

(2022) 10 KL CK 0071
In the High Court Of Kerala
Case No : Writ Appeal Nos.7, 111 Of 2019

State Of Kerala

APPELLANT

Vs

Haridareshmi.R Higher Secondary School Teacher(English)

RESPONDENT

Date of Decision : 11-10-2022

Acts Referred:

Kerala Education Act 1958 — Section 9

Citation : (2022) 10 KL CK 0071

Hon'ble Judges : P.B.Suresh Kumar, J;C.S.Sudha, J

Bench : Division Bench

Advocate : A.J. Varghese, M.R.Anison, T.T.Muhamood, R.K.Muraleedharan, A.Renjit, V.E.Abdul Gafoor, A.Mohammed Savad, C.Y.Vinod Kumar, Jayendran Kochoth

Final Decision : Dismissed

Judgement

P.B.Suresh Kumar, J

1. Among these appeals, W.A.No.7 of 2019 is preferred against the judgment in W.P.(C) No.41809 of 2017 and W.A.No.111 of 2019 is preferred against the judgment in W.P.(C) No.27184 of 2016. In both the appeals, the official respondents in the writ petitions are the appellants. The issues arose for consideration in the writ petitions were closely interlinked and they were, therefore, disposed of by a common judgment. The writ appeals also, in the circumstances, are disposed of by this common judgment. Parties are referred to in this judgment, as they appear in W.P.(C) No.41809 of 2017.

2. The petitioner was appointed as a High School Assistant in an aided High School (the School) on 06.06.2007. While the petitioner was working as such, the School was upgraded as a Higher Secondary School in terms of G.O.(MS) No.143/2014/GE dated 31.07.2014 and the School was functioning as a Higher Secondary School from the academic year 2014-15 onwards. On the School being upgraded as a Higher Secondary School, as the petitioner was qualified to

be considered for appointment as Higher Secondary School Teacher, the Manager appointed her by transfer as Higher Secondary School Teacher (Jr) in English on 18.9.2014 in an anticipated vacancy. Ext.P1 is the order of appointment of the petitioner. It is stated by the petitioner that though several high schools have been upgraded as higher secondary schools from the academic year 2014-15, steps have not been taken by the Director of Higher Secondary Education for creation of necessary posts in the upgraded schools. According to the petitioner, insofar as the schools including the School in which the petitioner was working were upgraded as higher secondary schools from the academic year 2014-15 onwards, it was obligatory on the part of the Director of Higher Secondary Education and the officers subordinate to him to sanction sufficient number of teaching and non-teaching posts in the respective schools in the year 2014-15 itself. W.P.(C) No.27184 of 2016 was filed by the petitioner, in the circumstances, seeking appropriate directions to the officers concerned in the Directorate of Higher Secondary Education to expedite the process of sanction of teaching posts in the School and to approve the appointment of the petitioner as Higher Secondary School Teacher from the date of her appointment.

3. While W.P.(C) No.27184 of 2016 was pending, on 21.08.2017, the Government created teaching and non-teaching posts in the schools upgraded as higher secondary schools from 2014-15 and 2015-16 onwards. Ext.P4 is the order issued by the Government in this regard. In terms of Ext.P4 order, a post of Higher Secondary School Teacher (Jr) in English was created in the School. When the said post was created, the sixth respondent, another High School Assistant in English in the School who became qualified much after the upgradation of the School, staked a claim for appointment as Higher Secondary School Teacher (Jr) in English in preference to the petitioner on the ground that he is senior to the petitioner for appointment against the 25% quota earmarked for High School Assistants in the School in terms of the provisions contained in Chapter XXXII of the Kerala Education Rules (the Rules). According to the petitioner, insofar as the provisions contained in Chapter XXXII of the Rules confer a right on High School Assistants working in the School to claim appointment against 25% of the vacancies of Higher Secondary School Teachers, it was obligatory for the Government to create sufficient number of posts of Higher Secondary School Teachers in the School simultaneous to the sanctioning of higher secondary courses itself, or otherwise, the right of a junior qualified High School Assistant to claim appointment as Higher Secondary School Teacher will be defeated by a senior High School Assistant who was not qualified at the time of upgradation of the School. The petitioner, in the circumstances, instituted W.P.(C) No.41809 of 2017 seeking appropriate directions to the first respondent to create a post of Higher Secondary School Teacher in English in the School retrospectively with effect from 01.06.2015, and for appropriate orders directing the officers concerned to approve the appointment of the petitioner as Higher Secondary School Teacher with effect from the date of her appointment.

4. Counter affidavits have been filed on behalf of the official respondents in both

the writ petitions. The stand taken by the official respondents in the counter affidavits is that regular appointments in the higher secondary school section of the School could be made by the Manager only after sanctioning of the required number of posts by the Director of Higher Secondary Education, that too, only after creation of sufficient number of posts by the Government and therefore, the appointment of the petitioner as Higher Secondary School Teacher in the School before creation of posts and sanctioning of posts by the Director of Higher Secondary Education were bad.

5. A counter affidavit has been filed by the fifth respondent, the Manager of the School in W.P.(C) No.41809 of 2017 contending that insofar as posts of Higher Secondary School Teachers have been created in the School only with effect from 21.08.2017, the sixth respondent who is senior to the petitioner is entitled to be considered for appointment against the newly created post of Higher Secondary School Teacher (Jr) in English. It was also contended by the Manager that in the light of the claim raised by the sixth respondent in this regard, the vacancy that arose on account of creation of the post of Higher Secondary School Teacher (Jr) in English has not been filled up.

6. The learned Single Judge took the view that required number of posts of higher secondary school teachers should have been created by the Government in the School simultaneous to the sanctioning of higher secondary courses itself, and disposed of the writ petitions directing the competent authority under the Rules to approve the appointment of the petitioner as Higher Secondary School Teacher in terms of Ext.P1 order with effect from 18.09.2014. In the aforesaid view of the matter, the learned Single Judge did not examine the sustainability of the claim raised by the sixth respondent. The official respondents are aggrieved by the said decision of the learned Single Judge and hence these appeals.

7. Heard the learned Government Pleader, the learned counsel for the petitioner as also the learned counsel for the sixth respondent.

8. The learned Government Pleader contended that the view taken by the learned Single Judge that it was obligatory for the Government to create sufficient number posts of Higher Secondary School Teachers in the high schools upgraded as higher secondary schools from the respective academic year itself is unsustainable in law. According to the learned Government Pleader, merely for the reason that the Government had upgraded a few high schools as higher secondary schools by sanctioning higher secondary courses, it cannot be said that it was obligatory for the Government to create sufficient number of teaching and non teaching posts in the respective schools simultaneously. It was asserted by the learned Government Pleader that creation of posts is a function of the Government involving financial consequences, and the same is therefore one to be done carefully on being satisfied that sufficient number of students are admitted in the schools concerned for higher secondary courses. According to the learned Government Pleader, this cannot be done at the time of sanctioning of higher secondary courses itself. That apart, it was also submitted by the learned

Government Pleader that sanctioning of higher secondary courses in the existing high schools in terms of G.O.(MS) No.143/2014/GE dated 31.07.2014 was subject to the conditions that there shall be at least 40 students for every batch of higher secondary course in the academic year 2014-15 and at least 50 students for every batch from the academic year 2015-16 onwards; that the higher secondary school section shall be run by the schools concerned by engaging qualified teachers on daily wages; that the schools will not be permitted to conduct the higher secondary courses sanctioned to them, if sufficient number of students as specified in the order are not available and that in such an event, the liability to pay remuneration to the teachers engaged on daily wages would be on the Manager. According to the learned Government Pleader, in the light of the provisions contained in the Government Order referred to above, the question of creation of posts in the schools concerned does not arise at any rate before the academic year 2015-16 and that Ext.P4 order has been issued after satisfying the conditions incorporated in the Government order referred to above. There is, therefore, no illegality in Ext.P4 order, submits the learned Government Pleader. It was, however, conceded by the learned Government Pleader that inasmuch as a post of Higher Secondary School Teacher (Jr.) in English has been created in the School in terms of Ext.P4 order with effect from 21.08.2017, the Manager is entitled to appoint by-transfer a qualified teacher to the said post with effect from the said date. The essence of the submissions made by the learned Government Pleader was that the appointment of the petitioner as per Ext.P1 order cannot be approved. On a query from the Court, it was pointed out by the learned Government Pleader that insofar as the Manager has not appointed anyone after 21.08.2017, it is unnecessary for this Court go into the question as to who is entitled to be considered for appointment as Higher Secondary School Teacher (Jr) in English in the School with effect from 21.08.2017.

9. Per contra, the learned counsel for the petitioner contended that in the light of the provisions contained in Rule 3 of Chapter XXXII of the Rules, it is for the Director of Higher Secondary Education to sanction all or any of the various categories of posts mentioned therein to higher secondary schools having regard to the requirements of each school and the Government has no role in the matter of sanctioning teaching or non-teaching posts in higher secondary schools. According to the learned counsel, having regard to the scheme of the provisions contained in Chapter XXXII, it is obligatory for the Government to create necessary teaching and non-teaching posts simultaneous to sanctioning of higher secondary courses. The learned counsel has relied on the decision of this Court in *State of Kerala v. Saji*, 2009 (3) KLT 766, in support of the said argument. It was also argued by the learned counsel that insofar as the provisions contained in Chapter XXXII of the Rules confer a right on the High School

Assistants in the School to claim appointment against 25% of the vacancies of Higher Secondary School Teachers, it was obligatory for the Director to sanction sufficient number of teaching posts in schools where higher secondary courses

have been sanctioned by the Government, simultaneous to the sanctioning of the courses itself. It was pointed out by the learned counsel that if the said position is not accepted, as in the case on hand, the right of a junior qualified High School Assistant to claim appointment as Higher Secondary School Teacher in terms of Rule 4 of Chapter XXXII of the Rules will be defeated by a senior High School Assistant who was not qualified at the time of commencement of higher secondary courses in the school. The learned counsel has also relied on Ext.P7 judgment of this Court in W.P.(C) No.20849 of 2013 to reinforce the said submission. It was pointed out by the learned counsel that even though there was an appeal against Ext.P7 judgment, the same was dismissed affirming the view taken by the learned Single Judge in Ext.P7 judgment.

10. The learned counsel for the sixth respondent supported the submissions made by the learned Government Pleader pointing out that the Manager was competent to make regular appointments in the higher secondary school section of the School only after the posts were created by the Government. It was asserted by the learned counsel that insofar as the sixth respondent is the senior most High School Assistant in the School qualified to be considered for appointment as Higher Secondary School Teacher as on the date of creation of the post of Higher Secondary School Teacher, he is entitled to be considered for appointment against the post created as per Ext.P4 order.

11. In reply to the submission made by the learned counsel for the petitioner, it was submitted by the learned Government Pleader that the decision of the Division Bench of this Court affirming Ext.P7 judgment has been challenged by the State before the Apex Court, and the matter is pending consideration before the Apex Court. It was also pointed out by the learned Government Pleader that pending consideration of the matter, the Apex Court has stayed the operation of Ext.P7 judgment.

12. We have examined the arguments advanced by the learned counsel for the parties on either side.

13. There is no dispute to the fact that it is in terms of G.O.(MS) No.143/2014/GE dated 31.07.2014 that the School has been upgraded as Higher Secondary School by the Government by sanctioning a few batches of higher secondary courses from the academic year 2014-15 onwards. G.O.(MS) No.143/2014/GE dated 31.07.2014 is not part of the records. At the time of hearing, the learned Government Pleader has made available a copy of the said Government order, the contents of which were not disputed by the learned counsel for the petitioner. A perusal of the said Government Order indicates that higher secondary batches have been sanctioned by the Government in terms of the said order to various high schools in the State in the aided sector, subject to the conditions mentioned therein. The relevant portion of the Government Order reads thus:

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Government order would indicate beyond doubt that the schools covered by the said order have been upgraded as higher secondary schools only provisionally subject to fulfilment of the conditions stipulated therein indicating clearly that if the conditions are not fulfilled, the schools will not be entitled to run the higher secondary courses sanctioned in terms of the order. It is also clear from the order that it is in the said circumstances that it is stipulated in the order itself that the higher secondary courses sanctioned in terms of the order shall be conducted by engaging qualified teachers on daily wage basis. In other words, regular appointment of higher secondary school teachers in such schools were prohibited in terms of the order, for if the schools do not fulfil the conditions stipulated therein, they will not be permitted to conduct higher secondary courses any more. In a case of this nature, it cannot therefore be contended that it was obligatory on the part of the Government to create teaching and non-teaching posts in the respective schools simultaneous to the sanction of higher secondary courses. Even otherwise, as rightly pointed out by the learned Government Pleader, merely for the reason that the Government has upgraded a few high schools as higher secondary schools by sanctioning higher secondary courses, it cannot be said that it was obligatory for the Government to create sufficient number of teaching and non-teaching posts simultaneous to the sanctioning of the courses. Creation of posts is purely an executive function and it is now trite that it is open to the Government to take note of the economic realities while taking decisions on creation of posts [See *Indian Drugs & Pharmaceuticals Ltd. v. Workmen, Indian Drugs & Pharmaceuticals Ltd.*, (2007) 1 SCC 408]. Reverting to the facts, creation of posts in newly upgraded higher secondary schools being a function of the Government involving financial consequences, the same has to be done carefully after being satisfied that it is necessary to do so, having regard to the educational need of the respective localities. It appears that it is to ensure that there is educational need in the field of higher secondary education in the respective localities that the Government has imposed the various conditions referred to in the order sanctioning higher secondary courses in the existing high schools in the aided sector. Government cannot be blamed for having decided to defer a decision on creation of posts in newly upgraded schools till it is satisfied that the conditions mentioned in the order to ensure that there exists a need in the field of higher secondary education in the respective areas, are fulfilled. Needless to say, it was not obligatory for the Government to create posts simultaneous to sanctioning of the courses, even if the sanctioning of the courses was unconditional, and in appropriate cases, the Government can certainly defer the decision on creation of posts until it is satisfied that its decision to sanction new higher secondary batches in the existing schools in the aided sector achieves its purpose. The Government cannot therefore be blamed, in a case of this nature, for having imposed a condition that regular appointment shall not be made until it ensures that educational need exists in the respective areas and that the courses shall be conducted without fastening any liability on the exchequer. The appointment of the petitioner being one made long prior to the creation of posts by the

Government and sanctioning of posts to the School by the Director, that too, flouting the conditions stipulated in the G.O.(M.S) No.143/2014/G.E. dated 31.07.2014, the same is bad in law, and the contrary finding rendered by the learned Single Judge is unsustainable in law.

14. Let us now deal with the arguments advanced by the learned counsel for the petitioner. True, Rule 4 of Chapter XXXII of the Rules dealing with the method of appointment of Higher Secondary School Teachers provides that vacancies of Higher Secondary School Teachers shall be apportioned in the ratio 1:3 between appointment by-transfer and direct appointment. The rule also provides that the appointment by-transfer shall be effected from High School Assistants who possess requisite qualifications under the educational agencies. The said provisions certainly confer a right on High School Assistants in the existing schools who possess the requisite qualification to claim appointment against 25% of the vacancies of Higher Secondary School Teachers. But, according to us, the provisions in Chapter XXXII of the Rules do not preclude the Government from sanctioning higher secondary courses in existing schools provisionally without creating sufficient number of posts subject to conditions including the condition that the courses shall be conducted by engaging qualified teachers on daily wage basis. The provisions in Chapter XXXII of the Rules can be pressed into service only when regular appointments are made after creation of posts by the Government and after sanctioning of the required number of posts in each school by the Director of Higher Secondary Education having regard to their requirements.

15. As regards the argument raised by the learned counsel for the petitioner based on the provisions contained in Rule 3 of Chapter XXXII of the Rules and the decision of this court in Saji, it is to be noted that the scheme of the provisions contained in Chapter XXXII of the Rules, of course, is that it is for the Director to sanction, having regard to the requirements of each school, all or any of the categories of posts mentioned in Rule 3. But that does not mean that necessary posts need not be created by the Government, for in terms of Section 9 of the Kerala Education Act, Government is obliged to pay salary to the teaching and non-teaching staff of aided higher secondary schools. The fact that creation of posts in higher secondary schools contemplated in terms of the provisions contained in Chapter XXXII of the Rules is evident from Rule 5(3) of Chapter XXXII, which reads thus:

"(3) Notwithstanding anything contained in these rules, if it is found necessary, Government may by orders, extend any ban on the creation of posts, retrenchment of staff etc.; effected by them in Government Higher Secondary Schools to Aided Higher Secondary Schools."

Of course, the said provision only provides that the Government would be competent to extend any ban on creation of posts, retrenchment of staff etc. effected in Government higher secondary schools to aided higher secondary schools also. However, in the light of the said provision, the petitioner cannot be

heard to contend that creation of posts happens simultaneous to the sanctioning of the various categories of posts by the Director in terms of Rule 3 of the Rules. On a close scrutiny of the provisions contained in Chapter XXXII of the Rules, it appears to us that the scheme of the provisions therein is that the power under Rule 3 can be exercised by the Director of Higher Secondary Education only if sufficient number of posts are created by the Government. Of course, in Saji, it was observed by this Court that the Director of Higher Secondary Education is empowered to sanction posts having regard to the requirement of each school. The decision in Saji was one rendered by this Court prior to the introduction of sub-rule (3) of Rule 5 of Chapter XXXII of the Rules. Be that as it may, as far as the case on hand is concerned, the petitioner had no case that posts of teaching staff in the higher secondary school section of the School have been sanctioned by the Director before the appointment of the petitioner, and as such, the argument based on Rule 3 of Chapter XXXII and the decision of this Court in Saji is without any substance.

16. Similarly, there is no substance in the argument advanced by the learned counsel for the petitioner based on Ext.P7 judgment. It is seen that as in the case on hand, during August, 2010 also, the Government sanctioned higher secondary courses to a few aided schools in the State subject to the condition that initial appointment of teaching staff shall only be as Guest Lecturers. Later, the Government sanctioned for the said schools, posts of Higher Secondary School Teachers (Jr.). Persons who were appointed as Guest Lecturers, and had been absorbed against the subsequently created posts of Higher Secondary School Teacher (Jr.), submitted representations before the Government to upgrade the post of Higher Secondary School Teacher (Jr.) sanctioned to the schools as they were qualified to be appointed as Higher Secondary School Teachers itself, having regard to the workload in the respective schools, in terms of Rule 1(d) of Chapter XXXII of the Rules. Even though the Government accepted the said claim of the teachers and upgraded the posts of Higher Secondary School Teacher (Jr.) created earlier, as Higher Secondary School Teacher based on the recommendations made by the Director of Higher Secondary Education, the same was done only prospectively from the date of the order. It is the said decision of the Government that was impugned in the writ petition in which Ext.P7 judgment was rendered. The view taken by the learned Single Judge in the said case was that insofar as the petitioners therein became qualified to be appointed as Higher Secondary School Teachers in terms of Rule 1(d) of Chapter XXXII of the Rules when posts of Higher Secondary Teacher (Jr.) have been created itself, the posts should have been upgraded with effect from the date on which they became qualified to be considered for appointment as Higher Secondary School Teachers. The said judgment, according to us, has no application to the facts of the present case.

17. As it is found that the Manager of the school was incompetent to make any regular appointment in the higher secondary section of the School prior to creation of posts by the Government and sanction of posts by the Director of

Higher Secondary Education, and insofar as it is admitted by the Manager that he has not made any appointment against the post of Higher Secondary School Teacher (Jr.) in English created by the Government in terms of Ext.P4 order, it is unnecessary for this Court to examine the sustainability or otherwise of the claim raised by the sixth respondent for appointment against the post of Higher Secondary School Teacher (Jr.) in English created in terms of Ext.P4 order.

In the result, the writ appeals are allowed, the impugned common judgment in the writ petitions is set aside and the writ petitions are dismissed.