

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE K.K. SASIDHARAN
and
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALU

W.A. No. 1107 of 2013

and

M.P. No. 1 of 2013

1. The State of Tamil Nadu,
Rep. by its Secretary to Government,
School Education Department,
Secretariat,
Fort St. George,
Chennai - 600 009.
2. The Director of Elementary Education,
College Road,
Chennai - 600 006.
3. The District Elementary Educational Officer,
College Road,
Chennai - 600 006. Appellants/Respondents 1 & 3

-vs-

1. S. Beulah Nirmala ... Respondent/Petitioner
2. K.P. Chandrasekaran ... Respondent/Fourth Respondent

PRAYER : Writ Appeal filed under Clause 15 of Letter Patent, praying to set aside the order dated 26.07.2012 made in W.P. No. 17589 of 2012 praying to

W.P.17589/2012: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of certiorarified Mandamus calling for the records of 2nd respondent proceedings No.119989/F1/2011 dated 30.12.2011 in pursuance to the order of 3rd respondent vide in R.C.No.439/B2/2011 dated 28.4.2011 and quash the same and consequentially directing the 2nd respondent to approve the appointment of the petitioner with salary for the period of service rendered under the 4th respondent school.

For Appellant : Mr. C. Munusamy
Special Government Pleader

For Respondents : Mr. K.P. Chandrasekaran

J U D G M E N T

(Judgment of the Court was delivered by P.D. AUDIKESAVALU, J.)

The intra-Court Appeal arises out of the order dated 26.07.2012 passed by Learned Judge of this Court in W.P. No. 17589 of 2012. The parties are hereinafter referred to as per their description in the Writ Petition for the sake of convenience.

2. The facts leading to the filing of the Writ Petition have been extensively captured in the order dated 26.07.2012 passed in W.P. No. 17589 of 2012 and hence, the same are not repeated in this order except with regard to the material facts relevant for the purpose of disposal of this Appeal.

3. It has been found by the Learned Judge, who heard the Writ Petition that after obtaining B.Ed., Degree in December 2007, the Petitioner was having teaching experience of two years nine months and twenty nine days in a recognized school. The Petitioner was appointed to the post of Headmistress on 03.01.2011 in the Aided Private School belonging to the Fourth Respondent in a selection process conducted by the Management on the basis of merit and ability. Though prior permission to fill up the said post by direct recruitment had been obtained on 09.11.2010, the proposal submitted by the Fourth Respondent for approval of the appointment of the Petitioner as Headmistress was rejected by the Third Respondent by proceedings R.C. No. 439/B2/2011 dated 28.04.2011 and confirmed by the Second Respondent by proceeding L. Dis No. 119989/F1/2011 dated 30.12.2011 on the ground that she did not possess the minimum eligibility of five years of teaching experience in a recognized school to hold that post.

4. The Learned Judge in the order under appeal relying on the order dated 15.02.2008 in W.P. No. 24213 of 2005, held that the requirement of five years of teaching experience cannot be confined only to the aided schools and that the teaching experience even in unaided schools also has to be taken into account. On that basis, it was held that the Respondents are bound to approve the appointment of the Petitioner as B.T. Assistant for the period of two years two months and two days, that is till the Petitioner completed five years of teaching experience and thereafter, the appointment of the Petitioner has to be approved as Middle School Headmistress with the scale of

pay applicable to Headmaster. Aggrieved thereby, the First to Third Respondents have preferred this appeal.

5. We have heard Mr. C. Munusamy, Learned Special Government Pleader appearing on behalf of the First to Third Respondents, Mr. K.P. Chandrasekaran, Learned Counsel appearing for the Petitioner and perused the materials placed on record, apart from the pleadings of the parties.

6. The Learned Special Government Pleader appearing for the First to Third Respondents contended that the appointment of the Petitioner even as a teacher cannot be considered inasmuch as on the date of her appointment on 03.01.2011, the Right of Children to Free and Compulsory Education (Amendment) Act, 2017 (hereinafter referred to as the 'Act' for short) has already come into force with effect from 01.04.2010 and in terms of Section 23 of that Act, the Petitioner ought to have passed the Teacher Eligibility Test before that date, which aspect of the matter had not been raised by the First to Third Respondents at that stage and had resultantly not been considered by the Learned Judge in the order under appeal, which requires re-examination on that ground.

7. We are unable to accept the proposition sought to be canvassed by the Learned Special Government Pleader for the simple reason that the proviso to Section 23(2) of the Act in clear terms enable a teacher, who at the commencement of that Act on 01.04.2010, did not possess that minimum qualification, shall acquire the same within a period of five years, which lapsed on 31.03.2015 and subsequently by the amendment made by the Parliament in Act 24 of 2017, the second proviso to Section 23(2) of the Act was inserted with effect from 01.04.2015, declaring that every teacher appointed or in position as on 31.03.2015, who did not possess that minimum qualification shall acquire the same by 31.03.2019. It is not in dispute that the Petitioner had obtained the B.Ed., Degree in December 2007 and had been working as a teacher from 01.03.2008 onwards and as such, she has to be treated as an existing teacher, falling within the category of persons entitled to the benefit of the proviso to Section 23(2) of the Act, when it came into force on 01.04.2010, as well as the benefit of the subsequent amendment inserting second proviso with effect from 01.04.2015. In such circumstances, the aforesaid ground sought to be canvassed by the First to Third Respondents cannot be countenanced.

8. However, we cannot approve the act of the Fourth Respondent, as the Management of an Aided School, in appointing the Petitioner as Headmistress without the requisite teaching experience of five years. This aspect of the matter came up for

consideration before a Division Bench of this Court in Government of Tamil Nadu -vs- J. Metildaviji (Order dated 21.03.2018 in W.A. No. 935 of 2014) in which one of us (K.K. Sasidharan, J.) was a party. The relevant portions from that order are extracted below:-

"8. The core question is as to whether the Management was correct in appointing a candidate without any experience, notwithstanding the Regulation which mandates five years experience as a B.T.Assistant.

9. The Regulation is very clear that for appointment to the post of Headmaster in a Middle School, the candidate must have five years of experience. The experience is also part of the eligibility criteria. There are no Regulations or Government Orders permitting relaxation in the matter of educational qualification or experience. The Government Orders relied on by the learned counsel for the first respondent relate to relaxation in respect of experience, in case, the teachers who were working in the very same institution were appointed as Middle School Headmaster....

13. There are no statutory provisions under the School Regulation Act giving relaxation in the matter of experience. The Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974 also contain the requirement of basic qualification and experience for appointment to the post of Headmaster. There is no provision giving relaxation in the Regulations also. We therefore, make the position very clear that the candidates for appointment to the post of Middle School Headmaster must have five years of experience as a teacher. We also make it clear that there is no provision for giving relaxation in the matter of either qualification or experience."

The Hon'ble Supreme Court of India in State of Orissa -vs- Mamata Mohanty [(2011) 3 SCC 436] after referring to the earlier decisions governing the various issues which also arise for consideration in the present case, has held that a person who did not possess the requisite qualification on the date of appointment shall not be entitled for grant-in-aid scheme till he completes the deficiency and that his case could be considered only from the date of completing the deficiency for extending the benefit of grant-in-aid scheme. It would be useful to refer to relevant passages in that decision which are squarely applicable to the facts of this case, and the same are as follows:-

"29. Education is the systematic instruction, schooling or training given to the young persons in preparation for the work of life. It also connotes the

whole course of scholastic instruction which a person has received. Education connotes the process of training and developing the knowledge, skill, mind and character of students by formal schooling. The excellence of instruction provided by an educational institution mainly depends directly on the excellence of the teaching staff. Therefore, unless they themselves possess a good academic record/minimum qualifications prescribed as an eligibility, it is beyond imagination of anyone that standard of education can be maintained/enhanced.

33. it is evident that education is necessary to develop the personality of a person as a whole and in totality as it provides the process of training and acquiring the knowledge, skills, developing mind and character by formal schooling. Therefore, it is necessary to maintain a high academic standard and academic discipline along with academic rigour for the progress of a nation. Democracy depends for its own survival on a high standard of vocational and professional education. Paucity of funds cannot be a ground for the State not to provide quality education to its future citizens. It is for this reason that in order to maintain the standard of education the State Government provides grant-in-aid to private schools to ensure the smooth running of the institution so that the standard of teaching may not suffer for want of funds.

34. Article 21-A has been added by amending our Constitution with a view to facilitate the children to get proper and good quality education. However, the quality of education would depend on various factors but the most relevant of them is excellence of teaching staff. In view thereof, quality of teaching staff cannot be compromised. The selection of the most suitable persons is essential in order to maintain excellence and the standard of teaching in the institution. It is not permissible for the State while controlling the education it may impinge the standard of education....

37. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person

to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin.

40. lacking eligibility as per the rules/advertisement cannot be cured at any stage and making appointment of such a person tantamounts to an illegality and not an irregularity, thus cannot be cured. A person lacking the eligibility cannot approach the court for the reason that he does not have a right which can be enforced through Court.

50. In absence of an enabling provision for grant of relaxation, no relaxation can be made. Even if such a power is provided under the Statute, it cannot be exercised arbitrarily. Such a power cannot be exercised treating it to be an implied, incidental or necessary power for execution of the statutory provisions. Even an implied power is to be exercised with care and caution with reasonable means to remove the obstructions or overcome the resistance in enforcing the statutory provisions or executing its command. Incidental and ancillary powers cannot be used in utter disregard of the object of the Statute. Such power can be exercised only to make such legislation effective so that the ultimate power will not become illusory, which otherwise would be contrary to the intent of the legislature.

51. More so, relaxation in this manner is tantamount to changing the selection criteria after initiation of selection process, which is not permissible at all. Rules of the game cannot be changed after the game is over.

56. It is a settled legal proposition that Article 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief.

57. This principle also applies to judicial pronouncements. Once the court comes to the conclusion that a wrong order has been passed, it becomes the solemn duty of the court to rectify the mistake rather than perpetuate the same....

58. We are fully alive of the object and purpose of according recognition and affiliation to educational institutions. It is the educational authorities of the State which grant recognition to a Committee of Management for opening or running an educational institution. Affiliation is granted by the particular University or Board for undertaking the examination of the students of that college for awarding degrees and certificates. Therefore, while granting the recognition and affiliation even for non-governmental and non-aided private colleges, it is mandatory to adhere to the conditions imposed by them, which also include the minimum eligibility for appointment of teaching staff. The authority at the time of granting approval has to apply its mind to find out whether a person possessing the minimum eligibility has been appointed...."

In view of this unassailable legal position, the appointment of the Petitioner as Headmistress of the School of the Fourth Respondent without requisite teaching experience is clearly in contravention of law and the Educational Authorities were right in declining to approve the appointment of the Petitioner. It would also necessarily follow that the Petitioner cannot cite the decisions of this Court, which run contrary to the authoritative pronouncement of the Hon'ble Supreme Court of India in State of Orissa -vs- Mamata Mohanty [(2011) 3 SCC 436], to ratify the appointment of the Petitioner violating the eligibility conditions prescribed by law.

9. The point now boils down to the short question as to whether the relief granted to the Petitioner by the Writ Court in the light of the aforesaid conclusion requires interference?

10. The Learned Counsel for the Petitioner contended that after passing of the order in the Writ Petition, the Petitioner has acquired the required teaching experience of five years as B.T. Assistant for appointment as Headmistress and hence, it is not necessary for this Court now to disturb the appointment of the Petitioner or deprive her of the consequential monetary benefits that she would be entitled to receive by way of grant-in-aid from the State in terms of the order passed by the Writ Court.

11. Having due regard to the aforesaid submissions made, we are of the considered view that it is a matter for the Petitioner and the Fourth Respondent to factually establish before the Educational Authorities that the Petitioner has acquired the requisite teaching experience of five years for appointment to the post of Headmistress after the passing of the

order by the Writ Court. If the Educational Authorities are subjectively satisfied that the Petitioner has acquired the requisite teaching experience of five years, her appointment as Headmistress of the School of the Fourth Respondent could be approved only from the date on which the requisite teaching experience of five years has been attained and the period she had worked in unaided schools shall be duly taken into account for that purpose, and the grant-in-aid towards salary for that post could be paid only from that date onwards and not earlier. Insofar as the question of treating the period from 03.01.2011 till the Petitioner acquired the requisite teaching experience of five years is concerned, the grant-in-aid towards salary for the post of B.T. Assistant could be made only if such vacancy was available in the School of the Fourth Respondent and she had performed the duties in that post during that period. In the light of the aforesaid findings of this Court, the concerned authorities of the Education Department shall accordingly pass fresh orders regarding the approval of appointment of the Petitioner as Headmistress in the School of the Fourth Respondent and her entitlement to salary by way of grant-in-aid and communicate the decision taken to the Fourth Respondent and the Petitioner by 30.06.2019. In the event, it is found that the Petitioner is not entitled for grant-in-aid towards salary for any part of the aforesaid period, it is certainly open to the Petitioner to invoke Section 70 of the Indian Contract Act, 1972, to pursue legal remedies against the Fourth Respondent (Management of the aided school) for recovery of the salary for the work extracted from her during that period as held by the Hon'ble Supreme Court of India in Government of Andhra Pradesh -vs- K. Brahmanandam [(2008) 5 SCC 241]. It is made clear that if the Petitioner has not passed the Teacher Eligibility Test as required by 31.03.2019, the question as to her continuance in service after that date shall depend upon such orders as would be applicable to similarly placed persons.

12. In fine, the Writ Appeal is allowed, the order dated 26.07.2012 in W.P. No. 17589 of 2012 is set aside and the Writ Petition is disposed on the aforesaid terms. Consequently, the connected Miscellaneous Petition is closed. No costs.

-s/d-

Assistant Registrar(CS-I)

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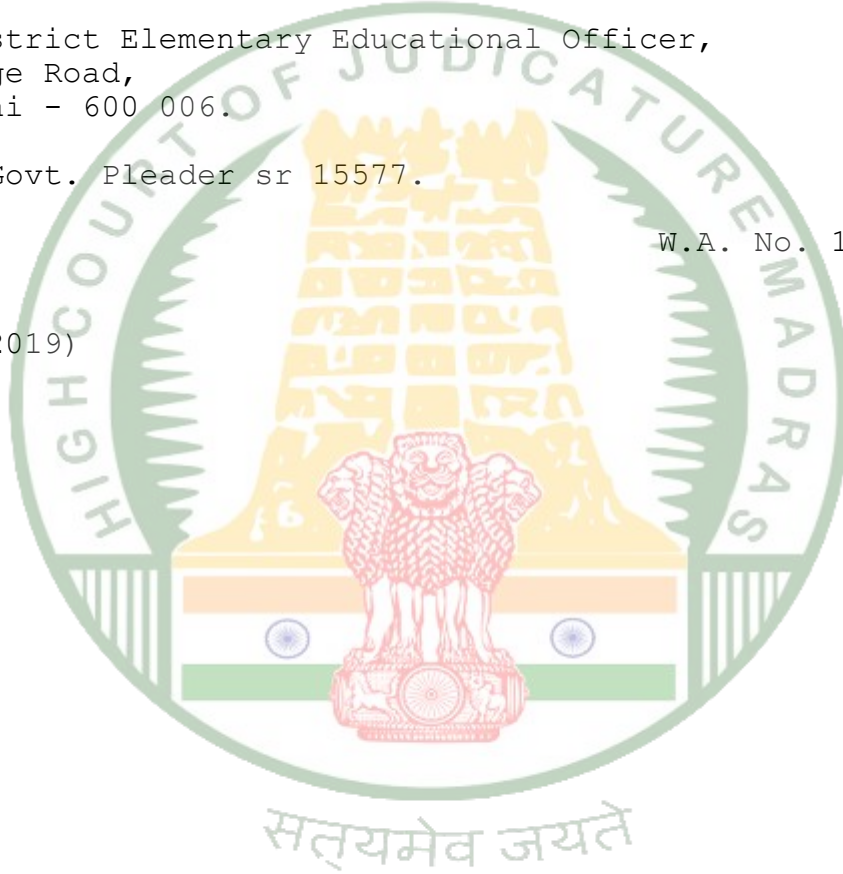
Sub-Assistant Registrar

To

1. The Secretary to the Government of Tamil Nadu,
School Education Department,
Secretariat,
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 2. The Director of Elementary Education,
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SP(05/04/2019)



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