

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 20.07.2018

CORAM

THE HONOURABLE THIRU JUSTICE V. PARTHIBAN

W.P.No.1222 of 2016 &
M.P.Nos.959, 1058 & 29245 of 2016

Dr.K.Murugan

.. Petitioner

versus

1. The Secretary to Government of Tamil Nadu,
Higher Education (K1) Department,
Fort St.George, Chennai.

2. The Registrar,
Tamil Nadu Open University,
No.577, Anna Salai,
Saidapet, Chennai-15.

.. Respondents

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, praying for issuance of Writ of Certiorarified Mandamus, to call for records of the 1st respondent in its G.O.Ms.No.26 Higher Education (K1) Department dated 13.2.2015 insofar as it disallows the higher start of pay to the petitioner at the time of his appointment as Professor, School of Humanities and th consequential order passed by the 2nd respondent in F.No.Registrar/TNOU/Admn./ 550/Dr.K.M.SOH/2015 dated 16.12.2015, quash the same and consequently, direct the respondents to refrain from revising the pay of the petitioner and making recovery from the pay of the petitioner.

For Petitioner : Mr. V.Vijay Shankar

For Respondents: Mr.S.T.Moorthy, AAG assisted
by Mr.C.Munusay, Spl.GP -R1
Mr.P.Sanjai Gandhi for R2

ORDER

The petitioner has approached this Court, seeking the following relief:

"To issue Writ of Certiorarified Mandamus, to to call for records of the 1st respondent in its G.O.Ms.No.26 Higher Education (K1) Department dated 13.2.2015 insofar as it disallows the higher start

of pay to the petitioner at the time of his appointment as Professor, School of Humanities and th consequential order passed by the 2nd respondent in F.No.Registrar/TNOU/Admn./ 550/Dr.K.M. SOH/2015 dated 16.12.2015, quash the same and consequently, direct the respondents to refrain from revising the pay of the petitioner and making recovery from the pay of the petitioner.

2. The case of the petitioner is as follows:

On 12.8.2003, the second respondent University issued an advertisement for filling up the post of Professor, School of Humanities. At the time when the advertisement was issued, the petitioner herein was working as Curriculum Development Specialist at the University of West Indies, Barbados and drawing an annual income of Rs.70,000 US dollars. The petitioner having evinced interest for being considered to the said post, he had applied for the same vide his application dated 9.9.2003. In his application in Column No.11, the petitioner had specifically expressed his desire to have a minimum pay of Rs.20,900/- per month as being acceptable to him. In the instructions enclosed to the application form in Column No.7, it is provided that higher start of pay in the prescribed scale of pay would be given to deserving candidates on the recommendation of the Selection Committee. After being satisfied with the academic credentials of the petitioner, he was called for interview and he appeared before the Selection Committee constituted by the second respondent University. On the basis of his performance in the interview plus academic credentials, the petitioner was selected for appointment to the post of Professor, School of Humanities and was offered a basic pay of Rs.20,900/- p.m. as desired by him. A formal appointment letter was issued by the second respondent University on 16.12.2015 by granting him the minimum pay of Rs.20,900/- in the pay scale of 16,400-22,400/-. On being appointed to the post of Professor, School of Humanities, the petitioner has been discharging his duties efficiently and diligently without any complaints or blemish whatsoever.

3. It appears that subsequent to his appointment, an audit was conducted by the Local Fund Audit in the second respondent University and a report was submitted by the Committee inter alia questioning the suitability of the petitioner for appointment to the post of Professor, School of Humanities and also questioned the higher pay fixation given to him. At this, the second respondent University informed the audit authorities that the Syndicate of the University had approved the grant of higher pay fixation to the petitioner at the time when the petitioner came to be appointed and the same position had been reiterated by the second respondent University. However, the

second respondent University had resolved to send its recommendation to the Government for necessary ratification in this regard.

4. Later, the first respondent issued G.O.Ms.No.26 Higher Education (K1) Department, dated 13.2.2015 ratifying the petitioner's appointment to the post of Professor, School of Humanities. While ratifying the appointment of the petitioner, strangely, the Government disallowed the higher minimum pay fixation granted to the petitioner and consequently, directed to recover the excess salary paid to him from the date of initial appointment till the date of the Government Order. Aggrieved by the same, the petitioner had submitted a detailed representation on 18.3.2015 requesting the Government to withdraw its order insofar as the objection to the granting of higher minimum pay fixation granted to the petitioner.

5. While matters stood thus, by subsequent proceedings dated 16.12.2015, the second respondent issued orders revising the pay and allowance of the petitioner with effect from 2.8.2004 and sought recovery of sum of Rs.15,59,406/- as excess payment paid to him from the date of his appointment. The said excess payment was sought to be recovered in 40 equal monthly instalments at Rs.38,406/- per month and the revised pay allowance would be made applicable to the petitioner from December, 2015. Since the recovery as directed has been given effect to, the petitioner was constrained to approach this Court, seeking to challenge the G.O.Ms.No.26 Higher Education (K1) Department dated 13.2.2015 insofar as re-fixation of the pay of the petitioner and recovery and the consequential order dated 16.12.2015 passed by the second respondent in pursuance of the said Government Order.

6. Shri V.Vijay Shankar, learned counsel appearing for the petitioner would contend that the impugned action by the respondents suffers from various infirmities and therefore, cannot be countenanced both in law and on facts. He would submit that when the petitioner was appointed initially in 2004, he was subjected to selection by a duly constituted Selection Committee comprising eminent faculty members including the Vice Chancellor of the second respondent University. The members of the Committee which interviewed the petitioner are as follows:

1. Dr.M.S.Palanichamy
Vice Chancellor
Tamil Nadu Open University .. Chairman
2. Dr.S.Sribala
Former Director, Ramajumam Institute
of Advanced Study in Mathematics,
University of Madras .. Member

3. Prof.P.K.Ponnusamy,
Vice Chancellor, Madurai Kamaraj
University, Madurai .. Member
4. Thiru A.Suthanthiraraj
Deputy Secretary to Government
Higher Education Department .. Member
5. Dr.T.M.Srinivasan,
Former Dean of Faculty
Indian Institute of Techonology .. Member
6. Dr.V.Saraswathi
Retd.Professor of English,
University of Madras .. Member
7. Dr.Radha Chellappa
Professor & HOD of English
Bharathidasan University,
Tiruchirappalli .. Member
8. Dr.T.Balakrishnan
Professor & Head,
University of Madras .. Member
9. Thiru N.Sundaram
Registrar, Tamil Nadu Open .. Member-
University Secretary

7. From the above, it could be seen the Committee which comprises academic personalities and Administrator, had verified and ascertained the academic credentials of the petitioner and on being fully satisfied of the petitioner's qualification and experience, the Committee recommended for higher pay fixation. He would draw the attention of this Court to the minutes of the Selection Committee meeting which concluded as follows:

"Dr.K.Murugan, OC. Due to excellent performance and experience in Open Distance learning system, the Committee is of the considered view to recommend a basic pay of Rs.20,900 amounting to ten increments to the above candidate."

8. The said recommendation was also confirmed by the resolution of the Syndicate in its meeting dated 5.2.2004 which is an admitted fact. Once the Committee comprising eminent personalities has unanimously recommended for fixation of higher pay to the petitioner and which recommendation has been confirmed by the Syndicate of the University, strangely the Audit has raised objections questioning the academic credentials

of the petitioner. Shri V.Vijay Shankar would further contend that in any event, subsequently, by G.O.Ms.No.26 Higher Education (K1) Department, dated 13.12.2015, appointment of the petitioner was ratified by the Government, the only explanation that was given by the Government in the Order was that the grant of higher pay to the petitioner was ordered to be discontinued and further recovery was ordered on that score. The learned counsel would submit that once the appointment of the petitioner was ratified to the post of Professor, School of Humanities, it would mean that the petitioner fulfilled all the educational and academic qualifications for the said post. The learned counsel would draw the attention of this Court to the University Grants Commission's guidelines in this regard governing the appointment to the post of Professor, School of Humanities. As per guideline 1.3.1, the following is provided:

1.3.1 Professor:

An eminent Scholar with published work of high quality, actively engaged in research, with 10 years of experience in postgraduate teaching, and/or experience in research at the University/National Level institutions, including experience of guiding research at doctoral level. OR

An outstanding scholar with established reputation who has made significant contribution to knowledge."

9. According to the learned counsel, the petitioner satisfied the above criteria as provided in the UGC guidelines since he had 11 years of experience in teaching/research, having worked as Research Associate in Indira Gandhi National Open University, New Delhi and 6 years as Curriculum Development Specialist in the University of West Indies, Barbados and was drawing an annual salary of Rs.70,000 US Dollars. He would further contend that there were instructions providing for higher pay for suitable candidates and the suitability of the petitioner for the subject post has been assessed by the Committee comprising eminent scholars and made recommendation for grant of higher pay. Such recommendation which is confirmed by the University Syndicate, cannot be trifled with on the basis of audit objection. In any event, it is a fact that the Government subsequently satisfied with the academic qualifications and suitability of the petitioner for the post of Professor, School of Humanities and ratified his appointment. The bone of contention is only with regard to the revision of pay and consequential recovery order.

10. Upon notice, Mr.S.T.S.Moorthy, learned Addl.Advocate General entered appearance for 1st respondent and Mr.P.Sanjai Gandhi, learned counsel entered appearance for 2nd respondent.

11. The substance of the resistance put up by the respondents justifying the action taken against the petitioner as disclosed in para 9 of the counter affidavit filed on behalf of the second respondent, is extracted as under:

"9. I submit that the petitioner did not have the teaching experience, as he was engaged in preparation/format and language editing of teaching materials and coordination of Curriculum implementation planning and development of Curricula etc. in Indira Gandhi National Open University from 1986 to November 1997 as Lecturer/Senior Lecturer and in University of the West Indies, Barbados from January 1998 to July 2004 as Curriculum Development Specialist, for which no evidences were produced. Thus the petitioner had no teaching experience at all in UG or PG levels, as stipulated by the UGC and Government of Tamil Nadu. The petitioner was not even worked as Reader but only a Senior Scale Lecturer. Only in this context of 'unqualified' for the post of Professor, the Audit has objected not only to the selection of the petitioner to the post of Professor but also allowing 10 increments and fixing the pay at Rs.20,900 instead of at the minimum 16,400 at his initial appointment as Professor. However, as pointed out in Audit, to obtain ratification of Government for appointment of the petitioner as Professor as well as ratification of the Government for allowing 10 increments to the petitioner at the time of initial appointment, the Syndicate of Tamil Nadu Open University had recommended the case of the petitioner to the Government for ratification, as a special case."

12. According to the respondents, the claim of the petitioner about his academic back ground was not substantiated with any material evidence and the petitioner was lacking teaching experience at UG and PG levels as prescribed by the UGC. According to the above averments, the petitioner had not even worked as Reader and therefore, the Audit authorities had rightly objected to his appointment as he was not qualified to be appointed as Professor, School of Humanities and more so, he was not qualified to be fixed in higher pay by granting 10 increments to him by fixing his minimum pay at Rs.20,900/- instead at the minimum of Rs.16,400/-. Since the petitioner had received excess payment, the same was sought to be recovered by the impugned orders.

13. The above objection has been forcefully reiterated by the learned Addl. Advocate General, Thiru S.T.S. Moorthy, appearing for the first respondent. He would submit that when the petitioner came to be appointed initially, the Committee had overlooked certain crucial factors and accepted the request of the petitioner for grant of higher pay and on the basis of the Committee's recommendation, the Syndicate also resolved to confirm the higher pay to the petitioner. However, subsequently, it was found that the petitioner did not submit any proof of his academic credentials which he claims to possess and therefore, the Audit has raised objections and on the basis of which, the impugned action was taken. Although, the Government has subsequently ratified the appointment of the petitioner by the G.O., nevertheless the grant of higher minimum pay to the petitioner was found to be unjustified with reference to the academic qualifications of the petitioner.

14. The learned counsel for the petitioner, in support of his contentions, particularly with regard to the order of recovery, would rely upon the decision of the Hon'ble Supreme Court reported in "(2015) 4 SCC 334 (State of Punjab and others versus Rafiq Masih (White Washer and others))" wherein, he would particularly draw the attention of this Court to paragraph 18, which reads as under:

"18. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarize 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 a 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."

15. The learned counsel would submit that sub para (iii) and (v) would be applicable to the case of the petitioner and therefore, the recovery as ordered, cannot be sustained in law as the same is contrary to the ruling of the Hon'ble Supreme Court. He would then rely upon the decision of the Division Bench of this Court reported in "(2006) 3 MLJ 1025 (P.Arumugam versus Registrar, Tamil University, Thanjavur)", wherein, he would draw reference to the observation made by the Division Bench in paragraphs 11.5 and 11.6 which is extracted as under:

"11.5. In the above stated circumstances, the question that remains to be considered is as to whether the respondent can be permitted to re-work the fixation of pay and the excess payment, if any, paid to the appellant based on wrong fixation of pay right from 01.02.1984 and seek for recovery of a huge sum of Rs.3,95,093/- from the terminal benefits payable to the appellant. It is relevant to state that between 01.02.1984 i.e. the date of appointment of the appellant as Superintendent in the respondent University, till he was allowed to retire from service on 31.12.2001, the respondent did not raise its little finger as regards the alleged excess payment paid to the appellant. On the other hand, knowing fully well about the previous employment of the appellant, the respondent University in its offer of appointment, dated 13.06.1983 as well as the order of appointment dated 21.0.1983, specifically mentioned that the pay of the appellant was being fixed in a particular scale ensuring the pay last drawn by the appellant in his previous employment. That apart, it is not known why in spite of the Audit Objections raised as early as in the year 1984-85, the respondent did not intimate the same to the appellant nor taken any proceedings for suitably re-fixing the pay fixed at the time of issuance of the order of appointment in accordance with Rule 44(4)(i) of the Tamil Nadu Pension Rules. The respondent thus, with its eyes wide open, fixed the pay of the appellant

in a particular scale of pay applicable to him and also allowed him to draw that pay throughout his service in the respondent university till the date of his retirement. Therefore, while the respondent was squarely responsible for the wrong fixation of pay, if any, of the appellant, the appellant was never to be blamed as regards his pay fixation. Neither in the offer of appointment nor in the appointment order, the appellant was ever reminded about any intimation required as regards the receipt of pension in the erstwhile service rendered by him in the State Government.

"11.6. Having regard to all the above factors, we are of the considered opinion that the respondent are now estopped from attempting to reverse the whole process of pay fixation made and the payment of salary made to the appellant right from the date of his appointment till the date of his superannuation. For whatever excess payment made to the appellant, even if the same was due to wrong fixation of pay contrary to the provisions contained in Rule 44(4)(i) of the Tamil Nadu Pension Rules, the whole liability will have to be borne by the respondent or if need be, the said liability to be recovered from the concerned authorities who was/were responsible for the commission of such lapses which resulted in any excess payment of salary. Certainly, in our considered view, the appellant cannot be made to bear such a huge liability and recovery of the same to be permitted, that too from the terminal benefits payable to the appellant. Such a course, as rightly held by the Single Judge, would be highly inequitable and will be totally unjustified."

16. The facts in the above decision are almost identical to the facts of the present case. He would submit that the observation as made by the Division Bench has to be applied to the present case as well.

17. Shri Sanjai Gandhi, learned counsel appearing for the second respondent University also made submissions.

18. Heard the learned counsel appearing for the parties. Upon perusal of the materials and pleadings placed on record, it

appears that there is considerable force in the contentions put forth on behalf of the petitioner for several reasons as stated hereunder:

19. When the petitioner was called for Interview, he was particularly asked to indicate the acceptability of salary for the purpose of appointing him to the post of Professor, School of Humanities, as found in Column No.11 of the application. Admittedly, the petitioner has clearly indicated a minimum pay acceptable to him at Rs.20,900/- in the pay scale of Rs.16,400-22,400. His request as disclosed in the application, was considered by the Selection Committee and after assessing the potentiality of the petitioner and his academic achievement and back ground and other related credentials, the Committee had categorically recommended for grant of higher pay as desired by the petitioner. From the notings of the Committee, it is very clear that a conscious decision has been taken by the Committee consisting of eminent faculty to grant higher pay to the petitioner. Therefore, there can be a valid presumption that the Committee had deliberated on the academic credentials of the petitioner while making recommendation for grant of higher pay to the petitioner as desired by him.

20. Moreover, the Syndicate of the second respondent University, which is the Apex body of the University has also considered the Committee's recommendation and the Syndicate has resolved to confirm and accept the recommendation of the Committee. When the highest body of the University has resolved to grant higher pay to the petitioner, such decision by the Syndicate cannot be unsettled at the instance of the objections raised by the Audit authorities. This Court is of the opinion that the merit of the candidate with reference to the academic accomplishment would fall within the domain of the Selection Committee and Syndicate of the University and the same cannot be the subject matter of consideration by the Audit authorities. As rightly contended by the learned counsel for the petitioner that the petitioner fulfilled UGC norms for appointment to the post of Professor, School of Humanities and satisfied the criteria as laid down by the UGC which was extracted supra.

21. Further, in the instructions issued at the time of selection of the petitioner, admittedly in Column No.11, it is provided for grant of higher start in the prescribed pay scale and exact instruction as given, is extracted hereunder:

"11. Minimum basic pay acceptable: Rs. _____ per month"
Therefore, it is well within the power of the authority concerned to grant higher start in the prescribed pay scale of pay and all this Court has to see whether such power or the discretion vested in the authority has been exercised fairly and properly?

22. From the materials produced, it could be seen that the petitioner was working in abroad at the time of his appointment and he was earning Rs.70000 US dollars annually. He accepted the appointment as Professor, School of Humanities since he was offered the pay of Rs.20,900/- as desired by him. Having offered the minimum pay as desired by the petitioner and invited him to join the faculty, it is not appropriate for the respondents to adopt adverse position against the petitioner denying higher start of pay scale after passage of several years at the instance of the Audit objection. Such reversal of the position by the respondents in the facts of the present case would be violative of the principles of promissory and equitable estoppel and would also undermine the principle of legitimate expectation.

23. In the instant case, the petitioner has worked for several years without any complaint. Further, there is another clinching factor in favour of the petitioner in this case that the Government, vide its order dated 13.2.2015 has ratified the appointment of the petitioner, it means that the petitioner has fulfilled all the necessary qualification for manning the post of Professor, School of Humanities. That being the case, this Court does not see any justification for the Government to disallow the higher start of pay granted to the petitioner. Such action on the part of the Government would amount to selective application of mind to the effect that the qualification is accepted for manning the post of Professor and the same qualification is not acceptable for the purpose of pay fixation. Such approach of the Government against the petitioner is iniquitous, unreasonable and arbitrary and therefore, violative of Article 14 of the Constitution of India. The objections raised by the respondents that the petitioner did not substantiate his academic credentials he claims to possess, cannot also be countenanced both in law and on facts for the reason that the Government had thought it fit to ratify the appointment by the impugned G.O. dated 13.2.2015. Once the petitioner possesses all the qualifications for manning the post of Professor, School of Humanities, it is not open to the Government to revise the pay of the petitioner and order recovery of the excess amount paid to him. Having offered the desired pay and invited the petitioner to join the faculty, it is patently unjust on the part of the respondents to resile its position with reference to the grant of higher pay granted to the petitioner. As far as the recovery is concerned, the law is well settled as laid down by the Hon'ble Supreme Court in the aforesaid decisions. In any event, the revision of pay as ordered by the Government vide impugned G.O., cannot be sustained in the facts and circumstances of the case and the same has to go lock, stock and barrel insofar as fixation of pay of the petitioner is concerned.

24. For the above said reasons, the petitioner is entitled

to succeed in all fours and the impugned order in G.O.Ms.No.26 Higher Education (K1) Department dated 13.2.2015 insofar as it disallows the higher start of pay to the petitioner and the consequential recovery order dated 16.12.2015 passed by the second respondent in F.No.Registrar/TNOU/Admn./ 550/Dr.K.M. SOH/2015 are hereby set aside. The respondents are directed to refund the amount already recovered from the salary of the petitioner forthwith.

The Writ Petition stands allowed accordingly. No costs. Consequently, connected WMPs are closed.

suk

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1. The Secretary to Government of Tamil Nadu,
Higher Education (K1) Department,
Fort St.George, Chennai.

2. The Registrar,
Tamil Nadu Open University,
No.577, Anna Salai,
Saidapet, Chennai-15.

+1cc to Mr. V.Vijay Shankar, Advocate sr.no.48870
+1cc to Government Pleader in sr.no.49420

W.P.No.1222 of 2016

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