

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.11.2019

CORAM

THE HON'BLE MR.JUSTICE D.KRISHNA KUMAR

W.P.No.17932 of 2015

N.Nagarathinam

... Petitioner

vs.

1.The District Educational Officer
Erode

2.The Principal Accountant General (A&E)
Office of Accountant General
Teynampet, Chennai-18

3.The Headmaster
Government High School
Kavilipalayam
Sathiyamangalam Taluk
Erode District

...Respondents

Writ petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the entire records connected with the impugned order passed by the 3rd respondent in Na.Ka.No.19/2015, dated 26.05.2015 and quash the same and direct the respondents to refund the recovered amount of Rs.1,40,023/- to the petitioner with 12% interest, recovered from the gratuity amount of the petitioner.

For Petitioner : Mr.S.N.Ravichandran

For Respondents : K.Karthikeyan, Govt.Advocate for
R1 and 3

Mrs.J.Sreevidya for R2

सत्यमेव जयते
O R D E R

Petitioner was initially appointed as Tamil Pandit Grade-I on 05.12.1996. The qualification prescribed for the post of Tamil Pandit Grade I, is S.S.L.C with B.O.L (Tamil) and Tamil Pandit Training, as per G.O.Ms.No.107 dated 20.01.1976. Petitioner had higher qualification of M.A. and B.Ed on the date of appointment itself. Based on the said qualification of M.A and B.Ed the petitioner was duly sanctioned two incentive increment by the department as per G.O.Ms.No.42 dated 10.01.1969. On 05.12.2006, petitioner was sanctioned increment for selection grade. On 18.07.2012 petitioner was promoted as

P.G.Assistant (Tamil). Petitioner after successful completion of 17 years of service, attained superannuation on 31.05.2013.

2. After 14 years of sanctioning of incentive increment, the 2nd respondent had raised audit objection on 06.05.2010 by stating that the steps have to be taken to recover a sum of Rs.69,122/- and directed the petitioner to submit her reply within 15 days. On 04.08.2010, petitioner submitted her reply to the 1st respondent through the 3rd respondent. Without considering the said explanation, the 2nd respondent by order in Lr.No.Pr.AG (CA)/ISC IV/11/C 20-917/10-11/49 dated 30.10.2012 rejected her representation by stating that the incentive increment for B.Ed was wrongly sanctioned and by an order dated 15.07.2013. The 3rd respondent has deducted a sum of Rs.1,40,023/- from the gratuity amount of the petitioner. Challenging the above said order, petitioner filed W.P.No.29569 of 2013 before this Court. By order dated 05.01.2015, this Court was pleased to set aside the order of the 3rd respondent on the grounds of violation of natural justice and remitted the matter back to the respondent to consider afresh.

3. Pursuant to the above said order, show cause notice was issued on 11.03.2015, to which the petitioner submitted a detailed representation on 06.04.2015 to the respondent. However, the 3rd respondent passed the impugned order dated 26.05.2015, stating that with the consent of the petitioner, a sum of Rs.1,40,023/- was deducted from the gratuity of the petitioner. Aggrieved by the same, the petitioner has filed the present writ petition to set aside the impugned order passed by the 3rd respondent.

4. According to the learned counsel for petitioner, the undertaking given by the petitioner cannot over ride the statute. According to him, the said undertaking from the petitioner was obtained by the respondent by adopting coercive method and at that time, the petitioner has submitted the said undertaking before the authority only for the purpose of forwarding the pension proposal to the 3rd respondent otherwise the petitioner would not avail pensionary benefits from the respondents. Therefore, the said recovery order is liable to be quashed.

5. Learned counsel for petitioner further submitted that the petitioner at the time of appointment possessed the prescribed qualification of S.S.L.C with B.O.L (Tamil) and Tamil Pandit Training, as per G.O.Ms.No.107 dated 20.01.1976. The petitioner had higher qualification of M.A and B.Ed on the date of appointment itself, therefore, the department has sanctioned

incentive increment to the writ petitioner. According to the learned counsel for the petitioner, now the recovery proceeding has been passed by the respondent is against the increments granted towards acquiring B.Ed qualification, which according to the respondent it is only the basic qualification for appointment to the said post of Tamil Pandit Grade I. Therefore, the learned counsel for the petitioner submits that the aforesaid order of recovery is liable to be quashed.

6. In the counter affidavit filed by the 1st respondent, it is stated that the petitioner was appointed as Tamil Pandit in Government Higher Secondary School, Annur in the said post on 05.12.1996. On the date of appointment the petitioner has possessed required qualification for the post and higher qualification of M.A degree. The petitioner has passed B.Lit and B.Ed and that was the required qualification for the post of Tamil pandit. Therefore, the petitioner was eligible for sanction of incentive increment for M.A. Qualification. Unfortunately she was sanctioned two incentive increment for B.Ed and M.A without following the relevant rules said in G.O.Ms.107 Edn dated 20.01.1976. After completion of 10 year service she was placed in the selection grade post. The petitioner was selected to the Tamil pandit post based on B.Lit and B.Ed. Petitioner was not eligible to get incentive increment for B.Ed qualification as per the G.O.Ms.No.107 Edn dated 20.01.1976. Considering the higher qualification i.e M.A degree one incentive increments was sanctioned as per the said Government order. It is further submitted that the 2nd respondent scrutinized the petitioner's service register and raised an audit objection regarding the sanction of incentive increment to the petitioner for the B.Ed qualification. It is true that the objection raised by the 2nd respondent is in order as per the G.O.Ms.N.107 Edn dated 20.01.1976. On the basis of the audit objection, the Headmaster, Government Higher Secondary School, Kavilipalayam the 3rd respondent has recovered the amount from the petitioner.

7. The qualification required for Tamil Pandit were any of the three sets of qualification.

1. A degree in the language plus L.T, B.T or B.Ed
2. BOL (Pass of Hons) with SSLC completed plus L.T, B.T or B.Ed
3. S.S.L.C completed and oriental title plus pundits of sec gr. Training

The petitioner was selected to the post of Tamil pandit in the 1st category. B.Lit, B.A (Tamil) qualified persons are eligible to apply the Tamil pandit post only after completion of B.Ed or B.T. Hence, the qualification of B.Ed of the petitioner is not a higher qualification and it is only essential basic

qualification. It is stated that the petitioner submitted a representation to the department and the 2nd respondent and her request was scrutinized as per the G.O.Ms.No.107 Edn dated 20.01.1976 and a reply was also sent to the petitioner by the 2nd respondent in Lr.No.Ag/ISC IV C 20-017/10-11/49 dated 30.10.2012. Only after the reply sent to the petitioner, the 3rd respondent took necessary steps to recover the excess payment from the petitioner. The petitioner submitted her acceptance for the recovery of excess payment from her gratuity in her letter dated 24.01.2013. It is the duty of the head of institution to take steps to recover the overpayment from their staff and settle the audit objection. Hence, the steps taken by the Headmaster is in order.

8. It is further stated that the audit objection raised is correct as per the said G.O. The incentive increment for B.Ed to the petitioner was irregular and it is against the Government rules. He further submitted that the recovery made by the 2nd and 3rd respondents are not contrary to the Government order, it is their duty to recover excess payment from the petitioner. As per the letter dated 24.01.2013, given by the petitioner the 3rd respondent recovered the excess payment from the gratuity amount and paid the balance to the petitioner on 16.07.2013. Petitioner filed W.P.No.29569 of 2013 and the Court passed an order. The petitioner submitted a representation to the 3rd respondent on 06.04.2015 and for that petition 3rd respondent sent a reply to the petitioner in her letter dated 26.05.2015 in obedience of the judgment delivered by the Court on 05.01.2015. It is stated that the petitioner's representation was considered and proper order was passed by the 3rd respondent as per the Government rules. The petitioner's statement that her B.Ed is higher qualification is contrary to the truth and further submitted that B.Ed qualification is required qualification for the post and hence the recovery order made against the incentive increment sanctioned to the petitioner is in order and prayed for dismissal of the writ petition.

9. In the counter affidavit filed by the 2nd respondent, it is stated that the petitioner was appointed as Grade I Tamil Pandit on 05.12.1996. The qualifications required for appointment as Tamil Pandit Grade as per G.O.Ms.No.107 dated 20.01.1976 are anyone of the following three sets of qualifications:

1. A degree in the language plus L.T, B.T or B.Ed
2. BOL (Pass of Hons) with SSLC completed plus L.T, B.T or B.Ed
3. S.S.L.C completed and oriental title plus pundits of Secondary Grade Training.

At the time of appointment, the petitioner had the following qualifications:

1. SSLC Completed
2. B.Litt(Tamil)
3. M.A.(Tamil)
4. Pandit Training
5. B.Ed.

10. It is further stated that to be appointed as Tamil Pandit Grade I under the qualifications mentioned in the third set of G.O.107 dated 20.01.1976 the petitioner did not possess the Oriental Title and hence the petitioner was appointed as Tamil pandit Grade I on 05.12.1996 based on the 1st set of qualification viz.,

1. A degree in the language plus L.T., B.T or B.Ed

It is submitted that since the petitioner did not possess the Oriental title, to be appointed as Tamil Pandit Grade I, the first set of qualification was taken into account. It is further submitted that the petitioner's first appointment itself was Tamil Pandit Grade I on 05.12.1996 based on the Degree in Tamil (B.Litt) and B.Ed qualification. It is further submitted that as per sub-para (1) of para (2) of G.O.107 dated 20.01.1976 B.As and B.O.Ls can be appointed as Tamil Pandit Grade I, if they have passed B.T. Hence, for possessing the essential qualification for appointment as Tamil pandit Grade I, incentive increment is not admissible for passing BT being the essential qualification for appointment as Tamil Pandit Grade I. B.Litt passed by the petitioner is equal to B.A or B.Ed which is the essential qualification for appointment as Tamil pandit Grade I. The B.Litt passed by the petitioner is equal to B.A or B.Ed which is the essential qualification for appointment as Tamil pandit Grade-I. It is further submitted that the petitioner after receiving the explanation vide letter No.Pr.AG(CA)/ISC W/II/C20-017/10-11/49 dated 30.10.2012 has accepted the explanation, has given the consent letter to recover the excess amount paid towards incentive increment from the DCRG payable. In view of the above, the petition may be dismissed as devoid of merits.

11. Learned Government Advocate submitted that the qualified persons of B.Lit, B.A (Tamil) are eligible to the post of Tamil Pandit only after completing B.Ed or BT. Hence the qualification of B.Ed of the petitioner is not a higher qualification and it is only essential basic qualification. Based on the audit objection of the 2nd respondent, the action was taken for recovery of excess payment made to the petitioner. According to the respondents, the department is entitled to recover the said amount.

12. Learned standing counsel appearing for the 2nd respondent based on the counter affidavit filed by the 1st respondent has submitted that the petitioner had the following qualifications:

1. SSLC Completed
2. B.Litt (Tamil)
3. M.A. (Tamil)
4. Pandit Training
5. B.Ed.

According to them, the qualifications for the post of Tamil pandit Gr.I is prescribed in the third set of G.O.107 dated 20.01.1976 and the petitioner did not possess the Oriental title. Hence, the petitioner was appointed as Tamil Pandit Grade I on 05.12.1996 based on the I set of qualification viz.,

1. A degree in the language plus L.T., B.T or B.Ed.

Since the petitioner did not possess the Oriental Title to be appointed as Tamil Pandit Grade I, the first set of qualification was taken into account. He further submitted that as per sub-para(1) of para (2) of G.O.107 dated 20.01.1976 B.As and B.O.Ls can be appointed as Tamil Pandit Grade I, if they have passed B.T. Hence incentive increment is not admissible for possessing B.T or B.Ed being the essential qualification for appointment as Tamil Pandit Grade I. The petitioner after receiving the letter No.Pr. AG(CA) ISC W/II/C20=017/10-11/49 dated 30.10.2012, has accepted the same and has given consent letter to recover the excess amount from the DCRG Payable to the petitioner.

13. Learned Government Advocate appearing for the respondents 1 and 3 and the learned standing counsel for the 2nd respondent strongly relying upon the qualification of the petitioner that on the date of appointment B.Ed qualification is one of the essential qualification for appointment to the post of Tamil Pandit, Grade I for which the petitioner cannot claim increments.

14. The next contention is that the petitioner has given an undertaking before the authority to recover the amount on 24.01.2013, and now the petitioner cannot go back from her statement and make the allegation that the said letter has been obtained coercively by the department. The said contention of the petitioner is liable to be rejected and therefore there is no valid ground to interfere with the order passed by the respondent.

15. Heard the learned counsel for the parties and perused the materials on record.

16. Learned counsel for petitioner argued that the petitioner was appointed as Tamil Pandit Grade I and she retired from service on superannuation 31.05.2013. The 2nd respondent has raised an audit objection on 06.05.2010 for sanctioning the incentive increment in so far as the B.Ed qualification and thus the show cause notice was served to the petitioner to submit her explanation within 15 days time. Based on the show cause notice, the petitioner submitted her explanation on 04.08.2010 through the 1st respondent. The 2nd respondent without considering the explanation, passed an order in Lr.No.Pr.Ag(CA)/ISC IV/11/C 20-917/10-11/49 dated 30.10.2012 rejecting her representation and clarified that incentive increment for B.Ed was wrongly sanctioned. Pursuant to the said order, the Head Master of the school viz., the 3rd respondent passed recovery order against which the petitioner filed W.P.No.29569 of 2013 before this Court.

17. Pursuant to the above said order, the 3rd respondent served show cause notice to the petitioner on 11.03.2015 and in response, the petitioner sent a reply on 06.04.2014 and on considering the said representation, the 3rd respondent has passed the impugned order on 26.05.2015, which is now the subject matter before this Court.

18. In the counter affidavit filed by the 1st respondent, it is stated that the petitioner was appointed as Tamil pandit Gr.I, based on the first set of qualification viz., a degree in the language plus L.T., B.T or B.Ed prescribed in G.O.Ms.No.107 dated 20.01.1976 But according to the petitioner, she was appointed as per the third set of qualification, the said fact was disputed by the respondents by stating that the petitioner did not possess the Oriental Title and hence she was not considered in the third set of prescribed qualification as per the G.O. Therefore, the contention of the petitioner that she is qualified under third set of G.O cannot be accepted.

19. The second contention of the petitioner is that the impugned order was passed by the 3rd respondent dated 15.07.2013 without providing an opportunity to the petitioner, and also the petitioner challenged the order passed by the 2nd respondent dated 30.01.2012, before this Court in W.P.No.29569 of 2013. By order dated 05.01.2015, this Court passed the following order:

".....

4. There is no dispute that before passing the impugned order of recovery, notice was not issued to the petitioner. The petitioner retired from service as early as on 31.05.2013.

It was only thereafter, the impugned order of recovery was passed by the third respondent and that too at the instance of the second respondent. Since the impugned order of recovery involves civil consequences to the petitioner, she should have been given prior notice. I am therefore of the view that the order of recovery is liable to be quashed solely on the ground of violation of principles of natural justice.

5. In the result, the order dated 15.07.2013 is set aside and the matter is remitted to the third respondent for fresh consideration. The third respondent is directed to furnish a copy of the audit objection to the petitioner and afford her reasonable time to submit response. The third respondent is further directed to conclude the proceedings as expeditiously as possible and in any case, within a period of two months from the date of receipt of a copy of this order. It is open to the petitioner to produce the documents in support of her contention that she was rightly given the increment."

This Court has set aside the order passed by the 3rd respondent dated 15.07.2013 and the order passed by the 2nd respondent has not been set aside by this Court and therefore the order passed by the 2nd respondent has become final. It is clear from the records that only after providing opportunity to the petitioner, the present impugned order came to be passed by the 3rd respondent in Na.Ka.No.19/2015 dated 26.05.2015. Therefore, the petitioner cannot question the consequential order passed by the 3rd respondent without challenging the order dated 30.10.2012 passed by the 2nd respondent. Hence, on this ground the petitioner cannot seek remedy to quash the impugned order passed by the 3rd respondent dated 26.05.2015.

20. Further contention of the petitioner is that the undertaking given by the petitioner cannot override the statute.

21. Learned counsel for the petitioner relied on the judgment of this Court in P.Subramanian vs. Government of Tamilnadu and Ors, 2010 3 MLJ 934, which reads thus:

28. In the present case, in a subsequent affidavit filed by the fifth respondent, it is stated that the petitioner has consented for recovery by letter dated 31.8.2005 both from the death-cum-retirement gratuity and commuted value

pension. Admittedly, by the time such letter was given the petitioner has since long retired in the year 2004 and in his eagerness to get the pensionary amount he was certainly in a lower bargaining power as a weaker party and there was no chance except to give such consent in order to get at least the balance amount for his livelihood and that cannot be a ground to take away the right which has already accrued to him and the respondents cannot be expected to take advantage of such weaker position of the petitioner after retirement. That was also the view expressed by P.Sathasivam, J., as he then was, in S.Pappa v. Government of Tamil Nadu and others, 2000-2-LW-460, where His Lordship, while dealing with the provisions of the Tamil Nadu Recognised Private Schools Act, 1973, of course relating to the unemployed teachers who were downgraded for which consent was stated to have been given, made the following observations by referring to a judgment of the Supreme Court in Central Inland Water Transport Corporation v. Brojo Nath Ganguly, [1986] 3 SCC 156:

29. I have already observed that at the time of passing of the impugned Government Order, even according to the Government, there were thousands of qualified trained Secondary Grade Teachers waiting for employment. In such a situation, they have no other option except to accept and abide by all conditions mentioned in the agreement. Even though the said agreement is to be executed by the School Management and the teacher, the terms and conditions have been drafted and formulated by the Education Department of the Government. Undoubtedly, the unemployed teachers are in a position of inequality of bargaining power which is the result of great disparity in the economic strength of the contracting parties. In other words, among the two, one of the parties namely, the Secondary Grade (Junior) Teacher is a weaker party and he has no choice but to give his assent to a contract and to sign the same in token of his acceptance, however, unfair unreasonable and unconscionable a clause in that contract or form or rules as observed in the Central Inland Water Transport Corporation case (cited supra). Asking the weaker party to execute an agreement which

contains unconscionable clauses is void and not binding. In such a situation, this Court is competent to strike down the unfair and unreasonable terms in the agreement entered into between the parties who are not equal in bargaining power. This position has been enunciated by the Hon'ble Supreme Court in the following decisions:

(i) Central Inland Water Transport Corpn. Ltd. v. Brojonath A.I.R. 1986 S.C. 1573.

(ii) Delhi Transport Corporation v. DTC Mazdoor Congress, AIR 1991 SC 101.

(iii) Uptron India Ltd. v. Shammi bhaki, AIR 1998 SC 1681.

Even though it is stated by the learned Additional Advocate General that the said agreement is only between the teacher and the school Management, for the reasons mentioned above, irrespective of the agreement, I am of the view that the teachers are entitled to challenge the impugned Government Orders as violative of Article 14 of the Constitution of India and Section 23 of the India Contract Act. Accordingly; the contentions raised by the learned Counsel for the petitioners on this aspect are well-founded"

22. Learned Government Advocate relied on the judgment of the Hon'ble Supreme Court in High Court of Punjab & Haryana & Ors vs. Jagdev Singh, 2016 Wr.L.R.1036, it has been held thus:

10. In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc., this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer 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).

11 The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking."

23. Yet another decision of Division Bench of this Court in The Director of Public Health and Preventive Medicine and The Block Medical Officer, Government Primary Health Centre Vs. M.Kandasamy in W.A. (MD) No.319 of 2012, by order dated 19.04.2018, held thus:

9. In the case on hand, as already stated, the respondent/writ petitioner had suppressed the letter of undertaking, dated 14.07.2011 while filing the Writ Petition. In spite of the fact that the appellants/respondents had averred in paragraph No.5 of their counter that the respondent/writ petitioner had given an undertaking, the respondent/writ petitioner chose not to disclose the same before the learned Single Judge.

10. In these circumstances, we are of the considered view that the respondent/writ petitioner is not entitled for any relief sought for in the Writ Petition. Applying the principles laid down by the Honourable Supreme Court of India reported in 2016 Writ L.R 1036 [High Court of Punjab and Haryana and others Vs. Jagdev Singh], the order passed in W.P(MD) No.8895 of 2012 is liable to be set aside. Accordingly, the same is set aside and the Writ

Appeal is allowed. No costs. Consequently,
connected Miscellaneous Petition is closed.

24. On the facts of the present case on hand, the petitioner has given an undertaking letter before the authority on 24.01.2013. The petitioner has raised this contention that the letter was obtained coercively and forceful manner only before this Court in W.P.No.29569 of 2013 and not before the authority concerned at the earlier point of time and therefore, the allegation of the petitioner that the undertaking was obtained coercively is unfounded and the same is unsustainable in law.

For the reasons stated herein above and the decisions cited supra, the writ petition is devoid of merits and there is no warrant to interfere with the order passed by the 3rd respondent and accordingly the writ petition is dismissed. No costs.

Sd/-
Assistant Registrar

/True Copy/

To

1.The District Educational Officer
Erode

2.The Principal Accountant General (A&E)
Office of Accountant General
Teynampet, Chennai-18

3.The Headmaster
Government High School
Kavilipalayam
Sathiyamangalam Taluk
Erode District

+1 cc to M/s.S.N.Ravichandran,Advocate Sr.No. 95501

+1 cc to M/s.J.Sree Vidya,Advocate Sr.No. 95713

+1 cc to The Government Pleader Sr.No. 96585

AKM/28.01.2020/12P- 7C/

W.P.No.17932 of 2015