
(2023) 02 KL CK 0102

In the High Court Of Kerala

Case No : Writ Appeal Nos.1766, 1872 Of 2022 & 49 Of 2023

Deputy Director Of Collegiate Education

APPELLANT

Vs

Santhosh.T

RESPONDENT

Date of Decision : 09-02-2023

Acts Referred:

Citation : (2023) 02 KL CK 0102

Hon'ble Judges : P.B.Suresh Kumar, J;Sophy Thomas, J

Bench : Division Bench

Advocate : A.J.Varghese, S.Muhammed Haneeff, K.T.Shyamkumar, P.Gopal

Final Decision : Dismissed

Judgement

P.B.Suresh Kumar, J.

1. These appeals are instituted challenging the common judgment in three writ petitions namely, W.P.(C) Nos.1459 of 2021, 8766 of 2017 and 8767 of 2017. The matter relates to the approval of the appointment of the petitioners in the writ petitions as Laboratory Assistants in the service of Sree Vyasa NSS College, Vadakkancherry, an aided college affiliated to the Calicut University and covered by the Direct Payment Scheme of the State Government. As the writ petitions were disposed of by a common judgment, the appeals are also disposed of by this common judgment. Parties and documents are referred to in this judgment, unless otherwise mentioned, as they appear in W.P.(C) No.1459 of 2021.

2. As per the staff pattern fixed by the Directorate of Collegiate Education for the College, there are 11 posts of Laboratory Assistants. In terms of Statute 66 of the Calicut University (Conditions of Service of the Teachers and Members of Non-Teaching Staff) First Statutes, 1979 (the Statutes), vacancies in the higher grades in private colleges are to be filled up by promotion from the next lower categories, if qualified persons are available and if not, by direct recruitment, by inviting applications and conducting a selection as prescribed in the Statutes. As qualified hands were not available in the service of the College in the categories

next lower to the grade of Laboratory Assistant, the College resorted to the process of direct recruitment for filling up the vacancies in the post of Laboratory Assistant. Ext.P5 is the notification issued by the College in this regard. Thereupon, a Selection Committee was constituted. Based on the recommendations of the Selection Committee, a selection was conducted and the management appointed the petitioners in the writ petitions as Laboratory Assistants in the College between 09.09.2013 and 07.07.2014.

3. The appointments of the petitioners were however not approved by the competent authority on the ground that candidates seeking appointment to the post of Laboratory Assistant shall have to clear Attenders Test conducted by the Kerala Public Service Commission in terms of Statute 41(12) of the Statutes. The Attenders Test being one conducted by the Kerala Public Service Commission only for in-service Office Attendants of private colleges, the petitioners took up the matter with the Government for appropriate orders to absolve them from clearing the Attenders Test. On the said representation of the petitioners, the Government directed the Director of Collegiate Education to ascertain whether the Management has any objection in downgrading the posts of Laboratory Assistants in which the petitioners were appointed to Office Attendants for a period of one year so as to accommodate them in the said post until they complete their period of probation and then promote them to the post of Laboratory Assistant. The Management agreed to the said course and consequently, after receiving a proposal from the Management for the said purpose, the Government permitted to accommodate the petitioners in the College as Office Attendants for a period of one year and then as Laboratory Assistants. Ext.P10 is the communication sent by the Government in this regard to the Director of Collegiate Education. Consequent upon the said arrangement, the appointment of the petitioners were approved initially for a period of one year as Office Attendants and then as Laboratory Assistants. Even though the petitioners were appointed during 2013 and 2014, the process aforesaid was completed only in the month of February and March, 2016 and they have been receiving salary for the period from their respective dates of appointments only from February and March, 2016.

4. As per the existing rules, Laboratory Assistants need not have to work during vacations as opposed to Office Attendants. It appears that a doubt arose later as to whether the petitioners who have not worked during vacations are entitled to salary for vacation periods during the first year of their service as they were appointed during the said period only as Office Attendants. Ext.P6 in W.P.(C) No.8766 of 2017 is the clarification sought in this regard by the concerned Deputy Director of Collegiate Education from the Director of Collegiate Education. Ext.P7 in the said writ petition is the reply to Ext.P6 notice. In terms of Ext.P7 communication, it was directed that since the petitioners have not worked during vacation, they are to be treated as non-vacation staff, indicating that they are not entitled to vacation salary for the said period. W.P.(C) Nos.8766 of 2017 and 8767 of 2017 were instituted challenging the said decision of the Director of

Collegiate Education. The petitioners therein have also sought in the said writ petitions a declaration that inasmuch as they are appointed as Laboratory Assistants, they are entitled to all service benefits attached to the said post. W.P. (C) No.1459 of 2021 was one instituted almost three years after the institution of W.P.(C) Nos.8766 of 2017 and 8767 of 2017 challenging Ext.P10 decision of the Government and for a direction to the respondents to approve the appointment of the petitioner therein as Laboratory Assistant with effect from the date of his original appointment and to regularise his pay and allowances accordingly.

5. The stand taken by the State and the official respondents in the counter affidavits filed in W.P.(C) Nos.8766 of 2017 and 8767 of 2017 is that inasmuch as the petitioners have been appointed in the first one year as Office Attendants and they have not worked during vacations, they are not entitled to vacation salary during the period in which their appointments were approved only as Office Attendants. The stand taken by State and the official respondents in the counter affidavit filed in W.P.(C) No.1459 of 2021 is that inasmuch as the petitioner therein was not qualified to be considered for appointment as Laboratory Assistant, he is not entitled to get his appointment approved as Laboratory Assistant with effect from the date of his initial appointment.

6. The learned Single Judge took the view that insofar as Statute 66 enables appointment by direct recruitment to the post of Laboratory Assistant, the requirement in Statute 41(12) dealing with the qualification prescribed for appointment to the said post ought to have been harmoniously read along with Statute 66 and a method found so as to allow the directly recruited Laboratory Assistants to obtain the qualifications in due course. Consequently, the learned Single Judge allowed the writ petitions, quashed Exts.P10 communication of the State Government and directed that the petitioners shall be disbursed all consequential monetary benefits as if they were never downgraded, subject, however, to the condition that they will clear the Attenders Test within the chance permissible in terms of Statute 41(12). The State and its officials and the Director of Collegiate Education are aggrieved by the said decision of the learned Single Judge and hence, these appeals.

7. Heard the learned Government Pleader, the learned counsel for the Management as also the learned counsel for the petitioners in the writ petitions.

8. The learned Government Pleader persuasively argued that inasmuch as the petitioners have not cleared the Attenders Test, they were not qualified to be considered for appointment to the post of Laboratory Assistant in terms of Statute 41(12) and the course adopted by the Government for approving their appointments cannot, therefore, be treated as illegal in any manner. According to the learned Government Pleader, the learned Single Judge, in the circumstances, ought not have directed the State to treat the appointments of the petitioners as valid and disburse them salary and other emoluments accordingly. Alternatively, it was also argued by the learned Government Pleader that at any rate, inasmuch as the petitioners have accepted their appointment as Office Attendants and

received pay and emoluments accordingly for a period of one year, they cannot be heard to contend anymore that downgrading of the posts in which they were appointed for a period of one year is bad in law, as the law does not permit a person to both approbate and reprobate. The learned Government Pleader relied on the judgments of the Apex court in *R.N.Gosain v. Yashpal Dhir*, (1992) 4 SCC 683, *Punjab & Sind Bank v. S. Ranveer Singh Bawa*, (2004) 4 SCC 484 and *Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation*, (2011) 5 SCC 435, in support of the said propositions.

9. Per contra, the learned counsel for the Management of the College and the learned counsel for the petitioners supported the decision of the learned Single Judge contending that the requirement to have the Attenders Test cleared in terms of Statute 41(12) for direct recruitment to the post of Laboratory Assistant is a requirement which is impossible of compliance inasmuch as the Public Service Commission is not conducting the said test for candidates aspiring appointment to the post of Laboratory Assistant by direct recruitment. According to them, it is on account of the said reason that the learned Single Judge has interpreted the statutory provision aforesaid in the manner indicated in the impugned judgment and the same cannot be said to be illegal in any manner. They have also brought to the notice of this Court the proviso to Statute 41(12) which permits the last grade staff in regular permanent service of private colleges to be appointed by promotion without clearing the Attenders Test subject to the condition that they should clear Attenders Test in one of the five consecutive Attenders Test conducted by the Kerala Public Service Commission for the last grade staff of private colleges, to contend that if appointment by promotion is permissible without clearing Attenders Test, there is no reason why the appointment by direct recruitment cannot be permitted without clearing Attenders Test, especially when it is impossible for a candidate aspiring appointment by direct recruitment to clear the Attenders Test. It was pointed out by the learned counsel for the petitioners that in light of the interpretation given to the provision by the learned Single Judge, the petitioners are entitled to the reliefs granted to them in the writ petitions and there is no reason for this court to interfere in the said decision of the learned Single Judge.

10. We have examined the arguments advanced the learned counsel for the parties on either side.

11. There is no dispute to the fact that in terms of Statute 66, appointment to the post of Laboratory Assistant in private colleges by direct recruitment is permissible if qualified hands are not available for promotion in the next lower categories. The fact that the petitioners do possess all the qualifications required to be considered for appointment to the post of Laboratory Assistant by direct recruitment except the clearance of Attenders Test is not in dispute. The fact that it is impossible for a candidate aspiring appointment to the post of Laboratory Assistant in private colleges by direct recruitment to clear Attenders Test is also not in dispute. Similarly, there is also no dispute to the fact that the proviso to

Statute 41(12) permits the last grade staff in regular permanent service of private colleges to be appointed by promotion without clearing the Attenders Test subject to the condition that they should clear the test in one of the five consecutive Attenders Tests conducted by the Kerala Public Service Commission for the last grade staff of private colleges. It is in the said circumstances, the Government has evolved a via media to downgrade the post of Laboratory Assistants in which the petitioners were appointed as Office Attendants for a period of one year so that the petitioners could be promoted after one year to the post of Laboratory Assistants without clearing Attenders Test by extending to them the benefit of the proviso to Statute 41(12). It is seen that it is having regard to the fact that it is impossible for a candidate aspiring appointment to the post of Laboratory Assistant in private colleges by direct recruitment to clear Attenders Test and the fact that the proviso to Statute 41(12) permits the last grade staff in regular permanent service of private colleges to be appointed by promotion without clearing the Attenders Test, subject to the condition that they should clear the test in one of the five consecutive Attenders Tests conducted by the Kerala Public Service Commission, the learned Single Judge took the view that Statute 41(12) requires to be interpreted harmoniously with Statute 66 and the only conclusion that could be arrived at by giving such an interpretation is to hold that the appointment can be made without insisting clearance of Attenders Test and the appointees need to clear the Attenders Test only as permitted in the proviso to Statute 41(12). It is fundamental that the law does not compel an impossible act. Inasmuch as the requirement in Statute 41(12) to clear Attenders Test for appointment to the post of Laboratory Assistants by direct recruitment is an impossible one, we are unable to find fault with the learned Single Judge for having interpreted the provision in the manner indicated in the judgment, or otherwise, the statute will not be workable [See *Sanjay Ramdas Patil v. Sanjay*, (2021) 10 SCC 306]. In other words, we are inclined to agree with the view taken by the learned Single Judge that the appointment of the petitioners as Laboratory Assistants are in order. The argument advanced by the learned Government Pleader that the petitioners were not qualified to be considered for appointment as Laboratory Assistants, in the circumstances, is liable to be rejected.

12. The materials on record would indicate that in furtherance to a communication sent by the Government on 21.10.2014 (Annexure A4 in the appeals), the Management of the College submitted a proposal (Annexure A5 in the appeals) for downgrading the posts of Laboratory Assistants in which the petitioners were appointed, for a period of one year and it is by accepting the said proposal that the Government issued Ext.P10 order. The materials also indicate that pursuant to Ext.P10 order, the petitioners have been appointed as Office Attendants by the Management on 23.06.2015 with effect from their respective dates of original appointments and they were promoted later as Laboratory Assistants after a period of one year, after declaring their probation in the post of Office Attendants. No doubt, it is a case where the petitioners have

accepted the course adopted by the Management and the Directorate of Collegiate Education and received pay and emoluments accordingly. It is thereafter that they have approached this court for a declaration that their original appointments were in order, and for consequential benefits. The question is whether in a situation of this nature, the petitioners can be said to be approbating and reprobating.

13. It is well settled that the law does not permit a person to approbate and reprobate. In other words, a person who maintained the stand that a transaction is valid for obtaining a benefit, cannot maintain the stand that the transaction is void, for obtaining another benefit. This rule is one evolved and applied to do equity. As far as the case on hand is concerned, in light of the interpretation given by the learned Single Judge to Statute 41(12) as accepted by this Court, the petitioners were entitled to get their appointments approved with effect from their initial dates of appointments. As it is inequitable to deny the petitioners the benefits which they are legitimately entitled to, merely for the reason that they have received the pay and emoluments based on the decision of the Government, the aim of equity being not to frustrate legitimate rights, according to us, the principle aforesaid cannot be applied to the facts of this case. The argument advanced by the learned Government Pleader in this regard is also therefore, liable to be rejected and we do so.

In the circumstances, the appeals are devoid of merits and are accordingly, dismissed.