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WA No. 3250 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.04.2024

CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

Writ Appeal No. 3250 of 2023
and
CMP. No. 26522 of 2023

1. The State of Tamil Nadu
rep. by the Secretary to Government
Education Department
Chennai - 600 009
2. The Director of Elementary Educational Officer
College Road
Chennai - 600 006
3. The District Elementary Educational Officer
Tirunelveli - 602 001
4. The Assistant Elementary Educational Officer
Valliyur
Tirunelveli

.. Appellants

Versus

1. S. Vasantha, B.sc., B.Ed.,
Middle School Headmaster
Hindu Middle School
Sanganapuram - 627 114
Valliyur Union
Tirunelveli District



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2. The Hindu Middle School
rep. by its Secretary
Sanganapuram Post
Valliyur, Radhapuram Taluk
Tirunelveli District

.. Respondents

Appeal filed under Clause 15 of Letters Patent against the order dated 14.03.2023 passed in Writ Petition No. 21236 of 2013 on the file of this Court.

For Appellant : Mrs. S. Anitha
Special Government Pleader

For Respondents : Mr. S.N. Ravichandran for R1

JUDGMENT

(Judgment of the Court was delivered by R. MAHADEVAN, J)

This writ appeal is directed against the order dated 14.03.2023 passed by the learned Judge in Writ Petition No. 21236 of 2013 filed by the first respondent herein.

2. The first respondent has preferred the aforesaid writ petition praying to issue a Writ of Certiorarified Mandamus to call for the records relating to the order passed by the first appellant in Letter No.13336/P1/2010-4 dated 08.01.2013 and the consequential order of recovery passed by the fourth appellant in Na.Ka.No.132/Aa1/2008 dated 12.06.2013 and quash the same and direct the first appellant to pass order of relaxation of five year



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teaching experience to the first respondent as Middle School Headmaster with effect from 02.11.1992.

3. The case projected by the first respondent before the writ court was that she passed B.Sc. (Physics) and B.Ed. and based on such qualification, she was appointed as Headmistress in the second respondent school on 02.11.1992 in a permanent vacancy, which arose due to the voluntary retirement of one S. Gangadaran, Secondary Headmaster on 31.10.1992. According to the first respondent, her appointment was made as per G.O. Ms. No.1297, Education Department dated 21.07.1979 and G.O. Ms. No.510, Education Department dated 26.05.1992 and hence, it is valid. The appointment of the first respondent was also approved by the educational authority viz., third appellant and she was in receipt of salary attached to her post from the date of her appointment. While so, based on an audit objection, the fourth appellant sent a communication dated 01.07.1998 stating that the first respondent is not entitled to payment of salary in the scale of pay of Rs.1640-2000 and instead, she ought to have been paid salary in the scale of pay of Rs.1400-2600 from 02.11.1992 to 01.11.1997 inasmuch as she was appointed without the requisite teaching experience for five years. Therefore, by the said communication, the excess salary paid to the first respondent was



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ordered to be recovered. Challenging the same, the first respondent filed WP No. 13097 of 1998, which was disposed of, by order dated 18.07.2007, by setting aside the said communication dated 01.07.1998 and by directing the fourth appellant to issue a fresh show cause notice to the first respondent and thereafter, proceed further in accordance with law. Based on the order so passed by the writ Court, the first respondent submitted representations to relax the condition to possess five year teaching experience and to drop all further proceedings initiated against her. However, the fourth appellant sent a communication dated 12.06.2013 to recover the excess salary paid to her by referring to the Letter dated 08.01.2013 of the first appellant. Aggrieved, the first respondent filed the aforesaid writ petition for the relief as stated *supra*.

4. Opposing the writ petition, the third appellant filed a counter affidavit in the writ petition, stating *inter alia* that the first respondent is not eligible for being appointed to the post of Headmistress without the mandatory teaching experience of five years. In this regard, an audit objection was raised with respect to payment of excess salary made to the first respondent in the post of Headmistress and it was intimated to her by the communication dated 01.07.1998. Challenging the same, the first respondent filed WP No. 13097 of 1998 and it was disposed of on 18.07.2007 with a direction to the fourth



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appellant to issue a fresh show cause notice and thereafter, proceed further in accordance with law. Thereafter, the first respondent made representations seeking relaxation of the 5 year teaching experience. But, the first appellant rejected the claim of the first respondent and ordered to recover the excess salary paid to her. The counter affidavit further proceeds to state that the qualification and/or experience required to be possessed by the first respondent cannot be relaxed in a routine manner and the non-possession of experience by the first respondent will adversely affect the students studying in the school. Furthermore, there is no evidence to show that the management of the school took earnest steps to appoint a qualified person having requisite experience. Therefore, the appellants sought to dismiss the writ petition.

5. The learned Judge, by order dated 14.03.2023, allowed the writ petition filed by the first respondent. While so, it was pointed out that the Government has issued G.O. (3D) No.31 School Education Department dated 26.03.2009 granting relaxation of five year teaching experience in respect of nine middle school Headmasters, who are similarly placed like the first respondent. The Government has also issued G.O. (3D) No.17, School Education Department dated 20.01.2011 in respect of 18 similarly placed persons like the first respondent. The learned Judge also pointed out that the



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aforesaid Government Orders came to be passed, after several writ petitions were allowed by the writ court; and it was also affirmed by the Division Bench of this Court in W.A. (MD) No. 676 of 2014; and therefore, the same treatment has also to be extended to the first respondent. Assailing the order so passed by the learned Judge in the writ petition, the State / appellants have preferred this writ appeal.

6. The learned Special Government Pleader appearing for the appellants submitted that the learned Judge allowed the writ petition filed by the first respondent on the ground that similar writ petitions filed by the persons, who are similarly placed like the first respondent, were allowed and they were also affirmed by the Division Bench of this Court. In this context, the learned Special Government Pleader brought to the notice of this Court the order dated 24.03.2023 passed by the Honourable Supreme Court in Civil Appeal No. 1951 of 2023 (SLP (C) No. 17939 of 2019) in the case of the ***State of Tamil Nadu and others vs. Nehru Middle School and another***, which was filed against the Judgment dated 13.06.2019 passed by the Division Bench of this Court. In the said case, the writ petitioner therein was appointed as Headmistress and she did not possess the mandatory five year teaching experience. The writ petition was allowed and it was also confirmed by the



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Division Bench of this Court by directing the educational authorities to relax the qualification to be possessed by her. However, the Honourable Supreme Court held that when the respondent No.2 therein did not possess the requisite teaching experience of five years, the refusal to accord approval for her appointment cannot be found fault with and accordingly, the appeal filed by the State was allowed. Therefore, the learned Special Government Pleader submitted that there is no illegality in the order dated 08.01.2013 passed by the first appellant, rejecting the claim of the first respondent seeking relaxation of 5 year teaching experience for holding the post of Headmistress.

7. Adding further, the learned Special Government Pleader appearing for the appellants submitted that the appellants cannot be expected to grant relaxation of qualification, age and experience in a routine manner. The power under Section 13-A of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 to grant relaxation of experience has to be exercised sparingly and it cannot be extended to all the teachers. In any event, the school management did not scout for the teachers with eligible qualification and experience before zeroing in on the first respondent to appoint her to the post of Middle School Headmaster. When the first respondent is not in possession of five years of teaching experience at the time of her appointment to the post



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of Middle School Headmaster, she is only entitled to receive the pay scale applicable to B.T. Teacher till she completes the five year teaching experience.

Hence, the order passed by the fourth appellant to recover the salary of the first respondent for the period from 02.11.1992 to 01.11.1997 is in order and it ought not to have been interfered with by the learned Judge.

8. Continuing further, the learned Special Government Pleader appearing for the appellants submitted that though the Government had passed orders, granting relaxation to some of the similarly placed persons like the first respondent, yet, the same cannot be expected to be extended to all including the first respondent, who do not possess the mandatory qualification and/or experience. In this context, the learned Special Government Pleader referred to the decision of the Honourable Supreme Court in ***Harpal Kaur Chahal vs. Director, Punjab Instructions, Punjab and another [1995 Suppl (4) Supreme Court Cases 706]*** and submitted that an illegality, once committed, cannot be pleaded to be legalised for committing another illegality. If candidates who are ineligible have been appointed, the refusal on the part of the Government to accord approval for such appointments, cannot be found fault. With these submissions, the learned Special Government prayed for allowing this appeal by setting aside the order passed by the learned Judge in the writ petition.



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9. Per contra, the learned counsel appearing for the contesting first respondent submitted that the first respondent was duly appointed to the post of Middle School Headmistress on 02.11.1992, which was also approved by the Educational authorities. After six years of her appointment, on the basis of an audit objection, the excess salary paid to her was sought to be recovered by the communication dated 01.07.1998. It is not the case of the appellants that she was paid the excess salary due to misrepresentation or fault on the part of the first respondent. In such circumstances, it is not open to the appellants to state that the management of the school did not go in search of a candidate with all the requisite qualification before appointing the first respondent to the post of Middle School Headmaster. In any event, the Government has granted relaxation in respect of several persons by issuing G.O. (3D) No.31 School Education Department, dated 26.03.2009 and G.O. (3D) No.17 School Education Department dated 20.01.2011. On the basis of the aforesaid orders, the learned Judge has rightly allowed the writ petition. When the first respondent is also similarly placed, she cannot be discriminated by not extending the said benefit conferred under the orders passed by the Government.

10. The learned counsel for the first respondent further submitted that the decision of the Hon'ble Supreme Court referred to above, on the side of the



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appellants, cannot be made applicable to the facts of this case. In that decision, the second respondent therein was appointed to the post of Headmistress without the mandatory qualification, but her appointment was not given approval by the educational authorities. Challenging the same, the second respondent filed the writ petition, which was allowed and the same was also affirmed by the Division Bench of this Court; and on appeal, the Hon'ble Supreme Court reversed the same. Whereas, in the present case, the appointment of the first respondent was approved and she has been working in the second respondent school. However, based on the audit objection, the differential salary paid to her for a period of five years was ordered to be recovered. When there is no fault attributable on the part of the first respondent in the matter of appointment to the post in question, recovery of excess salary cannot be ordered to be made and it is unjustified. Therefore, the learned Judge rightly allowed the writ petition filed by the first respondent by the order impugned herein, which does not warrant any interference at the hands of this court.

11. We have heard the learned counsel appearing for all the parties and also perused the materials placed before us.



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WEB COPY 12. It is evident that at the time of appointment of the first respondent to the post of Middle School Headmistress in the second respondent school, she did not possess the teaching experience of five years for holding the said post. It is also an admitted fact that notwithstanding the lack of five year teaching experience, the Educational authorities had approved the appointment of the first respondent in the post of Headmistress. However, on the basis of the audit objection, the fourth appellant sent the communication dated 01.07.1998 calling upon the first respondent as to why the salary paid in excess to her for the period from 02.11.1992 to 01.11.1997 be not recovered. The first respondent successfully challenged the said communication by filing WP. No. 13097 of 1998, and got it set aside by order dated 18.07.2007. Thereafter, she sought relaxation of the qualification viz., 5 year teaching experience for holding the post of Headmistress. However, the claim of the first respondent was rejected by the first appellant by order dated 08.01.2013. Following the same, on 12.06.2013, the fourth appellant ordered for recovery of the excess salary paid to the first respondent for the period in question. The orders so passed by the appellant authorities were questioned by the first respondent in WP. No.21236 of 2013, which was allowed by the learned Judge, by virtue of the earlier Government Orders passed in favour of the



similarly placed persons. Therefore, this writ appeal by the appellant authorities.

13. It is no doubt true that several orders have been passed by the writ court in identical matters, whereby the appointment of the persons without the requisite 5 year teaching experience, like the first respondent, was ordered to be ratified; and the said orders were affirmed by the Division Bench of this court. Pursuant to the same, the Government had also issued orders, granting relaxation of 5 year teaching experience in respect of the similarly placed persons like the first respondent. However, those orders have been set at naught by virtue of the decision of the Hon'ble Supreme Court in ***Nehru Middle School's*** case (supra) referred to on the side of the appellants. For ease of reference, the relevant passage of the said decision is extracted below:

“9. Now, so far as the submissions on behalf of the respondent No.2 relying upon the G.O issued by State Government on relaxation is concerned, at the outset, it is required to be noted that the same shall be applicable only in a case where the other eligible candidates are not available and/or other eligible candidates have given up their right to be considered for the promotion to the post of Head Mistress / Head Master. In the counter affidavit before the High Court, it was specifically pointed out on behalf of the appellants that the school obtained letters only from the BT Teachers and not from the secondary grade teachers eligible for promotion as Head Master of middle school. In that view of the matter, even reliance placed upon the G.O on relaxation is absolutely misplaced and the same shall not be of any assistance to the appellants.”

10. In view of the above and for the reasons stated above and, more particularly, considering the fact that respondent No.2 was not



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having the requisite teaching experience of five years as required, the appellants rightly refused to approve her appointment. The learned Single Judge as well as the Division Bench of the High Court have materially erred in directing the appellants still to approve the appointment of respondent No.2 with effect from 19.05.2010. The impugned judgment and order passed by the Division Bench as well as that of the learned Single Judge are unsustainable and the same deserve to be quashed and set aside and are accordingly quashed and set aside.
(Emphasis supplied)

11.The present appeal is accordingly allowed. There shall be no order as to costs.”

It is crystal clear from the above decision of the Hon'ble Supreme Court that any appointment *dehors* the statutory provision / mandatory requirements is illegal and cannot be continued. While so, it was held that reliance placed upon the G.O. on relaxation is absolutely misplaced and considering the fact that the second respondent was not having the requisite teaching experience of five years as required, the appellants therein rightly refused to approve her appointment. Accordingly, the appeal filed by the appellants therein was allowed by the Hon'ble Supreme Court.

14. In the light of the aforesaid decision of the Hon'ble Supreme Court, this court is inclined to reject the contention made by the learned counsel for the first respondent that the Government ratified the appointment of similarly placed persons like the first respondent by relaxing the mandatory

<https://www.mhc.tn.gov.in/judis> requirement of five year teaching experience for the post of Headmistress/



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Headmaster, however, they refused to extend the said benefit to the first respondent alone, which is discriminatory in nature. Accordingly, the order dated 08.01.2013 passed by the first appellant which was impugned in the writ petition, is restored and the order of the learned Judge is set aside to that extent.

15. At the same time, the order dated 12.06.2013 passed by the fourth appellant ordering recovery of excess salary paid to the first respondent for the period from 02.11.1992 to 01.11.1997, cannot be allowed to be sustained, having regard to the fact that the appointment of the first respondent to the post in question, was approved by the Educational authorities and the order of recovery was passed only on the basis of the audit objection and hence, there is no misrepresentation or fault on the part of the first respondent in this regard. The Hon'ble Apex Court in ***State of Punjab and others etc., vs. Rafiq Masih (White Washer) etc. [(2015) 4 SCC 334]***, with respect to the issue of recovery, has categorically held as follows:

“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



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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 employers right to recover.”

(Emphasis supplied)

In view of the above, the order of the learned Judge, *qua* recovery of excess salary paid to the first respondent, need not be interfered with by this court. As a sequel, the appellants are directed not to recover the excess amount, if not already recovered.

16. In fine, this writ appeal stands allowed to the extent as indicated above. No costs. Consequently, connected miscellaneous petition is closed.

(R.M.D., J) (M.S.Q., J)

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Index : Yes / No

Neutral Citation : Yes / No

Speaking / Non-Speaking Order

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