

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on 18 .12.2020

Order delivered on 05 .02.2021

CORAM

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

W.P.No.15990 of 2020

and

WM.P.No.19899 & 19900 of 2020

St.Therasa's Girls Higher Secondary School,
Tharangambadi - 609 313
Nagapattinam District
rep. by its Correspondent,
Sr.Arockia Mary ...Petitioner

Vs

1. The Director of School Education,
DPI Campus, College Road,
Chennai - 600 006.
2. The Chief Educational Officer,
Nagapattinam District,
Nagapattinam.
3. The District Educational Officer,
Sirkali Educational District,
Nagapattinam District. ... Respondents

Prayer:

Writ Petition filed under Article 226 of the Constitution of India praying Writ of Certiorarified Mandamus to call for the records relating to the impugned proceedings issued by the 2nd respondent in O.Mu.No.9544/A2/2019 dated 28.09.2019 and to quash the same and consequently direct the respondents to approve the appointment of non-teaching staff Mrs.L.Pasca Mary in the regular sanctioned post of Record Clerk in the petitioner School from the date of appointment on 03.09.2018 and to make the payment of salary with interest and other service benefits, without reference to G.O.Ms.No.238 School Education Department dated 13.11.2018 issued subsequently.

For Petitioner : Mr.G.Sankaran

For Respondents : Mr.P.Raja,
Government Advocate

O R D E R

The matter is taken up through web hearing.

This Writ Petition has been filed seeking to issue a Writ of Certiorarified Mandamus to call for the records relating to the impugned proceedings issued by the 2nd respondent in O.Mu.No.9544/A2/2019 dated 28.09.2019 and to quash the same and consequently direct the respondents to approve the appointment of non-teaching staff Mrs.L.Pasca Mary in the regular sanctioned post of Record Clerk in the petitioner School from the date of appointment on 03.09.2018 and to make the payment of salary with interest and other service benefits, without reference to G.O.Ms.No.238 School Education Department dated 13.11.2018 issued subsequently.

2. The petitioner School is a Religious Minority Institution established by the Society of Mary Immaculate in the year 1958. The School has been receiving grant-in-aid from the State Government and governed by the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 and the Rules made thereunder.

3. The petitioner School had a sanctioned vacancy in the post of Record Clerk at the relevant time due to retirement of one earlier incumbent, Mrs.S.Sagaya Lourdu Mary. In the resultant vacancy, one Mrs.L.Pasca Mary was selected and appointed by the Society on 03.09.2018. The said Mrs.L.Pasca Mary has also joined the post on the same day and has been working as Record Clerk till date.

4. According to the School, the appointment was against the regular sanction of posts as per staff fixation order issued by the 2nd respondent for the academic year 2017-18 dated 05.04.2018. In pursuance of the appointment, the petitioner School has forwarded a proposal on the same day i.e., 03.09.2018 seeking for approval of her appointment to the 2nd respondent through the 3rd respondent. In fact, the 3rd respondent had forwarded the proposal on 09.09.2019 after a period of one year to the 2nd respondent. However, the proposal was returned along with the documents by proceedings dated 28.09.2019 on the ground that in regard to filling up of non-teaching staff in the aided Schools, the same ought to be filled up with the surplus non-teaching staff available in other Aided Schools and no appointment should be made as per G.O.Ms.No.238 School Education department dated 13.11.2018.

5. According to the petitioner School, at that time of appointment, which was made on 03.09.2018, the post of Record Clerk was well within the sanctioned strength of the School as

per staff fixation order and also the G.O.Ms.No.238 dated 13.11.2018 was not made applicable retrospectively. In the said circumstances, the petitioner is before this Court challenging the order dated 28.09.2019, questioning the rejection order of the 2nd respondent inter alia contending that the subject appointment was made on 03.09.2018, prior to G.O.Ms.No.238, School Education Department dated 13.11.2018. Further, it was also contended that the issue is no more res integra, since number of decisions have been rendered by this Court holding that appointment against sanctioned post prior to issuance of the G.O. on 13.11.2018 cannot be covered under the said Government Order.

6. Notice was issued. Mr.P.Raja Government Advocate entered appearance on behalf of the respondents and a detailed counter affidavit has been filed.

7. According to the counter affidavit that as per G.O.Ms.No.238, dated 13.11.2018, the appointment to the post of Record Clerk was unauthorised as the post was declared as surplus. It was further contended that the appointment on 03.09.2018 had been ante dated just to take advantage of the orders passed by this Court on the subject matter, since the competent authority had received the proposal only after the said G.O. was issued. Mr.P.Raja learned Government Advocate, who reiterated the averments contained in the counter affidavit contended that the school had ante dated the appointment of the Record clerk as if it was made before 13.11.2018, the date of issue of G.O.Ms.No.238. The enclosed copy of the proposal dated 03.09.2018 did not bear any acknowledgement from the Education authority. Therefore, the petitioner School is not entitled to the grant of any relief, as this School has not approached this Court with clean hands.

8. Mr.G.Sankaran, learned counsel for the petitioner submitted that the issue as stated in the affidavit is no more res integra as there are any number of decisions of this Court which have been categorically and consistently held that any appointment made prior to the issuance of G.O.Ms.No.238 dated 13.11.2018, cannot be held to be invalid, by application of the said G.O. In fact, he would refer to the recent order passed by this Court dated 07.10.2020 in W.P.Nos.11574 and 11786/2020. According to the learned counsel in an identical circumstance, this Court has allowed both the Writ Petitions.

9. As regards the contention that the appointment was ante dated, learned counsel would submit that the respondents in their correspondence or communication to the School have not whispered about the proposal being antedated by the School. It is for the first time such a stand is disclosed in the counter

affidavit and argued by the learned Government Advocate. According to the learned counsel, for the first time such a contention is raised with a view to deny the legitimate relief to the school. He would draw the attention of this Court to the impugned proceedings dated 28.09.2019, wherein the authority himself has referred to the proposal said to have been submitted on 03.09.2018 by the School. In fact, the learned counsel would specifically draw the attention to the above proceedings wherein the objection of antedating of proposal has not been mentioned at all and only in the counter affidavit, such plea has been raised only for the purpose of the case.

10. This Court, considered the rival submissions of the learned counsels.

11. As far as the legal issue is concerned, it cannot be disputed that there are number of decisions rendered by this Court on the same subject matter holding that appointment to any sanctioned post(non-teaching), prior to G.O.Ms.No.238 dated 13.11.2018, cannot be held invalid by application of the said G.O. Therefore, on the legal aspect, there cannot be two opinions about allowing the petition in favour of the petitioner School.

12. As far as the factual dispute as to the actual date of appointment by the School is concerned, though in the counter affidavit, it is stated that the appointment of Record Clerk by the 3rd respondent was ante dated in order to take advantage of the decisions of this Court, the statement has not been substantiated with any material proof. On the other hand, it could be seen from the proceedings of the 2nd respondent as well as the other documents filed on behalf of the petitioner, the School had indeed submitted the documents for approval immediately after the appointment of the Record Clerk on 03.09.2018. Merely coming up with bald statement, without substantiating the same, cannot be a basis of acceptance by this Court in denying the relief to the petitioner School.

13. When the statement of fact is made, particularly, when that fact is most crucial for adjudication of the dispute, the respondents ought to have produced unimpeachable proof to demonstrate that the approval sought by the School has been received by the authority only after issuance of G.O. or the appointment itself was after the issuance of G.O. The respondent authorities ought to have maintained proper register in order to substantiate the factual statement as to when the appointment was factually made and the proposal from the school received by them. In the absence of any such material being produced before this Court, this Court has to necessarily go by the statement made on behalf of the petitioner School and also as per the 2nd

respondent proceedings itself dated 28.09.2019 and the copy of the proposal enclosed in the typed set of document. Therefore, the objection of the respondent resisting the prayer of the petitioner is to be rejected, as being unfounded.

14. The recent order referred to by the learned counsel for the petitioner in W.P.Nos.11574 and 11586 of 2020 dated 7.10.2020, therefore, covers the relief as prayed for by the petitioner.

"7. This Court considered the objections, but as far as the present claim on hand is concerned, admittedly the appointments of the petitioners had been made against the vacancies which existed prior to the issuance of G.O.Ms.No.238 dated 13.11.2018. These petitioners had also been admittedly appointed earlier to the date of the said G.O., Therefore, this Court finds that the reliance placed on the order passed by the learned Single Judge in the above mentioned matter (W.P. (MD) No.20527 of 2019) would clinch the issue in favour of the petitioners herein. For due appreciation of the claims of the petitioners herein, the relevant portions of the order passed by the learned Single Judge in Paragraphs 2 to 7 are extracted hereunder.

2.The learned counsel for the petitioner would submit that the Government Order itself cannot be sustained and since the petitioner was appointed in the post sanctioned in the year 1996 itself in regular vacancy on retirement and promotion, the reliance on the subsequent G.O passed on 13.11.2018, is improper. Insofar as, the sanctity of G.O(Ms) No.238 dated 13.11.2018 is concerned, the same is a subject matter of batch of writ petitions, which are said to be pending and therefore, I do not intend to go into the merits of the grounds raised questioning the validity of G.O(Ms) No.238. Nevertheless the fact remains that the proposal seeking for approval has now been rejected based on the reliance placed by the respondents on G.O(Ms) No.238 dated 13.11.2018.

3.It is not in dispute that the appointment of these two posts of Record Clerk and Office Assistant were based on the sanction granted on 28.12.1996 in G.O(Ms)

No.1731, Education Department. While that being so, relying on the subsequent G.O(Ms) No.238 for the purpose of rejection of the approval is illegal, since G.O(Ms) No.238 can only have a prospective effect. In view of the same, the consequential order passed by the respondent dated 10.06.2019 is also unsustainable. On this short ground, the petitioner herein would be entitled to succeed.

4.The learned counsel for the petitioner had also placed reliance upon a decision of this Court passed in W.P(MD) No.19677 of 2019 dated 04.10.2019 in the case of The Correspondent, St.Lasalle Higher Secondary School Vs. The State of Tamil Nadu and others, wherein this Court had taken note of the fact that the post involved in that case fell vacant prior to issuance of G.O(Ms)No.238 and therefore, reliance on G.O (Ms) No.238 for the sake of granting approval cannot be sustained. A similar view was also taken by this Court in W.P(MD) Nos.27911 and 27912 of 2019 dated 20.09.2019 in the case of P.Manikandan and other Vs. The Director of School Education and others.

5.The learned counsel for the petitioner had also relied upon a decision of this Court in S.Rasheetha Banu Vs. State of Tamil Nadu and others reported in (2012) 4 MLJ 198, wherein the learned Single Judge of this Court had held that if a person is appointed in a sanctioned post, the approval of appointment cannot be rejected on the ground that there is a fall in strength and the post became surplus. This Court was of the view that for the purpose of granting approval, the Teacher along with the post could be transferred and deployed to a needy school.

6.In the instant case also, if at all the respondents were of the view that there was a surplus, the option that would have been available to the respondents, would be to grant approval to the said posts and the concerned employee could have been redeployed to the needy school and as such,

the rejection of the approval itself ought not to have been exercised. In any event, such a rejection by relying on subsequent G.O is impermissible.

7. For all the aforesaid reasons, the impugned order dated 03.04.2019, issued by the third respondent in O.Mu.No.3083/E1/2019 and the consequential proceedings of the fourth respondent in Na.Ka.No. 2211/A3/2019 dated ...06.2019, are set aside. Consequently, there shall be a direction to the third respondent herein to disburse the grant-in-aid towards the salaries of the two employees namely S. Ignatius and D. Jeya Seela Rajathi from the date of their appointment/promotion together with all attendant benefits. Such an exercise shall be completed at least within a period of six weeks from the date of receipt of a copy of this order. Accordingly, this Writ Petition stands allowed. No costs. Consequently, connected miscellaneous petitions are closed.?

8. This Court is of the considered view that the claims of the petitioners are covered by the aforesaid findings as set forth by the learned Single Judge in the above paragraphs in all fours. Therefore, the writ petitions are allowed and the impugned orders in Na.Ka.No.15638/A4/2018 dated 03.06.2020 and Na.Ka.No.7220/A2/2018 dated ...11.2018 (sign on 28.11.2018) rejecting the approval of the petitioners are hereby set aside. The second and third respondents in the respective writ petition are directed to grant approval to the appointment of the petitioners in the fourth respondent school with effect from their date of initial appointment with all consequential benefits of arrears of salary and allowances admissible to the petitioners, if their appointment is found to be in order, otherwise. The second and third respondents are directed to pass appropriate orders in this regard within a period of four weeks from the date of receipt of a copy of this order. "

15. In view of the above, the Writ Petition stands allowed and the proceedings of the 2nd respondent made in O.Mu.No.9544/A2/2019 dated 28.09.2019 is hereby quashed and consequently, the respondents are directed to grant approval of appointment to Mrs. L. Pasca Mary in the then sanctioned post of

Record Clerk in the petitioner School from the date of her appointment from 03.09.2018, if her appointment is otherwise in order. The respondents are directed to grant admissible benefits of such approval being granted. The respondents are also directed to pass appropriate orders in this regard within a period of four weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

vsi

To

1. The Director of School Education,
DPI Campus, College Road,
Chennai - 600 006.
2. The Chief Educational Officer,
Nagapattinam District, Nagapattinam.
3. The District Educational Officer,
Sirkali Educational District,
Nagapattinam District.

+1cc to Mr.G.Sankaran, Advocate, S.R.No. 6695

+1cc to the Government Pleader, S.R.No. 6791

W.P.No.15990 of 2020

SR(CO)
GN(08/02/2021)

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