

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYASHTA, 1937

W.A.No.1452 of 2013 IN WP(C).28479/2004

AGAINST THE JUDGMENT IN WP(C) 28479/2004 of HIGH COURT OF KERALA DATED 19-07-2013

APPELLANT/PETITIONER:

M.O.V.SUMITHRA
MANAGER, KOTTUR AUP SCHOOL, MALAPATTOM P.O

BY ADVS.SRI.P.RAVINDRAN (SR.)
SMTAPARNA RAJAN

RESPONDENTS/RESPONDENTS:

1. STATE OF KERALA
REPRESENTED BY ITS SECRETARY
GENERAL EDUCATION DEPARTMENT, SECRETARIAT
THIRUVANANTHAPURAM 695 001
2. THE DEPUTY DIRECTOR OF EDUCATION
OFFICE OF THE DY.DIRECTOR EDUCATION, KANNUR 670 001
3. ASSISTANT EDUCATIONAL OFFICER,
IRRIKKUR 670 593

R BY SR. GOVERNMENT PLEADER SRI.P.FAZIL

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 25-05-2015, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & SHAJI P.CHALY, JJ.

Writ Appeal No.1452 of 2013

Dated this the 25th day of May, 2015

JUDGMENT

Antony Dominic, J.

Petitioner in W.P.(C)No.28479/04 is the appellant. In the writ petition, the appellant prayed for quashing Exts.P5 and P7, show cause notice issued by the Deputy Director of Education and letter dated 22.4.2004 issued by the Secretary to Government, requiring the Deputy Director of Education to recover the salary due to Smt.C.Prasanna Kumari with effect from 16.1.1997 from the appellant, respectively. By the judgment under appeal, taking the view that Ext.P5 which was issued in pursuance to Ext.P7, was issued based on the directions contained in Ext.P2 judgment, the learned Single Judge upheld the impugned communications and dismissed the writ petition. It is this judgment which is challenged before us.

2. We heard the learned Senior Counsel appearing for the appellant and the learned Government Pleader appearing for the respondents.

3. Briefly stated, the facts of the case are that the appellant is the manager of an aided school. A peon died in harness and a vacancy of peon arose on 16.4.1994. As early as on 30.3.1990, Rule 9 A was introduced in

Chapter XXIV A Kerala Education Rules whereby the manager was made duty bound to give employment to dependents of non teaching staff of aided schools died in harness in accordance with the Government Orders on the subject. However, on 3.4.1990 itself Government issued an order keeping in abeyance the said Rule and this order was vacated only on 16.1.1997. Taking advantage of the order dated 3.4.1990 keeping in abeyance of the Rule, another person was appointed ignoring the Rule 9A claim, on 16.5.1994. This controversy lead to filing of O.P.No.5151/1998 by the claimant and O.P.No.9947/1996 was also filed by the management, seeking order of approval of the person appointed. This controversy lead to the filing of O.P.No.664/1995 by the claimant. That original petition was disposed of by this Court directing the Government to make Rule 9A of Chapter XXIV A KER more effective and also to consider the claim of the claimant Smt.Prasanna Kumari. Accordingly, the Deputy Director of Education issued orders dated 25.1.1996 and 30.5.1996 directing the manager to appoint Smt.Prasanna Kumari. It was in these circumstances that the manager filed O.P.No.9947/1996 and the person appointed filed

O.P.No.5151/1998, challenging the orders of the Deputy Director of Education and also seeking approval of appointment already made. These original petitions were disposed of by Ext.P2 judgment where this Court upheld the claim of Smt.C.Prasanna Kumari, the claimant mentioned above for appointment at least from 16.1.1997, when the stay order keeping in abeyance Rule 9A was vacated by the Government.

In this judgment this Court held thus:

“Therefore, notwithstanding the stay order, Rule 9A would continue but the government plea that action can be taken against the Manager for the acts done before 16.1.1987 cannot be accepted as government cannot be taken action for thereon wrong. It is seen that government wrongly issued the stay order. But in view of Exts.P2 and P4 and vacation of stay order by government, Manager should have appointed the third respondent in O.P.No.9947/1996 at least from 16.1.1997 and therefore, Manager is liable for penal action. Taking into account Ext.P2 judgment and taking the fact that by Ext.P4 in O.P.No.5151/98, the stay were vacated, I am of the opinion that the third respondent's appointment should be made from the date of Ext.P4 that is from 16.1.1997. I also note that the petitioner in O.P.No.5151/1998 was working from 1994 onwards and he should be given salary from the date of his appointment till 16.1.1997 after approving her service till 16.1.1997. Considering Ext.P2 and Ext.P4 judgment, from 16.1.1997 onwards the manager is bound to pay salary to the third respondent in O.P.No.9947/96 and issue appointment order to her w.e.f. that date and appointment order shall be issued for the approval by the government within three

months from today failing which penal action can be taken against Manager.”

4. It was only after this judgment that by Ext.P3 order, dated 27.6.2002, the manager appointed Smt.C.Prasanna Kumari and salary was also disbursed by the Government as per Ext.P4. Thereafter, the Deputy Director of Education issued Ext.P5 show cause notice, dated 18.8.2004, calling upon the manager why she shall not be proceeded against for not complying with the orders of the Department and this Court in the matter of appointment and payment of salary to Smt.C.Prasanna Kumari. Manager filed her reply to the show cause notice as per Ext.P6. According to the manager, it was only thereafter she came to know that Ext.P5 was issued in compliance with Ext.P7 issued by the Government of Kerala as early as on 22.4.2004. This was the background in which the manager filed the original petition challenging Exts.P5 and P7 and it was dismissed by the learned Single Judge.

5. The first contention raised by the learned Senior Counsel for the appellant is that though the Government is entitled to recover the losses from the manager by a proceedings initiated by the Deputy

Director, the discretion conferred on the Deputy Director, according to the learned counsel is fettered by Ext.P7 communication issued by the Government. Therefore, according to him, Ext.P7 is illegal and the Deputy Director is liable to be directed to consider the matter in pursuance to Ext.P5 and duly applying the statutory discretion. Second contention raised by him is that against Ext.P2 judgment, W.A.Nos.2011/02 and 2055/02 were filed. It is stated that though the appeals were dismissed, the judgment was clarified by the Division Bench. According to the learned counsel that also calls for a fresh look in the light of the findings contained in the Division Bench judgment. On all these grounds, the learned counsel submitted that the judgment reserves to be set aside.

6. Both these contentions were refuted by the learned Government Pleader placing reliance on Ext.P2 judgment and also referring to the Division Bench judgments mentioned above where Ext.P2 judgment was confirmed by this Court.

7. We have considered the submissions made. Although both the contentions raised by the learned Senior Counsel for the appellant

would appear to be sound, on a closer examination of the same, we do not find any substance in either of these contentions. It true that law recognizes discretion on the Deputy Director of Education while examining the issue on the recovery of the loss suffered by the Government from the manager, in so far as this case is concerned, the Government's entitlement to realise its loss of the salary paid to Smt.C.Prasanna Kumari for the period subsequent to 16.1.1997 has already been recognised by this Court in Ext.P2 judgment. As we have already stated, Ext.P2 judgment was confirmed by a Division Bench of this Court in Anneuxre I, the judgment in W.A.No.2011/02. Though that judgment was against O.P.No.5151/98, the issue relating to the salary to be paid to Smt.C.Prasanna Kumari was considered in paragraph 4 of the judgment and it was held thus:

“The question that now arises is as to for what period should the appellant who worked against the post till 26.6.2002, be given his salary? Though there was no justification for the Manager of the school to allow the appellant to work against the post after 25-1-1996 when the 4th respondent had been directed to appoint, yet, he offered some sort of explanation on the ground that the operation of Rule 9A had been kept in abeyance till 16-1-1997. Even if one were to accept this explanation, the appellant can be entitled to salary till this date and not thereafter. The 4th respondent joined duty on

27-6-2002 in pursuance to the direction to appoint her in January 1996. She should have been allowed to join duty with effect from 17-1-1997 when Rule 9A had become operative after the State Government had withdrawn the order staying the operation of the Rule. She is, therefore, entitled to claim her salary and all other service benefits with effect from 17-1-1997. This is precisely with the learned single Judge has ordered. No fault can, thus, be found with the order under appeal."

8. W.A.No.2055/02 filed by the manager against the judgment in O.P.No.9947/96 was dismissed by this Court following the judgment in W.A.2011/02. Reading of these judgments in the writ appeals show that the Appellate Court had not modified the findings of the learned Single Judge as contained in Ext.P2. Therefore, though technically it can be said that Ext.P2 judgment has merged in writ appeal judgments, that merger does not in any manner affect the findings in Ext.P2 nor does it in any manner absolve the manager from the liability that is fastened on him in Ext.P2. If that be the situation, it has to be accepted as contended by the learned Government Pleader that the Government is bound to recover the salary paid to Smt.C.Prasanna Kumari subsequent to 16-1-97 from the manager. Consequently, this Court cannot find fault with Ext.P7, the direction issued by the Government requiring the

manager to initiate action for recovery of loss from the manager. Such being the facts, we cannot accept the case of the appellant that as a result of Ext.P7, the discretion of the Deputy Director is fettered or that in the light of the Division Bench judgment the matter requires a fresh independent look.

We do not find any merit in this appeal. Appeal fails and it is accordingly dismissed.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

jes

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P.A. to Judge