
(2014) 12 KL CK 0064

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 2609 of 2014 (A)

Roshan Thomas

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 19-12-2014

Acts Referred:

Constitution of India, 1950 — Article 162

Citation : (2014) 12 KL CK 0064

Hon'ble Judges : A.M. Shaffique, J

Bench : Single Bench

Advocate : V. Philip Mathew, Advocate for the Appellant; Lousy A., Government Pleader, Advocate for the Respondent

Judgement

A.M. Shaffique, J.—This writ petition is filed seeking to quash Exts. P10 and P14 and for a direction to respondents 1 to 4 to approve the appointment of the petitioner ignoring Ext. P2 and for other consequential benefits.

2. The facts involved in the writ petition would disclose that the petitioner was appointed as Upper Primary School Assistant (UPSA) in Sacred Heart High School, Mylapra. She was appointed on 01/06/2011 in an additional vacancy which had arisen in the school during the year 2011-12. Ext. P1 is the order of appointment. But, her appointment has not been approved so far and she is not getting salary and other benefits. In the meantime, as per GO(P) No. 199/2011/G.Edn dated 01/10/2011, Government directed that no filling up of post of additional division shall be allowed after 31/03/2011 except those posts which have not been filled up though allowed in the staff fixation orders of 2010-11. Since Ext. P2 cannot have any retrospective effect, a representation dated 14/12/2011 was submitted by the Correspondent of schools under the management by way of Ext. P3. Still the 4th respondent, as per order dated 16/12/2011, ordered that no additional division or post would be sanctioned during the year 2011-12. Ext. P4 is the said communication. Petitioner submitted a representation to the Chief Minister during the public contact programme,

based on which, a report seemed to have been given on 05/03/2012. Ext. P8 is the said report. The 6th respondent filed an appeal before the 2nd respondent against the rejection of the petitioner's approval. The same was rejected by Ext. P10 order dated 01/03/2013. Revision was filed which ultimately resulted in rejection. By Ext. P14, a letter had been issued by the Government to the 6th respondent stating that approval on regular basis can be examined only on finalisation of the UID and PTR status. Petitioner contends that as evident from Exts. P4 and P8, there was sufficient student strength at the time of inspection on 12/07/2011. In so far as Ext. P2 is concerned, it was only issued on 01/10/2011 and cannot have application to the case of the petitioner.

3. Counter affidavit has been filed by the 4th respondent, in which it is inter alia stated that petitioner was appointed as Upper Primary School Assistant (UPSA) against an additional division vacancy in the UP Section of the school. As per the staff fixation order dated 18/08/2010, for the academic year 2010-11, the class divisions sanctioned were only 22. Government as per Ext. P2 Government order dated 01/10/2011, ordered that the additional division vacancies shall not be filled up after 31/03/2011. Only exemption granted was with reference to posts which have not been filled up though allowed as per staff fixation order for the year 2010-11. Therefore, the staff fixation order of 2010-11 was made applicable for the academic year 2011-12 as well. Though a batch of writ petitions were filed challenging Ext. P2 Government order, no stay has been granted in any of the cases. Further, it is stated that the 6th respondent submitted the appointment order dated 01/06/2011 for approval. On verification, it was found that the proposal was not having full particulars. The joining report of the teacher, staff fixation statements as on 01/06/2011, declaration of the Manager regarding Rules 43, 51(A) and 51(B) claimants were not produced. Therefore, according to them, there cannot be any additional divisions for the year 2011-2012. Since there were no additional divisions sanctioned during the academic year 2010-11, there is no vacancy to accommodate the petitioner on 01/06/2011.

4. Reply affidavit is filed by the petitioner controverting the stand taken by the Government in this regard.

5. Heard learned counsel for the petitioner and the learned Government Pleader appearing on behalf of the Government and the educational authorities.

6. Learned counsel for the petitioner relied upon various judgments to substantiate his contentions. In *Ann Supriya Johny Vs. State of Kerala and Others*, this Court held that an unpublished Government order cannot be the basis of annulling an appointment made by the Manager and approved by the Educational authorities. This judgment cannot have application to the facts of the case as the appointment of the petitioner was not approved by the Educational authorities and in the meantime Ext. P2 order came into force. In *Rehana A.B v. State of Kerala and Others* [2013 KHC 249] I had occasion to hold that the qualification prescribed under a Statute cannot be changed by Government

orders, unless the statute is amended. The factual situation in the judgment aforesaid is totally different in the case on hand. The learned counsel for the petitioner relied upon the judgment in State of Kerala and Others Vs. Haseena, S. and Another, wherein a Division Bench of this Court had occasion to observe that the Managers cannot be found fault in not appointing protected teachers when no such list is furnished by the Department. It is also observed that the staff fixation has to be done every year. Reference is also made to a Full Bench judgment of this Court in Soman, P.S. Vs. Manager, AKMHS and Others, to contend that the amendments to Rules 7A and 51A can have only prospective operation. It is held that approval of appointment has to be from the date of appointment by the Manager and not on any subsequent date..

7. The learned Government pleader relied upon the judgment in Priyakumari Vs. State of Kerala, , wherein a learned Single Judge of this Court held that Ext. P2 Government order can have application only to appointments made after 31/03/2011. It is observed that the staff fixation order for the year 2010-11 will govern the academic year 2011-12. However, it will not apply to continuance of teachers appointed earlier to 31/03/2011. That was a case in which a teacher was appointed on 23/07/2007.

8. The first proposition is that as per Clause 17 of Ext. P2, the same was intended to be made applicable only after amendments are made to Kerala Educational Rules. True that, such a clause had been incorporated in Ext. P2 Government order. But the fact remains that, in the absence of any statutory provision, executive orders can be issued by the Government exercising power under Article 162 of the Constitution of India. An amendment is required only when the executive order is contrary to the provisions of the Act or Rules or when provisions are already made under the Statute. No such situation had arisen in this case and therefore the said contention cannot be accepted.

9. It is then argued that Ext. P2 cannot have any retrospective application. The short question to be considered is whether Ext. P2 has retrospective operation or not. There cannot be any doubt regarding the power of Government to issue executive orders and depending on the special circumstances, such orders can have retrospective effect as well. Reference is made to Rule 12 of Chapter XXIII of KER to indicate the manner in which staff fixation is to be done. On a perusal of Ext. P2, it is clear that the Government have adopted such a view under special circumstances. Ext. P2 is not under challenge in the writ petition. The staff fixation depends on the student strength verification to be done on the 6th working day. It is inter alia contended that, in the present case, the verification was done on 15/07/2011 which warranted additional divisions and therefore the Management had the right to appoint the petitioner. Same was not approved only on account of the restrictions imposed by Ext. P2. When the staff fixation is to be done by the educational authorities, in terms of Chapter XXIII of KER and if the Government chooses not to sanction additional divisions due to certain circumstances, definitely the said provision is enforceable. Additional divisions

can be granted only after verification and after approval by the Director of Public Instruction or District Educational Officer, as the case may be. In other words, additional division is not automatic and consequentially additional post is also not automatic. It depends upon the subsequent verification to be done by the DEO and DPI. When such a situation had not arisen and in the meantime, the Government had issued Ext. P2, the Educational authorities are bound by the same.

10. In such circumstances, I do not think that the petitioner has projected a legal grievance to seek directions for approval when the very appointment is against Ext. P2 and the rules governing the same.

In the result the writ petition fails and is dismissed.