



W.A.(MD)No.627 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 01.07.2022

PRONOUNCED ON: 15 .07.2022

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH
and
THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

W.A(MD).No.627 of 2022

S.K.Kannan
P.G.Assistant(Chemistry)
Government Higher Secondary School
Nadayaneri, Virudhunagar District
Now working at
Government Higher Secondary School
Pappayanaickerpatti
Srivilliputhur Taluk
Virudhunagar District

...Appellant/Petitioner

Vs

1.The Director of School Education
Office of the Director of School Education
Chennai 600 006

2.The Joint Director (Higher Secondary)
Directorate of School Education
Chennai 600 006

3.The Chief Educational Officer
Office of the Chief Educational Officer
Virudhunagar District

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4.The Head Master
Government Higher Secondary School
Nadayaneri, Virudhunagar District

....Respondents /Respondents

Prayer: Writ Appeal filed under Clause 15 of Letters Patent, to allow the writ appeal by setting aside the order made in W.P(MD).No.6285 of 2018 dated 08.03.2022.

For Appellant : Mr.M.Gnanagurunathan

For Respondents : Mr.S.Saji Bino
Special Government Pleader

J U D G M E N T

(Made by **R.VIJAYAKUMAR, J.**)

The writ petitioner is the appellant.

2.The writ petition was filed to quash an order passed by the fourth respondent herein wherein the request of the petitioner for re-fixation of his salary taking note of the last drawn salary in the previous post of B.T.Assistant (Science) was rejected.

3.The petitioner was appointed as B.T.Assistant (Science) in the



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Elementary Education through Teachers Recruitment Board on 09.04.2007 in the Panchayat Union Middle School. He has completed his probation on 08.04.2009. He was working in the said Elementary Education School till 09.06.2013. According to the petitioner, a recruitment process was commenced for P.G.Assistant Teacher in Higher Secondary Education by the Teachers Recruitment Board. The petitioner was selected and appointed as P.G.Assistant on 10.06.2013 in a Government High Secondary School and he has completed his probation on 09.06.2015.

4.The petitioner has further contended that he was relieved from the post of B.T.Assistant (Science) in the fore noon on 10.06.2013 and he immediately joined on the same day namely 10.06.2013 as P.G.Assistant. The same Service Register which was used while the petitioner was B.T.Assistant (Science) was continued to be used even after he was appointed as a P.G.Assistant (Chemistry).

5.The main grievance of the petitioner was that when he joined as a P.G.Assistant, he started drawing a lesser salary before than what he was receiving as last drawn salary in the post of B.T.Assistant (Science). Hence, he



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gave several representations to the respondents requesting them to consider his request for re-fixation of his salary in tune with last drawn salary for the post of B.T.Assistant. Finally, the petitioner gave a representation on 20.12.2017 to the Chief Minister Special Cell which was forwarded to the third respondent herein. The third respondent by his proceedings dated 16.02.2018 requested the fourth respondent (who is the Headmaster of the School in which the petitioner was working) directing him to pass orders and report the same to him.

6.The fourth respondent herein has passed the impugned order on 03.03.2018 rejecting the request of the petitioner on the following grounds.

(i). In the appointment order of the petitioner as P.G.Assistant (Chemistry), the pay was fixed as Rs.9300/- 34800/- and hence, the said salary cannot be refixed now by the Headmaster.

(ii). The petitioner has got selected through the Teachers Recruitment Board for the post of B.T.Assistant (Science) and thereafter, again got selected through the Teachers Recruitment Board for P.G.Assistant (Chemistry). Since both the services are completely different, there is no possibility of re-fixation of pay scale based on previous service.

(iii). No proposal or advise has been received from the second respondent for pay fixation.



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7. The above said impugned order was challenged by the writ petitioner before the learned Single Judge on the following grounds:

(i). The second respondent alone is the competent authority to fix the pay scale. The third respondent had erroneously sent the proposal to the fourth respondent.

(ii). The petitioner was originally selected as B.T. Assistant (Science) through the Teachers Recruitment Board and thereafter, through the selection of Teachers Recruitment Board, he has again been selected as a P.G. Assistant. Hence, the appointment of the petitioner as P.G. Assistant should only be considered to be an appointment by transfer of service. When the appointment of the petitioner is by transfer of service, he is entitled to pay protection. Therefore, the authorities were not right in rejecting his request to re-fix the pay scale on the basis of the last drawn salary of the petitioner while he was working as a B.T. Assistant.

(iii). The petitioner was relieved as B.T. Assistant (Science) on 10.06.2013 and on the same day, he has joined as P.G. Assistant. Hence, there is no break in service.



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(iv).The same service book which was utilized to record his service details while he was working as B.T.Assistant (Science) was continued even after being appointed as P.G.Assistant.

(v).A teacher by name S.Indira Anandhavalli was recruited through Teachers Recruitment Board as B.T.Assistant (Tamil) and posted at a Government Higher Secondary School. She was given pay protection by taking note of the last drawn salary for the previous post of Assistant since she has joined without break in service. Hence, the same is applicable to the petitioner as well.

8.The petitioner has legitimate expectation that the request of pay anomaly would be considered within a reasonable time.

9.After considering the submissions made on the side of the learned counsel appearing for the petitioner and the Government Advocate, the learned Single Judge arrived at the following findings:

(i).The appointment of the petitioner to the post of P.G.Assistant is a fresh recruitment by the Teachers Recruitment Board.

(ii).The salary that is applicable to the P.G.Assistant post is as per



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notification that is applicable to the petitioner in the recruitment process.

Having accepted the rules applicable to the recruitment process, the petitioner cannot now turn around and seek enhanced salary.

(iii).If the plea of the petitioner is accepted, other persons who are selected through the same selection process may also claim parity with him. Hence, the claim of the petitioner is illegal and dismissed the writ petition on the ground that a mandamus cannot be granted for an illegal claim.

10.This order is under challenge in the present Writ Appeal.

11.The learned counsel for the appellant has made the following submissions:

(i).A Division Bench of our High Court in a judgment in W.A.No.3868 of 2019 dated 16.10.2020 (The Secretary to State Government, Department of School Education, Fort.St.George, Chennai and another -Vs- G.Rufus David). has held that where a Secondary Grade Teacher working in an Aided School, got recruited as a B.T.Assistant (Science) and appointed to a Government School through Teachers Recruitment Board, the said appointment should be considered only as an appointment by transfer of service. The Division Bench



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has invoked Rule 3(i)(iv) of the Special Rules for Tamil Nadu Educational Subordinate Service. The Hon'ble Division Bench has further held that when the State authorities have decided to count the past service of the teacher for the purpose of conferment of pensionary benefits on his retirement, the same yardstick has to be resorted to by the State authorities for re-fixation of pay during the selection of his service as B.T.Assistant. According to the learned counsel for the appellant, the said judgment of the Division Bench was challenged by the State in ***SLP(C).No.5633 of 2021*** before the Hon'ble Apex Court. By an order dated 12.04.2021, the Hon'ble Apex Court has dismissed the Special Leave Petition. Hence, according to the learned counsel for the appellant, the order of the Division Bench has been confirmed by the Hon'ble Apex Court. In the present case, the B.T.Assistant Teacher has got recruited as a P.G.Assistant through Teachers Recruitment Board and hence, the same ratio has to be applied to the present case.

(ii).The said Division Bench Judgment cited supra has been followed one of us (R.Vijayakumar) ***in W.P(MD).No.14704 of 2014 by an order dated 24.01.2021 (S.Jayakumar Vs. The State of Tamil Nadu, represented by its Secretary, Department of School Educaiton, Fort St.George, Chennai 600 006 and others)***. Hence, the same may be followed.



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(iii). The learned Counsel had further referred the Special Rules for Tamil Nadu Higher Secondary Educational Service, notified under G.O.Ms.No.720, Education, dated 28.04.1981. The learned counsel for the appellant pointed out that P.G.Assistant (Chemistry) falls under Class -2. The mode of recruitment for Class -2 is by way of direct recruitment or recruitment by transfer from the Tamil Nadu Educational Subordinate Service. Hence, he contended that the present appointment of the petitioner as P.G.Assistant (Chemistry) should only be considered as recruitment by transfer from the Tamil Nadu Educational Subordinate Service (the post of B.T.Assistant). When an appointment takes place by transfer of service, the service in the new post should only be considered to be a continuous one and the petitioner is entitled to protect his last drawn wages as B.T.Assistant.

(iv).The learned counsel for the appellant had further contended that the learned Single Judge has not considered the fact that the petitioner did not resign from the post of B.T.Assistant, but he was only relieved by the concerned authorities so as to enable him to join as a P.G.Assistant.



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(v).The learned counsel had further contended that he was relieved on 10.06.2013 as B.T.Assistant and he joined as P.G.Assistant on the same day without any break in service. Hence, he prayed for allowing the writ appeal.

12.The learned Special Government Pleader appearing for the respondents had contended as follows:

(i).The petitioner has applied for the post of P.G.Assistant (Chemistry) pursuant to a public notification issued by the Teachers Recruitment Board. He took part in a competitive examination and thereafter, got selected and appointed to the post of P.G.Assistant. Hence, the appointment as P.G.Assistant should only be construed to be a fresh appointment through direct recruitment and not by transfer of service.

(ii). The learned Special Government Pleader further contended that thousands of teachers participated in the recruitment process and among them so many selected teachers were working as B.T.Assistants. Hence, the petitioner alone cannot plead that he has been inducted into a post with a lower salary.

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(iii). The learned Counsel had further contended that the pay scale was reflected in the public advertisement as well as in the appointment order. Hence, the petitioner cannot now complain as pay scale of B.T.Assistant has to be protected and he should be paid an enhanced salary. He had further contended that the Hon'ble Division Bench Judgment in W.A.No.3868 of 2019 referred to by the learned counsel for the petitioner is not applicable to the facts of the present case. Hence, he contended that the learned Single Judge was right in dismissing the writ petition and he prayed for confirming the order the learned Single Judge.

13.We have given anxious consideration to the submissions made on the side of the learned counsel for the appellant and the learned Special Government Pleader appearing for the respondents.

14.The undisputed facts are as follows:

(i).The petitioner was originally appointed as B.T.Assistant (Science) through Teachers Recruitment Board on 09.04.2007. While he was working as a B.T.Assistant (Science), he had applied for the post of P.G.Assistant, participated in the competitive examination and got selected as P.G.Assistant.



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The petitioner was appointed as P.G.Assistant on 10.06.2013. No doubt, the petitioner got relieved from the post of B.T.Assistant on 10.06.2013 and joined as P.G.Assistant on the same day.

(ii). A perusal of appointment order of the appellant as P.G.Assistant dated 05.03.2013 indicates that he was appointed in the pay scale of Rs.9300/- -34800/-. As per Clause 6 of the appointment order, he has to complete the probation of two years within a period of three years from the date of regularization of service.

15.The relevant portion of Special Rules for Tamil Nadu Higher Secondary Educational Service is extracted as follows:

<i>Class and Category (1)</i>	<i>Method of recruitment (2)</i>
<i>Class II. 1.Teachers in Academic Subjects</i>	<i>(i).Direct recruitment; or (ii).Recruitment by transfer from the Tamil Nadu Educational Subordinate Service; or (iii).If no qualified and suitable candidates are available for appointment by method (ii)above, by recruitment by transfer from any other service;</i>

2(b)(ii).Fifty percent of the substantive vacancies in Classes II and III of the service shall be filled or reserved to be filled by direct recruitment.



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8(a).Probation- *Every person appointed to any category by direct recruitment shall from the date on which he joins duty, be on probation in such category for a total period of two years on duty within a continuous period of three years.*

(b).*Every person appointed to any category by recruitment by transfer shall, from the date on which he joins duty, be on probation such category for a total period of one year within a continuous period of two years.*

16. There is no dispute that the petitioner on his appointment as P.G.Assistant is covered by the Special Rules for the Tamil Nadu Higher Secondary Educational Service and the relevant service rules have been extracted in the above said paragraphs.

17.A perusal of the Service Rules discloses that the post of P.G.Assistant (Chemistry) falls within Class -II of the Category No.1. The said post can either be filled through direct recruitment or recruitment by transfer from Tamil Nadu Educational Subordinate Service or if no qualified and suitable candidates are available for appointment by method (ii) above, by recruitment by transfer from any other service.

18.A perusal of Rule 2(b)(ii) indicates that 50% of the substantive vacancies in Class II and Class III of the service shall be filled or reserved to be



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filled by the direct recruitment. Thereby, indicating that the balance 50% shall be by transfer from other service.

19. A careful perusal of Rule 8 reveals that a person who has been appointed to any category by direct recruitment shall be on a probation for a period of two years on duty within a continuous period of three years. On the other hand, if he has been appointed by recruitment by transfer, he should be on probation for a period of just one year within a continuous period of two years.

20. The above said service rules clearly differentiate between the persons who are appointed through direct recruitment and those who are appointed by transfer of service.

21. A perusal of appointment order of the petitioner as P.G.Assistant (Chemistry) dated 05.03.2013 clearly indicates that the appointment is through the direct recruitment. Further, the probation has been fixed in Clause 6 of the appointment order for a period of three years as per Rule 8(a) meant for candidate appointed through direct recruitment. The pleadings in the writ petition in Paragraph No.4 clearly reveals that the petitioner had joined as



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P.G.Assistant on 10.06.2013 and he had completed his probation on 09.06.2015

namely after completing a period of two years meant for a candidate appointed through direct recruitment.

22. All the above said facts will clearly reveal that the petitioner was appointed to the post of P.G.Assistant only under the first method of recruitment meant for Class-II in the relevant Service Rules namely direct recruitment and not through the second mode namely transfer of service.

23. A perusal of Rule 2(b)(ii) in the said Service Rules indicates that 50% of the substantive vacancies for the post of teachers in the academic subjects have to be filled up by the direct recruitment. Thereby, indicating that the balance 50% should be by way of transfer of service. Only those persons who got appointed in the said 50% meant for transfer of service can claim benefit of pay protection. Any candidate who has got selected through 50% meant for direct recruitment can never claim any pay protection based on his last drawn wages in the previous post held by him before such recruitment. In the present case, admittedly, the petitioner has applied for P.G.Assistant post pursuant to the paper notification issued by the Teachers Recruitment Board. The petitioner



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has got selected by participating in the competitive examination. The petitioner's appointment order indicates that he has been selected and appointed through direct recruitment. Hence, the petitioner cannot claim the benefit of the candidates who were appointed through 50% reservation meant for the candidates appointed through transfer of service.

24. The learned counsel for the petitioner has referred to the Division Bench judgement of our High Court made in W.A.No.3868 of 2019 dated 16.10.2020 to contend that in a case where a Secondary Grade Teacher working in an Aided School got recruited through the Teachers Recruitment Board and appointed as B.T.Assistant, he was granted pay protection. The petitioner had further contended that the order of the Division Bench has been confirmed by the Hon'ble Apex Court in SLP(Civil).No.5633 of 2021 dated 12.04.2021. The petitioner had further referred to the judgment of one of us (R.Vijayakumar) rendered in W.P(MD).N.14704 of 2014 dated 24.01.2022.

25. The Hon'ble Supreme Court in a judgment reported *in (2017) 5 SCC Page 783 (Palure Bhaskar Rao and others -Vs- P.Ramaseshaiah and others)* in Paragraph Nos.14 and 15 has held as follows:



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“14.Transfer and recruitment by transfer are entirely two different concepts. No doubt transfer can be from one category to another category or within the class if the rule permits interchangeability of the categories within a class. Any other transfer both intra-category and inter-category are in fact, under law is a selection and appointment by way of a transfer from one category to another or from one class to another class or from one service to another. If it is a transfer simpliciter it conveys a different meaning and if it is a recruitment by transfer, as we have clarified above conveys a different concept altogether. The latter is a mode of selection/recruitment to a service.

15.Transfer in relation to service simply means a change of a place of employment within an organization. Such transfer being to a similar post in the same cadre and therefore, obviously such a transfer does not result in the termination of his lien in the parent cadre but recruitment by transfer is a different service concept altogether. It is a method of recruitment to a service, in the instant case to a different category in the same service initially and thereafter, to a different service altogether. Once an employee undergoes a transfer by way of a recruitment to a different cadre or to a different service, the employee loses his lien in the parent cadre/service. In that process, there is an induction to a new cadre and sometimes with a different type of duty. Such induction has distinct consequence on the career of the employee different from what would have been the normal course had he continued in the parent service. Thus the recruitment by transfer terminates the lien of an employee in the



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parent cadre/service whereas transfer simpliciter to a similar post in the same cadre results only in change of place of employment and therefore, there is no termination of lien (see.V.Jagannadha Rao Vs.State of A.P and B.Thirumal V.Ananda Sivakumar) ”

26.We are not in agreement with the judgment of the Division Bench in W.A.No.3868 of 2019 dated 16.10.2020 for the following reasons:

(i).The judgment of the Hon'ble Supreme Court reported in ***in (2017) 5 SCC Page 783 (Palure Bhaskar Rao and others -Vs- P.Ramaseshaiah and others)*** as referred supra has not been taken into consideration.

(ii).Rule 2(b)(ii) of Special Rules for Tamil Nadu Higher Secondary Educational Service relating to 50% reservation for direct recruitment has not been brought to the notice of the Division Bench.

(iii).Rule-8 relating to fixation of two different periods of probation for the candidates selected through direct recruitment and transfer of service has not been brought to the notice of the Division Bench.

27.In view of the above said circumstances, we respectfully follow the judgement of the Hon'ble Supreme Court reported in ***in (2017) 5 SCC Page 783 (Palure Bhaskar Rao and others -Vs- P.Ramaseshaiah and others)***.



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28. The petitioner has referred to the dismissal of SLP (Civil).No.5633 of 2021 dated 12.04.2021 which challenged the Division Bench judgment in W.A.No.3868 of 2019. A perusal of the order of Hon'ble Supreme Court reflects that the Special Leave Petition has been dismissed without assigning any reasons. The Hon'ble Supreme Court in a judgment reported ***in (2019) 4 SCC Page 376 (Khoday Distilleries Limited (Now known as Khoday India Limited) and others -Vs- Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal (Under Liquidation) Represented by the Liquidator)*** in Paragraoh No.26.2 has held as follows:

“26.2. We reiterate the conclusions relevant for these cases as under (Kunhayammed case, SCC P.384).

“(iv).An order refusing special leave to appeal may be a non-speaking order of a speaking one. In either case, it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v). If the order refusing leave to appeal is a speaking order i.e.gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a



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declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi). Once leave to appeal has been granted and appellate jurisdiction of the Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii). On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of the High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Order 47 Rule 1 CPC “

29. In view of the judgment of the Hon'ble Supreme Court, we find that the order dated 12.04.2021 made in SLP(Civil).No.5633 of 2021 is an order



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refusing the Special Leave Petition without assigning any reason. Hence, it does not attract the doctrine of merger. Therefore, an order refusing Special Leave Petition does not stand substituted in the place of the order in W.A.No.3868 of 2019. Hence, the contention of the learned counsel appearing for the appellant that the order of the Division Bench of our High Court has been confirmed by the Hon'ble Apex Court is not legally sustainable.

30.The petitioner having participated in the direct recruitment process and got appointment cannot turn around and contend that he was appointed by transfer of service from the post of B.T.Assistant to the post of P.G.Assistant. The continuous usage of the old Service Register of the petitioner, even after being appointed as P.G.Assistant will not confer any right to get pay protection. The fact that there was no break in service also will not convert a direct recruitment into an appointment by transfer of service. Hence, the contentions on the side of the learned counsel for the appellant are not legally sustainable.

31.In view of the above said discussions, we find that there is no illegality or infirmity in the order passed by the learned Single Judge in dismissing the writ petition. We concur with the conclusion arrived at by the



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learned Single Judge for the additional findings rendered by us as stated supra.

Hence, the writ appeal is devoid of any merits and the same stands dismissed.

No costs.

(P.N.P.J.,)

(R.V.J.,)

15 .07.2022

Index :yes
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To

1.The Director of School Education
Office of the Director of School Education
Chennai 600 006

2.The Joint Director (Higher Secondary)
Directorate of School Education
Chennai 600 006

3.The Chief Educational Officer
Office of the Chief Educational Officer
Virudhunagar District

4.The Head Master
Government Higher Secondary School
Nadayaneri, Virudhunagar District

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**P.N.PRAKASH,J.
AND
R.VIJAYAKUMAR,J.**

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Pre-delivery Judgment made in
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