

(2023) 08 KL CK 0093

In the High Court Of Kerala

Case No : ?Writ Appeal Nos.1301, 1351, 1354,1356, 1357, 1358, 1360 Of 2023

State Of Kerala

APPELLANT

Vs

P.Muralidharan & Ors

RESPONDENT

Date of Decision : 09-08-2023

Acts Referred:

Constitution of India, 1950 — Article 21

Citation : (2023) 08 KL CK 0093

Hon'ble Judges : Dr. A.K.Jayasankaran Nambiar, J;Mohammed Nias C.P., J

Bench : Division Bench

Advocate : A.J. Varghese, Vinitha B, George Poonthottam, Nisha George,
P.C.Sasidharan

Final Decision : Disposed Of

Judgement

Dr. A.K. Jayasankaran Nambiar, J

1. The State is the appellant in these Writ Appeals that impugn a common judgment of a learned Single Judge in eight writ petitions. The brief facts necessary for disposal of these Writ Appeals are as follows:

2. The Kadambur High School commenced its academic activity as a Lower Primary School in 1899. It was upgraded as an Upper Primary School with effect from 1.6.1958, as a High School with effect from 29.5.1982, and as a Higher Secondary School with effect from 2000. The issue involved in these writ petitions stemmed from a complaint that was raised before the educational authorities with regard to the conduct of the Higher Secondary Section of the School in the building that housed the High School Section. While it was the case of the management that the Higher Secondary Section was shifted to a new building during the academic year 2013-14, the educational authorities under the Kerala Education Rules, pursuant to an inspection done at the School on 12.7.2017 followed by a super check cell inspection on 15.1.2019, alleged that the High School had obtained the benefit of sanction of 26 divisions in excess of

what was justified based on the student strength and infrastructural availability in the School during the academic year 2018-19. Accordingly, while in the staff fixation for the High School for 2018-19, 154 divisions were sanctioned, pursuant to the inspection by the super check cell and an adjudication that followed, 26 divisions were reduced for the said academic year by Ext.P17 order dated 31.12.2019. By the said order, a further direction was issued by the Director of Public Instructions to revise all the staff fixation orders from 2016-17 onwards in the High School.

3. The essential allegation by the education authorities against the management was that the High School Section had shown greater students strength therein by reckoning the students of the Higher Secondary Section also and had thereby obtained sanction of 26 additional divisions in the High School Section for the academic year 2018-19. Aggrieved by the said order of the education authorities, the management impugned the same in W.P. (C).No.290/2020. W.P. (C).No.10664/2019 was filed challenging the show cause notice that was issued purporting to take over the management of the School. W.P.(C).No.28179/2022 was filed challenging the staff fixation for 2022-23 where again the eligible divisions were not sanctioned in the High School. W.P.(C).Nos.12046/2021, 40219/2022, 40849/2022, 40889/2022 and 40953/2022 were filed seeking approval of the appointments made of teachers in the High School Section which approvals were denied on account of Ext.P17 order that was impugned in W.P. (C).No.290/2020.

4. During the pendency of the writ petitions, Ext.P25 order was passed by the Regional Deputy Director of Higher Secondary Education permitting the conduct of classes for the Higher Secondary Section in the new building that was constructed by the management and directing the issuance of staff fixation orders for the Higher Secondary Section for the academic years from 2014-15 onwards. Thereafter, by an order dated 18.11.2022, staff fixation orders were passed in the Higher Secondary Sections for the academic years from 2014-15 to 2021-22. Taking note of the aforesaid development, the learned Single Judge found that the basis for the issuance of Ext.P17 order that was impugned in the lead writ petition [W.P.(C).No.290/2022] had been removed, and hence, the said order had to be quashed. The writ petitions were thereafter allowed with the following directions:

"1) W.P.(C.) No.290/2020 is allowed. Ext.P17 is set aside, and Ext.P2 staff fixation order is restored.

2) W.P.(C)Nos.40219/2022, 40849/2022, 40953/2022 and 40889/2022 are allowed, and the impugned orders in these writ petitions are set aside. There will be a direction to the competent authority among the respondents in these cases to approve the appointment of the teachers in these cases in the light of Ext.P10 in these writ petitions and also in the light of the findings in W.P.(C.) No. 290/2020, if the proposal for approval is otherwise in order, as expeditiously as possible at any rate within 2 months from the date of receipt of a copy of this

judgment.

3) W.P.(C.)No.10664/2019 is allowed, and Exts.P1 and P20 are quashed in the light of the findings in W.P.(C)No. 290/2020.

4) W.P.(C)No.12046/2021 is allowed, and Exts.P11, P12, P13 and P14 in this writ petition are quashed. There will be a direction to the competent authority among the 2023:KER:13500 respondents to approve the appointment of the teachers in the light of the observations in this judgment, if the proposal for approval is otherwise in order, as expeditiously as possible at any rate within 2 months from the date of receipt of a copy of this judgment.

5) W.P.(C)No.28179/2022 is allowed. Ext.P18 is set aside and there will be a direction to the competent authority among the respondents to pass fresh staff fixation orders in the light of the findings in W.P. (C) No. 290/2020 as expeditiously as possible at any rate within 2 months from the date of receipt of a copy of this judgment.”

5. When the Writ Appeals came up for admission, we noticed that the approval to the appointment of around 79 teachers in the School has been held up on account of Ext.P17 order passed by the Director of Public Instructions in connection with the staff fixation for the academic year 2018-19. We also notice that the basic grievance of the State in the appeals is that the merits of their allegation against the management namely, that they had inflated the student strength in the High School Section by including the students of the Higher Secondary Section, was not considered by the learned Single Judge in the impugned judgment. We therefore decided to hear the appeals finally so as to put a quietus to the issue.

6. While considering the arguments in the Writ Appeals, particularly on the issue of whether or not there was a shortage of students or lack of infrastructure noticed in the High School Section during the year, we found that in the staff fixation orders pertaining to the High School from 2013-14 onwards, while the School was found entitled to the sanction of a higher number of divisions, only a lesser number of divisions were actually sanctioned during the said years. The management also does not appear to have impugned those staff fixation orders before the Appellate/Revision authorities under the Kerala Education Act and Rules. We cannot overlook the possibility that the management did not stake a claim for the additional divisions because the class rooms for the additional divisions were actually used in those years for accommodating students of the Higher Secondary Section of the School. If that be the case, then may be there was no sanction of excess divisions at all in the High School Section as alleged in Ext.P17 order and the students of the Higher Secondary Section found in the High School Section was the reason why lesser number of divisions than what the school was found eligible to were actually sanctioned in the High School Section. This aspect is not seen considered or adverted to in Ext.P17 order. An effective adjudication of the show cause notice issued to the manager pursuant

to the inspection by the super check cell would have to consider the above aspect along with the findings of the super check cell to ascertain the real position. We are satisfied therefore that Ext.P17 order was rightly quashed by the learned Single Judge and further that the matter will now have to be examined afresh by the Director of Public Instructions in the light of our observations above.

7. As regards the teachers before us, we feel that inasmuch as it is not in dispute that they were actually teaching in the School all these years, they would be protected by the de facto doctrine when it comes to claiming their salary for the period they were engaged in teaching in the School. Their salary for the future period would however have to await the adjudication that we have directed above. The learned Government Pleader however brings to our notice a Division Bench decision of this Court in *State of Kerala v. Manager, Niduvloor A.U.P. School* – [2022 (4) KLT 499] to contend that there can be no direction issued to the Government to pay salary to teachers whose appointments have not been approved by the Government for the period they actually worked in the School. It is pointed out that the said decision held an earlier Full Bench decision of this Court in *Jolly v. State of Kerala* – [(2003) 2 KLT 192 (FB)] to be per incuriam on this issue in the light of the decisions of the Supreme Court in *Government of Andhra Pradesh and Others v. K.Brahmanandam and Others* – [2008 (2) KLT OnLine 1134 (SC)] and *Shesh Mani Shukla v. D.I.O.S. Deoria and Ors.* – [(2010) 1 KLT Suppl. 171 (SC)].

8. We find ourselves unable to accept the said contention of the learned Government Pleader. It is not in dispute before us that as per the Scheme of the Kerala Education Act & Rules, the right to make appointments of teachers in an aided School is that of the Manager of the School. The said right is not however absolute in nature and the obligation of the Government to pay salary to a teacher appointed by the Manager arises only when the appointment is duly approved by the Government after finding it to be in conformity with the statutory provisions regulating such appointments. That said, if the Manager of an aided School appoints a teacher, in contravention of the statutory provisions, and the teacher in question discharges his/her duties as a teacher in the School without being prevented by the Government from discharging such duties, the State Government has to be seen as tacitly consenting to such teacher discharging the obligations of the State with regard to imparting education to students in the School albeit without any obligation for the Government to pay salary to the teacher in question. The teacher in question, from whom teaching work has been extracted, has necessarily to be paid salary for the period worked and the only issue that has to be decided is whether it is the State Government or the Manager of the School that must bear the liability. Undoubtedly, in a case where the appointment of the teacher is contrary to the statutory provisions, the liability to pay salary to such teacher would fall on the Manager. However, to safeguard the right to livelihood of the teacher, traceable to Article 21 of our Constitution, from a possible refusal by the Manager to pay salary to the teacher

for the period worked, the State Government must step in as a protector of the fundamental rights of the teacher and make the payment of salary on behalf of the Manager, after reserving to itself the right to recover those payments from the Manager of the School. The said obligation of the State flows from its role as protector of the fundamental right of its citizens and not from its statutory role as a regulator of Educational Institutions in the State. It is in the context of the latter role that the observations of the Division Bench in the judgment relied on by the learned Government Pleader must be understood. Our direction, however, is based on the former role envisaged for the Government. Accordingly, we dispose these Writ Appeals with the following directions:

(i) The impugned judgment of the learned Single Judge, to the extent it quashes Ext.P17 order, is upheld. The Director of Public Instructions shall consider the matter afresh in the light of the observations of the learned Single Judge in the impugned judgment as also the observations in this judgment, within six months from today after hearing the manager of the School, the petitioner/teachers and others likely to be affected by the orders to be passed by the DPI.

(ii) The appointment of the petitioner/teachers alone (79 in number) shall be approved forthwith for the limited purpose of enabling them to draw their salary and other allowances for the period from the date of their appointment till the date of this judgment. The arrears of salary shall be paid to them within two months from today. Their entitlement to future salary and allowances will however depend on the outcome of the fresh adjudication proceedings directed above. Needless to say, if ultimately it is found that the appointment of the petitioner/teachers was made in contravention of the statutory provisions, then notwithstanding the payment of salary to the petitioner/teachers, it would be open to the Government to recover the salary paid to the petitioner/teachers from the Manager in terms of the provisions of the KER.

The Writ Appeals are disposed as above.