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W.P.No.8055 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.07.2023

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

W.P.No.8055 of 2015 and
MP.Nos.1 & 2 of 2015

B.Vallipavai

... Petitioner

Vs.

- 1.The State of Tamilnadu,
Rep. by its Secretary to Government,
Finance Department,
Fort St.George, Chennai-9
- 2.The Director of School Education,
College Road, Chennai-6
- 3.The Chief Education Officer,
Madurai District
- 4.The District Elementary Educational Officer,
Madurai District
- 5.The Secretary,
Arulmigu Andavar Subramaniaswamy
Girls Higher Secondary School,
Thirupparankundram,
Madurai District

... Respondents

PRAYER: Writ Petition is filed under Article 226 of Constitution of India praying to issue Writ of Certiorarified Mandamus calling for the entire records connected with impugned order of New Contributory Provident Fund Scheme in GO.Ms.No.259, Finance (Pension) Department dated 06.08.2003 and subsequent GO.Ms.No.304 dated



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27.05.2004 of the first respondent and quash the same insofar as the petitioner's concerned, as not applicable to the petitioner because it cannot be given retrospective operation and direct the respondents to continue the Teachers Provident Fund (Family Pension) Scheme and Account No.3394152.

For Petitioner : Mr.S.N.Ravichandran

For Respondents

For R1 to 4 : Mr.M.P.Murugan Raja,
Government Advocate

For R5 : Mr.P.Gopalan

ORDER

This writ petition has been filed challenging the order of the first respondent thereby converted employees from old pension scheme to contributory pension scheme.

2. The fifth respondent school, namely Arulmigu Subramaniaswamy Andavar Girls Higher Secondary School run by the temple through HR&CE Department. It is an aided institution and governed by the provisions of Tamilnadu Recognised Private School Regulations Act, 1973 and Rules, 1974. A vacancy was arose for the post



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of B.T.Teacher(Science) in the fifth respondent school on 09.11.2002 due to voluntary retirement of Tmt.Kanchana Mallika on 08.11.2002. Therefore, the fifth respondent sought permission to fill up the said post in the month of December 2002 on the recommendation of the fourth respondent dated 10.02.2003 to fill up the post of B.T.Assistant. On such permission, the fifth respondent had notified vacancy in the District Employment Exchange and requested a list of suitable candidates by letter dated 02.03.2003. The District Employment Exchange had furnished list of candidates to the fifth respondent school by letter dated 28.03.2003. Accordingly, the petitioner was directed to receive call letter from the fifth respondent for interview to be held on 10.04.2003.

2.1 The petitioner appeared for interview and on her merit and ability, the fifth respondent school selected her and appointed as B.T.Assistant by order dated 17.04.2003. She had joined in the service on the same day. Her appointment was approved by the fourth respondent by the proceedings dated 31.07.2004. But it was with effect from 17.04.2003. She has been enrolled for Teachers Provident Fund and



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she was given TPF No.339415. While being so, the fourth respondent by the proceedings had informed the petitioner that her appointment was made after 01.04.2003 and as such, as per the Government Order in GO(Ms).No.259 dated 06.08.2003, she had not been been eligible for TPF scheme and directed to get new number under the Contributory Pension Scheme for deductions. Therefore, the petitioner made representation requesting to continue her in the old pension scheme.

3. The learned counsel for the petitioner would submit that the new contributory pension scheme was notified only by GO.Ms.No.304 dated 27.05.2004. The scheme was implemented with effect from 01.04.2003. The petitioner comes within the operative date, but before the date of Government Order. Therefore, in GO.Ms.No.259, Finance (Pension) Department dated 06.08.2003, Tamilnadu Pension Rules, 1978 was amended, according to which, Tamilnadu Pension Rules shall not apply to the Government servants on or after 01.04.2003. Therefore, the amendment itself is unconstitutional because it has given retrospective operation. The Government Order itself was issued only on 06.08.2003,



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but it was given effect from 01.04.2003. Therefore, the amendment itself had taken away the vested right of pension which is earned and accrued right of the petitioner retrospectively which is impermissible in law.

4. The third respondent find counter and stated that as per GO.Ms.No.259, Finance (Pension) Department dated 06.08.2003, Tamilnadu Pension Rules, 1978 was amended to the effect that Tamilnadu Pension Rules shall not apply to the Government servants appointed on or after 01.04.2003. It is purely State Government policy in respect of its employees. This rule has been made applicable with effect from 01.04.2003. Admittedly the petitioner was appointed on 17.04.2003 and necessary proposals for admission into TPF scheme were submitted by the petitioner on 27.01.2005 through the fifth respondent at the time when the Government introduced a new scheme. However erroneously the proposals sent by the fifth respondent submitted by the Government Date Centre and the petitioner was allotted with TPF number. Therefore, taking advantage of the same, the petitioner cannot seek benefit under old pension scheme. The new pension scheme came into force with effect



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from 01.04.2003. Therefore, it is mandatory to the employees recruited on or after 01.04.2003 to join in the new scheme i.e. contributory pension scheme. The petitioner had applied only after introduction of new pension scheme and as such, she is not eligible for inclusion in the existing pension scheme.

5. Heard, the learned counsel appearing on either side.

6. Admittedly, the vacancy arose for post of B.T. Teacher due to voluntary retirement of earlier incumbent on 08.11.2002. The third respondent accorded permission to fill up B.T. Assistant post of the fifth respondent school by communication dated 10.02.2003. Accordingly, the fifth respondent had notified its vacancy to the District Employment Exchange by the letter dated 02.03.2003. After furnishing the list of candidates, the petitioner was called for interview by the letter dated 28.03.2003 for the interview to be held on 10.04.2003. Accordingly, the petitioner had appeared in that interview on 10.04.2003 and she was selected on the basis of the merit and ability to the post of B.T. Assistant.



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Accordingly, she was appointed and she had joined on 17.04.2003. In fact, the fourth respondent approved her appointment by the proceeding dated 31.07.2004 itself.

7. The learned counsel for the petitioner relied upon the judgment of the Hon'ble High Court of Uttarakhand at Nainital, wherein the Hon'ble Division Bench in Special Appeal No.330 of 2013 held that undisputedly, when petitioners applied for the post, old pension scheme was in existence, therefore, petitioners had every reasonable expectation that they would be governed by the service conditions prevailing on the date posts were advertised and recruitment process was commenced. The service conditions, prevailing on the date recruitment process commenced, cannot be permitted to be altered in disadvantage of the recruitees. The learned counsel for the petitioner also relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Union of India Vs. Tushar Ranjan Mohanty* reported in *1994 (5) SCC 450*, wherein it is held that Rules under Article 309 of Constitution of India cannot be made retrospectively so as to nullify the right vested in a



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person under a statute or under the Constitution. He also relied upon the judgment of this Court passed in batch of writ petitions in WP.Nos.8584, 8589, 8592, 8593 and 8595 of 2021 dated 10.02.2023 and this Court had relied upon the judgment of the Delhi High Court in WP(C) 8208 etc., of 2020 dated 15.01.2021, wherein it is held as follows:

8. The issue in the present batch of matters is no longer res integra. Consequently, the request for additional time to file counter-affidavit is declined.

9. In the case of certain constables of the BSF, this Court by its judgment dated 12th February, 2019 in Tanaka Ram (supra) allowed the prayer of those Petitioners and permitted them to avail of the benefit of the Old Pension Scheme. It was held that the option to continue the Old Pension Scheme should be extended to all those who had been selected in the examination conducted in 2003, but were issued call letters only in January or February, 2004. It is also pertinent to mention that the Respondents aggrieved by the said judgment filed an SLP bearing No. 25228/2019 before the Apex Court. The said SLP has been dismissed by the Supreme Court vide order dated 02nd September, 2019.

10. This Court in Shyam Kumar Choudhary and



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Ors. vs. Union of India being W.P.(C) No.1358 of 2017 allowed similar petitions vide judgment dated 09th April, 2019 against which the Respondents had again filed SLP bearing no. 31539/2019 which was again dismissed on 27 th September, 2019. The Respondents thereafter chose to file a review petition bearing no.2188/2020 before the Apex Court in the said matter and the said Review petition was also dismissed on merits vide order dated 24th November, 2020.

11. Following the judgment of Shyam Kumar Choudhary (supra), the learned predecessor Division Bench in Niraj Kumar Singh & Ors. vs. Union of India & Ors., W.P.(C) No.13129/2019 granted similar benefit to 17 petitioners who had applied to the post of Sub-Inspector in Central Police Organisations pursuant to an advertisement dated 21 st June, 2003 even when the written examination and physical efficiency test were held in November, 2003, medical examination was held in January~February, 2004 and final result was declared in May, 2004. The said 17 petitioners were issued offer of appointment on 02nd June, 2005 and on accepting the same, the appointment letter was issued on 14th July, 2005 for joining the Sashastra Seema Bal.

12. Another Coordinate Bench vide judgment dated



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06th November, 2020 in W.P.(C) No. 6548 of 2020 as well 6989/2020 was pleased to allow the said petitions for grant of Old Pension Scheme by following the judgment in Shyam Kumar Choudhary (supra).

13. Having regard to the fact that in the present batch of cases also the advertisement/notification was issued in September, 2003 and June, 2003 i.e. prior to coming into force of the present contributory pension scheme on 22nd December, 2003, this Court is of the view that petitioners cannot be deprived of the benefit of the Old Pension Scheme.

8. This Court also relied upon the judgment of the Hon'ble Supreme Court of India in the case of ***P.Ranjitharaj Vs. State of Tamilnadu and others*** reported in ***(2022) SCC online SC 508***, wherein it is held as follows:

12. In the given circumstances, when those who are lower in order of merit to the appellants were appointed by an order dated 24th September, 2002, the appellants have no right of say in the matter of appointment and no justification has been tendered by the State respondent as to why their names were withheld for two/three years, when their names were cleared by the Commission on 3rd September, 2002



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and sent to the State Government and finally appointments were made of the appellants on 23rd August, 2005 and 23rd April, 2004 respectively and the delay indeed in making appointments in the case of the present appellants in no manner could be attributable to them.

13. In the given circumstances, when all other candidates who had participated along with the appellants pursuant to advertisement dated 9th November, 2001, on the recommendations made by the Commission were appointed on 24th September, 2002 including those who are lower in the order of merit, there appears no reason for withholding the names of the present appellants and merely because they were appointed at a later point of time, would not deprive them from claiming to become a member of Tamil Nadu Pension Rules, 1978, which is applicable to the employees who were appointed on or before 1st April, 2003.

9. In both the judgments, given indication as to how the issue involved in the present writ petition should be dealt with. The contributory pension scheme was brought into force from 01.01.2004, whereas vacancy arose for the post of B.T.Assistant as early as on



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09.11.2002 itself. After obtaining permission from the third respondent to fill up the vacancy, the fifth respondent requested the District Employment Exchange for list of suitable candidates by letter dated 02.03.2003 itself. After furnishing of the list of candidates, the petitioner was called for interview to be held on 10.04.2003. Therefore, the option to continue the old pension scheme must be extended to all those persons who were participated in the selection prior to the crucial date, but however got appointment letter after crucial date. Though GO.No.259 dated 06.08.2003 with effect from 01.04.2003 and the old pension scheme will not apply to the Government service who are appointed on or after 01.04.2003.

10. The process of appointment was started from the date of vacancy and ended with the issuance of appointment orders. GO.Ms.No.259 (Finance) Pension dated 06.08.2003, which brought in a New Pension Scheme with retrospective operation. Because of the retrospective operation of the New Pension Scheme, no employer and employee would have forethought that appointments made after



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01.04.2003 would not be eligible for the Old Pension Scheme. In fact the petitioner had been enrolled for Teacher Provident Fund and she was given TPF No.339415. Therefore, her request was accepted and she had been enrolled under the old pension scheme.

11. That apart, the learned counsel for the petitioner produced office memorandum issued by the Government of India on 03.03.2023, considering the representation submitted from Government servants appointed on or after 01.10.2004 requesting for extending the benefit of the pension scheme under Central Civil Services (Pension) Rules 1972 (now 2021) on the ground that their appointment was made against the post / vacancies advertised/notified for recruitment prior to notification for National Pension System referring to court judgments on various Hon'ble High Courts and Hon'ble Central Administrative Tribunals decided that in all cases where the Central Government civil employee has been appointed against a post or vacancy which was advertised / notified for recruitment / appointment prior to the date of notification for national pension scheme i.e. 22.12.2003 and is covered under the



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National Pension System on joining service on or after 01.01.2004, may be given a one-time option to be covered under the CCS (Pension) Rules, 1972 (now 2021). The said option may be exercised by the Government servants latest by 31.08.2023. In fact the Government of India also called for list of pending cases of employees seeking conversion from contributory pension scheme to old pension scheme by the letter dated 19.02.2023, in which following details were called for:

(i) The details of employees in your department in Secretariat and under your control viz., Heads of Department, Public Sector Undertakings, Statutory Boards and Government Societies for whom orders have been issued for conversion from Contributory Pension Scheme to Old Pension Scheme with authority (G.O.No. and Date along with a copy along with case history from 2003 to till date.

(ii) The details of employees seeking Old Pension Scheme from Contributory Pension Scheme either under the ambit of Government Orders / Clarifications / Court Orders and pending court cases / pending cases with specific case history may be forwarded for consolidation and taking a final decision in the matter after due examination.



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12. Therefore, the retrospective amendment / change affecting the vested or accrued rights of employees, adversely affecting their pension, was declared to be invalid as held by the Hon'ble Supreme Court of India in the case of *Chairman, Railway Board and Ors Vs. C.R.Rangadhamaiah and Ors.* reported in *1997 (6) SCC 623*.

13. In view of the above, this Court is of the considered opinion that the petitioner cannot be deprived of the benefit of old pension scheme. Therefore, the impugned orders are not applicable to the petitioner. The first and second respondents are directed to continue the petitioner under the Teacher's Provident Fund (Family Pension Scheme) in TPF.No.339415. Accordingly, this writ petition stands allowed. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

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Internet: Yes
Index: Yes/No
Speaking/Non-speaking order
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G.K.ILANTHIRAIYAN, J.

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To

1. Secretary to Government,
The State of Tamilnadu,
Finance Department,
Fort St.George, Chennai-9
2. The Director of School Education,
College Road, Chennai-6
3. The Chief Education Officer,
Madurai District
4. The District Elementary Educational Officer,
Madurai District
5. The Secretary,
Arulmigu Andavar Subramaniaswamy
Girls Higher Secondary School,
Thirupparankundram,
Madurai District
6. The Public Prosecutor,
High Court, Madras.

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