(2011) 09 MAD CK 0159

Madras High Court

Case No: Writ Petition No. 21582 of 2009

K. Gnanamoorthy		APPELLANT
	Vs	
The Secretary to Government Micro, Small and Medium Enterprises (E1-2) Department Fort St. George, Secretariat Chennai - 600 009, The Director of Industries and Commerce Chepauk, Chennai - 600 005 and The Superintendent Government Technical Training Centre Guindy, Chennai - 600 035		RESPONDENT

Date of Decision: Sept. 15, 2011

Acts Referred:

- Constitution of India, 1950 - Article 226

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: Mr. R. Muthukkannu, for the Appellant; Mr. R.M. Muthukumar, Government Advocate, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

The Honourable Mr. Justice K. Chandru

1. The Petitioner has filed the present writ petition seeking to challenge an order dated 16.10.2008 passed by the State Government as well as the order dated 10.9.2009 passed by the third Respondent. By the impugned order dated 16.10.2008, the State Government rejected the case of the Petitioner seeking to regularise his services in the post of Junior Engineer (Industries) with effect from

13.8.1986, namely the date of his temporary appointment, by relying upon Rule 26A(vii) of the Fundamental Rules, which reads as follows:

Rule 26A(vii) Government servants in temporary service including of those recruited through Employment Exchange will be eligible to count their temporary service in a post towards increment only if they satisfy all the rules prescribed for holding that post in a regular capacity.

and informed the Petitioner that he is entitled to regularisation only from 11.8.1990, the day on which he became fully qualified to hold the post of Junior Engineer in regular capacity. Thereafter, the third Respondent, by his proceedings dated 10.9.2009, ordered that the increments paid to him from 13.8.1987 to 10.8.1990 as well as the difference in payment of higher rate of pay and allowances from the date of regularisation till the revised rate of increments ordered by the office of the third Respondent will stand recovered from him.

2. The Petitioner earlier filed a writ petition, being W.P. No. 13291 of 2006, challenging an order of second Respondent, namely the Director of Industries and Commerce, dated 8.8.1996, but however, subsequently, withdrew the writ petition on 4.2.2008 and preferred an appeal before the State Government, which was rejected on 16.10.2008, as already stated.

3. The regularisation order of the service of the Petitioner dated 18.7.1996 made in G.O. (4D) No. 56, Small Industries (Estt.I) Department is also enclosed in the typed set in pages [9] to [12] and as per paragraph [4] of the order, the Petitioner got his regularisation only by relaxing Rule 3 of the Ad hoc Rules regarding method of appointment, Rule 4 of the Ad hoc Rules regarding rule of reservation, and Rule 22(aa) of the General Rules regarding retrospective regularisation in his favour. The relaxation order in the post of Junior Engineer (Industries) was made and he was appointed with effect from 11.8.1990.

4. It is subsequent to the regularisation, the question of the Petitioner drawing increments without regard to the relevant rules came to be noticed and therefore, by the impugned orders, the claim of the Petitioner seeking regularisation of his services in the post of Junior Engineer (Industries) with effect from 13.8.1986 was rejected and the Petitioner was informed about the erroneous payment and the intention of the department to re-fix and recover the amount.

5. Therefore, the only question that arises is whether the impugned orders suffer from any irregularity or illegality.

6. The writ petition was admitted on 23.10.2009. Pending the writ petition, this Court granted interim stay against any recovery and subsequently made the stay absolute with liberty to the Respondents to file counter and seek modification of the said order. Though counter affidavit dated 17.6.2010 was filed, no petition to modify the stay order was filed and hence, the writ petition came up in the normal course.

7. Resisting the case of the Petitioner, in paragraphs [7] to [10] it was averred as follows:

7. It is submitted that the Government had rejected the appeal filed by the Petitioner herein to restore his date of regularisation from 13.8.1986 as he had not satisfied the rules provided in the Ad hoc Rules governing the appointment to the post of Junior Engineer (Industries). Therefore, the services of the Petitioner were regularized with effect from 11.8.1990 in the G.O.(4D) No. 56, Small Industries Department, dated 18.7.1996, only after relaxing the Ad hoc Rules governing the appointment to the post of Junior Engineer (Industries).

8. It is submitted that the orders were passed by the Government taking into consideration his temporary appointment only after relaxing the Ad hoc Rules and method of appointment. There was no sustaining evidence to show that the orders were contrary to law or it is illegal.

9. It is submitted that though the Tamil Nadu Public Service Commission had given concurrence for the appointment through the Special Employment Office for Physically Handicapped, the Petitioner''s appointment as Junior Engineer (Industries) is governed by a set of Ad hoc Rules irrespective of the fact that whether his appointment was made through the Tamil Nadu Public Service Commission or through any other method. Since the Petitioner had not satisfied the existing Ad hoc Rules at the time of his temporary appointment, the Government had taken the stand that he was eligible for regularisation of services with effect from the date of relaxation i.e. from 11.8.1990. The rules relaxed in the G.O.(4D) 56, Small Industries Department, dated 18.7.1996 are Rule 3 (method of appointment) and Rule 4 (Rule of reservation) of the Ad hoc Rules governing the appointment to the post of Junior Engineer (Industries) and Rule 22(a) (regularizing retrospectively).

10. It is submitted that the appointment made initially was on temporary basis. The question of continuance of the Petitioner in Government service at the time of appointment was not certain. The G.O. Ms. No. 602, Social Welfare Department, dated 14.8.1981 was taken into consideration for mere temporary appointment only. Hence, the relaxation of rules governing regular appointment had to be done for regularizing his services. The Petitioner cannot cite this Government Order for overriding or relaxation of Ad hoc Rules as it was invoked for temporary appointment only.

8. The stand taken by the Respondents cannot be found fault with. It is not a case where the Petitioner was not having any notice before either re-fixation or recovery being made on the ground of excess payment. The Petitioner originally challenged the order of the second Respondent before this Court and subsequently withdrew the same and contained himself by making appeal to the first Respondent. Therefore, if the authorities on the basis of the existing rules come to the conclusion that the amount paid was on erroneous understanding of the legal position, there is

no impediment for the Respondents to recover the said amount. This position of law has been made clear by the Supreme Court in Registrar, Co-operative Societies Haryana Vs. Israil Khan and Others, . In that case, the Supreme Court in paragraphs [7], [9] and [10] has observed as follows:

7. There is no "principle" that any excess payment to employees should not be recovered back by the employer. this Court, in certain cases has merely used its judicial discretion to refuse recovery of excess wrong payments of emoluments/allowances from employees on the ground of hardship, where the following conditions were fulfilled:

(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous. Col. (Retd.) B.J. Akkara Vs. The Govt. of India and Others,

9. What is important is, recovery of excess payments from employees is refused only where the excess payment is made by the employer by applying a wrong method or principle for calculating the pay/allowance, or on a particular interpretation of the applicable rules which is subsequently found to be erroneous. But where the excess payment is made as a result of any misrepresentation, fraud or collusion, courts will not use their discretion to deny the right to recover the excess payment.

10. In these cases, the Rules specifically provided that the employees should be paid a consolidated salary. Therefore without amendment of the Rules, the Managing Committees could not have passed a resolution for giving the benefit of regular pay scales that too with retrospective effect to the employees. Further, the Societies did not have the funds to make such payments and illegally diverted the funds made available for disbursal of loans to farmers, for the purpose of making such excess payment to the employees. When the resolution extending such benefit was passed and the amounts earmarked for loans for farmers were diverted for making payment to the employees, the Managing

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Committees as well as the employees were aware that the resolution and consequential payment was contrary to the Rules. There was no question of any wrong calculation or erroneous understanding of the legal position. Most of the employees who received similar relief have refunded or have agreed to refund the excess payment. Making any exception in the case of the Respondents would also lead to discrimination.

9. In the light of the same, there is no case made out. The writ petition stands dismissed. No costs.