

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE ANIL K. NARENDRA

FRIDAY, THE 30TH DAY OF JANUARY 2015/10TH MAGHA, 1936

WA.No. 1105 of 2013 () IN WP(C).28039/2011

AGAINST THE JUDGMENT IN WP(C) 28039/2011 of HIGH COURT OF KERALA
DATED 12-07-2013

APPELLANT/PETITIONER:

B. JAYARAJAN
S/O. BHARATHARAJAN, MANAGER,
S.N.V. GIRLS HIGH SCHOOL
PARAVOOR, KOLLAM-691301.

BY ADV. SRI. V. A. MUHAMMED

RESPONDENTS/RESPONDENTS:

1. THE STATE OF KERALA
REPRESENTED BY ITS SECRETARY TO GOVERNMENT
GENERAL EDUCATION DEPARTMENT, SECRETARIAT
THIRUVANANTHAPURAM-695001.
2. THE DISTRICT EDUCATIONAL OFFICER
KOLLAM DISTRICT-691001.
3. SRI. J. S. SHALI
SEWING TEACHER, S.N.V. GIRLS HIGH SCHOOL, PARAVOOR
KOLLAM DISTRICT-691301.
4. SMT. N. T. JISHA
VISHAKAM, P.O. KOTTAPPURAM, PARAVOOR
KOLLAM DISTRICT-691301.

R1 & R2 BY SR. GOVERNMENT PLEADER SRI. VIJU THOMAS
R4 BY ADV. DR. K. P. SATHEESAN (SR.)
R4 BY ADV. SRI. M. R. JAYAPRASAD
R4 BY ADV. SRI. P. MOHANDAS (ERNAKULAM)
R4 BY ADV. SRI. ANOOP. V. NAIR
BY SMT. ASHA CHERIAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 28.11.2014, ALONG
WITH W.A.NO.1157/13, THE COURT ON 30-01-2015, DELIVERED THE FOLLOWING:

APPENDIX IN W.A.1105/13

APPELLANT'S ANNEXURES: NIL

RESPONDENTS' ANNEXURES:

ANNEXURE R4(A): COPY OF REPLY GIVEN BY THE HEADMISTRESS, SNV GHS,
PARAVOOR DT.26.11.13.

ANNEXURE R4(B): COPY OF NOTIFICATION PUBLISHED BY THE APPELLANT IN
KERALA KOUMUDI DAILY DT.25.5.14.

ANNEXURE R4(C): COPY OF NOTIFICATION PUBLISHED BY THE APPELLANT IN
MATHRUBHOOMI DAILY DT.25.5.14.

TRUE COPY

P.S.TO JUDGE

dsn

ANTONY DOMINIC & ANIL K.NARENDRA, JJ.

W.A.Nos.1105 & 1157 of 2013

Dated this the 30th day of January, 2015

JUDGMENT

ANIL K.NARENDRA, J.

These appeals arise out of the judgment of the learned Single Judge dated 12/7/2013 in W.P.(C)Nos.28039/2011 and 28631/2011, respectively. The learned Single Judge by a common judgment dated 12/7/2013 dismissed both the writ petitions and it is aggrieved by the said judgment, the appellants are before us in these writ appeals. W.A.No.1105/2013 is filed by the petitioner in W.P.(C)No.28039/2011 and W.A.No.1157/2013 is filed by the petitioner in W.P.(C)No.28631/2011.

2. We heard the arguments of the learned counsel for the appellants in these writ appeals, the learned Government Pleader appearing for the official respondents and also the learned Senior Counsel for the party respondent.

3. For convenience, we shall refer the facts and parties as mentioned in W.P.(C)No.28631/2011.

4. Going by the averments in W.P.(C)No.28631/2011, the petitioner (appellant in W.A.No.1157/2013) was appointed as a

Sewing Teacher on 1/6/2010, in the High School section of SNV Girls High School, Paravur, an aided school managed by the 3rd respondent (the appellant in W.A.No.1105 of 2013), against the vacancy which arose on account of the retirement of Smt. K. Radhamani Amma, who retired on superannuation on 31/3/2009. Exhibit P1 is the copy of appointment order dated 1/6/2010 issued by the 3rd respondent Manager appointing the petitioner as a probationary Sewing Teacher in the High School section of the school. Exhibit P2 is the Statement of Change of Staff prepared by the 3rd respondent and Exhibit P3 is the report in this regard submitted by the Headmaster of the school to the District Educational Officer, Kollam, the 2nd respondent herein. Along with Exhibit P4 covering letter, the 3rd respondent Manager forwarded Exhibit P1 appointment order to the 2nd respondent for approval.

5. According to the petitioner, Smt. Vasanth, a protected Sewing Teacher in the Upper Primary section of the school, who was continuing on clubbing arrangement with UP School, Koonayil, as per Order No.B4/17192/02 dated 31/12/2002 of the 2nd respondent, retired from service on

31/3/2010. Against that retirement vacancy, the former Manager appointed the 4th respondent as Sewing Teacher from 29/5/2010, by Exhibit P5 proceedings dated 1/6/2010, ignoring the fact that the post of Sewing Teacher in the UP section was abolished in the year 2002 itself due to fall in student strength and Smt. Vasantha was allowed to continue only on clubbing arrangement, in terms of the proviso to Rule 6B of Chapter XXIII of the Kerala Education Rules, 1959 (hereinafter referred to as 'the KER'). On her retirement, that post ceased to exist. Further, the 2nd respondent has not sanctioned the post of Sewing Teacher in the UP section during the academic year 2010-11.

6. The petitioner contended that, SNV Girls High School is owned and managed by SNV Samajam, Paravur, and the President of the Samajam is the Manager of the school. The General Body of the Samajam elects the members to the Managing Committee, which is having a tenure of 5 years. The previous Managing Committee assumed charge on 23/5/2003 and the term of the said committee was over by 23/5/2008. However, the election to the Managing Committee was conducted

only on 19/4/2009 and in the meeting of the new Managing Committee held on 30/5/2009 Sri. Jayarajan was elected as the President of the Samajam and thus he became the Manager of the school. Exhibit P6 is the minutes of the meeting of the Managing Committee held on 30/5/2009, as per which the new office bearers assumed charge on that day itself. In order to substantiate the fact that, the newly elected Manager visited the school on 30/5/2009 and took charge on the same day itself, the petitioner relied on Exhibit P7 visit book. The petitioner also relied on Exhibit P8 application for Fitness Certificate dated 28/6/2009, submitted by the newly elected Manager and also Exhibit P9 Fitness Certificate dated 7/7/2009 issued by the Municipal Engineer, Paravur Municipality, based on Exhibit P8 application.

7. By Exhibit P10 Government order dated 31/5/2010, the Government approved Sri. Jayarajan as the Manager of the school. Relying on Exhibit P10, the petitioner contended that, as on 1/6/2010, the date on which the 4th respondent was appointed as Sewing Teacher, the former manager was incompetent to

make such an appointment. The petitioner further contended that, 29/5/2010 fell during the vacation and going by Sub-rule (2) of Rule 7A of the KER, the post that fall vacant on the closing date shall not be filled up till the reopening date. Further, Exhibit P5 proceedings of the former Manager appointing the 4th respondent as Sewing Teacher was issued on 1/6/2010, which is after the issuance of Exhibit P10 Government order approving Sri. Jayarajan as the Manager of the school. The petitioner also relied on Exhibits P11, P12 and P13 Staff Fixation orders for the academic years 2008-09, 2009-10 and 2010-11, in order to contend that, since the student strength in the UP section was less than 500, no post of Sewing Teacher was sanctioned in the UP section during those academic years.

8. The approval for the appointment of the 4th respondent was rejected by the 2nd respondent, against which she filed a revision before the Government. The Government by Exhibit P14 order dated 7/10/2011 allowed the revision, holding that Sri. Sathjith was the Manager of the school up to 31/5/2010 and the appointment of the 4th respondent as Sewing Teacher made by

him on 29/5/2010, with effect from 1/6/2010, is a valid one. The Government also found that the 4th respondent has been prevented from attending duty by the newly elected Manager and in such circumstances, the 2nd respondent was directed to ensure that the 4th respondent is allowed to join duty forthwith based on the appointment order dated 29/5/2010 issued by the former Manager.

9. A perusal of Exhibit P14 order passed by the Government would show that, the contention raised before the Government by the newly elected Manager was that, going by Exhibit P10 order dated 31/5/2010 he is the approved Manager of the school and hence the appointment of the 4th respondent made by the former Manager, who has no right to make any appointment as he ceased to be the Manager of the school with effect from 19/4/2009 is not a valid appointment and that, he has appointed the petitioner as Sewing Teacher, with effect from 1/6/2010, and she is attending duty without any break.

10. As rightly noticed by the Government in Exhibit P14, the former Manager has been continuing as such till the

Government issued Exhibit P10 order dated 31/5/2010 approving Sri. Jayarajan as the Manager of the school, replacing the former Manager from that post. It is pertinent to note that, in Exhibit P10 Government order dated 31/5/2010, the Government found that, though election to the Managing Committee of the Samajam was held on 19/4/2009 and result of the said election was also declared by the Returning Officer on 20/4/2009, the Returning Officer could not conduct the election of the office bearers, for various reasons. Though, 11 out of 21 elected members convened a meeting on 30/5/2009 and elected the office bearers, pursuant to which Sri. Jayarajan took charge as President of the Samajam, for the purpose of assuming charge, the presence of the Returning Officer was not available. The application submitted by Sri. Jayarajan for approval as the Manager of the school was rejected by the 2nd respondent on the ground that, the handing over the charge of management was not legal. The appeal filed against the said order was also rejected by the Director of Public Instruction. But, in Exhibit P10, the Government found that, since the election to the Managing Committee of the Samajam

conducted on 19/4/2009 is in accordance with law the Managing Committee which was in existence prior to that election and its members cannot continue as such and the former Manager cannot continue as the Manager of the school after 19/4/2009. Therefore, the Government by Exhibit P10 order approved Sri. Jayarajan as the Manager of the school.

11. In **Gopalakrishna Kurup v. State of Kerala (2000 (1) KLT 22)** a Division Bench of this Court, interpreting Sub-rule (1) of Rule 4 of Chapter III of KER, which deals with the approval of appointment of Managers and Sub-rule (1) of Rule 5, which deals with the change of management, held that, the very fact that there is a specific provision for approval of change shows that power lies with the Educational Agencies for effecting a change. But the same becomes operative after the Educational Officer competent to approve it does so. Rule 5 mandates that all changes in the personnel of the Managers of aided institutions shall be immediately reported to the Educational Officer concerned for approval thereof. This clearly reinforces the conclusion that change can be made and it becomes operative

only when an approval is given by the concerned Educational Officer.

12. The Apex Court in **Gokaraju Rangaraju v. State of A.P. (1981 (3) SCC 132)** and in **Central Bank of India v. Bernard (1991 (1) SCC 319)** held that, the de facto doctrine envisages that acts performed de facto by officers within the scope of their assumed official authority are to be regarded as binding as if they were performed by officers de jure. In **Manager, St.Mary's High School v. Biju Abraham (2002 (1) KLT 406)** a Division Bench of this Court held that, the mere fact that the appointment of the Manager was subsequently found to be illegal or irregular could not take away the rights of the appointees. As far as appointees are concerned, they are appointed by the approved Manager. They are not concerned with the dispute with regard to the managership of the school. The Division Bench held further that, the de facto doctrine saves the acts of the officers de facto performed within the scope of their assumed official authority. Whatever defects there may be in the nature of their appointment, it is based upon the principle of

public policy and necessity. Such a doctrine was introduced into the law as a matter of public policy and necessity, to protect the interest of the public and the individual whose interests were involved in the official acts of persons exercising the duties of an office without being lawful officers.

13. A reading of Exhibit P10 order passed by the Government makes it abundantly clear that, the former Manager was continuing as such till the Government issued Exhibit P10 order dated 31/5/2010, approving Sri. Jayarajan as the Manager of the school. Going by Sub-rule (1) of Rule 4 and Sub-rule (1) of Rule 5 of Chapter III of the KER, the change of management becomes effective only when approval is granted by the educational authorities concerned. Accordingly, the newly elected Manager has the right to hold that office only with effect from 31/5/2010, i.e., the date of his approval as the Manager of the school. So the former manager has every right to act as the Manager of the school and to do every act within his lawful authority till that date. If that be so, as rightly found by the Government in Exhibit P14 order, the appointment of the 4th

respondent as Sewing Teacher made on 29/5/2010 by the former Manager, while he was acting as lawful Manager of the school is a valid one, which does not suffer from any legal infirmity.

14. Going by exhibits P11 to P13 Staff Fixation orders for the academic years 2008-09, 2009-10 and 2010-11 there was only one vacancy of Sewing Teacher for both UP section and HS section. Though, Smt. K.C. Radhamani Amma retired while working as Sewing Teacher in the HS section on 31/3/2009, Smt. S. Vasantha was continuing as Sewing Teacher in the UP section on clubbing arrangement and she retired from service only on 31/3/2010. In such circumstances, an open vacancy of Sewing Teacher occurred in the school only on 1/4/2010. As evident from Exhibit R4(a) order of appointment dated 29/5/2010 issued by the former Manager of the school, the 4th respondent was appointed on 29/5/2010 as probationary Sewing Teacher, with effect from 1/6/2010, against the retirement vacancy of Sewing Teacher in the HS section. It was also made clear in Exhibit R4(a) order that, the date of joining duty will be on 1/6/2010. Exhibit R4(b) is the Change of Staff Statement dated 29/5/2010 signed

by the former Manager of the school, which states that, though the vacancy of Sewing Teacher in the HS section occurred on 1/4/2009, on retirement of Smt. K.C. Radhamani Amma, the said vacancy became an open vacancy only on 1/4/2010 because Smt. S. Vasantha, Sewing Teacher in the UP section, who was continuing on clubbing arrangement, retired only on 31/3/2010.

15. Going by Sub-rule (2) of Rule 7 of Chapter XIVA KER, posts that may fall vacant on the closing date shall not be filled up till the re-opening date except in the case of posts of non-vacation staff. In **Manager, Evans School v. P.J. Usha Kumari and others (2011 (2) KLT 301)** a Division Bench of this Court held that, Sub-rule (2) of Rule 7 of Chapter XIVA KER is a complete embargo against appointment of teachers during vacation and only non-vacation staff and Headmasters could be appointed during the vacation. The purpose of the Rule is to avoid Government paying salary and financial benefits to teachers appointed during vacation but remain unemployed until re-opening of the educational institution. The Rule does not make any distinction between those appointed directly and those came

on promotion from lower grades. If the post has to be filled up through promotion certainly the eligibility will be with effect from the date of arising the vacancy, but appointment could be made by virtue of the prohibition under Sub-rule (2) of Rule 7 only with effect from the date of re-opening of the School.

16. In **Smitha Johny v. Johny Varghese and others (2010 (13) SCC 414)**, after referring to the provisions of Sub-rule (2) of Rule 7 of Chapter XIVA KER and also Note (2) under Rule 43 of Chapter XIVA, which provides that promotion under Rule 43 shall be made from persons possessing the prescribed qualification at the time of occurrence of vacancy, the Apex Court held that, for promotion to the post of HSA(English) which has arisen on 1/4/2005, candidates with requisite qualification as on the date of occurrence of vacancy alone are eligible to be promoted.

17. In the case on hand, an open vacancy of Sewing Teacher in the HS section of the school had arisen on 1/4/2010, on the retirement of Smt. S. Vasantha on 31/3/2010, who was continuing on clubbing arrangement as Sewing Teacher in the UP

section. As evident from Exhibit R4(a), the former Manager of the school issued an order of appointment dated 29/5/2010, appointing the 4th respondent as a probationary Sewing Teacher, with effect from 1/6/2010, i.e., from the re-opening date, against the retirement vacancy of Sewing Teacher in the HS section, which has arisen on 1/4/2010. Further, it was also made clear in Exhibit R4(a) that, the date of joining duty will be on 1/6/2010.

18. We notice that, the embargo under Sub-rule (2) of Rule 7 of Chapter XIVA KER is only against making appointments to posts that may fall vacant on the closing date till the re-opening date, i.e., during vacation, except in the case of posts of non-vacation staff, and this provision is intended to avoid the Government paying salary and other financial benefits to such appointees during vacation. There is no legal bar under Sub-rule (2) of Rule 7, against the Manager issuing an order of appointment during vacation, in a teaching post that fall vacant during vacation, making such appointment effective from the re-opening date. Therefore, we are of the considered view that, Exhibit R4(a) order of appointment dated 29/5/2013 issued by

the former Manager of the school, appointing the 4th respondent as a probationary Sewing Teacher, with effect from 1/6/2010, i.e., from the re-opening date, against the retirement vacancy of Sewing Teacher in the HS section, which has arisen on 1/4/2010, is not hit by the embargo under Sub-rule (2) of Rule 7 of Chapter XIVA KER.

19. As we have already noticed, a reading of Exhibit P10 Government order makes it abundantly clear that, the former Manager was continuing as such till the Government issued Exhibit P10 order dated 31/5/2010, approving Sri. Jayarajan as the Manager of the school. If that be so, the former Manager was neither an usurper or intruder and he was acting as a de facto Manager till the Government by Exhibit P10 approved Sri. Jayarajan as the Manager of the school. Therefore, as rightly found by the Government in Exhibit P14 order, the appointment of the 4th respondent as Sewing Teacher made on 29/5/2010 by the former Manager, while he was acting as lawful Manager of the school is a valid appointment, which does not suffer from any legal infirmity.

20. As rightly noticed by the learned Single Judge, though Smt. Radhamani Amma retired on 31/3/2009, an open vacancy of Sewing Teacher had arisen in the school only when Smt. Vasantha, who was continuing on clubbing arrangement, retired on 31/3/2010. In that open vacancy, the former Manager appointed the 4th respondent as Sewing Teacher by Exhibit R4(a) order dated 29/5/2010, with effect from 1/6/2010. Since there was only one vacancy of Sewing Teacher, to which appointment has already been made by the former Manager, the newly elected Manager could not have issued Exhibit P1 order of appointment dated 1/6/2010, appointing the petitioner as a Sewing Teacher, with effect from 1/6/2010, in the absence of an established vacancy. It was in such circumstances, the learned Single Judge concluded that, the Government committed no error in approving the appointment of the 4th respondent and repelled the challenge made against Exhibits P14 and P15 orders in W.P.(C) No.28631/2011 (which are marked as Exhibits P11 and P12 orders in W.P.(C)No.28039/2011) and dismissed both the writ petitions.

21. We also notice that, pursuant to Exhibit P14 Government order, the 2nd respondent by Exhibit P15 communication dated 13/10/2011 directed the 3rd respondent to ensure that the 4th respondent is allowed to join duty forthwith based on Exhibit R4(a) order of appointment issued by the former Manager of the school. It is admitted in W.P.(C) No.28631/2011 that, the Headmistress of the school had permitted the 4th respondent to mark the attendance immediately on receipt of Exhibit P15.

22. For all the above reasons, we find absolutely no grounds to interfere with the judgment of the learned Single Judge dismissing W.P.(C)Nos.28631/2011 and 28039/2011.

In the result, both of the writ appeals fail and they are dismissed. No order as to costs.

Sd/-

**ANTONY DOMINIC,
Judge**

Sd/-

**ANIL K. NARENDRAN,
Judge**

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