
(2006) 08 KL CK 0023

In the High Court Of Kerala

Case No : W.A. No's. 275 and 2043 of 2005

State of Kerala and Others

APPELLANT

Vs

Daisy, K.V. and Others

RESPONDENT

Date of Decision : 18-08-2006

Acts Referred:

Constitution of India, 1950 — Article 14

Kerala State and Subordinate Services Rules, 1958 — Rule 2(17)

Citation : (2006) 08 KL CK 0023

Hon'ble Judges : K.P. Balachandran, J;K.A. Abdul Gafoor, J

Bench : Division Bench

Advocate : Waheeda Babu, Govt. Pleader, for the Appellant; Benoy Thomas and Paulson Thomas, for the Respondent

Judgement

K.A. Abdul Gafoor, J.—Both these writ appeals are by the State. We will first deal with Writ Appeal No. 2043/2005 where the necessary documents and pleadings are available. Disposal of this writ appeal will necessarily give quietus to the dispute raised in Writ Appeal No. 275/05 as well, we feel.

2. The State is aggrieved by the direction issued by the learned Single Judge. The learned Single Judge has quashed Exts.P-8, P-9, P-12 and P-19 orders and issued a declaration that "all appointees to the post of Higher Secondary School Teachers and Higher Secondary School Teachers (Junior) are entitled to salaries as per the pay scale admissible to them from the approved dates of their appointments". The learned Single Judge also directed the Appellants herein to extend the benefit of Ext.P-16 Government Order to Petitioners 1, 5 and 6 within a time frame.

3. The submission of the Government Pleader is that Ext. P-8 regulates payment of salary to the teachers appointed in Aided Higher Secondary Schools during the period up to 1-12-2001. Therefore, the learned Single Judge was not justified in directing them to be paid salary in a particular pay scale as if they are not admissible to the same. It is contended that the Petitioners were appointed in

the Aided Higher Secondary School sanctioned by the Government during the year 2000-2001 without due sanction of posts. It cannot therefore, be said that they did have a scale of pay to claim salary when creation of posts came far later as per Ext. P-3 order dated 17-8-2001. They can claim salary only after approval of their appointment based on staff fixation orders issued pursuant to Ext. P-3. The staff fixation order for the school was issued far later than their appointment, as per Ext.P-14 order No. C4/2825/HSE/02 dated nil. Later, their appointments were approved only by Ext. P-15 series orders on 9-8-2003. When the appointments were so approved on that date with effect from the date of their initial appointment, there was a condition as No. 4 which reads as follows:

Salary to the above teachers shall be claimed from 1 -12-2001 onwards under the new head of account 2202-02-110-94-01 NON PLAN. Payment of arrears will be governed by para 12 of the G.O. (P) No. 56/2002/Fin., dated 16-1 -2002 and specific orders for claiming arrear will be intimated separately.

4. The G.O. referred to above is Ext. P-8. Para 12 thereof states that "Aided School Plus Two Teachers will be paid salaries prospectively from the date of creation of posts. Arrears will be paid on par with Government Guest Teachers. General Education Department will issue further detailed orders". Therefore, it is submitted by the Government Pleader that going by Ext. P-15 series orders approving their appointments and para 12 of Ext. P-8 which is reiterated in Ext. P-15, the Petitioners do not have any entitlement for salary in excess of the rate paid to the guest teachers appointed in Government Higher Secondary Schools, so far as the arrears of salary until the date of approval is concerned.

5. It is further submitted that the separate order envisaged in Ext. P-8 as extracted above has been issued as per Ext. P-9. The said order provides that the salary of the Higher Secondary School Teachers who were appointed in the newly created posts will be given from 2001 December onwards. It only provides that payment of arrears will be governed by para 12 of Ext.P-8 G.O. (P) No. 56/2002/Fin., dated 16-1-2002. It is submitted that Ext. P-9 is the order contemplated in terms of para 12 of Ext. P-8. Therefore, the Petitioners do not have any entitlement for arrears of salary in excess of what is mentioned in para 12 of Ext. P-8. In such circumstances, the direction issued by the learned Single Judge is not justified.

6. It is further submitted that Government finds it financially difficult to pay arrears to such teachers. It was in the above circumstances, Ext. P-8 order has been issued, containing several economy measures including the restriction in the matter of payment of arrears, as well.

7. In counter to these contentions, it is submitted by the counsel for the writ Petitioners that as per Ext. P-13 series orders, they were appointed in a Higher Secondary School duly sanctioned by the Government Their appointment was made by the Manager concerned. This appointment was in terms of Ext. P-I (a) Government Order dt. 13-5-1998 which provides the procedure for appointment

of Higher Secondary School Teachers. As per this order, 25% of the vacancies in the category of Higher Secondary School Teachers shall have to be filled up by promoting the qualified High School Assistants and Primary School Assistants and 75% of the vacancies shall be earmarked for direct recruitment from open market. The appointing authority is the Manager concerned. The Government do not have any case that their appointment was in violation of Ext. P-1(a) order. Writ Petitioners Nos. 1, 5 and 6 were appointed by direct recruitment towards 75% quota, while Ors. were appointed on promotion against 25% of vacancies reserved in Ext.P-1(a) for promotion. All of them are qualified. When these facts are not disputed, the Government is bound to pay them in the scale of pay mentioned in Ext. P-13 series appointment orders. That scale of pay forms a condition of service. The same scale of issued by the competent Educational Officer concerned. When they were thus appointed pay is mentioned in the order approving the appointments on a particular scale of pay or when Ext. P-1 order prescribing method of appointment does not envisage payment at a lesser rate like guest lecturers, the orders of the Government in para 12 of Ext. P-8 to restrict the payment to a lesser extent is unjustified. This was interfered with by the learned Single Judge rightly, according to him. There is, therefore nothing for interference in this appeal, it is submitted.

8. Even admittedly by the Appellant, St. Antony's Higher Secondary School, Pudukkad where the Petitioners were appointed was a newly sanctioned Higher Secondary School in the year 2000-2001. This is an admitted fact The appointment to Aided Higher Secondary School is governed by Ext. P-1(a) Government Order dated 13-5-1998. This is also not disputed. That is a composite order concerning the appointment not only in aided schools but in Government Schools as well. While dealing with appointments in Government Higher Secondary Schools in para 2(ii) thereof, there envisaged a situation of appointing teachers in the same pattern as Guest Lecturers appointed in Government Colleges whenever sufficient suitable hands from Employment Exchange were not available for appointment. But when appointment by way of direct recruitment to the 75% of vacancies earmarked in that regard in Aided Higher Secondary School was dealt with in para 2(iii) of Ext. P-1(a), there is no such stipulation of appointment of Higher Secondary School Teachers in the same term as Guest Lecturers, as envisaged in Government Schools. So far as the Aided Higher Secondary Schools are concerned, the only restriction is as contained in para 3 of Ext.P-1(a) which reads as follows:

While making appointments the Manager will see that only part-time teachers are appointed when the periods to be taught are less than 15 in a week. This procedure will be followed in Government Schools also when direct recruitment is resorted to through Employment Exchange.

9. Ext. P-13 series appointment order and Ext. P-15 approval order reveal that Petitioner Nos. 1 and 6 were appointed only on part-time basis in the scale of pay of Higher Secondary School Teacher (Junior) and Petitioner No. 5 was

appointed Higher Secondary School Teacher (Junior) on full-time basis. We are not mentioning the case of other Petitioners because even admittedly by the Government Pleader, they are entitled to arrears of salary at the full rate because of Ext. P-16 order. Thus in appointing these three persons, the Manager had followed Ext. P-1(a) order.

10. The condition No. 4 contained in the approval order Ext. P-15 as extracted in para 3 above is to the effect that the salary of teachers will be claimed from Non Plan Account and that payment of arrears will be governed by para 12 of Ext. P-8. The first sentence in para 12 of Ext. P-8 makes it clear that Aided School Plus Two Teachers will be paid salary prospectively from the date of creation of the post. Nothing is mentioned there regarding the rate of salary.

11. As already mentioned above, the school was sanctioned during the year 2000-2001 and necessary posts were sanctioned as per Ext. P-3 Government Order dt. 17-8-2001, including for the schools sanctioned in the years 1999-2000, 2000-2001 and 2001-2002, both in Government Sector as well as aided Sector. Based on the sanctioning of posts, the concerned Educational Officer fixed staff strength of the school where the Petitioners were appointed, as per Ext. P-14 order. This order also sanctions one post of Higher Secondary School Teacher (Junior) and two posts of Higher Secondary School Teacher (Senior) for the year 2000-01 and one post of Higher Secondary School Teacher (Junior) and three posts of Higher Secondary School Teacher (Senior) for the year 2001-02, in Chemistry. The Petitioner No. 5 was appointed as a full-time teacher in Chemistry and the Petitioner No. 6 was appointed as a part-time teacher in Chemistry against the posts sanctioned in the year 2000-01. The part-time teacher had been later made full time when one more full time post had been sanctioned in the next academic year 2000-2002. This appointment was also duly approved as per Ext. P-16 order series.

12. Therefore, going by the first sentence in para 12 of Ext. P-8 Government Order, they are entitled to salary from the date of creation of posts. Posts were created as per Ext. P-3 with effect from the very date of sanction of the schools concerned. So creation of posts has effectiveness from the date of appointment. Even going by para 12 of Ext. P-8 three teachers are entitled to be paid salary from the date of creation of posts.

13. As the order creating posts, sanctioning staff fixation and approval of appointment came thus later than their date of appointment, they have to be paid arrears of salary. When they are entitled to salary, even going by para 12 of Ext. P-8, from the date of their appointment for which there were posts duly sanctioned as mentioned above, whether the arrears could be restricted by the latter part of the para 12 in Ext. P-8 order is the moot question debated in this case; because Ext. P-9 consequent order in terms of para 12 of Ext. P-8 does not contain any further details except to reiterate the second part of para 12 of Ext. P-8 Government Order. The second part of para 12 of Ext. P-8 Government Order is as follows:

Arrears will be paid on par with Government Guest Teachers. General Education Department will issue further detailed orders.

14. Ext. P-9 is the further order issued. But it does not contain any details other than to quote this part of Ext. 18. Therefore, Ext. P-9 does not give any indication as to the question involved except to fix a month for payment of salary i.e. December, 2001.

15. Ext.P-1(a) is the order governing method of appointment. It does not stipulate salary scale. Aided School Teachers are entitled to the same salary scale as that of Government Schools. This is an admitted fact. Government Pleader does not dispute this. Admittedly, salary scales are fixed by the orders issued by the Government accepting recommendation of the appropriate Pay Commissions. So far as Government School teachers are concerned the pay and allowances are governed by Rule 2(17) of part II of the Kerala State and Subordinate Services Rules, 1958. This rules makes applicable the rules regulating pay issued from time to time viz. the orders accepting the recommendations of relevant pay commission. At the relevant point of time, the scales of pay are governed by the order issued in G.O. No. 3000/98/FIN dated 25-11-1998 which has effectiveness from 1-3-1997. Going by this, the salary scale applicable to Higher Secondary School Teacher (Junior) is Rs. 5,500-9,075 and that of Higher Secondary School Teacher (Senior) is Rs. 6,675-10,550. When aided schools teachers are entitled to salary scales as prevalent in Government schools, they are entitled to get pay in these scales of pay.

16. Ext. P-13 series reveal that the respective teachers were appointed in the said pay scales. Ext P-13 also reveals that appointment of their juniors had also been approved in the said scale irrespective of whether they are Higher Secondary School Teachers (Junior) or Higher Secondary School Teachers (Senior). The appointments had been effected as early as in 2000. After extracting the service from the appointees, appointed in a particular scale of pay, whose appointment has been approved later in the very same scale of pay, it is not proper and fair on the part of the Government to say, far later--that too because of the financial constraints faced by the Government--that they would be paid only at a lesser rate of pay. No other categories of employees who had been appointed at a particular scale of pay are dealt with in that manner in payment of arrears at a lesser rate. No hostile discrimination can be played against the directly recruited Higher Secondary Teachers alone on this count.

17. Also, it is seen from Ext.P-16 dated 25-11-2004 that Higher Secondary School Teachers appointed against the 25% quota reserved for promotion had been paid the full rate of salary even towards arrears, during the same period though their posts also had been sanctioned along with the posts sanctioned in respect of the Petitioners. The duty to be performed by the Higher Secondary School Teachers whether they are appointed on promotion against the 25% quota or appointed on direct recruitment against the 75% quota is one and the same. Scale of pay entitled to them is also one and the same. It cannot be said

that promotees are entitled for arrears at full rate in the scale of pay of the higher posts, while direct recruits will be entitled only a lesser pay, during the same span of time when both the groups were performing the same duty during the same period. This is nothing but naked discrimination offending Article 14 of the Constitution of India. If the financial constraints is the reason for denial of arrears of salary at the full rate, necessarily that shall be applicable to the promotees from lower scale as well.

18. Government Pleader had also not brought to our notice any other situation where arrears of salary were restricted to any other category than the Aided Higher Secondary School Teachers because of the financial constraints of the Government which is common to all the appointees in different cadre and in different services.

19. The rate of pay as paid to guest lecturers become applicable, going by para 2(ii) of Ext.P-1(a) only when there was "shortage of suitable candidates from Employment Exchange" for appointment in Government schools. There is no dispute regarding the suitability of the writ Petitioners. That was why their appointments were approved as per Ext.P-14. Therefore, such a restriction is not applicable to the writ Petitioners, to limit the rate of their salary during any particular period.

20. We have also considered the judgments of two Division Benches in Writ Appeal Nos. 662/03 and 206/05 cited by the Government Pleader in support of the contentions. The first among these, is with respect to the regularisation of service of teachers in non-vocational subjects in Vocational Higher Secondary Schools and consequent claim for salary for the post of Lecturers. The Division Bench in para 16 of the judgment noticed that when they were appointed as teachers in Vocational Higher Secondary School, they were promised to be paid at the rate of Rs. 250 per mensem alone as additional pay in addition to what they were getting in the lower scale. Having accepted appointment with that stipulation, they could not have claimed for the salary as equal to the lecturers. Such a situation is not available here. Here all of them were appointed in a particular scale of pay, which alone they claim. Therefore, that dictum does not have any application to the fact frame of the case on hand.

21. The latter judgment is in respect of the payment in a particular scale to Laboratory Assistant appointed in Aided Higher Secondary School. But the order issued in that regard GO.(MS)No.299/04/GE dn. dated 24-9-2004 regulating their salary made it clear that they would be eligible for the salary only with effect from 28-3-2003. It is with that stipulation, their appointments materialised. In this case, the appointment order specifically mentions a scale of pay. And the posts were also sanctioned from the date of sanction of the school. Posts were available to them with effect from the date of the appointment of the respective Petitioners. Therefore, that judgment also cannot be applied to the case on hand.

22. The method of appointment to the post in question is governed by Ext.

P-1(a) Government Order issued well earlier than the sanctioning of the school itself. That does not discriminate in the matter of payment with regard to the promotees and direct recruits. The pay revision order referred to above also does not, in any way, discriminate with respect to the payment of arrears in respect of promotees to the post of Higher Secondary School Teachers and direct recruits against the said post. The promotees have been given arrears in full as admitted by the Government Pleader. The Petitioners in this case had been appointed as per Ext. P-13 series mentioning a particular scale of pay and their posts had been duly sanctioned as per Ext.P-14 order. The order approving their appointment, Ext.P-15, also refers to the scale of pay. In such circumstances, the direct recruits cannot be discriminated.

23. The Petitioners were working from the date of their appointment against the post to which they were appointed on a particular scale of pay. Far later as done in Ext.P-8, Government cannot restrict that their arrears of pay would be given only at a lesser rate as applicable to guest lecturers appointed in Government schools. That too after extracting their service. The appointment orders read with the order approving the appointments contain the terms of engagement. Government cannot unilaterally vary it to the disadvantage of the Petitioners. It is, therefore, quite arbitrary and unreasonable offending Article 14 of the Constitution of India.

24. It may also be borne in mind that no post of guest lecturer is created or permissible to be created as per Ext.P-1 in Aided Higher Secondary Schools. Nor such type of appointment is permissible in Aided Higher Secondary Schools, as per Ext. P-I order of the Government. So the learned Single Judge was perfectly justified in quashing that restriction regarding the rate of pay for payment of arrears as contained in para 12 of Ext.P-8 Government Order. Ext.P-12 Government Order is only a follow-up of Ext.P-8. It shall also have the same fate.

25. Necessarily, when these orders are quashed, the Petitioners 1, 5 and 6 will be entitled to salary in the respective scales of pay as applicable to them as mentioned in the order approving their appointment with effect from their respective dates of appointment. The other Petitioners were already paid as per their admissibility.

26. At the same time, the Government Pleader is justified to submit that the learned Single Judge ought not to have issued a declaration that all the appointees in all the Aided Higher Secondary Schools in the same manner were entitled to arrears of salary in the same manner. Payment of arrears of salary depends upon several aspects including following of the procedure for making appointment, the tenure of appointment, condition in the order of appointment, terms of approval etc. Therefore, such a declaration was unnecessary and not justified without examining each situation and consequent eligibility. So the declaration in that manner has to be vacated. But the cases of the concerned incumbents shall have to be separately considered by the respective controlling officers. The Petitioners 1, 5 and 6 are entitled to arrears of salary worked out

based on the respective scales of pay in which they were appointed.

27. Now we will consider Writ Appeal No.275/05. The grievance of the Government in this case is that the learned Single Judge while directing payment of salary to the writ Petitioners, it was not mentioned whether the salary payable shall be in accordance with law as stipulated in Ext.P-11 judgment marked in W.P.C. No. 16664/04. We make it clear that whenever this Court makes a direction to effect payment of salary that shall always be in the rate of pay provided as per law. The Government need not have felt any doubt on that.

28. Of course, the Government Pleader is justified to submit that their arrears " of salary shall have to be worked out after verifying whether their appointments had been in a sanctioned post and whether the prescribed procedure had been followed for such appointment and whether there was due approval for their appointment. We make it clear that, while carrying out the direction in that case, these are matters for the Government to consider and to pass appropriate orders taking those relevant aspects as well. Necessarily, no further orders are required except as to clarify so, in Writ Appeal No. 275/05.