

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.03.2017

PRONOUNCED ON : 13.06.2017

CORAM:

THE HON'BLE MR.JUSTICE HULUVADI G.RAMESH
and
THE HON'BLE MR.JUSTICE RMT.TEEKAA RAMAN

W.A.No.1394 of 2014
and M.P.No.1 of 2014

1. State of Tamil Nadu
Rep. by the Secretary,
Education Department,
Fort St. George, Chennai - 9.
 2. The Director of School Education,
DPI Compound,
Nungambakkam,
Chennai - 6. ... Appellants/Respondents 1 & 2
- ... Vs ...
1. K.Mathukumar
 2. The Correspondent,
M.M.Higher Secondary School,
Bethelpuram, Kanyakumari District.
 3. P.R.Selvi ... Respondents/Petitioner/
Respondents 3 & 4

Prayer: Writ Appeal filed under Clause 15 of Letters Patent,
against the order dated 14.02.2014 made in W.P.No.23260 of 2011.
W.P.No.22360 of 2011:

Writ Petition filed under article 226 of the Constitution
of India Seeking Writ of Certiorarified Mandamus calling for
records relating to the proceedings in
Na.Ka.No.18132/WS/E1/2008, dated 07.06.2011 passed by the Second
respondent herein and quash the same and further direct the
respondents to approve the post of P.G.Assistant Economics, in
M.M.Higher Secondary School, Bethelpuram, Kanyakumari District
with all backwages, contiunity of service and all other
consequential benefits.

For Appellants : Mr.T.N.Rajagopalan,
Special Government Pleader

For R-1 : Mr.K.Vasudevan
For R-2 : Mr.S.Silambanan, Senior Counsel
for M/s.Kaavya Silambannan Associates
For R-3 : Mr.S.Parthasarathy

JUDGMENT

(Judgment of the Court was delivered by
RMT. TEEKAA RAMAN,J.,)

Challenging the correctness of the order dated 14.02.2014 made in W.P.No.23260 of 2011, the State has preferred this appeal.

2. The first respondent herein/writ petitioner has filed the above W.P.No.23260 of 2011 for a writ of Certiorarified Mandamus, calling for the records relating to the proceedings No.Na.Ka.No.18132/W5/E1/2008 dated 07.06.2011 passed by the second respondent in the writ petition viz., Director of School Education, DPI Compound, Nungambakkam, Chennai, and quash the same and further direct the respondents to approve the post of P.G. Assistant (Economics), in M.M. Higher Secondary School, Bethelpuram, Kanyakumari District, with all backwages, continuity of service and all other consequential benefits.

3. The factual matrix of the case, which has a chequered history, are as follows:-

The writ petitioner was qualified M.A. in Economics and M.Ed. Degree and was appointed by the second respondent herein viz., M.M. Higher Secondary School, Bethelpuram, Kanyakumari District as Postgraduate Assistant on 01.06.1988, on the assurance that the post will be sanctioned and he was continued to work and teach Economics. According to the writ petitioner, in the year 1992, the Government sanctioned five posts of P.G. Assistants with effect from 01.06.1991 and in the year 2001, the Government sanctioned three posts to the said School. Though the School was bound to send the writ petitioner's name for approval, his name was not sent and hence, he filed a writ petition in W.P.No.18900 of 2001 seeking for a direction to the Director of School Education to approve the writ petitioner's post and pay all the arrears of salary from 1988 onwards till the date of approval of the post and that the writ petition was allowed by an order dated 29.09.2004. Against which, both the School Management as well as the Government has preferred writ appeals in W.A.Nos.3776 of 2004 and 593 of 2005 respectively, in

which, by an order dated 12.12.2006, at paragraph Nos.8, 9 and 12, a Division Bench of this Court has held as follows:-

"8. Admittedly the post of PG Assistant for the subject Economics against which the writ petitioner was appointed has not been sanctioned by the State Government. There is nothing on record to suggest that the service of the writ petitioner was also approved by the authorities of the State. It appears that the State Government earlier sanctioned five posts of PG Assistant for five different subjects by G.O.Ms.No.552, Education Department, dated 11.1.92 with effect from 1.6.91, namely :-

1. Tamil : 1 post
2. History : 1 post
3. Political Science: 1 post
4. Botany : 1 post
5. Zoology : 1 post

Subsequently, vide proceedings Na.Ka.No.95192/W6/2000, dated 13.9.2001, three more posts of PG Assistants for three different subjects were sanctioned, namely:-

1. P.G. Assistant in English .. 1 post from 4.6.2001
2. P.G. Assistant in Physics .. 1 post from 4.6.2001
3. P.G. Assistant in Mathematics .. 1 post from 4.6.2001

9. It is settled law that if a person has been appointed against a post not sanctioned by the State Government, he cannot claim salary against such unsanctioned post. There is nothing on record to suggest that the post of PG Assistant (Economics) was required to be sanctioned for the school, in absence of which the teaching in the school would have been affected. In absence of such averment and other details, according to us, no relief could have been granted in the manner granted by the learned single judge and in the manner as was sought for by the writ petitioner. If the petitioner was appointed against a post created by the school management, but not sanctioned by the State Government, the petitioner, at best, could claim for wages from the school management, which was paid to him at the rate of Rs.1,000/- per month for taking classes for two hours per day. In such a situation, the impugned order dated 29.9.2004 passed by the

learned single Judge in W.P.No.18900 of 2001 cannot be upheld.

10.

11.

12. If the school so require, it may make a fresh requisition for sanction of a post of PG Assistant for the subject Economics and in such a case, the Director of School Education, Chennai, will determine the question, preferably within two months thereof. If any favourable order is passed by the authority, the school will determine whether against such post, the petitioner's service could be adjusted from the date of such sanction and whether he is entitled for any consequential benefit. If the petitioner is no more in the service of the school and if the post is sanctioned from any subsequent date, i.e., from a date subsequent to the removal of the petitioner, in such a case, no benefit could be allowed in favour of the petitioner." (emphasis supplied)

4. After the orders of the Division Bench of this Court in W.A.Nos.3776 of 2004 and 593 of 2005, dated 12.12.2006, the correspondence of the School by a letter dated 17.09.2007 addressed to the Director of School Education, College Road, Chennai, that in view of certain internal issues and also of the observation made by the Hon'ble High Court in para 12 that "if the School so requires, it may make a fresh requisition for sanction of a post of P.G. Assistant for the subject of Economics. The School Management is of the view that considering all the facts and circumstances of the case, the School does not, at present, require any sanction of the post of P.G. Assistant since there are other posts of P.G. Assistant in other subjects were not sanctioned by the Government. Hence, in order to avoid any problems among the staff and other administrative problems, it is submitted that the School does not require any sanction for a post of P.G. Assistant including Economics at present. Based upon the representation made by the School Management, the Director of School Education, by a proceeding dated 01.10.2007, has passed an order stating that the School correspondence has informed not to sanction the post of post graduate teacher in Economics with retrospective date and since the Government has already sanctioned eight post graduate teachers posts, it is again informed that the request of Thiru K.Mathukumar for sanction of additional one Economics Post Graduate Teacher post could not be accepted.

5. Aggrieved against the said order, the writ petitioner has

filed another writ petition in W.P.No.5285 of 2008 and in the said writ petition, the learned Single Judge of this Court has given a direction to the third respondent/School to send a proposal requesting the first respondent for sanctioning the post of the Post Graduate Assistant within a period of four weeks from the date of receipt of a copy of that order and on receipt of such proposal, the first and second respondents therein are directed to pass appropriate orders within a period of another four weeks. Aggrieved by the said order of this Court in W.P.No.5285 of 2008, dated 16.04.2010, the School Management filed a Review Petition. But, the prayer in the review petition was rejected and as against which, a Writ Appeal was filed in W.A.No.2586 of 2010. The said writ appeal No.2586 of 2010 was dismissed on 23.12.2010. Thereafter, another proposal was sent by the School Management on 05.03.2011 for the eight sanctioned posts namely, Tamil, English, Mathematics, Physics, History, Botany, Zoology and Political Science. Further, the School Secretary has stated that the writ petitioner viz., Mathukumar was appointed as a Post Graduate Teacher in Economics on 06.06.1988 on a consolidated pay given from the Management fund and since he has left the School without any intimation from September 2001, the post was vacant for the Month of September, October, November and on 15.11.2001, one Tmt. P.R. Selvi (the 3rd respondent herein) was appointed and she was working as a Post Graduate Teacher in Economics. Necessary attendance certificates have been verified. In the above judgments in W.P.No.5285 of 2008 and W.A.No.2586 of 2010, it is mentioned that the Director of School Education should verify and confirm as to whether there is a need for Post Graduate Teacher before appointing him. In this regard, the School Secretary has already sent a record stating not to appoint Post Graduate Teacher in Economics and already, eight Post Graduate posts are sanctioned for the School and therefore, requested to reject the petition of the writ petitioner/K.Mathukumar. Accordingly, the said request was rejected on 01.10.2007. Based upon the inspection and verification report of the Chief Educational Officer, Kanyakumari, on 01.08.2010, the student strength in the School is very less. Hence, the post of Post Graduate Assistant (Economics) was not sanctioned. In the year 2001, three P.G. Assistant posts were sanctioned and it was also approved, in which, the name of the writ petitioner was not included, since the writ petitioner was not working in the School from 08.09.2001. Thereafter, on 15.11.2001, one Tmt.P.R.Selvi was appointed as a Post Graduate Assistant (Economics). As the writ petitioner was not holding any post in the School from 08.09.2001, his name was not recommended. Pursuant to the direction given by this Court, a verification was carried by the Chief Educational Officer, Kanyakumari and he had stated that

the student strength in the School is very less and takers for Economics subject at plus two level are also very less. On above factual background, the present writ petition in W.P.No.23260 of 2011 has been filed for the above said prayer.

6. The learned Single Judge, after hearing all the parties, has directed the official respondent Nos.1 and 2 to sanction the post so as to enable the School to appoint the writ petitioner as a P.G. Assistant in Economics retrospectively from 06.06.1988. It is further directed that the Director of School Education has to consider for the transfer of the writ petitioner to any other School within a reasonable time, based upon the undertaking given by the writ petitioner that he will not claim salary for the period he was not worked viz., since December 2001. It is further directed to pay the arrears of salary from the year 1988. As against the above said direction, the present writ appeal has been filed.

7. Mr.T.N.Rajagopalan, learned Special Government Pleader appearing for the appellant contended that the appointment of the first respondent is in a non sanctioned post at the time of initial appointment and therefore, he cannot claim salary for the period he worked in the non-sanctioned post. It is further contended that the appointment and sanctioned retrospective effect is not support by any legal right from the date of appointment in the non-sanctioned post by the Management. It is also contended that the writ petitioner's claim for salary is against the provisions contained in Section 19 of the Tamil Nadu Recognised Private School Act, 1973 r/w. Rule 15(1)(2) of the Tamil Nadu Recognised Private School (Regulation) Rule 1974. Since the writ petitioner was working in a non-sanctioned post, he has relied upon the order passed by this Court in an earlier round of litigation by the petitioner, in the very same proceedings in W.A.Nos.3776 of 2004 and 593 of 2005 dated 12.12.2006, wherein, the Division Bench of this Court has observed that "if the petitioner was appointed against a Post created by the School Management, but not sanctioned by the State Government, the writ petitioner, at best, could claim for wages from the School Management, which was paid to him at the rate of Rs.1,000/- per month for taking classes for two hours per day. Further, in the said order, the Division Bench of this Court has already taken a view that such an issue cannot be determined by this Court under Article 226 of the Constitution of India and could be determined by the competent authority or a Court of law, if details of data and other informations are available and also relied upon the directions issued by this Court viz., if the petitioner is no more in the service of the school and if the post is sanctioned from any subsequent date, i.e., from a date subsequent to the removal of the petitioner,

in such a case, no benefit could be allowed in favour of the petitioner.

8. The learned counsel for the School Management has submitted that in view of the poor strength in the Economics stream in +2, the school Management has already decided to shut down the Economics section and also already, sent necessary letter for non-requirement of any post of Post Graduate Assistant in Economics.

9. The learned counsel for the first respondent/writ petitioner made submissions in support of the order passed by the learned Single Judge.

10. After hearing the arguments of the learned counsel for the respondents and after going through the chequered history as narrated above, it is not in dispute that the first respondent was appointed by the School Management on 06.06.1988 when the school was upgraded in the financial year as higher secondary school and in the year 1991, the second respondent school was sanctioned with five posts of Post Graduate Assistants for various subjects. Further, in the year 2001, three posts of Post Graduate Assistant were sanctioned and in the year 2001, the name of the writ petitioner was not included by the School Management since at that time, he has already left the School without any intimation and post was vacant from September 2001 to 15.11.2001. It is further stated that he has also not returned the quarterly papers of the student which has caused great embarrassment for the school Management and hence, a quarterly examination was ordered to be re do by the students. Since the writ petitioner/first respondent herein was not holding any post in the School on 08.09.2001, his name was not recommended by the school. After various orders passed by this Court in the above referred proceedings, the school Managements have sent a fresh proposal to the Director of School Education for sanctioning of the post of Post Graduate Teacher (Economics) in the following manner:-

1) From 06.06.1988 to September 2001, Thiru Mathukumar as a Post Graduate Teacher in Economics and 2) From September 2001 to 14.11.2001, no one was employed in that post and 3) From 15.11.2001 till date Tmt.P.R.Selvi was working as a Post Graduate Teacher (Economics).

11. The above said factual position has been duly verified by the Director of School Education from the attendance. The fresh proposal was sent on 05.03.2011 and the above lines stand justified, based upon the attendance of the writ petitioner and the present incumbent P.R.Selvi. However, in view of the report

of the Director of the School Education made in the year 2010 that there is a poor strength in the school and there is no takers student opted to study the subject Economics at plus two level in that school, the school management has already sent a letter to the Director of School Education/the second appellant herein that they no longer required P.G. Assistant in Economics. Based upon the entire issues, the Director of School Education has issued a impugned proceedings on 07.06.2011 rejecting sanction of the post to the above said School which was challenged in the writ petition and it is now before us as a Writ Appeal.

12. Since the writ petitioner was appointed on a consolidated pay and from the history of the G.Os sanctioning different post from 1991 to 2001 goes to show that P.G. Assistant in Economics does not arise for the School as the writ petitioner was appointed as a Post Graduate by the School Management but not sanctioned by the State Government, the writ petitioner could claim wages from the School Management which is said to have been paid to him.

13. The learned Government Pleader appearing for the appellants relied upon the decision of the Hon'ble Supreme Court reported in 2015 (2) SCC page 170 (Prajnya Parimita Barik Vs State Of Orissa And Others) and he has also drawn the attention of this Court to the order passed during earlier round of litigation by a Division Bench consisting of Lordships S.J.Mukhopadhyaya and F.M.Ibrahim Kalifulla wherein, the Division Bench of this Court has held that the writ petitioner, who was appointed by the Management on a consolidated pay being made by the self financial scheme cannot seek the post by the Government and further, in the said order, they have directed the Director of School Education to consider as to whether the post of P.G. Assistant in Economics is required for the petition School. Pursuant to the second round of litigation as referred above, the School Management has addressed a letter to the Director of School Education stating that the students strength has become poor and weak and the students in the Economic have also gone down and accordingly, addressed that the post of P.G. Assistant for Economics need not be granted. Based upon such communication, a Committee of the Director of School Authorities have inspected the school and found that the statement made by the School is satisfactory and found to be reasonable. Accordingly, based upon that recommendation, the Director of School Education has rejected the plea of the writ petitioner which has resulted in the third round of litigation. Meanwhile, in order to obey the orders of the Division Bench of this Court, the School Management has addressed a communication to the Director of School Education that upto the date of the

petitioner worked in the School viz., September 2001, he may appoint for the following two months and that post was kept vacant. Thereafter, since the writ petitioner has left the School, the students have been left in lurch and the writ petitioner has not even returned the quarterly answer sheet of the +1 and +2 students for the Economics subject, the School Management was forced to redo the quarterly examination in the interest of the student and thereafter, during the month of September/November, the fourth respondent in the writ petition P.R.Selvi was appointed in his place and she is continued to work till today viz., for 16 years. Therefore, taking into consideration all the above factual matrix, the third respondent/School Management has forwarded a communication to the Director of School Education, in obedience of the orders of the Division Bench that upto the date of the writ petitioner leaving the School, he may be appointed and thereafter, since the fourth respondent P.R.Selvi was working since 2001, she may be appointed thereafter. This letter was again challenged by the writ petitioner in the present writ petition wherein, the learned Single Judge has directed the School Authorities to sanction a post of P.G. Assistant for Economics retrospectively from the date of appointment of the writ petitioner till the date he left the school and also directed to consider him for transfer to any other school. With regard to the legitimate relief that could be granted to the writ petitioner in an earlier proceedings the Division Bench in W.A.Nos.3776 of 2004 and 593 of 2005 (S.J.Mukhopadhaya and F.M.Ibrahim Kalifulla,JJ.) it is categorically held as follows:-

"8. Admittedly the post of PG Assistant for the subject Economics against which the writ petitioner was appointed has not been sanctioned by the State Government. There is nothing on record to suggest that the service of the writ petitioner was also approved by the authorities of the State. It appears that the State Government earlier sanctioned five posts of PG Assistant for five different subjects by G.O.Ms.No.552, Education Department, dated 11.1.92 with effect from 1.6.91, namely :-

- | | | |
|-----------------------|---|--------|
| 1. Tamil | : | 1 post |
| 2. History | : | 1 post |
| 3. Political Science: | : | 1 post |
| 4. Botany | : | 1 post |
| 5. Zoology | : | 1 post |

Subsequently, vide proceedings Na.Ka.No.95192/W6/2000, dated 13.9.2001, three more posts of PG Assistants for three different subjects were sanctioned, namely:-

1. P.G. Assistant in English .. 1 post from 4.6.2001
2. P.G. Assistant in Physics .. 1 post from 4.6.2001
3. P.G. Assistant in Mathematics .. 1 post from 4.6.2001

9. It is settled law that if a person has been appointed against a post not sanctioned by the State Government, he cannot claim salary against such unsanctioned post. There is nothing on record to suggest that the post of PG Assistant (Economics) was required to be sanctioned for the school, in absence of which the teaching in the school would have been affected. In absence of such averment and other details, according to us, no relief could have been granted in the manner granted by the learned single judge and in the manner as was sought for by the writ petitioner. If the petitioner was appointed against a post created by the school management, but not sanctioned by the State Government, the petitioner, at best, could claim for wages from the school management, which was paid to him at the rate of Rs.1,000/- per month for taking classes for two hours per day. In such a situation, the impugned order dated 29.9.2004 passed by the learned single Judge in W.P.No.18900 of 2001 cannot be upheld.

14. Further, a direction is given to the School Authorities to consider whether the subject of Economics is necessary or not to make an independent assessment of the same and also given liberty to the school authorities as extracted above. Admittedly, that order still holds good and not being challenged.

15. When the appointment is made by the Management of the School Committee and as well as the salary is being paid from self financial appointment by the School Committee, the State Government cannot be directed to upgrade and sanction a post that too retrospectively from the date of appointment and the said relief cannot be granted. Further, in view of the factual position as mentioned in the preceding paragraphs, admittedly, on the date forwarding of the proposal, the writ petitioner was not working in the post of Post Graduate Assistant in Economics, and though unfortunately the third respondent alone was working in that post, a person cannot be appointed to a post nor being recommended for sanction of the post when he is not working in the said consolidated payment post on the date of proposal and

now, the Management have taken a decision based upon the factual position on the students strength, who were opting for Economics subject, both the School Management as well as the Director of School Education have come to the conclusion that the post of Post Graduate is not necessary and hence, both on law and facts, we are of the considered view that the direction issued by the learned Single Judge is not sustainable and the same is liable to be set aside.

16. Accordingly, the directions issued in the impugned proceedings are hereby set aside and the decision already taken in the earlier round of proceedings by the Division Bench shall hold good and the subsequent development on factual positions as narrated above, we are of the considered view that the direction issued to the State Government to sanction the post retrospectively that too from the year 1988 will not only cause an unnecessary burden on the exchequer but it is also against the decision of the Hon'ble Supreme Court referred to above.

17. In the result, the order dated 14.02.2014 passed in W.P.No.23260 of 2011 is set aside and the Writ Appeal is allowed. Consequently, the writ petition shall stand dismissed. The connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

Jrl
To

1. The Secretary
Education Department,
Fort St.George, Chennai-9.

2. The Director of School Education,
DPI Compound,
Nungambakkam, Chennai-6.

+lcc to Mr.Kaavya Silambanan Associates, S.R.No.42008
+lcc to Mr.Vasudevan, Advocate, S.R.No.41684
+lcc to the Government Pleader, S.R.No.42057

W.A.No.1394 of 2014

GJ(CO)
RS(27/06/2017)