IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.11.2018

CORAM:

THE HONOURABLE MRS.JUSTICE V. BHAVANI SUBBAROYAN

W.P.No.14500 Of 2008
and
M.P.No. 2 of 2008

A.Saraswathi ...Petitioner

Vs.

1. State of Tamil Nadu, rep. by its
   Secretary to Government,
   Finance Department,
   Fort St. George,
   Chennai 600 009.

2. The Director of Cooperative Audit,
   No.5, Kamarajar Salai,
   Chennai 600 005.

3. The Assistant Director of Cooperative Audit,
   Coimbatore Circle,
   Coimbatore District 641 018. ...Respondents

Writ Petition filed under Article 226 of the Constitution of the India, praying to issue a Writ of Certiorarified Mandamus, calling for the entire records relating to the Impugned Orders issued by the 1st respondent Government Letter No.13864/CA/2006 dated 01.02.2008 confirming the order of reversion passed by the 2nd respondent in Na.Ka.38795/2000 dated 02.05.2005 and quash the same as illegal and null and void and consequently direct the respondents to regularize the service of the Petitioner in the Post of Junior Cooperative Auditor from the date of original promotion i.e. from 03.02.1997 as per the Proceedings N.Ka.36444/96 A.Pa.A.1 dated 27.01.1997 of the 2nd respondent and grant all consequential service benefits including further promotions and seniority.

For Petitioner : Mr.R.Krishnamoorthy

For Respondents : Mr.L.P.Shanmugha Sundaram
Special Government Pleader

ORDER

The petitioner's prayer is for issuance of Writ of Certiorarified Mandamus to quash the Impugned Orders passed by the 1st respondent Government Letter No.13864/CA/2006 dated 01.02.2008 confirming the order of reversion passed by the 2nd respondent in Na.Ka.38795/2000 dated 02.05.2005 as illegal and null and void and consequently direct the respondents to regularize the service of the Petitioner in the Post of Junior Cooperative Auditor from the date of original promotion i.e. From 03.02.1997, as per the Proceedings Na.Ka.36444/96 A.Pa.A.1 dated 27.01.1997, of the 2nd respondent and grant all consequential service benefits including further promotions and seniority.

2.The learned counsel for the petitioner would submit that, the case of the petitioner is that, she has been temporarily appointed as Typist on 04.04.1984 in the Cooperative Department under the control of the 3rd respondent and terminated from service with effect from 10.07.1984 and she was reinstated into service as Typist as per G.O.No.996 Personnel and Administrative Reforms Department dated 22.09.1984 and her service was regularized from 25.06.1984. She joined duty under the 3rd respondent from 24.05.1987, as per the orders dated 19.05.1007.

3.By G.O.Ms.No.159 dated 05.03.1996, they had permanently absorbed 12 typists, including the petitioner working in the Cooperative Audit Department as on 20.08.1987 and others who remain in the Cooperative Audit Department as Typists.

4.The petitioner would contend that, she was promoted as Junior Cooperative Auditor with effect from 03.02.1997 vide the proceedings N.Ka.36444/96 A.Pa.A.1 dated 27.01.1997 of the 2nd respondent and was deputed for the basic training for one year and the probation has commenced on 03.02.1997. Since the petitioner did not pass the Accounts Test for Subordinate Officers Part-I as required in the Ad-hoc Rules, the 2nd respondent/ Head of the Department of Cooperative Audit granted promotion by granting exemption from passing the Accounts Tests for Subordinate Officers Part-I in view of the orders in the G.O.Ms.No.1125, Finance (TH & CA) Department dated 30.10.1990. After the said Basic Training of one year, the petitioner was regularly posted as Junior Cooperative Auditor under the 3rd respondent with effect from 03.02.1998 as per the proceedings of the 2nd respondent made in Na.Ka.36444/96 dated 27.01.1998, and was regularly working as the Junior Cooperative Auditor then onwards.

5.On 02.05.2005, the petitioner received an order of the 2nd respondent about Reversion of Service of the petitioner from the post of Junior Cooperative Auditor to the post of Typist without following the due process of law on the ground that the 1st respondent in their letter dated 09.03.2005 had disapproved the action of the 2nd respondent in promoting her as Junior Cooperative Auditor and ordered for recovery of the salary paid to the petitioner for the promoted post of Junior Cooperative Audit Officer from 03.02.1997 to 03.10.2002.

6.The petitioner would contend that aggrieved by the said orders of reversion of service, she filed an Appeal to the 2nd respondent on 17.05.2005 which was rejected and so she preferred an appeal before the 1st respondent/Government on 15.02.2006 to approve her Original Promotion as Junior Cooperative Auditor with effect from 03.02.1997 as ordered in the proceedings of the 2nd respondent dated 27.01.1997 contending that she was permanently absorbed in the Cooperative Audit Department as per G.O.Ms.No.159 of Finance Department with effect from 22.09.1987, the crucial date fixed by the Government for exercising the option to remain in Cooperative Audit Department. Pending the above Appeal, she was allowed to continue to work as the Junior Cooperative Auditor.

7.The petitioner would further contend, in the mean while, the petitioner had passed the Departmental test for Subordinate Officers Part-I in the examinations held on 31.10.2000 and requested the 2nd respondent to re-promote her as Junior Cooperative Auditor pending the Appeal before the Government. By denying that, she was qualified for that post on the crucial date of promotion on 01.10.2001 and the same was considered and she was re-promoted as Junior Cooperative Auditor by the 2nd respondent by his proceedings in Na.Ka.38795/00 dated 04.09.2006 and was regularized with effect from 04.10.2002 instead of the first date of promotion on and from 03.02.1997 and was posted to work under the 3rd respondent continuously. The petitioner would further contend that she was promoted as Senior Cooperative Auditor as per the proceedings in Na.Ka,5922/07 dated 31.05.2007 of the 2nd respondent in the panel as on 01.10.2005 and she joined in the promoted post on 08.06.2007.

8.The Appeal dated 15.02.2006 is pending before the 1st respondent/Government to approve her Original Promotion as Junior Cooperative Auditor with effect from 03.02.1997 has been rejected by the 1st respondent through the Impugned Proceedings in the Government Letter dated 01.02.2008 stating that the exemption granted in G.O.Ms.No.1125 dated 30.10.1990 is not applicable to the post of Typist since the Post of Junior Assistant/Typist were not allotted to the Cooperative Audit Department and she did not come to the Cooperative Audit Department based on G.O.Ms.No.26 dated 12.01.1989, and also she was not absorbed from Cooperation Department to Cooperative Audit Department. In view of the above Impugned Order, the 2nd respondent by his proceedings dated 03.05.2008 directed the 3rd respondent to recover the salary paid to the petitioner while working as Junior Cooperative Auditor from 03.02.1997 to 03.10.2002.

9.The petitioner has raised the ground that, reverting the post of Junior Cooperative Auditor to the post of Typist on the ground that she did not pass the Account Test for Subordinate Officers Part-I prescribed for the promoted post and consequential recovery order passed by the 2nd respondent are illegal, arbitrary, unlawful and in the violation of the Ad-hoc Rules framed by the respondent and against the principles of Natural Justice.

10.The petitioner would further contend that, no notice was given and she was "not heard" before passing the impugnd orders and violating the principles of Audi Alteram Partem.

11.The learned counsel for the 2nd respondent/the Cooperative Department had filed a counter wherein it is stated that, the petitioner was appointed as Typist through Employment Exchange temporarily under Rule 10(a)(i) of the general rules for the Tamil Nadu State and Subordinate Services Rules in the Cooperative Audit Department under the control of Assistant Director of Cooperative Audit, Coimbatore. And it was purely on temporary basis and liable for termination at any time without assigning any reasons and it was made only as a stop-gap arrangement. The petitioner was removed from service on 10.07.1984 and also a decision was taken by the Government to regularize the services of the temporary persons as no regular candidates were available for appointment in the temporary vacancies that arouse between 1981 and 1984 in consultation with the help of the Tamil Nadu Public Service Commission. As per the concurrence given by the Tamil Nadu Public Service Commission, all the temporary employees in the category of Junior Assistants, Typists and Steno-Typists who were continuing in the service as on 25.06.1984 are also regularized from 25.06.1984, as per the instructions in G.O.Ms.No.996. Personnel and Administrative Reforms dated 22.09.1984 by the Assistant Director of Cooperative Audit, Coimbatore, in his proceedings Rc.No.2339/87/Aa, dated 19.05.1987.

12.The Cooperative Audit Department came into existence only from 17.06.1981 which was carved out from the composite

Cooperative Department, the Adhoc Rules for the Subordinate staff were issued inG.O.Ms.No253, Finance (CA) Department, dated 31.03.1986. The Rule 8(b) of the Adhoc Rules which provides for promotion is as follows:

8(b) other qualifications:-

No person shall be eligible for appointment to the posts specified in column(1) of the Table below by the methods of appointment specified in the corresponding entries in column (2) unless he/she possesses the qualifications specified in the corresponding entries in column(3) thereof:-

THE TABLE

Posts (1)	Methods of appointment (2)	Qualifications (3)
Junior Cooperative Auditor	(i) Transfer	Must have served as Junior Inspector of Cooperative Societies
	(ii) Direct recruitment	Must possess B.Com., Degree or B.A. (Cooperation) Degree or B.A. (Economic) Degree

Posts (1)	Methods of appointment (2)	Qualifications (3)
	(iii) Recruitment by transfer	(i) Must possess the Minimum General Educational Qualification specified in Schedule-I of the General Rules for the Tamil Nadu State and Subordinate Services Rules; (ii) Must have passed the Account Test for Subordinate Officers, Part I; (iii) Must have passed the District Office Manual Test; and Must have put in service for a period of not less than two years on duty as Junior Assistant in the Cooperative Audit Department in the Tamil Nadu Ministerial Service and in the case of persons who were appointed to the post of Junior Assistant by transfer from the post of Typist must have put in a total service in the Cooperative Audit Department in the Tamil Nadu Ministerial Service in both categories for a period of not less than five years on duty; or must have put in a service for a period of not less than

13.For qualifying Account Test has been prescribed, which was exempted for those who have opted for permanent absorption in the Cooperative Audit Department as per G.O.Ms.No1125, Finance (THg & CA) Department dated 30.10.1990. Till 1989, in both the departments the regular employees were directed to exercise option for permanent absorption, either in the Administrative Wing or in the Audit Wing of the Department. First the option was called for from the regular subordinate staff and the permanent absorption of the regular employees in Subordinate service was issued in G.O.Ms.No.26, Finance (Audit II) Department dated 26.01.1989.

14.After bifurcation of Cooperative Audit Department from the Cooperative Department, the Adhoc Rules for the posts of Junior Assistant, Steno-Typist and Typist were framed in G.O.Ms.No.1057, Finance (TH & CA) Department dated 27.09.1990 and based on the above G.O., the option has been received from the petitioner and the Ministerial staff in service as on 20.08.1987. The 2nd respondent i.e., the Director of Cooperative Audit has scrutinized all the options received and drew a list of persons to be absorbed permanently in the Cooperative Audit Department. As per the said list, the Government in G.O.Ms.No.159, Finance (CA) Department on 05.03.1996 had absorbed the staff under Ministerial service including the petitioner in the category of Typist who worked in the Cooperative Audit Department on 20.08.1987 and those who have remained in the Cooperative Audit Department were alloted to the Cooperative Audit Department on a permanent basis. In the said G.O. it has been mentioned that "lien/membership rights of all the staff absorbed who are now working under the control of the Director of Cooperative Audit are terminated in the Cooperative Department (Registrar of Cooperative Societies) with effect from the date of the said order regarding the seniority for the performance and promotional opportunities and lien of the staff who were working under the control of Registrar of Cooperative Societies and will be alloted to the Cooperative Audit Department for permanent absorption would be terminated with effect from the date of their joining in the Cooperative Audit Department against future vacancies".

15.The petitioner's name was also considered for promotion on 07.01.1997, as she has satisfied all the qualifications prescribed in Rule 8(b) of the Adhoc Rules except the passing of the Account Test for Subordinate Officers part I presuming that exemption given in G.O.Ms.No.1125, Finance (TH & CA) Department on 30.10.1990 was applicable while drawing the panel as on 01.10.1996, she joined as Junior Cooperative Auditor on 03.02.1997.

16.The probation in the category of Junior Cooperative Auditor was commenced on 03.02.1997 and was declared on 02.02.1998. But as per Rule 8(b) of the Adhoc Rules in G.O.Ms.No.253, passing the Account Test for Subordinate Officers, part I is a must. Hence, the proposal have been sent to the Government for ratifying the action of the 2nd respondent in promoting the petitioner. The Government in its letter dated 09.03.2005 in letter No.70524/Finance (CA)/2004, Finance (CA) Department, had directed the 2nd respondent to revert the petitioner from Junior Cooperative Auditor to the post of Typist, since, she has not passed the Account Test to qualify for the said post and stating the promotion is erroneous. Only as per order of the 1st respondent, the petitioner was reverted to the post of Typist on 02.05.2005, an order for recovery of the salary paid for the promoted post of Junior Cooperative Audit Officer was also ordered.

17.It was further submitted that the petitioner had sent a representation on 23.05.2005 seeking selection grade in the post of Typist and Junior Cooperative Auditor promotion in the panel on 01.10.2001 and further promoted as Senior Cooperative Auditor. Since, she has passed the Account Test on December 2000, she was promoted as Junior Cooperative Auditor on 04.09.2006 as per the proceedings Rc.38795/00/GA.3, and as Senior Cooperative Auditor by proceedings Rc.38528/06/GA.3, dated 30.05.2007 according to her eligibility in the respective panels of Junior Cooperative Auditor for the year 01.10.2001 and Senior Cooperative Auditor for the year 01.10.2005 as per Adhoc Rules.

18. Even though, the G.O.Ms.No.1125, provides for exemption for accounts additional test for persons who were permanently absorbed as per G.O.Ms.No.26, Finance (Audit II) Department, dated 12.01.1989 and not to the Ministerial service persons. The executive orders issued in G.O.Ms.No.1125, Finance (THg & CA) Department dated 30.10.1990 is not applicable to the petitioner herein. Rightly, the Government order excess pay due to the petitioner on erroneous promotion and the exemption given in G.O.Ms.No1125 is applicable to the petitioner and as was rejected. The petitioner's has not passed the Account Test of Subordinate service part I, she was reverted back as Typist.

19.Heard Mr.R.Krishnamoorthy, learned counsel for the petitioner and Mr.L.P.Shanmugha Sundaram, Special Government Pleader (Co-op) for the respondents.

20.It could be seen that the petitioner was working as Typist and at the time of absorption from the Cooperative Audit Department and the additional qualifications prescribed specially for the Junior Cooperative Auditor is not fulfilled by her. As per the given methods of appointment by transfer, a person must have served as Junior Inspector of Cooperative Societies and persons directly recruited must possess the minimum general educational qualifications as per the general rules for the Tamil Nadu State and subordinate service rules and must have passed the Account Test for Subordinate Officers, Part I and must have passed the District Office Manual Test, and must have put in service for a period of not less than two years on duty as Junior Assistant in the Cooperative Audit Department in the Tamil Nadu Ministerial Service. In the case of the persons who were appointed to the post of Junior Assistant by transfer from the post of Typist must have put in a total service in the Cooperative Audit Department in the Tamil Nadu Ministerial Service in both categories for a period of not less than five years on duty.

21.The petitioner has not been absorbed in the Cooperative Audit Department in G.O.Ms.No.26, Finance Department dated 26.01.1989 and exemption was not given in G.O.Ms.No.1125, Finance Department is not extended to her, since she was not allowed to the Cooperative Audit Department. As per the order or notification of promotion or appointment of a Government servant in an officiating capacity, promotion to a higher post should be cancelled. Since it is brought to the notice of the appointing authority that such a promotion or appointment has resulted from a factual error and the Government servant concerned should immediately on such cancellation, be brought to the position the person would have held. Accordingly, there was an error found immediately, the petitioner was reverted back to the post of Typist. It could be seen that the petitioner's temporary service were regularized from 25.06.1984 by the Assistant Director of Cooperative Audit Coimbatore, as per instructions given in G.O.Ms.No.996 dated 22.09.1984. Based on the G.O.Ms.No.1057, Finance (TH & CA) Department, dated 27.09.1990, the petitioner was absorbed as permanent Typist to Cooperative Audit Department vide G.O.Ms.No.159, Finance (CA) Department, dated 05.03.1996. The exemption is applicable only to the persons who have opted to serve in the Cooperative Audit Department vide G.O.Ms.No.26, Finance Department dated 26.01.1989. Since the petitioner has not been absorbed through G.O.Ms.No26, Finance Department, dated 26.01.1989 and the promotion given to the petitioner was found to be erroneous and irregular hence, it was cancelled. The petitioner's reversion is not illegal. The petitioner's appeal has been considered by the 1st respondent and while G.O.Ms.No.159 perused, orders were passed by the 1st respondent to revert her as Typist, which is in the opinion of the Court as reasoned order. In the appeal, the petitioner was not given opportunity to explain and defend her case and no question on filing of Audi Alteram Partem. As per the Supreme Court decisions, the promotion was given to the petitioner on a erroneous consideration and salary has been paid to her accordingly. The petitioner has worked as a Junior cooperative Auditor and she has worked for many years and she is entitled to receive the pay, even though she has been appointed erroneously. The petitioner has not committed any mistake or she has not suppressed any fact for getting this promotion and order of recovery cannot be effected as the petitioner has a mislead and mistake is not on the part of the petitioner and it is committed only by the respondents. For no fault of the petitioner she cannot be penalized.

22.As per the said decisions of the Hon'ble Supreme Court, the respondents cannot recover any money from the petitioner for the wrong promotion and the salary paid. The recovery of salary was for the period from 03.02.1997 to 03.10.2002. The respondents are not entitled to recover the salary received by the petitioner for the service rendered as Junior Cooperative Auditor without the prescribed qualification for the promotion for the period from 03.02.1997 to 03.10.2002. Against the order of reversion of service dated 02.05.2005, on 15.02.2006 an appeal was filed before the 1st respondent Government. The order of recovery of salary is not justifiable and not acceptable by this Court. The petitioner has passed the examination subsequently and she has given due promotion as per the prescribed qualifications. The petitioner cannot now claim that she should be given promotion retrospectively from the original date of promotion cannot be accepted and the same has to be rejected. The petitioner's prayer is partly accepted and the amount paid as salary for the period where she was erroneously promoted cannot be recovered and the prayer of the petitioner to regularize service in the post of Junior Cooperative Auditor from the date of original promotion on 03.02.1997 is rejected. As per the proceedings f the 2nd respondent dated 27.01.1997 in Na.ka.36444/96 to grant all consequential service benefits including further promotions and seniority cannot be granted.

Accordingly, the Writ Petition fails and the same is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

vji/nsd

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

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

2.The Director of Cooperative Audit,
No.5, Kamarajar Salai,
Chennai 600 005.

3.The Assistant Director of Cooperative Audit,
Coimbatore Circle,
Coimbatore District 641 018.

+1cc to Mr.R.Krishnamoorthy, Advocate, SR.NO..No.76527/18.

W.P.No.14500 Of 2008 and
M.P.No. 2 of 2008

kak(26/02/2019)