

(2009) 07 MAD CK 0404

In the Madras High Court

Case No : Writ Petition No. 1205 of 2007 and M.P. No. 1 of 2007

S. Vellaipandian

APPELLANT

Vs

The District Elementary Educational Officer and Secretary,
Saradha Vidyalaya Primary School

RESPONDENT

Date of Decision : 16-07-2009

Acts Referred:

Citation : (2009) 07 MAD CK 0404

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : S. Mani, for the Appellant; D. Gandhiraj, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.S. Ramanathan, J.—The admitted case of both the petitioner and the respondents is that the petitioner was employed as teacher in the second respondent School on leave vacancies from 17.08.1990 to 10.03.1995 as detailed below:

From 17.08.90 to 20.09.90 05.10.90 to 23.11.90 24.11.90 to 17.01.91 18.01.91 to 28.02.91 01.03.91 to 31.03.91 02.04.91 to 29.04.91 18.06.91 to 08.08.91 09.08.91 to 19.09.91 04.10.91 to 06.11.91 further from 07.11.91 to 19.12.91 11.02.92 to 11.03.92 12.03.92 to 29.04.92 16.07.92 to 10.09.92 08.10.92 to 11.03.92 16.02.93 to 15. .93 06.07.93 to 31.08.93 01.09.93 to 21.09.93 12.10.93 to 08.12.93 02.02.94 to 22.02.94 07.04.94 to 27.04.94 12.07.94 to 10.08.94 27.10.94 to 03.11.94 17.02.95 to 10.03.95 respectively.

He was paid salary by the first respondent till June 1991. Thereafter, relying upon the G.O.Ms. No. 788 Education dated 31.07.1991, the department refused to sanction leave salary on the ground that as per the Government Order mentioned above only women teachers can be employed in all primary schools giving education from first to fifth standards and hence the petitioner being a

male teacher, he cannot be given salary for the days worked after coming into force of the said Government Order. Therefore, the petitioner filed a Writ Petition in W.P. No. 1223 of 2002 before this Court for a mandamus directing the second respondent to pay the salary. An interim order was passed and on the basis of the interim order the salary was paid to him. The main Writ Petition was dismissed by this Court on the ground that there was no proof that the petitioner worked in those leave vacancies on the days stated by him and in that judgment, the applicability of G.O.Ms. No. 788 was not all considered. Hence, the petitioner filed the Writ Appeal in W.A. No. 589 of 2002 and the Hon"ble Division Bench of this Court by an order dated 25.08.2006 modified the order of the learned Single Judge and directed the petitioner to make representation to the first respondent herein with request to disburse the salary for the period he worked as Secondary Grade Teacher in leave vacancies. Based on that order, the petitioner submitted a representation with full details and requested the first respondent to disburse the salary for the period he worked. The first respondent passed the impugned order dated 24.11.2006 rejected the request of the petitioner stating that as per G.O.Ms. No. 788 Education (2) Department, dated 31.07.1991, only female teachers can be appointed in the primary schools and the said Government Order applies even to temporary appointment like appointment on leave vacancies and as substitute teacher and hence the appointment of the petitioner is irregular and he was paid salary for those period and directed the Additional Assistant Elementary Educational Officer, Srivilliputhur, to recover the salary paid to the petitioner from the second respondent in this Writ Petition. This order is challenged in this Writ Petition.

2. As stated supra, it is not disputed by the first respondent that the petitioner had worked on those days in the leave vacancies or as a substitute teacher. It is further admitted that even after the passing of G.O.Ms. No. 788 Education (C2) Department dated 31.07.1991, the petitioner was paid salary by the Department and that payment was continued even after the dismissal of W.P. No. 1223 of 2002 filed by the petitioner. Therefore, it is admitted that on the basis of the request of the second respondent, the Education Department approved the salary payable to the petitioner, sanctioned the salary to the petitioner and the salary was paid by the Department to the petitioner through the second respondent. Now, when the petitioner requested the first respondent to disburse the salary as per the directions of the Division Bench of this Court made in W.A. No. 589 of 2002, this impugned order was passed by the first respondent directing the Additional Assistant Elementary Educational Officer to recover the salary paid to the petitioner from the second respondent.

3. The petitioner challenged the order of the first respondent on the ground that the G.O.Ms. No. 788 dated 31.07.1991, has no application to the appointment made in the leave vacancy. He also relied upon the G.O.Ms. No. 197, School Education (C2) Department dated 21.07.2000, G.O.Ms. No. 237, School Education Department dated 05.09.2000 and the letter No. 267 School Education Department dated 19.10.2000 and submitted that after the passing of G.O.Ms.

No. 788 dated 31.07.1991 as per G.O.Ms.580 Education, dated 28.08.1996, Male teacher can be appointed upto 25% and in the case of primary schools, male teacher can be appointed up to 10% and in G.O.Ms. No. 197 Education, dated 21.07.2000, 25% vacancies can be filled up by employing male teacher. On the basis of the above G.Os., the learned Counsel for the petitioner submitted that the first respondent should not have directed to recover the salary paid to the petitioner from the second respondent and the appointment of the petitioner was approved by the first respondent and his subordinates and therefore, the impugned order is illegal and liable to be set aside. He further contended that in the Writ Appeal No. 589 of 2002, the petitioner was directed to approach the first respondent for disbursement of salary and there is no whisper in the said order that the G.O.Ms. No. 788 Education Department dated 31.07.1991 and it is nowhere stated in the order that under G.O.Ms. No. 788 Education Department dated 31.07.1991 only female teachers can be appointed in the primary schools.

4. The learned Government Advocate relying upon the counter affidavit submitted that the G.O.Ms. No. 788 is applicable to temporary appointment including the appointment made during leave vacancies and the subsequent G.Os. relied upon by the petitioner were passed in the year 2000 and those G.Os. cannot be made applicable to the case of the petitioner, as the petitioner completed his period in the year 1995 itself and as per the G.O.Ms. No. 788 dated 31.07.1991 the appointment of the petitioner is prohibited and hence the first respondent is justified in directing the Additional Assistant Elementary Educational Officer to recover the salary paid to the petitioner and prayed for dismissal of the Writ Petition.

5. In my opinion, it is not necessary to go into the question whether G.O.Ms. No. 788 Education dated 31.07.1991 prohibits the employment of male teacher or whether that G.O. is applicable to temporary employment like appointment made during leave vacancies for deciding the issue involved in this Writ Petition.

6. It is not in dispute that the petitioner was employed on the days mentioned above and his employment was approved by the Department and the salary was sanctioned and paid by the department through the second respondent. Therefore, when the payment was made to the petitioner without any misrepresentation on his part and the payment was made for his services rendered, the department is not justified in ordering recovery of that amount from the petitioner. The issue is no longer *res integra* and it has been held in the judgment reported in *Sahib Ram Vs. State of Haryana and Others*, . In the said judgment it has been held that when the payment was not made on account of any misrepresentation on the part of the appellant as in the case the petitioner, the benefit of the higher pay scale given to him by the wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under that circumstances, the amount paid till date may not be recovered from the appellant. These points were summarised by the Division Bench of this Court reported in 2008 (3) L.W. 383 (*R. Premkumari v. State of Tamil Nadu*

Represented by its Secretary to Government) and the Hon''ble Division Bench after considering the various judgments referred to in that case held where excess payment is made not on account of any erroneous representation of the employee, but on the basis of the error committed by the authorities, the Hon''ble Supreme Court has invariably directed that recovery need not be made. It is further held in the judgment that there is nothing to indicate that the present appellant had made any misrepresentation in the matter. Since the amount had already been paid and obviously spent by the appellant thinking that she was entitled to such amount, it would cause undue hardship if at a distant point of time such amount is recovered and the order of recovery was set aside by the Division Bench of this Court. In this case also without any misrepresentation on the part of the petitioner, the authorities sanctioned salary, permitted him to work on leave vacancies and therefore, following the judgment referred to above, the first respondent is not entitled to direct the recovery of all the amounts from the second respondent towards salary paid to the petitioner for the period he worked. Hence, the impugned order is set aside and the Writ Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.