

(2015) 04 KL CK 0108
In the High Court Of Kerala
Case No : WP(C) No. 27281 of 2013 (I)

Muhammed Abdul Nazir

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 10-04-2015

Acts Referred:

Citation : (2015) 04 KL CK 0108

Hon'ble Judges : Anil K. Narendran, J

Bench : Single Bench

Advocate : N. Manoj Kumar and Jayasree Manoj, for the Appellant

Final Decision : Disposed off

Judgement

Anil K. Narendran, J—The petitioner who is working as HSA (Arabic) in T.I.M. Girls Higher Secondary School, Nadapuram in Kozhikode district has filed this writ petition seeking a writ of certiorari to quash Exts. P1 to P4 orders. The petitioner has also sought for a writ of certiorari to quash Exts. P5 and P6 to the extent it approves the appointment of the petitioner as HSA (Arabic) only with effect from 2.8.2008, instead of granting approval with effect from 1.6.2005.

2. Gong by the averments in the writ petition, the petitioner is working as HSA (Arabic) in T.I.M. Girls Higher Secondary School, Nadapuram, managed by the 5th respondent. The school started functioning in the year 1979. The petitioner was appointed in a newly created post of HSA (Arabic) sanctioned for the year 2005-06. The approval for his appointment was declined on the ground that the school in question is a newly opened school and by G.O.(P) No. 178/02/Fin./G.Edn. dated 28.6.2002, all the vacancies in the newly opened schools should be filled up by absorbing protected teachers. Ext. P1 is the order of the District Educational Officer, Vadakara, the 4th respondent declining approval for the appointment of the petitioner as HSA (Arabic).

3. Challenging Ext. P1, the 5th respondent-Manager preferred appeal before the 3rd respondent, the Deputy director of Education, Kozhikode. The said appeal

ended in dismissal by Ext. P2 order dated 4.12.2006 stating that protected teachers are not appointed. Ext. P2 order was under challenge in a revision filed by the Manager before the Director of Public Instruction, the 2nd respondent. The said revision also ended in dismissal by Ext. P3 order. Though the Manager has filed a review petition before the Government, the same also ended in dismissal by Ext. P4. In the meanwhile, one protected teacher Smt. Vineetha was appointed in the school in the vacancy which arose when Smt. Biyathu HSA (Physical Science) was promoted to the post of Headmaster and the said Vineetha joined the school on 2.8.2008. Consequent to the same, the appointment of the petitioner was approved with effect from 2.8.2008 by Exts. P5 Government Order and an endorsement to that effect dated 22.8.2009 was also made in Ext. P6 appointment order by the 4th respondent.

4. The grievance of the petitioner in this Writ petition is that the stand taken by the educational authorities that his appointment need be approved only with effect from 2.8.2008, instead of 1.6.2005, the date on which he was actually appointed as HSA (Arabic) in an additional division vacancy, which had arisen during the academic year 2005-06, is patently illegal.

5. A counter affidavit has been filed on behalf of the 4th respondent contending that the appointment of the petitioner as HSA (Arabic) with effect from 1.6.2005 was not in order as that vacancy can be filled up only by appointing a protected teacher in terms of G.O.(P) No. 178/2002/G.Edn. dated 28.6.2002, as the school managed by the 5th respondent is a newly opened school. The aforesaid Government Order existed during the academic year 2005-06 and it was in violation of this order, the 5th respondent-Manager appointed the petitioner as HSA (Arabic) and therefore, approval for his appointment was rightly rejected in Exts. P1 to P4 orders. Later, the 5th respondent-Manager appointed a protected teacher as HSA (Physical Science) with effect from 2.8.2008 in a vacancy that has arisen due to the promotion of Smt. V.K. Biyathu as Headmistress. It was taking note of such appointment of a protected hand, the approval for the appointment of the petitioner as HSA (Arabic) was ordered to be approved with effect from 2.8.2008 by Ext. P5 Government Order, which resulted in the approval granted by the 4th respondent in Ext. P6. The 4th respondent would also contend that Exts. P9 and P10 replies given by the Public Information Officer in the Office of the 3rd respondent would not mean that there were no protected hands in the category of HSA (Arabic) available within the Educational District during the academic year 2005-06. Therefore, according to the 4th respondent, the authorities were fully justified in granting approval to the appointment of the petitioner as HSA (Arabic) only with effect from 2.8.2008.

6. I heard arguments of the learned counsel for the petitioner and the learned Senior Government Pleader appearing for respondents 1 to 5.

7. During the course of the argument, the learned counsel for the petitioner brought to my notice a judgment by a Division Bench of this Court in State of Kerala Vs. Nadeera, (2013) 2 KLT 88 , in which it has been held that when the

Manager exercises his powers to make appointment in terms of the staff fixation order of a qualified teacher, postponement of appointment on the ground that the same can be done only from the date of appointment of protected hand is not justified. The Division Bench held that circular dated 19.11.2009 issued by the Government in this regard has not retrospective effect. Para 6 and 7 of the said judgment read thus:

"6. Now the question is whether this circular could be implemented retrospectively having regard to the facts of the present case that the regular teachers were appointed in the year 2005 in the existing vacancies. So far as the protected teachers available in the respondent school, there is no complaint from the department that the Managers have violated or discriminated the protected teachers available in the schools itself. What is required as per 2002 circular or 2006 circular is, if the list of protected teachers is forwarded by the Assistant Educational Officer concerned to the Deputy Director, which is made available to the Managers, then the Managers have no choice or option than to appoint protected teachers by filling up all the vacancies with protected teachers upto 2006 Government order. After 2006, at least one protected teacher had to be appointed from the said list. What is relevant is the list of protected teachers from other managements will not be available with the schools, where vacancies existed or arise in future. The schools, who have to be presumed as new establishments, though commenced much earlier from a particular date as indicated above, definitely, there would be existing vacancies and future vacancies also would arise. Apart from the protected teachers, who worked for a particular management, the management will not have the list of protected teachers from other managements. This information would be available only with the department, as all the managements are expected to send the list of protected teachers, which would be maintained education district-wise and category-wise. Therefore, it is mandatory on the part of the department to maintain such list and once such list is sent to the managements, if there is violation of any direction or guideline, then the managements could be found fault with. In the absence of sending such list, if the guidelines are expected to be implemented by the schools, it would be mere exercise like searching in vacuum or air. Then what should be the position of vacancies in such schools? As per the existing procedure, in the month of July of every year, staff fixation order has to be passed depending upon the number of students available in a particular class of a particular school vis-a-vis the accommodation available in the said school. This would result in either increase in the number of teachers or decrease in the number of teachers. The exercise has to be compulsorily done every year so as to see that the students would not suffer from want of teachers and there is proper teaching faculty available in the school, which would cater to the needs of the schools. In case protected teacher is not available, the vacancies cannot be kept vacant for all time to come, as the managements would be found fault with by the department and also the parents, who send their children for education to a particular school. If vacancies are kept unfilled, the department

can take action against the management. It is not the case of the department that the management conceal the list of protected teachers and intentionally violated the guidelines. There is no obligation on the part of the Managements of these aided schools to secure list of protected teachers.

7. In 2009 by a circular referred to above would indicate, till 2009, there was no such obligation on the part of Managers of the aided schools. Therefore, if at all any obligation cast on the Managers of the schools to secure the list of protected teachers, it commenced only in the year 2009 by circular dated 19.11.2009. This circular can have only prospective effect and not retrospective effect. In order to remove or absolve the problems of protected teachers, as there were several complaints that vacancies, which have to be compulsorily filled up by protected teachers, are not filled up, then, the circular came to be made in the year 2009. Though guidelines came to be issued from time to time how protected teachers have to be appointed against the existing or new vacancies, the department never took care to send list of protected teachers. If a direction or guideline was in existence on the similar lines of circular dated 19.11.2009, there is justification on the part of the department to postpone the approval of appointment of a regular teacher from the date on which a protected teacher is appointed. In the absence of pin pointing violation of the guidelines intentionally or negligently by the Managers, the department can blame only its officers for not implementing their own guidelines. The authorities, who gave this guidelines from time to time were also required to see that necessary material or list of protected teachers available with them was sent to various schools to reduce the misery of protected teachers. Having not done so without taking any action against those officials, who did not care to see that their guidelines are implemented, shifting the disadvantage to the regularly appointed teachers is unreasonable and arbitrary. The teachers, who are appointed regularly on account of their qualification and efficiency, need not lose any of the benefits available to them for no fault of theirs. Even vicariously they cannot be saddled with such disadvantage on account of no fault of the Managers of the schools. Therefore, there is no justification in the action taken by the department in issuing approval of the appointments of the writ petitioners from a date on which protected teacher was appointed."

8. It is not in dispute that there was a newly created post of HSA (Arabic) in the staff fixation order for the school managed by the 5th respondent for the academic year 2005-06. It was in that vacancy, the petitioner was appointed as HSA (Arabic) by the 5th respondent-Manager. As on the date of appointment of the petitioner, i.e., as on 1.6.2005, the 3rd and 4th respondents have not forwarded any list of protected hands within Kozhikode Educational District to the 5th respondent-Manager in order to insist that only after appointing protected hands, a fresh hand need be appointed. As rightly held by the Division Bench of this Court in Nadeera's case (supra), when the Manager exercises his power to make appointment in terms of the staff fixation order that cannot be curtailed or prevented by the Educational Officers on the ground that protected hands are

available within the Educational district. It is not in dispute that no list of protected hands in the educational district was forwarded to the 5th respondent Manager as on the date of appointment of the petitioner. Moreover, going by the judgment of the Division Bench in Nadeera's case (supra), circular dated 19.11.2009 has no retrospective application. If that be so, the petitioner's appointment being prior to 19.11.2009, the same has to be approved since such an appointment is strictly in accordance with the staff fixation order issued by the 4th respondent. Therefore, the stand taken by the respondents 1 to 4 in Exts. P1 to P4 rejecting approval for the appointment of the petitioner as HSA (Arabic) and Exts. P5 and P6 orders to the extent it approves the appointment of the petitioner only with effect from 2.8.2008, instead of granting approval with effect from 1.6.2005 are legally unsustainable.

9. In the result, Exts. P1 to P4 and Exts. P5 and P6 to the extent approval for the appointment of the petitioner as HSA (Arabic) is granted only with effect from 2.8.2008 are quashed and it is declared that the petitioner is entitled for approval of his appointment as HSA (Arabic) in T.I.M. Girls Higher Secondary School, Nadapuram, Kozhikode district with effect from 1.6.2005. The 4th respondent is directed to pass appropriate orders granting approval for the appointment of the petitioner as HSA (Arabic) with effect from 1.6.2005, if he is otherwise qualified, within a period of two months from the date of receipt of a certified copy of this judgment. It is made clear that on approval of appointment with effect from 1.6.2005, the petitioner shall be entitled for all consequential benefits including monetary benefits for the period from 1.6.2005 till 2.8.2008, which shall be disbursed to the petitioner without any further delay, at any rate within a period of three months from the date of passing an order granting approval for appointment.

The Writ Petition is disposed of as above.