
(2009) 04 KL CK 0038

In the High Court Of Kerala

Case No : Writ Petition (C) No. 25176 of 2008

K. Unni Narayanan, Manager and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 06-04-2009

Acts Referred:

Kerala Education Act, 1958 — Section 9(1), 9(2)
Kerala Education Rules, 1959 — Rule 1, 7A, 7A(3)

Citation : (2009) 2 ILR (Ker) 487 : (2009) 2 KLT 604

Hon'ble Judges : M.L. Joseph Francis, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : K. Ramakumar, for the Appellant; Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

K. Balakrishnan Nair, J.—In these writ petitions, the petitioners challenge G.O.(P) No. 104/08/G.Edn. dated 10.6.2008, to the extent it directs that if the term of appointment of an incumbent does not extend to one academic year, even if the duration of the vacancy, in which, he/she is appointed, is one academic year or more, his/her appointment shall be approved only on daily wage basis. According to the writ petitioners, the above direction contained in the aforementioned Government Order runs counter to the statutory rules in the Kerala Education Rules (for short the K.E.R.).

2. This case is treated as the main case for referring to the exhibits. In the 4th respondent's Higher Secondary School, a vacancy in the cadre of High School Assistant (H.S.A.) (English) arose, as a result of grant of leave to one Shri. Shinoj T. Elias, H.S.A. (English) from 8.7.2008 to 7.7.2013. The writ petitioner, Ms. Sneha Cherian, was appointed in that vacancy on 6.10.2008 and the period of her appointment will expire only on 7.7.2013. The Manager forwarded the said appointment order for approval to the District Educational Officer (D.E.O.). But, the D.E.O. approved the said appointment from 6.10.2008 to 31.3.2009 only on

daily wage basis. The D.E.O. further stated that the approval was made, relying on Ext.P2, G.O.(P) No. 104/2008/G.Edn dated 10.6.2008. The petitioner submits that the vacancy has a duration of five years and therefore, her appointment should have been approved without any time limit, and that too in the time scale of pay applicable to H.S.As. In support of that submission, reliance is placed on Rule 7A of Chapter XIV A of the K.E.R.

The offending clauses in Ext.P2 Government order are clauses 5(i) and (ii). The said clauses read as follows:

(i) If the period of appointments does not cover one academic year (i.e. from the re-opening day of the school after summer vacation to the closing day for summer vacation), the appointment shall be made only on daily wages.

(ii) If the period of appointment commences after the beginning of the re-opening day but extends over the next academic year/years, the period up to the first vacation shall be approved on daily wages only. Re- appointment can be approved on regular basis, only if the duration of the period of re-appointment completes one academic year. If the period of re-appointment is also less than one academic year, that re-appointment will also be considered only on daily wages basis. In short, fractions of an academic year will not be considered for approval on regular basis.

3. In the case of the petitioner, Clause 5(ii) has been made applicable. In the case of other writ petitioners, Clause 5(i) was made applicable. The petitioner submits that the above clauses cannot stand with Rule 7A of Chapter XIVA of the K.E.R. and therefore, are ultra vires and unenforceable. The petitioner also points out that Ext.P2 Government order mentions about the proposal to amend the Rules in accordance with the terms contained therein. It means, the Government themselves admit that the conditions in Ext.P2 cannot be implemented without amending the rule. So, the reliance placed by the D.E.O. on Ext.P2, before the rules are amended, is unsustainable, it is submitted.

4. The Government did not file any counter affidavit in this case. But, we notice that in the connected cases, the Government have filed counter affidavits. The Government supported the impugned order relying on the contentions raised in those counter affidavits.

5. We heard Smt. Mary Benjamin, learned Counsel for the petitioner as also M/s. K. Ramakumar (Sr.), Kurian George Kannanthanam (Sr.), N.Sugathan, V.A. Muhammed, P.J. Mathew, P.N. Mohanan, Elvin Peter P.J., U. Balagangadharan, C.P. Peethambaran, and Jiji Thomas on behalf of the petitioners in the connected Writ Petitions. We also heard Shri. Benny Gervacis, learned Senior Government Pleader and Smt. R. Bindu, learned Government Pleader for the official respondents.

6. The learned Counsel for the petitioner and the learned Counsel appearing in the connected cases reiterated the aforementioned contentions, which we have

already noticed. Their main contention is that the terms of Ext.P2 Government Order run counter to the statutory rules, including Rule 7A of Chapter XIVA of the K.E.R. The learned Government Pleaders, relying on Sub-sections (1) and (2) of Section 9 of the Kerala Education Act and also Rule 1 of Chapter XIVA of K.E.R., submitted that the Managers are bound by the directions issued by the Government from time to time. So, Ext.P2 being one of the orders issued by the Government, the Managers are bound to follow the same.

7. In certain circumstances, the Government may be able to issue executive instructions, but they have no efficacy to override the statutory provisions. We agree with the contentions of the writ petitioners that the offending conditions in Ext.P2 Government Order cannot stand with the statutory rules. Therefore, for enforcing them, the relevant rules require amendment. As long as the rules are not amended, Ext.P2 cannot be pressed into service by the Government. In this context, we notice Rule 7A of Chapter XIV A of the K.E.R., which reads as follows:

7A (1) xxx xx

(2) Posts that may fall vacant on the closing date shall not be filled up till the reopening date except in the case of posts of non-vacation staff.

(3) Vacancies, the duration of which is less than one academic year, shall not be filled up.

8. We notice that Sub-rule (3) of Rule 7A speaks of vacancies, the duration of which is less than one academic year. In other words, if the vacancy is having a duration of one academic year or more, appointment can be made to fill up the same. The term of appointment need not be co-terminous with the term of the vacancy. If, in fact, the vacancy is having a duration of one academic year or more, even if, there is some delay in making the appointment, such appointment will have to be approved. The reason is that Rule 7A speaks of duration of vacancy and not duration of appointment. So, we are of the view that if appointments are made to vacancies, having duration of one academic year or more, they are liable to be approved.

9. In this writ petition and connected writ petitions, we notice that the vacancies available arose as a result of retirement or long term leave, which extended to more than one academic year. Therefore, the delay, if any, in making the appointments in these cases, is not of any consequence. If the duration of the vacancy is only one academic year and there is considerable delay in making the appointment, in such cases, what should be done is kept open. In the cases before us, there is no such contingency. In the present writ petition, though the vacancy arose in June, the appointment was made in October. The vacancy has got a duration of five years and therefore, the delay is negligible. So, there is no reason for not approving it in the time scale of pay, from the date of appointment.

10. As noticed earlier, in the case of leave vacancies involved in the connected cases, their duration is more than one year. So, the initial delay is only negligible.

In the result, we uphold the contention raised by the writ petitioners that Ext.P2 cannot be pressed into service, without amending the Rules. The contention of the Government to the contrary is devoid of any merit.

11. In the result, the writ petition is allowed. The approval of Ext.P1 appointment order made on daily wage basis and upto 31.3.2009 is quashed. The petitioner's appointment shall be approved in the time scale of pay from 6.10.2008 to 7.7.2013 and she shall be retained in service as H.S.A. till the vacancy is available. The order of approval shall be passed and arrears of salary shall be released to her, by the D.E.O. within six weeks from the date of production of a copy of this judgment.

12. In the case of the writ petitioners in these cases, orders, if any passed, approving their appointments on daily wage basis, relying on Ext.P2 Government Order are quashed. All appointments, whether pending approval or already rejected, shall be considered/reconsidered by the Educational Officers concerned and fresh orders shall be passed in the light of the declaration of law made by us in W.P.(C) No. 25176 of 2008. The salary found due to be paid to the incumbents concerned shall be released immediately. The action in this regard shall be completed within six weeks from the date of production of a copy of this judgment.

13. These writ petitions are also allowed as above.