thoroughly held and that the petitioner was found guilty. Therefore, the decision of the School Committee to the effect that the petitioner had committed misconduct is not based on any evidence. Therefore, the same cannot be countenanced. Thereafter, no further liberty was given to the petitioner in respect of such findings and straightaway the termination order was issued. Therefore, I hold that the termination order is not irregular but it is illegal.

9. Next, the learned counsel for the petitioner would submit that no approval was obtained from the second respondent before terminating the service of the petitioner. For this, the learned counsel for the petitioner relies on a Division Bench judgment of this Court in *The Ayya Nadar Janakiammal College, Sivakasi vs. Pandian*, reported in 1998 (I) MLJ 14, wherein the issue before the Division Bench was as to whether termination of the services of the probationer by passing an order simpliciter without attaching any stigma, requires any prior approval from the competent authority under the Act. The Division Bench held that even if the probationer is sought to be terminated on the ground that his services were not satisfactory, even then, prior approval should be obtained from the competent authority.

10. In yet another case, in *RV Thevar Memorial Girls High School vs. The Director of School Education*, reported in 2002 (4) CTC 129, again yet another Division Bench has reiterated the law to state that prior approval if not obtained before terminating the teacher from service, the said termination is illegal and void *ab initio*. Therefore, I hold that termination of the petitioner without prior approval is illegal, which cannot be allowed to sustain.

11. The learned counsel for the respondents 3 and 4 would submit that the impugned order is not an order of punishment but it is only an order terminating the petitioner from service, without attaching any stigma, on the ground that the petitioner's service was not satisfactory. This argument deserves rejection even without any consideration, because, in the counter filed by the third respondent, it is reiterated that the impugned order is in culmination of the disciplinary proceedings. Therefore, according to the counter, it is only an order of punishment. Nowhere it is indicated either impliedly or expressly in the counter that the impugned order was passed only on the ground that the petitioner had not rendered satisfactory service. Therefore, this argument which



is now advanced by the learned counsel for the respondents across the bar, cannot be accepted, as it is quite contrary to the counter filed by the third respondent.

12. The learned counsel for the respondents 3 and 4 would further submit that on the above ground if this Court is inclined to hold that termination is illegal and therefore, the petitioner is entitled for reinstatement, instead of reinstating the petitioner, there may be a direction issued by the School Management to pay compensation. For this purpose, the learned counsel relied on the judgments of the Hon'ble Supreme Court in Ruby General Insurance Co.Ltd. vs. Shri P.P.Chopra, reported in 1969(3) SCC 653, and in Rolston John vs. Central Government Industrial Tribunal-cum-Labour Court, reported in AIR 1994 SUPREME COURT 131. In these cases, we have to take note of the fact that they relate to industrial disputes. The law relating to industrial disputes is different from service law. The appointments of workmen are not regulated by any specific Statute, whereas the appointment of the teacher in this case in a private aided school is regulated by a Statute. When the Statute specifically states that termination could be made only after obtaining prior approval and that the said Statute provides for the procedure to be followed, in my considered opinion, the termination in this case is to be examined on the basis of the Statute and the other laws relating to service. It is too well settled that the principles of law evolved under the Industrial Law cannot be imported to the Service Law, because basically these two areas are different and the laws governing them are also different. To my knowledge, I have not come across any judgment wherein the Courts have held that even in service law, when termination is set aside instead ordering for reinstatement, compensation can be awarded. The learned counsel on either side would also fairly concede that there is no judgment in this aspect, as on today. In view of the same, I am of the view that the principles evolved in respect of industrial law in these two judgments, cannot be imported to the facts of the present case, because the present case is governed by the Statute and the principles of service law. Therefore, this submission is also rejected.

13. Next, it is brought to the notice of this Court that in the place of the petitioner, as against the said vacancy, already a person by name M.Parthasarathy Selvaganesan was appointed by the



Management as early as on 07.10.2009. But in the counter filed by the second respondent, it is stated that for making such appointment, no prior permission was obtained from the second respondent by the School Management. It is also stated that the appointment of M.Parthasarathy Selvaganesan, when the writ petition is pending before this Court, cannot be approved.

14.The learned counsel for the petitioner would bring to my notice that after the change of officer at the office of the second respondent, somehow approval of appointment of M.Parthasarathy Selvaganesan was obtained. The learned counsel would further submit that as against the same, the petitioner raised an objection to the Chief Educational Officer and the Chief Educational Officer, Tirunelveli, by his Proceedings in Na.Ka.No.12898/B2/2009 dated 29.04.2013, has issued a show-cause notice to the School Management to show-cause as to why the approval granted by the District Educational Officer should not be cancelled. In my considered opinion, the appointment of M.Parthasarathy Selvaganesan in the place of the petitioner, when the writ petition is pending before this Court, cannot cloth M.Parthasarathy Selvaganesan with any right, since I could see from the records that the approval of appointment of M.Parthasarathy Selvaganesan itself is illegal. Therefore, it is for the Education Department to take a decision to withdraw the said approval after affording sufficient opportunity. In this writ petition, all that I can direct is to reinstate the petitioner in service with continuity of service and with back wages to be paid by the Management. I do not intend to direct the Educational Department to pay back wages to the petitioner, because, the Educational Department has paid wages to the said M.Parthasarathy Selvaganesan. Therefore, it is for the school Management to pay the back wages.

15.Now, turning to the last objection regarding the maintainability of the writ petition, I have to say that it is true that as against the order of termination from service, appeal can be filed under Section 23 of the Act. But availability of such alternative remedy would not deprive this Court from entertaining this writ petition, because, in this case, there is serious violation of principles of natural justice and because the impugned order of termination is not irregular but illegal. The power of this Court under Article 226 of the Constitution of India is not limited by any of the provisions of the Constitution. In fact, it is unlimited. But at the



same time, in the course of time, the higher judiciary has itself imposed certain restrictions to exercise the said power. One such restriction is to refuse to entertain a writ petition when the party aggrieved has got an efficacious statutory alternative remedy. It is also too well settled that in a case where the order impugned is void *ab initio*, or illegal or the same has been passed in gross violation of principles of natural justice, this Court would not hesitate to entertain a writ petition so as to exercise its jurisdiction under Article 226 of the Constitution of India. In the case on hand, I have already concluded that initiation of disciplinary proceedings itself is illegal and the termination is void *ab initio*, for want of approval from the Education Department and the same violates the principles of natural justice, because, there was no enquiry held into the charges by affording any opportunity to the petitioner. In this factual situation, applying the above said settled principles of law, I have to hold that this writ petition is maintainable.

16. For grant of back wages, the learned counsel for the third respondent has got very serious objection. According to him, if it has been pleaded in the writ petition that the petitioner was not elsewhere employed gainfully and unless it is proved that he was not so gainfully employed, it is not possible for this Court to order for back wages. In this regard, the learned counsel relied on a judgment of the Hon'ble Supreme Court in *Zila Sahakari Kendriya Bank Mariyadit vs. Jagdishchandra and others*, reported in (2001) 3 SCC 332. That was a case where it was found positively that the employee had embezzled the money belonging to the employer. It was subsequently repaid. However, termination order was quashed only on the technical ground in as much as no enquiry was conducted. It was in those circumstances, the Hon'ble Supreme Court took a view that the order directing payment of back wages cannot be sustained. But in the present case, I have not set aside the order of termination on any such technical ground, pure and simple. I have held that order of termination is void *ab initio*, as the initiation of disciplinary proceedings itself is illegal. Since on facts, these are distinguishable, the view taken in the said judgment cannot be applied to the facts and circumstances of the present case.

17. Next, the learned counsel for the respondents 3 and 4 relied on yet another judgment of the Hon'ble Supreme Court in *Kanailal Bera vs. Union of India* and



others, reported in (2007) 11 SCC 517. In that case, the Hon'ble Supreme Court did not go into the question as to whether the appellant had committed any misconduct or not, as the Court was inclined to set aside the order of punishment only on technicalities. In those circumstances, in that case, the Hon'ble Supreme Court declined to order for payment of back wages. In this case also, again the Hon'ble Supreme Court reiterated that the order of punishment, if set aside on technicalities, back wages cannot be ordered in a mechanical fashion. As I have already stated, in the present case, I have not set aside the impugned order of termination only on any technical ground, but on the ground that the dismissal is void *ab initio* and the initiation of disciplinary proceedings itself is illegal.

18. The learned counsel for respondents 3 and 4 has relied on yet another judgment of the Hon'ble Supreme Court in J.K.Synthetics Ltd. vs. K.P.Agrawal and another, reported in (2007) 2 SCC 433, wherein also a similar stand has been taken.

19. But the learned counsel for the petitioner would rely on a recent judgment of the Hon'ble Supreme Court in R.S.Misra vs. Union of India and others, reported in (2012) 8 SCC 558. That was a case where the termination order was set aside and the High Court ordered for payment of 50% of arrears of salary, but the Hon'ble Supreme Court modified the order of the High Court and ordered for payment of full back wages. The Hon'ble Supreme Court had gone to the extent of saying that if once the Tribunal had allowed the original application filed before the Administrative Tribunal and directed the Commissioner to pass fresh orders under Article 81(b) of the Education Code, after considering the representation submitted by the appellant, earlier order terminating the appellant's services become redundant and the appellant was deemed to continue in service for all purposes. The facts of the said case are akin to the facts and circumstances of the present case. Here also, there is no reason as to why the petitioner should be denied any back wages, when the termination order is held to be illegal. In such view of the matter, I am inclined to issue a direction to the Management to pay full back wages to the petitioner.

20. In the result, the writ petition is allowed, the impugned order of termination is set aside and the third respondent is directed to issue consequential order reinstating the petitioner, within a period of four weeks from the date of receipt of a copy of this



order. It is also further directed that the petitioner shall be entitled for continuity of service and all the other attendant benefits. It is also directed that the petitioner shall be entitled for back wages from the date of termination till the date of reinstatement, to be paid by the third respondent Management. Consequently, the connected miscellaneous petition is closed. No costs. "

9. Going through the order of the writ court, we find that the learned Single Judge has adverted to all the facts, placed on either side, considered each and every ground raised by the counsel and after discussing the same at length, had negatived all the grounds raised by the appellants and allowed the writ petition. We are in complete agreement with the findings rendered by the learned Single Judge. We see no reason to interfere with the detailed and well considered order of the writ court. Accordingly, the writ appeal is dismissed. No order as to costs. Connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar (CSII)

/True Copy/

Sub-Assistant Registrar

To

1. The Chief Educational Officer,
Tirunelveli, Tirunelveli District.

2. The District Educational Officer,
Cheranmahadevi at Tirunelveli, Tirunelveli-627 001.

+One cc to Mr. M. P. Senthil, Advocate, SR.No.25487

+One cc to Mr. T. Cibi Chakraborty, Advocate, SR.No.25701

+One cc to The Special Government Pleader, SR.No.25777

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RL/6C/13P/SK/SKN/SARIII/3/6/2016

Judgment in

W.A. (MD) No.1274/2014

and

MP (MD) No.1/2014

Date: 29.04.2016