
(2013) 02 KL CK 0092

In the High Court Of Kerala

Case No : W.A. No"s. 178 and 739 of 2012

State of Kerala and Others

APPELLANT

Vs

Haseena, S. and Another

RESPONDENT

Date of Decision : 19-02-2013

Acts Referred:

Kerala Education Rules, 1959 — Rule 6(viii)

Citation : (2013) 2 ILR (Ker) 108 : (2013) 2 KHC 103

Hon'ble Judges : Manjula Chellur, C.J.; Vinod Chandran, J

Bench : Division Bench

Advocate : V.A. Muhammed Special Government Pleader, for the Appellant; S. Subash Chand and Sri Shindo Varghese for 1st respondent, Sri E.S.M. Kabeer and Sri V.A. Muhammed for 2nd respondent, for the Respondent

Final Decision : Dismissed

Judgement

Manjula Chellur, C.J.—These two Writ Appeals are taken up for consideration together, as they arise out of a common judgment dated 4-8-2011 of the learned Single Judge. It is not in dispute that the party respondents/writ petitioners were appointed against a clear vacancy as early as in 2005 as High School Assistants in Mathematics and Natural Science. It is also not in dispute that though they were appointed as early as in 2005, approval of their appointments came to be done only with effect from 1-6-2010. The grievance of the writ petitioners was, as they were appointed against a regular vacancy by the Manager of the respondent School, for no fault of theirs, there cannot be postponement of their approval from the actual date of appointment in the year 2005. So far as the stand of the Government was, as and when the vacancy arises or in the vacancy already existing, the Manager should appoint atleast one protected teacher in the vacancy, therefore, according to the stand of the Government, in the absence of not appointing protected teachers, approval of appointment of regular teacher has to be postponed and it can only be from the date on which a protected teacher is appointed. This stand of the Government was mainly on account of

Government order dated 19-11-2009. As against this, the stand of the writ petitioners was, till Government order dated 19-11-2009 came into existence, there was no compulsion as indicated in the Government order to appoint atleast one protected teacher in the vacancy available in the schools and otherwise, the regularly appointed teachers" approval will be postponed. Therefore, in the absence of any such compulsion on the part of the Managers of aided schools, the appointments, which were done in 2005 cannot be frustrated by postponing the date of approval to a future date. After going through all the Government orders and the facts in the present two cases, the learned Single Judge opined that neither the Managers nor the writ petitioners could be found fault with for not appointing any protected teacher against clear vacancy in 2005, as a duty was cast on the officers of the Education Department to send the list of protected teachers of the schools concerned, so that the Managers could comply with the undertaking given to the Government as per Rule 6 (viii) of Chapter V of the Kerala Education Rules. Against this judgment of the learned Single Judge, the Government is in appeals before us contending that there is an obligation on the part of the Managers to follow the directions issued by the Government from time to time by securing the list of protected teachers, so that the existing vacancies would be filled up by the protected hands.

2. It is not in dispute that the school in question was established in 1982. It is also not in dispute that as per the order of Government, all those schools which were started after 1979 have to be considered as new schools, therefore, the first priority so far as appointment of teachers has to be given to protected teachers. Later on, the existing vacancies could be filled up directly by the schools concerned through the Managers.

3. The relevant Government orders which came up for consideration before the learned Single Judge were Exhibits P-10 and P-7 Government orders of 2002 and 2006 respectively and the Judgments referring to these two Government orders are at Exhibits P-12 to P-15. Before we take up these two relevant Government orders, Exhibits P-7 and P-10, it is pertinent to mention that as per G.O. (Ms.) No. 123/91/G. Edn. dated 5-8-1991, on account of decrease in the number of protected teachers, the Managers of aided schools were permitted to call for applications for appointments without appointing protected teachers. By G.O. (Ms.) No. 347/98/G. Edn. dated 1-9-1998, the Department came out with another direction, wherein they indicated that all the vacancies arising in the schools newly opened had to be filled up by protected teachers only. Later on in 2002, as referred above, G.O. (P) No. 178/02/G. Edn. dated 28-6-2002 was issued, wherein the Government issued guidelines for the redeployment of protected teachers. The Managers of newly opened or upgraded aided schools were directed to fill up all the existing/arising vacancies in these schools only by appointing protected teachers. It was further directed that the Deputy Directors of Education concerned shall make available to the Managers, district-wise and category-wise list of protected teachers on the basis of total length of service of teachers to be so appointed. Exhibit P-11 circular is dated 24-1-2005, wherein

the Government directed the Managers to comply with the instructions in strict sense given under this Government order. So far as this circular is concerned, the emphasis was instructions to the Educational Officers how they should draw the list of protected teachers and send it to various schools in order to comply with the earlier guidelines issued in the year 2002. Apart from this Exhibit P-11, there is another relevant notification, i.e., Exhibit P-7 G.O. (P) No. 46/06/G Edn. dated 1-2-2006. There is yet another notification, i.e., G.O. (Rt.) No. 3776/06/G Edn. dated 24-8-2006, wherein anguish was expressed by the Government in not adhering to earlier directions to fill up the vacancies with protected hands. Therefore, they came up with the above said Government Order dated 24-8-2006. Paragraphs 2 and 3 of the above Government Order are relevant, which read as under:

2. In spite of various measures for the deployment of protected teachers, the same have not yielded results to the expectation of Government. Various reasons are attributed to such a situation. Often the versions of Managers are that there is delay in getting the list of protected hands from the Educational Officers and that the same forces them to make fresh appointments. On the contrary the Educational Officers hold the view that the managements make fresh appointments even after receipt of the list of protected teachers adducing flimsy reasons. There are instances where the protected hands are reluctant to join duty even after getting appointments from the management. Yet other rare instances are that when a teacher gets a convenient posting in a Government schools by way of deployment on protection he/she will try to continue there till retirement by any means.

3. After considering all the above facts in consultation with the Director of Public Instruction, Government Order that the following measures will be taken forthwith for the effective deployment of protected hands.

(1) A Special Cell in each District under the Chairmanship of Deputy Director of Education concerned will be constituted. The Administrative Assistant, Accounts Officer and Senior Superintendent working in the office of DDE and all the District Educational Officers and Assistant Educational Officers in a Revenue District will be the members of the cell.

(2) The Special Cell will start functioning with a time schedule for the following activities

(i) Ensure that the conditions in G.O. (P) 178/02/GE dated 28-6-2002 and G.O. (P) No. 46/06/GE dated 1-2-2006 are implemented strictly.

(ii) The Educational Officers will include the names of protected teachers to be appointed by the Managers in arising vacancies in the staff fixation order itself.

(iii) Disciplinary action under Rule 7, Chapter III KER will be taken against the Managers who do not follow the instructions and who furnish false report before the Educational Officers to obtain sanction of posts and approval of appointment

and they should be made to repay financial liabilities with interest to Government.

(iv) Disciplinary action will be taken against protected hands who are reluctant to join duty even after getting the appointment orders.

(v) The Director of Public Instruction will prepare time schedule for the functioning of the Special Cell and see that the directions are implemented effectively. A quarterly periodical progress reports will be furnished to Government.

4. As a matter of fact, finding fault with the officers of the department in not complying with the earlier guidelines safeguarding interest of the protected teachers, this 2006 Government Order came to be issued in order to see that the Managers were alerted, who were making fresh appointments even after receipt of the list of protected teachers without adhering to the earlier guidelines what they should do and in case if they do not follow the guidelines, what would be the consequences. However, none of the above said Government Orders ever indicated that in the absence of appointing a protected teacher in the existing vacancy or vacancies arising later, the teachers, who are appointed regularly by the Managers, would not be entitled for approval of their appointments till a particular time or a date. As a matter of fact, such a condition or compulsion came to be imposed by way of clarification by Circular dated 19-11-2009. As per this circular, by G.O. (P) No. 46/06/G. Edn. dated 1-2-2006, at least one teacher should be appointed from the list of protected teachers and the vacancy caused by the relief of protected teacher to his parent school or otherwise will be filled up by protected teacher. It further says, if no protected teacher is appointed in such schools in the first among the existing/arising vacancies, it has to be filled up compulsorily by protected teacher and the appointment made otherwise shall not be approved. In other words, ignoring the instructions of the department, in spite of having the list of protected teachers, if no appointment is given to a protected teacher, otherwise filled up by direct appointment by regular recruitment, no approval of the said appointment would be given, is the caution indicated in the circular.

5. 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, atleast 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.

6. 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.

7. There is yet another fact, which was brought to our notice, which has to be placed on record by us. Several regularly appointed teachers similar to the teachers before us got all the benefits without knocking at the door of the Court, by grant from the parent department. There is no uniformity in the exercise of their authority while approving the appointments. If regularly appointed teachers of one school get advantage of their appointment right from the inception, why others should be denied such benefit? There is no answer from the department for this. Several facts and circumstances are placed before us where such discrimination is meted out by the department. As a matter of fact, without challenging the judgments at Exhibits P-12 to P-15 and after complying with those judgments, we are unable to understand the stand of the department in approaching this Court by filing these appeals. It is pertinent to mention that the directions issued in the judgments at Exhibits P-12 to P-15 are already complied with by approving the appointments of regular teachers from the date of their actual appointments. It is needless to say that as per Rule 6 (viii) of Chapter V of the Kerala Education Rules, the only obligation cast on the Managers of the aided schools is, they must appoint the protected teachers, whenever a list is sent. Beyond that, there is no other obligation cast on them.

In that view of the matter, having regard to the discussion and reasoning made above, we are of the opinion, the learned Single Judge was justified in allowing the Writ Petitions, rejecting the stand of the Government. Accordingly, the Writ Appeals are dismissed.