BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.10.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

W.P(MD)Nos.3442 of 2021 & 14796 of 2023
and
W.M.P(MD)Nos.2792 & 2794 of 2021

(In W.P(MD)No.3442 of 2021)

J.Somasundara Raj ... Petitioner

Vs.

1.The Regional Accounts Officer (Audit),
School Education Department,
Madurai.

2.The Head Mistress,
Head Master,
Kamaraj Nagarmandra Higher Secondary School,
Pettai,
Tirunelveli.

3.The Head Master,
Government Higher Secondary School,
Vadasery, Nagercoil,
Kanyakumari District. ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, calling for the records relating to the audit objection of first respondent enclosed along with impugned communication of second respondent in Na.Ka.No.63/141/2019, dated 10.07.2019 and consequential impugned entry of audit objection made into the service record of petitioner, quash the same and consequently direct the respondents herein to continue to pay the incentive increment to the petitioner for acquiring B.Ed., in the post of Physical Education Teacher as per G.O(Ms)No.42, dated 10.01.1969 and G.O(Ms)No.95, dated 25.01.1980.

(In W.P(MD)No.14796 of 2023)

J.Somasundara Raj ... Petitioner

Vs.

1.The Government of Tamil Nadu,
Represented by its Principal Secretary to Government,
Revenue Administration,
Fort St. George,
Chennai-600 009.

2.The District Collector,
Nagercoil,
Kanyakumari District.

3.The Head Master,
Government Higher Secondary School,
Vadasery, Nagercoil,
Kanyakumari District.

4.The Sub Treasury Officer,
Kalkulam,
Kanyakumari District. ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus, directing the third respondent to issue No-Government due certificate to petitioner to produce before the fourth respondent for getting his pensionery benefits.

(In Both the cases)

For Petitioner : Mr.R.Russel Raj

For Respondents : Mr.V.Om Prakash
Government Advocate

COMMON ORDER

W.P(MD)No.3442 of 2021 has been filed by a retired Physical Education Teacher seeking to quash the intimation letter issued by the Head Mistress of the School on 10.07.2019, wherein the Teacher was requested to clear the audit objections. The petitioner has further prayed for continuous payment of the incentive increment for acquiring B.Ed degree.

2. The petitioner has also filed W.P(MD)No.14796 of 2023 for a Mandamus directing the Head Master of the School to issue No Due Certificate to the petitioner to produce it before the Sub Treasury Officer, Kalkulam for getting pensionary benefits or other orders.

3. The petitioner was initially appointed as Physical Education Teacher in the pay scale of Secondary Grade Teacher on 13.04.1998. While he was in service, he had acquired higher qualification of B.Ed on 28.12.2014. Based upon the said higher qualification, the petitioner was conferred with an incentive increment with effect from 28.12.2014. According to the petitioner, the said conferment of incentive increment is based on G.O(Ms)No.42 Education, dated 10.01.1969 and G.O(Ms)No.95 Education Department, dated 21.01.1980.

4. The petitioner was promoted as Director Grade-II, Physical Education on 22.06.2018. While he was functioning in the said post, he was issued with the impugned notice on 10.07.2019, enclosing an audit objection of the first respondent against granting of incentive increment. The petitioner has sent a written reply on 02.08.2019. However, no further proceedings were initiated either by the School Management or by the Educational Authorities based upon the said audit objection. The petitioner had attained superannuation on 31.05.2022. Till such date, the petitioner was receiving the incentive increment. These facts are not in dispute.

5. After his retirement, in view of the audit objection raised while he was in service, the petitioner was not able to get his terminal benefits. Therefore, the present writ petition has been filed challenging the impugned communication, dated 10.07.2019. Consequentially, the petitioner has prayed for issuance of No Due Certificate from the School Head Master so that, he could claim the terminal benefits and other benefits from the Treasury.

6. It is not in dispute, the petitioner is a Physical Education Teacher. As per G.O(Ms)No.624 Education (E2) Department, dated 13.07.1992, sanction of incentive increments for acquiring higher qualification could be conferred upon a Teacher, only if he or she acquires the higher qualification in a particular subject which is required to be taught by the said Teacher. Therefore, it is clear that the writ petitioner would be entitled to an incentive increment only when he or she acquires higher qualification in the subject which he or she handling. In the present case, admittedly, the acquisition of B.Ed degree cannot be considered to be a higher qualification for a Physical Education Teacher. Therefore, it is clear that on an erroneous assumption, the incentive increments were awarded to the writ petitioner with effect from December 2014.

7. Audit objections were raised with regard to the conferment of incentive increment upon the petitioner in the year 2019 and the said fact was communicated to the writ petitioner by the concerned Head Master on 10.07.2019. The petitioner has submitted a detailed reply, enclosing the supporting documents to the effect that he is entitled to receive the said incentive increment and he had prayed for removal of the said audit objections. From the records, it could be seen that no further action was initiated either by the concerned School Management or by the Educational Authorities. The petitioner had attained superannuation on 31.05.2022. After attaining superannuation, the Educational Authorities and the Treasury Authorities have not cleared the terminal benefits of the writ petitioner.

8. The learned Counsel appearing for the writ petitioner relied upon the judgment of the Hon'ble Supreme Court in the case of ***State of Punjab & Others Vs. Rafiq Masih (White Washer)*** reported in ***(2015) 4 SCC 334,*** based upon which the Government of Tamil Nadu has issued G.O(Ms)No.286 Finance [Pension] Department, dated 28.08.2018 to impress upon the Court that the recovery orders could not be passed when the excess payments have been

made for a period in excess of five years. According to the writ petitioner, in the present case, so far no recovery orders have been passed. So, after retirement, no such recovery order could be passed. He further contended that the petitioner having attained superannuation, any recovery order passed as on today would cause great prejudice to the writ petitioner. Hence, he prayed for quashing the said communication of the Head Master and for disbursal of the terminal benefits.

9. Per contra, the learned Government Advocate appearing for the respondents had relied upon the judgment of the Hon'ble Supreme Court in ***Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others in Civil Appeal No.5899 of 2012, dated 17.08.2012,*** to contend that when there is a wrong fixation of pay, the authorities are entitled to recover the same. He further contended that the impugned letter issued by the Head Master has been issued within a period of five years from the date on which the incentive increment was sanctioned to the writ petitioner. Therefore, even as per the orders of the Hon'ble Supreme Court, the recovery proceedings could be continued. He further relied upon the judgment of the learned Single Judge of this Court in a batch of writ petitions in W.P(MD)Nos.18111 of 2019 etc.,

dated 25.04.2022, to convince the Court that when the petitioner is not entitled to receive the incentive increment and when the mistake in granting of such an increment was found out on a later point of time, the authorities could very well recover the same even after the petitioner had attained superannuation. Hence, he prayed for dismissing both the writ petitions.

10. I have carefully considered the submissions made on either side.

11. The discussion in the preceding paragraphs will clearly reveal that the petitioner has been conferred with an incentive increment in violation of G.O(Ms)No.624, dated 13.07.1992. However, the question that arises for consideration is whether after attainment of superannuation the said excess amount paid to the petitioner could be recovered at this length of time.

12. The Hon'ble Supreme Court in the case of ***State of Punjab & Others Vs. Rafiq Masih (White Washer)*** reported in ***(2015) 4 SCC 334,*** in paragraph No.12 has held as follows:

> *"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. The said judgment has been incorporated by the Government of Tamil Nadu in G.O(Ms)No.286, dated 28.08.2018, with a direction to the authorities not to recovery the excess amount paid to the employees in the

circumstances that are mentioned in paragraphs No.3 of the G.O. In the present case, though on an erroneous ground incentive increment has been awarded to the writ petitioner in the year 2014, the same was found out in the audit objection in the year 2019. Even thereafter, the Educational Authorities have not initiated any action or passed any orders of recovery. As per the judgment of the Hon'ble Supreme Court, the order of recovery could not be passed as against the retired employees. That apart, in the present case, the excess payment has been made between the year 2014-2022. Therefore, after retirement, especially when the excess payment has been made for a period in excess of five years, no order of recovery could be passed at this length of time. Any order of recovery would be iniquitous or harsh or arbitrary and it would be outweigh the equitable balance of the employer's right to recover. Therefore, this Court is of the view that the excess amount that was paid to the writ petitioner as an incentive increment till his retirement on 31.05.2022 shall not be recovered. However, the Department is at liberty to refix the pay scale deleting the incentive increment and on the basis of the revised pay scale the pensionary benefits of the writ petitioner may be refixed and the terminal and other benefits of the writ petitioner may be released.

14. With the above said observation, both the writ petitions stand allowed to the extent as stated above. The authorities are directed to refix the salary and pay pensionary benefits to the writ petitioner, within a period of three (3) months from the date of receipt of a copy of this order. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions stand closed.

10.10.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes
BTR

To

1.The Regional Accounts Officer (Audit),
School Education Department,
Madurai.

2.The Head Mistress,
Head Master,
Kamaraj Nagarmandra Higher Secondary School,
Pettai,
Tirunelveli.

3.The Head Master,
Government Higher Secondary School,
Vadasery, Nagercoil,
Kanyakumari District.

4.The Principal Secretary to Government,
The Government of Tamil Nadu,
Revenue Administration,
Fort St. George,
Chennai-600 009.

5.The District Collector,
Nagercoil,
Kanyakumari District.

6.The Sub Treasury Officer,
Kalkulam,
Kanyakumari District.

R.VIJAYAKUMAR, J.

BTR

W.P(MD)Nos.3442 of 2021 & 14796 of 2023

10.10.2023