
(2013) 06 KL CK 0006

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 23907 of 2009 and 27579, 28714 of 2012

Ann Supriya Johny

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 13-06-2013

Acts Referred:

Citation : (2013) 4 KHC 525

Hon'ble Judges : C.K. Abdul Rehim, J

Bench : Single Bench

Advocate : Benoy Thomas, for the Appellant; Shyson P. Manguzha, Government Pleader, Paulson Thomas, for the Respondent

Judgement

C.K. Abdul Rehim, J.—Common question involved in all these 3 cases is that, whether an appointment approved on the basis of staff fixation for the previous year can be cancelled after a long lapse of time based on subsequent fixation issued relying on a Government Order, which was not published. The petitioners in WP(C) Nos. 23907/2009 and 27579/2012 are Higher Secondary School Teacher (Jr.) in Mathematics and the petitioner in WP(C) No. 28714/2012 is H.S.S.T. (Jr.) in Physics. All of them were appointed under the respective managements with effect from 30/06/2003. Their appointments were approved by the Director of Higher Secondary Education. The appointments were approved from the Academic year 2002-03 onwards, on the basis of staff fixation orders finalised with respect to the years 2000-01, 2001-02. Dispute arose when staff fixation orders were issued with respect to subsequent years, after a long lapse of time, in the year 2012. Rule 1(d) and Rule 1(e) of Chapter XXXII of KER prescribes that work load of H.S.S.T. shall be 15 or more periods per week and workload of H.S.S.T. (Jr.) shall be less than 15 periods per week. By virtue of GO (MS) No. 18/91/G.Edn. dated 01/02/1991 the maximum workload of the teachers in the Higher Secondary School was fixed, which in case of H.S.S.T. (Jr.) is below 15 and in the case of H.S.S.T. is below 26. In the year 2002 the Government issued a further order, GO (MS) No. 398/2002/G.Edn., dated

29/11/2002 (Ext. P6 in WP(C) No. 23907/2009) prescribing norms with respect to sanctioning of post of H.S.S.T. (Jr.) stipulating the minimum periods required for sanctioning of posts. It prescribed that minimum number of excess period per week required for appointment of H.S.S.T. (Jr.) in the concerned subject shall be 3 when there is one H.S.S.T. available and it shall be 6 and 9 respectively when 2 post of H.S.S.T. and more than 2 post of H.S.S.T. are available. On the basis of the above said Government Order, the Director of Higher Secondary Education issued a Circular on 01/11/2003 directing that no appointments can be made by any Manager/Principal against availability of any excess periods within the prescribed minimum under the said Government Order. When the staff fixation was effected with respect to Academic year 2002-03 onwards, by virtue of orders issued after a long lapse of time, the Regional Deputy Directors concerned had fixed strength following stipulations contained in the Government Order and on the basis of the above said Circular issued by the Director. Consequently, there occurred reduction in the number of posts of H.S.S.T. (Jr.) in the Schools concerned where the petitioners are working. The petitioners in WP(C) No. 23907/2009 has challenged the staff fixation order with respect to the subsequent years (Ext. P5) before the Government. Ext. P8 is the order passed by the Government repelling such challenge. Government upheld, orders issued by the Regional Deputy Director abolishing the excess posts of H.S.S.T. (Junior) on the basis of Ext. P6 stipulations insisting on availability of minimum required number of periods. It was observed that, the appointments were subject to further review, and the approval will not confer any right to the post. According to the Government, the approval was issued only based on a declaration furnished by the Manager that he had acted as per rules. The approval was subject to condition that the Manager will be responsible for any irregularities noticed in future. Therefore, it is held that the Manager cannot escape from responsibility of making appointment of excess teachers. It is challenging Ext. P8 order of the Government, WP(C) No. 23907/2009 is filed. Inter alia, the petitioners are also challenging validity of Ext. P6 Government Order. Contention of the petitioners is mainly on the ground that Ext. P6 Government Order cannot be made applicable to the appointments made before such order is made known and circulated to all concern. The petitioners relied on a subsequent Government Order, GO (Rt) No. 2358/2009/G.Edn., dated 12/06/2009 (Ext. P10 in WP(C) No. 23907/2009). In the said order it is clarified that, in cases where appointments were made prior to Ext. P6 Government Order, against sanctioned posts which are already approved, termination of service is not proper. In such case, the Government is directed to treat those posts of H.S.S.T. (Junior) as supernumerary posts and the incumbents were allowed to continue.

2. Learned counsel for the petitioners contended that since the Government took a stand that Ext. P6 cannot be made applicable with respect to appointments made earlier, the same yardstick is to be adopted in similar situation. It is contended that even though Ext. P6 order was issued on 29/11/2002 it was not published in the Government Gazette, nor it was circulated among the authorities

concerned. It was only through Ext. P11 dated 01/11/2003 that instructions were issued to the authorities concerned to comply with stipulations contained in Ext. P6. Therefore, it has to be presumed that Ext. P6 order was implemented only with effect from 01/11/2003. Since the petitioners were appointed with effect from 30/06/2003 and since their appointments were approved, abolition of the post on the basis of Ext. P6 cannot be sustained, is the contention.

3. It is argued that Ext. P6 is an order issued by the Government, which is having the effect of amending Rule 1(d) and (e) of Chapter XXXII of Kerala Education Rules. Being an order in the realm of subordinate legislation, it will become operative only when it is duly published. Learned counsel had placed reliance on a decision of the Hon'ble Supreme Court in B.K. Srinivasan and Others Vs. State of Karnataka and Others, It is held that unlike parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitaries. It is therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent Statute or not. It will then take effect from the date of such publication or promulgation. Where the parent Statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent Statute is silent about publication or promulgation and if the subordinate legislation also does not prescribe the mode of publication, it will take effect only when it is published through customarily recognised official channel namely, the Official Gazette or some other reasonable mode of publication.

4. In another decision of the Hon'ble Apex Court in D.B. Raju Vs. H.J. Kantharaj and Others, it is held that the vital difference between an Act of a Legislature and a subordinate legislation is that the Act of the Legislature is passed by the accredited representatives of the people who in theory can be construed to see that their constituents know what has been done, and this is done only after debates taking place which are open to the public. The matter receives wide publicity through the media. But the case is different with delegated legislation and orders issued by the authorities. The mode of publication can vary but there must be reasonable publication of some sort.

5. Relying on the dictum, contention is that, since Ext. P6 was not published through any known methods and since it was not made known to the Managers or Educational Authorities concerned, it cannot be legally presumed that the stipulations therein were introduced with effect from the date of such order. In the case at hand, Ext. P6 was made known to the persons concerned only through Ext. P11 Circular issued on 01/11/2003. Therefore, appointments made which were approved with effect from 30/06/2003 cannot be nullified and the post against which the said appointments were made cannot be abolished with retrospective effect. In order to verify veracity of the factual situation as alleged, this Court directed the learned Government Pleader to ascertain as to whether

Ext. P6 was published through any methods prior to issuance of Ext. P11 Circular. In the instructions received from the Government it is mentioned that even though copy of Ext. P6 order was forwarded to the Director of Higher Secondary Education for further action by circulation with appropriate direction to all concern, the Director had published and circulated the said order to the Managers and Principals of Higher Secondary Schools only as per Ext. P11 Circular. In view of such a stand taken by the Government, I am inclined to uphold that the stipulations contained in Ext. P6 will become operative only with effect from the date of Ext. P11, i.e. from 01/11/2003. Therefore, the impugned order passed by the Government (Ext. P8) upholding abolition of the post of H.S.S.T. (Junior) with retrospectivity, from 30/06/2003 onwards, cannot be sustained. As such the appointment and approval of the petitioner in WP(C) No. 23907/2009 is to be held as valid. As it is evident from Ext. P10 Government Order that under similar circumstances the Government have upheld such appointments and ordered that teachers appointed shall be permitted to continue by creating supernumerary post. I am of the considered opinion that the petitioners in these cases are also entitled for a similar treatment.

6. The factual situation in WP(C) No. 27579/2012 is exactly identical to that of WP(C) No. 23907/2009. Ext. P4 is the staff fixation order issued with respect to the academic years 2002-03 onwards. By virtue of the said order the post of H.S.S.T. (Junior) in Mathematics was abolished. Consequently, the Regional Deputy Director had issued Ext. P7 letter to the principal concerned to re-submit salary bill for the month of September 2012, excluding the post of the petitioners, which was found in excess. Considering the view taken as above, action initiated for abolition of the post with retrospective effect cannot be sustained. An identical treatment in the matter of retaining the petitioners has to be adopted as directed above.

7. In WP(C) No. 28714/2012 the petitioner was appointed as H.S.S.T. (Junior) in Physics in the 4th respondent School, TD Higher Secondary School, Thuravoor. Her appointment was approved with effect from 30/06/2003. The 5th respondent in the said case is the H.S.S.T. (Junior) in Physics appointed at TD Higher Secondary School, Alappuzha, under the same management. Her appointment was also approved with effect from the very same date. Subsequently, the petitioner as well as the 5th respondent were mutually transferred with effect from 30/06/2006. By virtue of staff fixation made with respect to the years 2002-03 onwards, by applying the stipulations contained in the Government Order, post of H.S.S.T. (Junior) (Physics) at Thuravoor School was found excess and abolished on 29/11/2002 (Ext P6). Consequently, the Principal of the 4th respondent School had initiated steps directing the Principal of the Alappuzha School to recover the salary drawn by the petitioner till her date of transfer from the Thuravoor School. So also it is revealed that the steps were initiated to withhold the payment of salary to the 5th respondent, who was transferred to the Thuravoor School on the basis of abolition of the post. The 5th respondent has raised a contention in this writ petition that even assuming that the

Government Order dated 26/11/2002 is made applicable, the staff fixation issued as per Ext. P4 is not correct and in order. It is contended that one among the three H.S.S.Ts. working at the Thuravoor School in the subject of Physics, is the Principal of the said School. Going by the Government Order, GO (MS) No. 338/2003/G.Edn. dated 16/12/2003 it is prescribed that the Higher Secondary School Teachers concerned on placement as Principal will continue to perform his duty as H.S.S.T. in the concerned subject but with a reduction of four periods per week. The total periods available in the subject concerned as evident from Ext. P4 is 18. While applying the stipulations contained in Ext. P6 and the stipulations of the Government Order dated 16/12/2003, the maximum period allotted for three H.S.S.Ts. will be only 71 (25 + 25 + 21). Therefore, there was availability of nine excess periods per week enabling the creation of one post of H.S.S.T. (Junior). Hence it is contended that abolition of the post is not sustainable. A further, contention raised is to the effect that even assuming that abolition of the post of H.S.S.T. (Junior) is to be effected, the same can be applied only with respect to H.S.S.T. (Junior) appointed at Thuravoor School, who is the petitioner in the said writ petition. Therefore, withholding of the salary of the 5th respondent cannot be sustained, is the contention. However, in view of the findings as above, I am of the opinion that this Court need not adjudicate upon the controversy and it is not necessary to arrive at a conclusion on all these aspects. Under the above mentioned circumstances, these writ petitions are allowed. It is declared that the appointment of the petitioners as well as the 5th respondent in WP(C) No. 28714/2012, which were approved with effect from 30/06/2003 is declared as valid. The respondents are directed to treat the petitioners as well as the 5th respondent in WP(C) No. 28714/2012 as H.S.S.T. (Junior) validly appointed and they should be treated as continuing in the post against which appointments are made. The salary if any withheld on the basis of the staff fixation made with respect to the years 2002-03 shall be disbursed without any further delay.