



W.P.(MD)Nos.13832, 15229 to 15233 and 15235 to 15241 of 2016

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.09.2022

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THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P.(MD)Nos.13832, 15229 to 15233 and 15235 to 15241 of 2016
and
W.M.P.(MD)Nos.10311, 10312, 11216 to 11225, 11228 to 11241,
12782 to 12786 and 12788 to 12794 of 2016

W.P.(MD)No.13832 of 2016:

S.Robert Kennady

... Petitioner

vs.

- 1.The Secretary to Government,
School Education Department,
Government of Tamil Nadu,
Fort St. George, Chennai - 9.
- 2.The Director of School Education,
Office of the Director of School Education,
Chennai-6.
- 3.The Chief Educational Officer,
Ramanathapuram District,
Ramanathapuram.



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4.The District Educational Officer,
Paramakudi,
Ramanathapuram District.

5.The Zonal Accounts Officer (Audits),
School Education Department, Madurai - 2.

6. The Secretary,
Ayur Vishya Higher Secondary School,
Paramakudi, Ramanathapuram District.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, to call for the records of the 2nd respondent in his proceedings in Na.ka.No.42026/H/E2/2016, dated 11.06.2016 and consequential order passed by the 6th respondent in his proceedings Lr.No.25/2016-17, dated 05.07.2016 and to quash the same as illegal, arbitrary, violation of principles of law.

In W.P.(MD)No.13832 of 2016:

For Petitioner	: Mr.G.Marimuthu
For R1 to R5	: Mr.S.Kameswaran
	Government Advocate (Civil side)

In W.P.(MD)Nos.15229 to 15233 and 15235 to 15241 of 2016:

For Petitioner	: Mr.G.Marimuthu
For Respondents	: Mr.S.Kameswaran
	Government Advocate (Civil side)



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COMMON ORDER

This writ petition in W.P.(MD)No.15229 of 2016 is filed for issuance of Writ of Certiorari, to quash the impugned orders, dated 11.06.2016 and 28.06.2016.

2. The brief facts as stated in the affidavit filed in W.P.(MD)No.15229 of 2016 are that the petitioner was appointed as a B.T. Assistant (English) in the Government High School, Palanivalasai, District. The petitioner's educational qualification is M.A., B.Ed., The minimum educational qualification to appoint as a B.T. Assistant is B.A., B.Ed., or B.Sc., B.Ed. As per the G.O.Ms.No.1024 Education, Science and Technology Department dated 09.12.1993, a B.T. Assistant is eligible to receive 2 incentives (four increments). As per the Rule 26(e)(2) of the Fundamental Rules of the Tamil Nadu states that the employee is eligible to receive incentive increments on the last date of the examination of the higher studies.



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3. The contention of the petitioner is that under G.O.Ms.No.42, Education Department, dated 10.01.1969, M.A., or M.Sc., M.Ed., degree can be considered as higher qualification for the post of B.T. Assistants for which two advance increments are admissible and the same shall be paid from the date following the last date of the examination of higher qualification. If the person having qualification at the time of entering into the service, their initial pay may be fixed by giving advance increments in their scale of pay. In the year 2008, the petitioner obtained permission from the 5th respondent to study M.Phil., degree and completed it successfully in the month of November, 2010. Considering the said facts, on 21.11.2010, the 5th respondent revised the pay scale and subsequently, the 3rd respondent approved it. The Government passed G.O.Ms.No.194, dated 10.10.2006 and deleted the cutoff date fixed to the P.G. Assistants to obtain higher qualification to receive incentives. Therefore, the P.G. Assistants are eligible to receive incentives in accordance with Fundamental Rules and G.O.s. The Government issued G.O.(ID)No.18 School Education dated 18.01.2013 and included M.Phil., and Ph.D., in the higher qualification to B.T. Assistant. The said decision was taken considering the fact that



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many Universities have stopped offering M.Ed., education under the Open University system. On 25.03.2013, the Director of Elementary Education issued a circular stating that a Teacher completed higher educational qualification in the Sastra University is entitled to receive incentives in accordance with G.O.Ms.No.42. Thereafter Government letter No.129, dated 17.07.2013 of the Principal Secretary to Government, School Education Department fixed the cutoff date as 18.01.2013 (the date of G.O.(ID)No.18) to B.T. Assistants to receive incentives. The contention of the petitioner is that there is no ambiguity in the Fundamental Rules and G.O.s passed on various dates. Therefore, the Government letter No.129, dated 17.07.2013, is against the fundamental rules and the G.O.s wherein it imposes cutoff date to receive incentive increments. Further, the Government did not prescribe any cutoff date to the Secondary Grade Teachers and the P.G. Assistant who are working under Elementary Department and School Department.



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4. On 01.08.2013, this Court granted Interim Stay to the Government letter No. 129, dated 17.07.2013 in M.P.(MD)No.2 of 2013 in W.P.(MD)No.12825 of 2013. The Tamil Nadu High and Higher Secondary School Graduate Teachers Association filed a writ petition before the Principal Seat of this Court and obtained interim stay to the letter in M.P.No.2 of 2013 in W.P. No. 22412 of 2013. On 11.06.2016, in letter No. Na. ka.No.42825/A/E2/2016, the Director of School Education sent the above letter to all Chief Educational Officers and District Educational Officers to give notice and deduct salary on the basis of the audit inspection report. The letter sent by Director of School Education is very vague. The implication of the letter is that the incentives provided to B.T. Assistants from the last date of higher qualification should be deducted from the salary, they are eligible to receive it only from 18.01.2013. The 4th respondent conducted the audit inspection and came to the conclusion that the petitioner is eligible to receive incentive only from 18.01.2013 but the petitioner was paid from 21.11.2010.



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5. The 5th respondent sent a communication to the 3rd respondent to grant Selection Grade in the post of B.T. Assistant. But the 3rd respondent returned the proposal stating that the Selection Grade will provide only, if the petitioner repay the incentive amount which was received as incentives from 21.11.2010 to 17.01.2013. The petitioner submits that on 31.05.2016, the petitioner had completed ten years of service. Hence, the petitioner is eligible for Selection Grade. Aggrieved over the impugned orders, the petitioner has filed the present writ petition in W.P.(MD)No. 15229 of 2016.

6. While admitting this writ petition, this Court has granted interim stay. The 3rd respondent has filed a vacate stay petition along with a counter affidavit. The counter affidavit states that the instruction dated 11.06.2016 of 2nd respondent is a common instruction and moreover, it is an inter departmental communication. Therefore, the writ petitioner has no locus standi to challenge the proceedings of 2nd respondent. The said proceedings of 2nd respondent had directed the departmental



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authorities to follow Principles of Natural Justice. The 3rd respondent through his proceedings, dated 28.06.2016, has directed the writ petitioner to pay back the incentive increment received by the petitioner for his qualification of M.Phil., since it is paid by a wrong interpretation. B.T Assistant for his higher qualification can receive incentive increment as per G.O.No.18, dated 18.01.2013. This will have effect from the date of Government Order. But, for the Petitioner the incentive increment was sanctioned on 21.11.2010, the date next to the last exam. Therefore, the incentive increment paid from 21.11.2010 to 17.01.2013 has to be ordered to recover. The writ petitioner's qualification is M.A., B.Ed., M.Phil. In respect of the rule provision referred by the writ petitioner, the same is not applicable to the petitioner. The G.O.Ms.No.42, Education Department, dated 10.01.1969, directs to pay incentive increment for higher qualification but it does not state that the incentive increment ought to be paid on the last day of examination in higher qualification. The G.O.Ms.No.42, Education Department, dated 10.01.1969 states that obtaining higher qualifications such as M.A., or M.Sc., or M.Ed. In respect of obtaining M.Phil., Ph.D., the issuance of increment G.O (1) (D) No. 18, School



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Education, dated 18.01.2013. The relevant portion of the G.O is extracted hereunder:

“(a) In G.O.Ms.No.1024 Education, Science and Technology Department dated 09.12.1993 it is observed that the B.T. Assistant after obtaining M.A., MSc., degree with 1st incentive increment in the post of B.T. Assistant and Head Master if they obtain M.Ed., they are qualified to get 2nd incentive increment.

(b) In the letter No.9854.3/K/E1/10 dated 08.12.2010, the Director of School Education had stated the Universities (Distance Education) have removed the MEd, from their Syllabus as such obtaining M.Ed., degree through Distance Education is hardly able. But, M.Phil., and Ph.D., degree are obtained through Distance Education. A Teacher in his service life time can get only two incentives as such if M.Phil., or Ph.D., is obtained by Teachers they can be sanctioned with increment

(c) The recommendation of the Director of School Education was accepted by the Government and Apart from 1 incentive increment obtained for MA., MSc.,. Instead of M.Ed., referred in G.O.Ms.No.1024 Education Science and Technology dated 09.12.1993 if one gets qualified with M.Phil., or Ph.D., or M.Ed., he is eligible for 2nd incentive increment for higher qualification. Therefore, a teacher can get only two incentive increment.”

The G.O.(1)(D)No.18, School Education, dated 18.01.2013, categorically states that a Teacher is eligible for only two incentive increments. The petitioner has misunderstood the Government Orders. In the letter No. 129, School Education



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Pa.Ka.5(20 2013-1, dated 17.07.2013, the Director of School Education has clarified the G.O.1(D)No.18, School Education (E2) Department, dated 18.01.2013. In the clarification letter, the Director of School Education has categorically stated that the Teachers are eligible for 2nd incentive increment for their qualification M.Ed., or M.Phil., or Ph.D. In total, in life time of the Teacher, a Teacher is qualified to have two incentive increment. It is made clear that the qualification of the 2nd incentive increment can be given from 18.01.2013 only. The case of the petitioner falls within the ambit of G.O.(1)(D)No.18, School Education, dated 18.01.2013, read along with the clarification letter. Therefore, the reference made by the petitioner on Fundamental Rules and G.O.Ms.No.42, Education Department, dated 10.01.1969, is no way connected to 2nd incentive increment. The claim of the petitioner is unsustainable.

7. The Hon'ble Supreme Court in Civil Appeal No.3500 of 2006 disposed on 29.07.2016 in the case of ***High Court of Punjab and Haryana and others -Vs-***



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Jagdev Singh, reported in 2016 (14) SCC 267 had held that the recovery is sustainable. Therefore, the respondents prayed to dismiss the writ petition.

8. Heard Mr.G.Marimuthu, learned Counsel appearing for the petitioner in all cases and Mr.S.Kameswaran, learned Government Advocate appearing for the respondents in all cases and perused the documents.

9. It is an admitted fact that the petitioner is claiming incentive increment for the higher qualification of M.Phil. The G.O.Ms.No.42, Education Department, dated 10.01.1969 has granted incentive increments for B.T. Assistants if passed M.A., M.Sc. M.Ed. only. The relevant portion is extracted hereunder:

*“INCENTIVE INCREMENT
GOVERNMENT OF TAMIL NADU
EDUCATION DEPARTMENT*

G.O.Ms.No.42.

10th January 1969.

Education Fourth Five Year Plan - Scheme for Incentive Payments and awards to teachers during 1968-69 - Sanctioned.



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Read: The following papers:-

From the Director of School Education, letter No. 186476/PDI/67, dt. 3rd October 1967 and 26th June '68.

Order No. 42, Education, dt. 10th January 1969.

The Government have already accepted in principle that incentive payments and awards should be given to the teachers in schools who acquire higher educational qualifications. The Director of School Education has accordingly submitted proposals, as indicated in Annexure to this order.

2. The Government approve of the proposals of the Director of School Education and direct that advance increments be granted to them. as indicated in the Annexure.

3. The expenditure should be debited to "28. Education Z Development schemes - Schemes in the Fourth Five Year Plan - Miscellaneous - O-Incentive Payment and awards to teachers". The Director of School Education is requested to take action to provide additional funds required by reappropriation from savings.

4. This order issues with the concurrence of the Finance Department Vide its. U.O.No.410/PIX/69-1, dated 7th January 1969.

(By Order of the Governor)

ANNEXURE

A teacher belonging to the category mentioned in column (1) of the Table below shall be eligible for the two advance increments in the scale of pay admissible for this category if he/she possesses or acquires higher qualification specified in column 3 provided the maximum in the scale of pay is not reached.



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<i>Category</i>	<i>Scale of Pay</i>	<i>Higher qualification for which two advance increments are admissible</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>
<i>1. Secondary or Senior Basic Grade Teachers</i>	<i>90-4-110-3-140</i>	<i>B.T. or B.Ed degree of a University in the State or the degrees of other Universities recognised as equivalent to the degree of B.T. or B.Ed degree of Universities of this State.</i>
<i>2. B.T. B.Ed Assts.</i>	<i>Rs: 140-5-180-10-250</i> <i>Rs.225-10-275-15-350</i>	<i>M.A. or M.Sc. M.Ed. degree of a University in the State or the degree of other Universities: recognised as equivalent to M.A./M.Sc. or M.Ed. degree Universities of this State.</i>
<i>3. Headmasters of Govt. Board Schools and Municipal Township Schools</i>	<i>Rs.225-10-275-15-350</i>	<i>-do-</i>
<i>4. Headmasters of Aided High Schools</i>	<i>Rs.225-15-275</i> <i>Rs.300-15-430</i>	<i>-do-</i>



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5. Pandits I Gr.	Rs.140-250 or lower scale.	B.T. or B.Ed degree of a University in this State or degree of other Universities recognised as equivalent to B.T. or B.Ed. degrees of Universities in this State.
6. Pandits II Gr.	Rs.90-4-110-3-140	-do-
7. Physical Training Instructors, I Gr.	-do-	B.T. or B.Ed. degree of Universities recognised equivalent to B. T. or B.Ed. degree of a University in this State or Diploma in Physical Education.
8. Other specialist teachers	-do-	B.T. or B.Ed. or other recognised equivalent degrees in this State.

From the above it would be clear that the G.O.Ms.No.42 has not granted any incentive increment for the higher qualification for the qualification of M.Phil. or Ph.D.



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10. The Government had taken a policy decision to grant incentive increment for M.Phil., or Ph.D. degree for the first time through the G.O.(ID)No. 18 School Education dated 18.01.2013. The said decision was taken considering the fact that many Universities have stopped offering M.Ed., education under the Open University system. It is settled principle any government order would come into effect only from the date of issuance of the G.O., unless it is specifically stated in the G.O. that it is applicable with retrospective effect. Since there were several demands to grant the benefits prior to 18.01.2013, the government clarified through Government Letter No.129, dated 17.07.2013 of the Principal Secretary to Government, School Education Department, thereby fixing the cutoff date as 18.01.2013 (the date of G.O.(ID)No.18) to B.T. Assistants to receive incentives. In the present case, G.O.(1D)No.18, School Education, dated 18.01.2013, has not stated the G.O. would have retrospective effect coupled with the clarification issued by the government, in such circumstances, this Court is of the considered opinion that the G.O. has come into effect only from 18.01.2013.



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11. The claim of the petitioner is that the G.O.Ms.No.42 had stated that the incentive increment shall be granted from the last date of the examination of higher qualification. But the said G.O.Ms.No.42 has not stated that the incentive increment shall be granted for M.Phil. or Ph.D. Therefore, the said condition is applicable only for the G.O.Ms.No.42 alone. Moreover when the G.O.(1D)No.18 has come into effect from the date of issuance of G.O. as per clarification letter, granting retrospective effect by invoking the date of passing the examination would make the clarification letter redundant. Also, such claim is violative of the settled proposition that any Government Order would come into effect from the date of issuance of Government Order unless it is mentioned the same would come into effect retrospectively. When the G.O. has not mentioned that the G.O. is applicable retrospectively, in such circumstances if the claim of the petitioner is accepted, then the same would amount to supplementing the words which is not there in the G.O., thereby attracting the principles of “Casus Omissus”. Also if sanctioned prior to G.O. (1D)No.18, the sanction will not have the authority of law, thereby becomes illegal claim. For all these reasons, this Court is of the



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considered opinion that the G.O.(1D)No.18, School Education, dated 18.01.2013 would into effect from 18.01.2013 only and the persons claiming incentive increments for passing M.Phil. and Ph.D. would be entitled to from the date of issuance of the G.O. i.e. 18.01.2013 and not prior to the date. Therefore, this Court is of the considered opinion that the claim of the petitioner to grant incentive increment from 2010 onwards, i.e., from the date of completion of the higher qualification is not sustainable.

12. The petitioner submitted that as per the Rule 26(e)(2) of the Fundamental Rules, the employee is eligible to receive incentive increments on the last date of the examination of the higher studies. The said fundamental rule are applicable only for the Departmental Test. Granting incentive increments is a concession granted to educational department alone and it is covered under separate G.O.s. The granting of incentive increment is only a concession granted to the employee, which is bounty and it cannot be demanded as a fundamental



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right or any statutory right. The incentive increments are based on certain conditions which are stated in the said G.O.s. In the present case, the Government has specifically issued G.O.(1)(D)No.18, School Education, dated 18.01.2013, granting incentive increments for M.Phil., degree and the G.O. was issued on 18.01.2013. Therefore, the petitioner is entitled to incentive increment from that date only, i.e., 18.01.2013 and not from 2010 onwards. The incentive increment was granted without any authority of law prior to 18.01.2013. Therefore, the respondents have every right to recover the illegal incentive increment which was paid from 2010 onwards. Therefore, the impugned order is sustainable in law.

13. In the present cases the petitioners are either on the verge of retirement or retired at the time of filing the writ petitions, hence the petitioners claim that the issue is settled by the Hon'ble Supreme Court in the case of State of Punjab and others Vs. Rafiq Mashhi (White Washer) and other reported in (2015) 4 SCC 334, wherein it is held as under:



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“12. 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.

13. We are informed by the learned counsel representing the appellant-State of Punjab, that all the cases in this bunch of appeals, would undisputedly fall within the first four categories delineated hereinabove. In the appeals referred to above, therefore, the impugned orders passed by the High Court of Punjab and Haryana (quashing the order of recovery), shall be deemed to have been upheld, for the reasons recorded above”.



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14. Since the petitioners falls under clause (ii) and (iii), the petitioners claim that the respondents should be restrained from recovering the amount. However, the respondents relied on the subsequent judgement rendered in High Court of Punjab and Haryana and others VS Jagdev Singh 2016 (14) SCC 267, wherein the Hon'ble Supreme Court **distinguished and clarified** the aforesaid white washer case and has held as under:

“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.

12. For these reasons, the judgment of the High Court which set aside the action for the recovery is unsustainable. However, we are the view that the recovery should be made in reasonable installments. We direct that the recovery be made in equated monthly installments spread over a period of two years”

15. In the present cases the petitioners were put on notice by stating that the payment is subject to audit objection. As stated supra the petitioners are either on



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the verge of retirement or retired and there is an audit objection, in such circumstances, in order to meet the ends of justice, this Court is of the considered opinion that the petitioner is liable to repay 50% of the recovery amount and the balance 50% shall be waived.

16. For the reasons stated above this Court is passing the following orders:

- i. The recovery order is partially modified, the respondents are directed to recovery 50% of the recovery amount and the balance shall be waived.
- ii. The respondents are directed to grant the benefits of incentive increment from 18.01.2013 and refix the consequential benefits and refix the pensionary benefits.
- iii. The said exercise shall be completed within a period of eight weeks from the date of receipt of the copy of the order.



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17. With the above said observation, all the writ petitions are disposed of.

No costs. Consequently, connected miscellaneous petitions are closed.

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To

- 1.The Secretary to Government,
School Education Department,
Government of Tamil Nadu,
Fort St. George, Chennai - 9.
- 2.The Director of School Education,
Office of the Director of School Education,
Chennai-6.
- 3.The Chief Educational Officer,
Ramanathapuram District,
Ramanathapuram.
- 4.The District Educational Officer,
Paramakudi,
Ramanathapuram District.
- 5.The Zonal Accounts Officer (Audits),
School Education Department, Madurai - 2.



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