**IN THE HIGH COURT OF****KARNATAKA AT BANGALORE**

Writ Petition No. 7508/2009

Decided On: 20.09.2011

Appellants: **Smt. A.V. Gayathri W/o. Ravi Kumar**
**Vs.**
Respondent: **The State of****Karnataka** **rep. by its Secretary, Department of** **Education,** **The Addl. Secretary-2 to Govt. (Primary and Secondary** **Education), Dept. of** **Education,** **The Director of Pre-University** **Education** **Board and Arya Vidya Shala Parents' Association rep. by its Secretary**

**Hon'ble Judges/Coram:**
A.N. Venugopala Gowda, J.

**ORDER**

**A.N. Venugopala Gowda, J.**

1. 4th Respondent invited applications on 27.07.1994 for the post of Accountant-cum-Clerk. The Petitioner applied and was issued with an appointment order on 20.09.1995, which was approved by the 3rd Respondent on 06.05.1996. One Smt. Kanmani, who was also appointed alongwith the Petitioner to the post of Clerk-cum-Typist and whose appointment was approved by the 3rdRespondent on 06.05.1996 without grant, submitted a representation to the 3rd Respondent, stating that, her appointment should have been approved with grant and not that of the petitione, 3rd Respondent issued show cause notice dated 25.07.2000 and passed an order dated 02.07.2001, wherein, it was observed that, there was no post of Accountant-cum-Clerk in the staff pattern of the Pre-University Colleges, but there was a provision for Head Clerk-cum-Accountant in the staff pattern, if the students strength is more than 250 and the scale of the post is equivalent to that of First Division Assistant. It was found that the strength of students in the college where the Petitioner was appointed was far below 250 and the college was not eligible for the post of Accountant-cum-Clerk and hence, the appointment and pay in the FDA's pay scale paid to the Petitioner was illegal. The appointment of Smt. Kanmani, which had been approved without aid, being found to be eligible for grant, was approved.

2. Aggrieved, the Petitioner filed an appeal before the 1st Respondent, who found that, the 3rd Respondent has committed mistake and created the problem. However, the 3rd Respondent was directed to find similar post in some other grant-in-aid institution and accommodate both i.e., Smt. Kanmani and the Petitioner, after going through the facts, determining as to who should remain in the original place and who should be accommodated in the new place. The 3rd Respondent passed an order dated 07.02.2002, to absorb the Petitioner in Vijaya Independent Pre-University College, Jayanagar IV Block, Bangalore, to the post which became vacant due to the promotion of one Sri Veerabhadraiah, Second Division Assistant. The Petitioner was directed to report for duty. The Petitioner reported for duty. The Petitioner was paid the pay of First Division Assistant. The Petitioner's pay scale instead of being fixed in the scale of S.D.A, was fixed in the scale of F.D.A i.e., ` 1,280-2,375/-. The 3rd Respondent issued a communication dated 17.07.2002 directing the DDPI that the amount paid in excess of Petitioner's entitlement be recovered from the salary of the Petitioner and credited to the Government Accounts. It now transpires that, the excess amount paid to the Petitioner is ` 70,493/-. Feeling aggrieved, the Petitioner filed W.P. 18344/2003, which was dismissed on 18.04.2007 observing that, Petitioner is at liberty to file an appeal under Section 130 of Karnataka Education Act. The appeal filed thereafter by the Petitioner before the 2ndRespondent was dismissed on 04.02.2009. This writ petition has been filed to quash the orders at Annexures E, G & L and direct the Respondents 1 to 3 to place the Petitioner in her original cadre in terms of the order as at Annexure-F and to grant consequential reliefs.

3. Statement of objections has been filed on behalf of Respondents 1 to 3 in justification of the orders passed by the concerned Respondents. The 4th Respondent has filed separate statement of objections in opposition to the claim made by the Petitioner and has sought dismissal of the writ petition.

4. Sri Prasanna V.R. learned advocate appearing for the Petitioner, contended that, the impugned orders are arbitrary & illegal and even otherwise, in the order passed at Annexure-F, the mistake committed by the Directorate of PUE, on account of which the problem was created and the direction issued to find similar post in some other grant-in-aid institution and accommodate the Petitioner and Smt. Kanmani, the order having been issued posting the Petitioner in place of Sri R. Veerabhadraiah, the Petitioner being a graduate and eligible to hold the post of First Division Assistant, the salary paid cannot be ordered to be recovered. Learned Counsel submitted that, the Respondents 1 to 3 have acted mechanically in the matter and the orders passed by them, impugned in the writ petition being illegal, the Petitioner is entitled to the benefit of direction issued in the order at Annexure-F.

5. Sri Ragavendra R. Gayathri, learned HCGP appearing for the Respondents 1 to 3, submitted that, the Petitioner having reported to duty in the place of Sri R. Veerabhadraiah, Second Division Assistant, could not have drawn the salary of higher post and since excess salary has been drawn by the Petitioner, the recovery has rightly been ordered. Learned Counsel submitted that, the approval of appointment of the Petitioner with grant on 06.05.1996, as at Annexure-C, having been found to be erroneous, after issue of show cause notice and hearing the Petitioner, the order dated 07.02.2002 was passed. However, the Petitioner was accommodated in grant-in-aid institution and that the action token by the Respondents is in accordance with law.

6. Sri M. Aswathanarayana Reddy, learned Counsel appearing for the 4th Respondent, made submissions in support of the stand taken in the statement of objections filed on behalf of 4th Respondent and sought dismissal of the writ petition.

7. The points for consideration are:

1. Whether the order passed by the 2nd Respondent dated 04.02.2009 (Annexure-L) suffers from any infirmity?

2. Whether the 3rd Respondent was justified in directing recovery of the excess salary paid to the Petitioner?

Re-Point No. 1:

8. The Petitioner's appointment as Accountant-cum-Clerk with pay scale of ` 1280-2375 in the Arya Vidyashala Composite Pre-University College, Bangalore, was approved by the 3rd Respondent as per the memorandum dated 06.05.1996, as at Annexure-D. Considering the representation made by Smt. Kanmani, the 3rd Respondent passed the order dated 02.07.2001, as at Annexure-E, cancelling the appointment of the Petitioner as Accountant-cum-Clerk and discontinued the grant-in-aid sanctioned to the Petitioner, on the ground that, the post of Accountant-cum-Clerk was not available as per the staffing pattern and the students strength and that, she has been illegally allowed to draw the pay in the higher scale of pay i.e., Head Clerk-cum-Accountant. The said orders were questioned by the Petitioner in R.P.64/2001 before the 1st Respondent and by observing that, by approving the appointment of Petitioner with grant-in-aid, the Directorate has committed mistake and created a problem since there was no provision for the post according to the staffing pattern. However, the 3rd Respondent was directed to find similar post in some other grant-in-aid institution and accommodate the Petitioner and Smt. Kanmani, after carefully going through the facts determining as to who should remain in the original place and who should be accommodated in a new place (Annexure-F). The 3rd Respondent having considered the matter, passed the order dated 07.02.2002 as at Annexure-G and transferred the Petitioner to Vijaya Independent Pre-University College, Jayanagar IV Block, Bangalore, to the vacancy caused by the promotion of one Sri R. Veerabhadraiah, a Second Division Assistant.

9. Indisputedly, the Petitioner reported at the Vijaya Independent Pre-University College, Jayanagar IV Block, Bangalore and has been working therein i.e., as Second Division Assistant. It is not the case of Petitioner that, on the date of her appointment in the 4th Respondent and before her posting to Vijaya Independent Pre-University College, Jayanagar IV Block, Bangalore, the strength of the students in the 4th Respondent-college was 250 and above. Indisputedly, as per the staffing pattern, the minimum students strength required to have the post of Head Clerk-cum-Accountant is 250 and above in the circumstances, the decision taken by the 3rd Respondent as per Annexure-G, pursuant to the direction of the 1st Respondent as per Annexure-F, is justified. The 1stRespondent has correctly examined the factual aspects while considering Appeal No. 26/2007 and the order passed on 04.02.2009, as at Annexure-L, is neither arbitrary nor illegal much less suffers from any infirmity for being quashed.

Re-point No. 2:

10. Undeniably, the appointment of the Petitioner in the 4th Respondent-college was approved by the 3rd Respondent on 06.05.1996, as per Annexure-D. The post having been approved, the Petitioner was paid the salary and allowances. The 3rdRespondent passed the cancellation order on 02.07.2001. The 1st Respondent while examining the Revision Petition filed by the Petitioner, in the order at Annexure-F, has observed as follows:

By approving the appointment of Smt. Gayathri as Accountant-cum-clerk with aid, the Directorate has committed mistake and created this problem. There was no provision for this post at all, according to the staffing pattern.

In the interest of equity and justice, I direct that, the Director, PUE may find similar post in some other grant-in-aid institution and accommodate both of them, after careful going through the facts determining as to who should remain in the original place and who should be accommodated in a new place.

It is clear from the record that, the Petitioner did not contribute for the mistake and it is the Directorate of PUE, which committed the mistake and created the problem. There was no misrepresentation of whatsoever nature made by the Petitioner in the matter of according of approval to the post, the pay fixation and the disbursal of pay and allowances attached to the post.

11. The excess payment has been made by the employer on account of acts attributable to 3rd Respondent, which was subsequently found to be erroneous and the order at Annexure-E was passed. Till the order at Annexure-E was passed, the Petitioner had no knowledge of erroneous approval of the appointment or any excess salary and allowances paid to her and that, she would be required to refund the same. The period between the order at Annexure-D and the order at Annexure-E is about 5 years, during which period, the salary received has been spent by the Petitioner for the upkeep of herself and her family, by believing that she was entitled to it. It is not the case of the Respondents that, the Petitioner had a dominant role to play in the matter of approval of her appointment and in receiving the salary. The payment made is not on account of any acts of misrepresentation or fraud attributable to the Petitioner. There is long passage of time of nearly a decade, after the order at Annexure-E was passed. The observations made by the 1st Respondent in the order at Annexure-F, extracted supra, makes it clear that the 3rd Respondent committed the mistake and created the problem. In the circumstances, the 3rd Respondent is not justified in ordering recovery of excess salary, which if allowed to remain, would cause undue hardship to the Petitioner.

In the result, the writ petition is allowed in part.

The prayer of the Petitioner to quash the orders at Annexures E, G & L being untenable, stands rejected.

However, the order of the 3rd Respondent dated 17.07.2002 as at Annexure-H, to the extent of effecting recovery of the excess pay from the monthly salary of the Petitioner and for its remittance to the Government, stands quashed.

No costs.