

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.09.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

W.P.No.12463 of 2012

N.Peace Solomon

.. Petitioner

Vs.

1.The District Education Officer,  
Office of Coonoor Educational District,  
Coonoor, The Nilgiris - 643 102.

2.The Correspondent,  
CSI High School, Kotada,  
The Nilgiris - 643 236.

.. Respondents

Petition is filed under Article 226 of the Constitution of India for the issuance of writ of certiorari to call for the records pertaining to the proceedings of the first respondent in Na.Ka.No.8017/A2/2010, dated 16.3.2012 and quash the same as illegal, unconstitutional and ultra vires.

For Petitioner : Mr.Ma.P.Thangavel

For Respondents : Mr.K.Venkatramani (for R1)

Addl. Advocate General

assisted by

Mrs.K.Bhuvaneswari

Government Advocate

Mr.A.S.Balaji (for R2)

O R D E R

This writ petition has been filed by the petitioner seeking a writ of certiorari to call for the records pertaining to the proceedings of the first respondent in Na.Ka.No.8017/A2/2010, dated 16.3.2012 and quash the same as illegal, unconstitutional and ultra vires.

2. Brief facts leading to the filing of the writ petition are as under: According to the petitioner, he was appointed as Secondary Grade Teacher on 23.6.1989 in CSI Primary School, Hilical, Coonoor, and since then he was in continuous service without any blemish. The said school is a government aided school and the first respondent had recognized the seniority of the petitioner and promoted him to the post of Headmaster and appointed him at CSI High School, Kotada.

3. It is stated that consequent to the promotion, the pay scale of the petitioner was fixed and both the promotion and pay scale granted were ratified by the Assistant Educational Officer, Kotagiri. It is his case that he was holding the post of Secondary Grade Middle School Headmaster till August, 1997 and thereafter held the post of Secondary Grade Assistant till 2003.

4. It is alleged that the respondent, without issuing any notice to the petitioner, by proceedings dated 22.1.2003 re-fixed the pay of the petitioner and had thereby reduced it by Rs.1525/- per month. The petitioner sent a representation to the respondent authorities on 15.9.2003. However, without passing any orders, the first respondent by proceedings dated 9.2.2004 directed the petitioner to pay the excess amount paid to him as salary. Challenging the same, the petitioner filed W.P.No.23507 of 2004 and this Court, by order dated 6.1.2011, set aside the order of the first respondent by directing the petitioner to give a fresh representation and directing the first respondent to give opportunity to the petitioner as well as the second respondent and passing appropriate orders in accordance with law.

5. It is averred that the petitioner sent a representation on 4.2.2011, but even before that the first respondent by order dated 27.1.2011 informed that the writ petition filed earlier by the petitioner had been dismissed and, therefore, the order of the recovery of excess amount paid should be implemented by the second respondent. It is asserted that the first respondent even without understanding the order passed by this Court, the first respondent by proceedings dated 16.3.2012, which was served on the petitioner on 20.3.2012, directed him to pay a sum of Rs.2,17,689/-, without giving details of the calculation behind such amount. Even though the petitioner sent a representation, the respondents without considering the same, superannuated the petitioner from service on 31.5.2008.

6. In such premise, the present writ petition is filed for the relief stated supra.

7. The learned counsel appearing on behalf of the petitioner contended that even though in the earlier round of litigation this Court had directed the first respondent to issue notice to the petitioner before passing any order, no such notice, not to say of any documents pertaining to fixation of pay or recovery, were given to the petitioner and, therefore, the impugned order on the face of it is in gross violation of the principles of natural justice.

8. Per contra, the learned Additional Advocate General appearing on behalf of the first respondent reiterated the reasons that weighed with the first respondent while passing the impugned order and stated that pursuant to the order passed by this Court in the earlier round of litigation, the first respondent had addressed three communications to the second respondent school and since the second respondent school did not cooperate with the conduct of enquiry, nor allowed the first respondent to comply with the order of this Court, the impugned order was passed and, therefore, the same does not warrant any interference.

9. I heard Mr.Ma.P.Thangavel, learned counsel for the petitioner; Mr.K.Venkatramani, learned Additional Advocate General assisted by Mrs.K.Bhuvaneswari, learned Government Advocate for the 1<sup>st</sup> respondent and Mr.A.S.Balaji, learned counsel for the 2<sup>nd</sup> respondent and perused the documents available on record.

10. At the outset, it is to be noted that this Court at the stage of admission of this writ petition passed an interim order of stay on 27.4.2012 and the same was extended until further orders by proceedings dated 25.9.2012. Therefore, it is explicitly clear that till date the impugned order passed by the first respondent to recover the excess amount alleged to the paid to the petitioner had not been implemented.

11. The service rendered by the petitioner as Secondary Grade Teacher initially in a government aided school and thereafter his promotion as Headmaster is not disputed. There is no rebuttal by the respondents to the plea of the petitioner that his promotion as Headmaster and fixation of pay scale has

been ratified by the Assistant Educational Officer, Kotagiri, Nilgiris District. This only shows that the ratification granted by the Assistant Educational Officer, Kotagiri, subsists as on date and there is no whisper whatsoever by the respondents on this issue.

12. In the earlier round of litigation, this Court by order dated 6.1.2011 made in W.P.No.23507 of 2004, observed as under:

"7. the impugned order in No.1/E1/2003, dated 22.1.2003 and 8017/B2/2004, dated 9.2.2004 passed by the first respondent are set aside and the writ petition is allowed. The petitioner shall make a representation to the first respondent by enclosing a copy of this order. The first respondent is directed to give opportunity to the petitioner as well as to the second respondent and pass appropriate orders in accordance with law. The first respondent shall complete the said exercise within a period of six weeks from the date of receipt of the representation of the petitioner."

13. A bare perusal of the above said order reveals that the first respondent was directed to give opportunity to the petitioner as well as the second respondent and thereafter pass orders in accordance with law. It is not the case of the first respondent and opportunity has been given to the petitioner. Even in the counter affidavit it is stated that three communications were addressed to the second respondent and as the second respondent did not cooperate, they proceeded further and passed the impugned order. In other words, the order passed by the first respondent is ex facie in gross violation of the order passed by this Court in the earlier round of litigation and it is also clear that the impugned order has been passed without following the bare bones of the principles of natural justice.

14. This Court feels it just to add that salary of an employee constitutes a property within the meaning of Article 300A of the Constitution of India. If at all any excess amount wrongfully paid is to be recovered from an employee, it should only be in accordance with procedure contemplated under law. To put it otherwise, recovery cannot be made unilaterally by the authorities without the participation of the employee to whom the alleged excess payment is made and from whom recovery is sought to be made. The order impugned and the counter affidavit, on the face of it, divulge that the petitioner was not given prior notice to participate in the proceedings to enable him to

have his say in the proceedings. The procedure adopted by the first respondent is, therefore, in gross violation of the elementary principles of natural justice.

15. Before adverting to the issue of recovery of excess salary alleged to have been paid to the petitioner, it is apposite to refer to a decision of the Hon'ble Supreme Court in State of Punjab and others v. Rafiq Masih (White Washer) and others, AIR 2015 SC 696, wherein it has been held 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, summarise 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."

(emphasis supplied)

16. In the case on hand, it is the say of the first respondent in the counter affidavit that "the salary received by the petitioner from 1.7.1992 to 30.2.2003 which was found excess". Therefore, for the excess salary alleged to have been paid from 1992, recovery is proposed by the first respondent, for the first time in the year 2003, i.e., after lapse of eleven

years. The action of the first respondent runs counter to the law laid down by the Hon'ble Supreme Court in the above decision. That apart, it is not the case of the first respondent that such excess amount was paid to the petitioner on account of misrepresentation or fraud on the part of the petitioner.

17. This Court is of the considered opinion that recovery of amount from the salary already paid bona fide to the petitioner by making recovery has a serious consequence. Where excess payment of the salary has been wrongfully made, the authorities cannot shut their eyes for a long period or for an indefinite period and then all of a sudden wake up from the slumber and take an action belatedly (in the instant case almost eleven years) for recovering the amount, as such belated recovery has drastic consequence on the employee. It is in such view of the matter that the Hon'ble Supreme Court in the decision, supra, had postulated that if at all a recovery is intended to be made, it should be at least within 5 years period from the date when actual excess payment was made.

18. On the ground of violation of principles of natural justice and also for making recovery after a lapse of eleven years without affording an opportunity of hearing to the petitioner, this Court is of the view that the writ petition deserves to be allowed.

19. In the result:

(a) the writ petition is allowed and the order in Na.Ka.No.8017/A2/2010, dated 16.03.2012 passed by the first respondent is set aside;

(b) the respondents are directed to pass appropriate orders for sanctioning the retirement benefits along with pensionary benefits to the petitioner within a period of eight weeks from the date of receipt of a copy of this order. No costs. Consequently, M.P.No.1 of 2012 is closed.

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Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

vs

To

The District Education Officer,  
Office of Coonoor Educational District,  
Coonoor, The Nilgiris - 643 102.

W.P.No.12463 of 2012

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srg 26/09/2018



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