

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

MONDAY, THE 3RD DAY OF AUGUST 2015/12TH SRAVANA, 1937

WA.No. 994 of 2011 () IN WP(C).9382/2009

AGAINST THE JUDGMENT IN WP(C) 9382/2009 of HIGH COURT OF KERALA
DATED 12-04-2011

APPELLANT(S)/WRIT PETITIONER:

M.G. SINY, HIGH SCHOOL ASSISTANT
(PHYSICAL SCIENCE), GRACY MEMORIAL HIGH SCHOOL
PARATHODE 686 512, KOTTAYAM, DISTRICT.

BY ADVS. SRI. BINOY VASUDEVAN
SMT. P.G. BABITHA

RESPONDENT(S)/RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY THE
SECRETARY TO GOVERNMENT, GENERAL EDUCATION (H)
DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.
2. THE DIRECTOR OF PUBLIC INSTRUCTION
THIRUVANANTHAPURAM. 695001.
3. THE DEPUTY DIRECTOR (EDUCATION),
KOTTAYAM. 686512.
4. THE DISTRICT EDUCATIONAL OFFICER
KANJIRAPPALLY. 686507.
5. THE MANAGER,
GRACY MEMORIAL HIGH SCHOOL, PARATHODE 686 512
KOTTAYAM.
6. SMT. MANJOOSHA MATHEW, AMBATTUPOTHYIL
THIDANAD PO, KANJIRAPPALLY. 686507.

R-6 BY ADV. SRI. GEORGE POONTHOTTAM
R5 BY SRI. S. EASWARAN
R1 TO R4 BY SR GOVERNMENT PLEADER SRI. P. FAZIL

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 03-08-2015, ALONG
WITH WA. 1016/2011, WA. 1024/2011, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

W.A.Nos.994, 1016 & 1024 of 2011

Dated this the 3rd day of August, 2015

JUDGMENT

Antony Dominic, J.

1. W.A.No.994/11 is filed against the judgment in W.P (C).9382/09. W.A.NOs.1016/11 and 1024/11 are filed by the Manager of an aided school against the judgments in W.P(C).No.37958/08 and 5471/09 respectively. The issues raised being connected, these cases were disposed of by the learned single Judge together and for the same reason, these appeals were heard and are being disposed of together.

2. Briefly stated, the relevant facts are that on 3.10.2005, the petitioner in W.P(C).No.37958/08, hereinafter referred to as 'teacher', was appointed as UPSA in the school, of which, the appellant in W.A.Nos.1016/11 and 1024/11 is the Manager. The appointment was to an additional vacancy sanctioned in the academic year 2005-06. The proposal of the Manager for approval of the appointment was rejected by the District Educational Officer as the Manager had not furnished the required documents such as

original qualification certificate with attested copies, declaration regarding the date of opening and upgrading of the school, conduct certificate, etc. The Manager did not challenge that order nor was the order communicated to the teacher. The teacher continued to work in the school and on 31.3.2006, the school was closed for summer vacation.

3. With effect from 17.5.2006, the teacher applied for maternity leave. Presumably for the reason that the approval of her appointment was rejected, no action was taken by the Manager on the leave application. When the school was re-opened on 1.6.2006, the appellant in W.A.994/11, hereinafter referred to as the 'second teacher', was appointed in the additional vacancy mentioned above. However, that appointment was also not approved by the Department. While matters stood thus, on 28.9.2006, the petitioner in W.P(C).No.37958/08, the teacher who was appointed on 3.10.2005, reported back in the school and the Manager appointed her on daily wages. Subsequently, by order dated 20.12.2006, her appointment on daily

wages for the period from 28.9.2006 to 1.12.2006 was approved by the Department.

4.It was thereafter that the teacher submitted an appeal against the non-approval of her appointment with effect from 3.10.2005. That appeal was allowed by the Deputy Director, Kottayam as per his order dated 26.4.2007. Against this order, the Manager filed a revision before the Director of Public Instructions which was rejected by order dated 4.8.2007. The revision filed before the Government was also rejected by Government Order dated 24.11.2008. Thereupon, the Manager filed W.P(C). 5471/09 challenging the orders rejecting his revisions and the teacher filed W.P(C).No.37958/08 for implementation of the orders. W.P(C).9382/09 was filed by the second teacher who was appointed from 1.6.2006 and her prayers are similar to those sought for by the Manager in his writ petition.

5.The aforesaid writ petitions were heard together and by the common judgment under appeal, following the Division Bench judgment of this Court in Unni

Narayanan v. State of Kerala [2009 (2) KLT 604], learned single Judge allowed W.P(C).No.37958/08 filed by the teacher and dismissed the other two petitions, filed by the Manager and the second teacher. It is accordingly that the Manager filed writ appeals against the dismissal of W.P(C).5471/09 filed by him and the judgment allowing W.P(C).No.37958/08 filed by the teacher. W.A.994/11 is filed by the second teacher against the dismissal of W.P(C).9382/09.

6. We heard learned counsel for the appellants, learned Government Pleader and the learned counsel appearing for the party respondents.

7. The first contention raised by the learned counsel for the Manager is that Unni Narayanan (supra), heavily relied on by the learned single Judge for allowing W.P(C).No.37958/08 and dismissing the other two cases, has since been overruled by the Apex Court in its judgment in State of Kerala v. Sneha Cheriyan [2013 (1) KLT 755]. The second contention raised is that the Government, in its order dated 24.11.2008, placed reliance on G.O(P).317/15/G.Edn dated

17.8.2005. According to the counsel, the said Government Order does not have any relevance in the context of the instant case. It was also contended that the teacher having accepted the appointment on daily wages with effect from 28.9.2006 is estopped thereafter from claiming appointment on regular basis by moving an appeal as done in the instant case. Lastly, it was contended that the Government having not suffered any loss could not have ordered recovery of the differential amount paid to the teacher, from the Manager.

8.All these contentions were refuted by the learned Government Pleader and the learned counsel appearing for the teacher appointed on 3.10.2005.

9.We have considered the submissions made. The first contention of the learned counsel for the Manager is that Unni Narayanan (supra) having been overruled by the Apex Court in Sneha Cherian (supra), the very foundation of the judgment is lost. It is true that Unni Narayanan (supra) was overruled by the Apex Court in Sneha Cherian (supra). But the question is

whether the principles laid down in Sneha Cherian (supra) would legitimise the appointment made by the Manager on daily wages when the teacher reported in school on the expiry of her maternity leave. Reading of Sneha Cherian (supra) shows that after going through the provisions of KER, the Apex Court issued the following directions:

"i) A teacher, who was relieved from service under R.49 and 53 of Chapter XIVA of the K.E.R., is entitled to get preference for appointment under R.51A only if the teacher has a minimum prescribed continuous service in an academic year as on the date of relief.

ii) The Manager of an aided school can, however, appoint teachers in vacancies occurred due to death, retirement, promotion, resignation, long-term leave etc., provided they are established vacancies and the approval can be granted subject to the conditions under R.49 of Chapter XIVA of the K.E.R.

Iii) Approval can also be granted to appointments made to the approved vacancies arising and continuing beyond 31st March due to sanctioning of additional divisions.

iv) The Manager can make appointments in school even if the duration of which is less than one academic year but on daily wages basis and if the

duration of vacancy exceeds one academic year that can be filled up on scale of pay basis.

v) The Manager is free to appoint teachers on a regular basis from the re-opening date itself against regular established vacancies and need not wait for the appointments till completion of the staff fixation as per the K.E.R.

vi) Teachers who have been appointed in the midst of the academic year and not completed the requisite minimum continuous service before vacation will not be entitled to get vacation salary."

10. Reading of the directions of the Apex Court shows that the appointments made to additional divisions sanctioned beyond 31st March could also be approved. It is made clear that Managers can make appointments in schools even if the duration of vacancy is less than one academic year and that such appointment can only be on daily wage basis. These directions issued by the Apex Court show that the nature of appointment that the Manager is entitled to make viz. whether it is regular appointment or appointment on daily wages would depend upon the question whether the duration of the vacancy exceeds one academic year or not. If the duration is less than one academic year, the

appointment can only be on daily wages and if the duration of the vacancy is in excess of one academic year, regular appointment can be made.

11. In so far as this case is concerned, the teacher was appointed with effect from 3.10.2005 and when she reported back in the school on 28.9.2006, she was appointed on daily wages. The reason stated by the Manager for appointing her on daily wages was that as on 17.5.2006, when she entered on maternity leave, she had not worked for one academic year. Therefore he appointed the appellant in W.A.994/11 with effect from 1.6.2006 and the teacher on daily wages, when she reported back in the school. As we have already found, the entitlement of the Manager to make appointments on regular basis or on daily wage basis would depend upon the duration of the vacancy and not the length of the service rendered. In fact, even the Manager does not dispute the factual position that the duration of the vacancy exceeded one academic year. In such a case, even going by the principles in *Sneha Cherian (supra)*, the Manager could not have appointed the teacher on daily wages

when she reported in the school on expiry of her maternity leave on the basis that as on the date when she entered on maternity leave, she had not rendered service for one academic year. Therefore, even though it is true that Unni Narayanan (supra) was overruled by the Apex Court in Sneha Cherian (supra), that will not, in any manner, affect the conclusion of the learned single Judge on the validity of the order of the DPI and of the Government which were challenged by the Manager.

12. The second contention is that the Government Order dated 17.8.2005 relied on by the Government to reject the revision of the Manager has no relevance. We are unable to agree. Paragraph 3(i) of the Government Order dated 17.8.2005 reads thus:

"(i) The Assistant Educational officers/ District Educational officers concerned will sanction additional divisions in Government/Aided Schools, eligible as per the provisions in the KER, for the year 2005-06 and approve the appointments against those vacancies, if they are otherwise in order. Eligible post of non-teaching staff will also be sanctioned accordingly."

13. Reading of the above provisions of the Government Order shows that by this order, the Government permitted the authorities to approve appointments made against those additional vacancies sanctioned for the academic year 2005-06. Admittedly, the vacancy to which the teacher was appointed on 3.10.2005 was an additional vacancy sanctioned in the academic year 2005-06. If that be so, the Government was fully justified in placing reliance on the Government Order dated 17.5.2005.

14. Next contention of the learned counsel for the Manager was that acceptance of appointment by the teacher on daily wages estopped her from claiming the benefits which led to the impugned orders. It is true that the teacher has accepted the appointment offered to her on daily wages. However, the question is whether acceptance of appointment on daily wages would prevent her from claiming the benefits which she was otherwise entitled to. As is evident from the pleadings and the orders impugned, the reliefs that she claimed, are based on the provisions of the Kerala Education Act and the Rules. In other words,

what she had claimed are only statutory benefits. It is trite that there is no estoppel against statute. Therefore, acceptance of appointment on daily wages did not, in any manner, estop the teacher from asserting her statutory claims under the Kerala Education Act and the Rules.

15. We are also not impressed by the contention of the Manager that the Government did not suffer any loss by paying the differential amount, which is reported to be more than ₹6 lakhs, to the teacher and that therefore, the Manager cannot be saddled with that liability. Admittedly, loss was caused to the teacher and the person responsible for causing that loss is the Manager. When such loss is made good by the Government, the Government is entitled to recoup that loss from the person who caused it. In that view of the matter, we are not in a position to absolve the Manager from his liability.

16. For the aforesaid reasons, we do not find any merit in W.A.Nos.1016/11 and 1024/11 and are to be rejected. As far as W.A.994/11 filed by the second

teacher appointed on 1.6.2006 against the dismissal of W.P(C).9382/09 filed by her is concerned, her contentions are same as that of the Manager in W.A.Nos.1016/11 and 1024/11, which we have already rejected. Therefore, W.A.994/11 also does not have any merit.

17. In the result, the appeals are dismissed.

We are informed that during the pendency of these appeals, disciplinary action has been initiated against the teacher and that the same is pending. Obviously, the judgment in these appeals cannot have any impact on the right of the Manager to pass appropriate orders on conclusion of such disciplinary proceedings.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
SHAJI P. CHALY, Judge.

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PS to Judge