

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

FRIDAY, THE 6TH DAY OF MARCH 2015/15TH PHALGUNA, 1936

WP(C).No. 1294 of 2009 (D)

PETITIONERS :

**T.S. BABU,
EDAYIRIKKAPUZHA P.O. KANGAZHA, KOTTAYAM DISTRICT
(PRESENTLY WORKING AS H.S.A.(MATHS) DBHS
THRIKKARIYOOR, KOTHAMANALAM)**

**BY ADVS.SRI.P.K.SURESH KUMAR (SR.)
SMT.P.JAYALAKSHMI**

RESPONDENTS :

- 1. STATE OF KERALA
SECRETARY, DEPARTMENT OF GENERAL EDUCATION,
THIRUVANANTHAPURAM.**
- 2. THE DISTRICT EDUCATIONAL OFFICER,
ATTINGAL THIRUVANANTHAPURAM DISTRICT.**
- 3. MANAGER, TRAVANCORE DEVASWOM BOARD
HIGH SCHOOLS, NANDANCODE, THIRUVANANTHAPURAM.**
- 4. V.S.LAKSHMI, H.S.A.(ENGLISH),DEVASWOM
BOARD HIGH SCHOOL, VAMANAPURAM.**
- 5. JAYASUDHA R. H.S.A.(ENGLISH)
DEVASWOM BOARD HIGH SCHOOL CHERIYANAD.**
- 6. SMITHA MOHAN, H.S.A.(ENGLISH)
DEVASWOM BOARD HIGH SCHOOL, KANGAZHA, KOTTAYAM.**

ADDL. R7 IMPEADED :

- 7. THE DISTRICT EDUCATIONAL OFFICER,
KOTHAMANGALAM - 686691.**

ADDL. R7 IS IMPEADED AS PER ORDER DT 1/03/12 IN IA NO. 3026/2012.

**R1 & R2 BY GOVERNMENT PLEADER SRI. P.V. ELIAS
R3 BY ADV. SRI.M.V.S.NAMBOOTHIRI, SC,
R3 BY ADV. SRI.K.N.VENUGOPALA PANICKER, SC, TDB
BY ADV. SRI.G.BIJU
R4,R5 & R6 BY ADV. SRI.ELVIN PETER P.J.**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 06-03-2015, ALONG WITH WPC. 1491/2009, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONER'S EXHIBITS :

- P1: COPY OF GO.(RT) NO. 5130/2007/GEDN. DT 12/11/2007 ISSUED BY GOVT. OF KERALA, GENERAL EDUCATION (A) DEPARTMENT.
- P2: COPY OF JUDGMENT DT 6/3/2008 IN WPC NO. 3263 OF 2008 PASSED BY THIS HON'BLE COURT.
- P3: COPY OF GO(RT) NO. 3522/08/G.EDN. DT 31/7/2008 ISSUED BY GOVT. OF KERALA, GENERAL EDUCATION (A) DEPARTMENT.
- P4: COPY OF PROCEEDINGS DT 16/7/2005 OF THE R3.
- P5: COPY OF ORDER NO. 3228/4/EDN. DT 29/7/2005 ISSUED BY SECRETARY, TRAVANCORE DEVASWOM BOARD.
- P6: COPY OF PPHEARING NOTE SUBMITTED BY THE PETITIONER BEFORE THE GOVERNMENT AT THE TIME OF PERSNAL HEARING ON 9/4/2007.
- P7: COPY OF APPOINTMENT ORDER OF SMT. RETNA BAI DT 1/5/2003.
- P8: COPY OF STAFF FIXATION ORDER DT 14/7/2003 FOR THE YEAR 2003-04 OF DBHSS, THAKAZHY ISSUED BY DISTRICT EDUCATIONAL OFFICER, KUTTANAD.
- P9: COPY OF PROCEEDINGS DT /12/2003 ISSUED BY DISTRICT EDUCATIONAL OFFICER, ATTINGAL.
- P10: COPY OF PROCEEDINGS DT 15/7/2004 OF DISTRICT EDUCATIONAL OFFICER, ATTINGAL.
- P11: COPY OF LETTER NO. B3-8428/2011 DT 18/12/2011 ISSUED BY THE DISTRIC EDUCATIONAL OFFICER, KOTHAMANGALAM.
- P12: COPY OF REPLY DT 21/12/2011 SUBMITTED BY THE PETITIONER BEFORE THE DISTRICT EDUCATIONAL OFFICER, KOTHAMANGALAM.

RESPONDENT'S EXHIBITS : NIL.

//TRUE COPY//

P.A. TO JUDGE

bp

C.K.ABDUL REHIM, J.

WP(C).NOs.1294 & 1491 of 2009

Dated this the 6th day of March, 2015

JUDGMENT

The 5th respondent in WP(C)No.1491/2009 is the petitioner in WP(C)No.1294/2009. Core issue involved is regarding validity of Ext.P11 Government Order [in WP(C)1491/2009]. The petitioner in WP(C) 1294/2009 is seeking implementation of the said order, whereas the petitioners in the other case is challenging its validity. Since the issue involved in both the cases are one and the same, or rather intrinsically connected, both these cases are disposed of together through this common judgment.

2. Dispute arises on the basis of rival claims made by the 1st petitioner in WP(C) 1491/2009 and the petitioner in WP(C) 1294/2009 with respect to a regular vacancy of High School Assistant (HSA) arose at DBHS, Vamanapuram, under Corporate Management of the 4th respondent [in WP(C) 1491/2009]. The said vacancy arose consequent to promotion of one Smt.Ratna

Bai, H.S.A(Maths) with effect from 01/05/2003. The Corporate Manager had filled up the vacancy by appointing the 1st petitioner in WP(C) 1491/2009, Smt.Lakshmi V.S., as H.S.A(English). But the appointment was not approved by the educational authorities. The petitioner in WP(C) 1294/2009, Sri.T.S.Babu is a regular H.S.A (Maths) who was working at DBHS Thakazhy under the corporate management from 05/06/2000 onwards, who was promoted as H.S.A (Maths) with effect from 05/06/2000 against a transfer vacancy which occurred at DBHS, Thakazhy. During the Academic Year 2003-2004 one post of H.S.A was abolished in DBHS, Thakazhy and the Educational Officer required the Manager to adjust the excess H.S.As according to the subject requirement. Therefore, Sri.T.S.Babu was transferred to DBHS, Parumala, under the same management, as H.S.A(Maths) on 08/03/2004 against a leave vacancy, with retrospective from 14/07/2003 (the date on which the post of H.S.A(Maths) became excess at DBHS, Thakazhy). But the transfer of Sri.T.S.Babu was not approved since another senior hand had drawn salary for the said period at DBHS, Parumala. Hence the service of Sri. T.S. Babu was regularised at DBHS Vamanapuram by lien

adjustment against the vacancy which arose consequent to promotion of Smt.Ratna Bai from 15.7.2003 to 1.6.2004. Subsequently, based on the report of the super check cell 4 posts of HSA (Core subject) were abolished at DBHS Parumala with effect from 14.7.2005. Therefore Sri.T.S.Babu was reverted as UPSEA with effect from 15.7.2005 and transferred to DBHS Erumely. Thereafter he was promoted as HSA (Maths) from 15.9.2006 onwards when a leave vacancy arose at DBHS, Thiruvalla. Sri. T.S. Babu had filed a revision petition before the Government against the decisions of the Educational Officer reverting him to the post of UPSEA with effect from 15.7.2005. He claimed salary of HSA (Maths) for the period from 2.6.2004 to 14.9.2006, based on the contention that during the said period there was a regular post of HSA (Maths) available at DBHS, Vamanapuram, in order to accommodate him, because the vacancy of HSA(Maths) which arose consequent to promotion of Smt.Ratna Bai with effect from 1.5.2003 had continued to be existed and his service as HSA (Maths) at DBHS Parumala from 15.7.2003 to 1.6.2004 had already been regularised against the said vacancy. In effect contention raised

by Sri.T.S.Babu was that the appointment given to Smt. V.S.Lakshmi by the Corporate Manager as HSA(English) at DBHS Vamanapuram with effect from 1.6.2004 was not regular since there existed no vacancy of HSA (English) and that the petitioner could have been accommodated in the vacancy of Smt.Ratna Bai, as HSA (Maths)

3. Before the Government Smt. V.S.Lakshmi and other two petitioners in 1491/2009 contended that their appointment as HSA (Eng) was to satisfy the requirement under Ext.P1 Government order (in WPC 1491/2009). The Government have decided the matter through order dated 12.11.2007 (Ext. P1 in WP(C).1294/2009). But the petitioners in WP(C).1491/2009 have challenged the said order in a writ petition filed before this court as WP(C).3263/2008. In Ext.P9 judgment (in WP(C). 1491/2009) this court had quashed the order finding that the petitioners therein were not heard before passing the said order. This court directed the Government to reconsider the matter and to pass fresh orders after giving opportunity to all concerned. Ext. P11, the order impugned in WP(C).1491/2009, was passed consequent to the above said direction issued from this court .

4. The petitioners in WP(C).1491/2009 raised various contentions challenging validity of the impugned Government order. It is pointed out that by virtue of Ext. P2 staff fixation order of DBHS, Vamanapuram for the year 2004-05, copy of which is produced as Ext.P2 in WP(C).1491/2009, it is evident that there existed 17 divisions and 17 posts in HSA core subjects. It is pointed out that by virtue of Ext.P1 Government order it was ordered to create a new cadre of HSA (Eng) in Government and Aided schools by re-allocating the periods of English, presently allocated to core subjects of Maths, Science and Social Studies, in a phased manner, without causing retrenchment of existing HSA's (core subjects). It is stated in the Government order that the new cadre should be created by appointing or promoting qualified hands against vacancies arising due to retirement/sanction of additional division/resignation/leave by observing the minimum subject ratio requirement between 3 core subjects. It is further pointed out that the direction contained in the above said Government order has already been incorporated as Rule 6(1) of Chapter XXIII of KER. The said provision is to the effect that the post of HSA (English) should be

sanctioned on the basis of periods allocated to English, observing the minimum subject requirement. Note attached to Rule 6.1 provides that the Rule shall be implemented in a phased manner without causing retrenchment for any existing High School Assistants (Core subject) as on 7.1.2002 (date of Ext.P1 government order).

5. Learned counsel appearing for the petitioners in WP(C). 1491/2009 contended that considering the sanctioning of 17 posts in the core subjects at DBHS, Vamanapuram the vacancy which arose consequent to promotion of Smt. Ratna Bai need to be filled up by appointing an HSA(English), considering the requirement under Ext.P1 Government order and Rule 6(1) of Chapter XXIII KER. But it is pertinent to note that staff fixation for the year concerned with respect to DBHS, Vamanapuram has not been challenged either by the Corporate Manager or by the petitioners. In the impugned order the Government have negatived the claim based on the findings that Ext.P1 Government order does not permit appointment of HSA(English) by reverting senior teachers. Learned counsel contended that there was no retrenchment of any HSA(core subject) at DBHS,

Vamanapuram and therefore the vacancy in question could have been filled up by creating a post of HSA(English). But the question as to whether there was availability of HSA(Core subject) in any of the schools to accommodate Sri. T.S.Babu against the vacancy is the crucial question to be considered. This is especially because Rule 35 of Chapter XIV A KER provides that, if the Educational agency is having more than one school in a revenue District, they shall be construed as one selection and a common seniority list shall be prepared for all the schools together. Hence, as far as the teachers employed in all the schools under the Corporate management, a common seniority list has to be considered. Since the post of HSA(Maths) held by T.S. Babu at DBHS Thakashy was abolished, he ought to have been accommodated against the vacancy which arose at DBHS Vamanapuram consequent to promotion of Smt. Ratna Bai.

6. Learned counsel for the petitioners in WP(C). 1491/2009 had placed reliance on a decision of this court reported in **Minimole vs. State of Kerala (2012 (4) KLT 719)** where the question decided was as to whether any protected teachers under the same management can be accommodated

without creating the post of HSA (English) in a vacancy arising out of a regular promotion. Referring to Ext.P1 Government order as well as Rule 6(1) of Chapter XXIII KER this court observed that the rider provided in note attached to Rule 6(1) is only against causing retrenchment of existing HSA's in core subjects. Therefore after ensuring avoidance of retrenchment of existing HSA (core subject) new cadre has to be created by appointing qualified hands against vacancies caused by retirement/promotion/resignation. The court found that HSA's in core subjects in the said case became protected not as a result of creation of the post of HSA(English). Only in such cases alone the retrenchment need to be avoided. Since two teachers in the same case became protected during earlier years due to reduction of posts in those subjects, the restraintment contained under the note attached to Rule 6(1) will not apply, is the finding.

7. But the dictum contained in **Minimole's case** cited supra cannot be applied on the facts of the present case. Sri.T.S.Babu was not a protected teacher but a senior regular hand working under the corporate management as HSA in core subject. There exist a lien for adjusting him against any vacancy

either existing or arising in any of the schools under the corporate management, consequent to abolition of the post of HSA(Maths) in which he was working. More over in **Minimole's case** (supra) the creation of the post of HSA(English) was approved by the educational authorities by virtue of staff fixation order of the relevant year. On the other hand in the case at hand no post was created by the educational authorities. Therefore the appointment of Smt. V.S.Lakshmi as HSA(English) even without creation of such a post based on Ext. P1 Government order or Rule 6(1) could not be approved.

8. Another contention raised by the petitioners in WP(C). 1491/2009 is that the post of HSA core subject at DBHS Parumala , to which Sri.T.S.Babu was transferred with effect from 15.7.2003 was abolished only by virtue of Ext.P8 staff fixation order issued on the basis of the report of super check officer. Since the said order was issued after the expiry of academic year 2004-05 , only on 19.7.2005, the same cannot be accepted under Rule 15 of Chapter XXIII KER.

9. At the 1st instance, the petitioner has no locus standi to raise such a contention. It is evident that appointment of

Sri.T.S.Babu was regularised based on the lien adjustment in the vacancy of Smt. Ratna Bai, which arose on 15.7.2003. The said post was considered as not in existence because the Corporate Manager had irregularly appointed Smt. V.S.Lakshmi with effect from 1.6.2004, as HSA (English). But for the appointment of Smt.V.S.Lakshmi Sri. T.S.Babu ought to have been accommodated as continuing against the vacancy of HSA (Maths) in DBHS, Vamanapuram. The petitioner is not entitled to challenge the staff fixation order in another school, DBHS Parumala, for the subsequent year of 2004-05, in order to contend that a post of HSA (English) ought to have been created at DBHS, Vamanapauram during the year 2003-04.

10. Yet another contention raised is that Sri.T.S.Babu is entitled to claim salary of HSA (Maths) for the period from 2.6.2004 to 14.9.2006 because he was only reverted to the post of UPSA and not retrenched. The terms of Ext.P1 Government order as well as the provisions contained in rule 6(1) is relied upon in order to contend that the restraintment is only with respect to creation of HSA (English) by retrenchment of HSA core subject . But it is pertinent to note that, the educational

authorities have now created a post of HSA (English) at DBHS Vamanapuram. Further, on considering the total strength of HSA (Maths) in all the schools under the Corporate management if Sri. T.S.Babu ought to have been adjusted against the vacancy arose consequent to promotion of Smt. Ratna Bai, then there is no merit in the contention that appointment of Smt. V.S.Lakshmi as HSA(Eng) by the Manager was regular and liable to be approved. Since the said appointment itself was irregular, Smt. V.S.Lakshmi cannot be permitted to take a contention that any subsequent reversion of Sri. T.S.Babu may not stand in the way of creating a post of HSA (English).

11. Learned counsel appearing for the petitioner in WP(C) 1294/2009 had placed a Division Bench judgment of this court in WA.No.1077/2009 dt. 15.10.2009. It is observed therein that, new post can be created without disturbing the existing teachers in the core subjects. It is explained that the normal post of HSA (English) should be filled only when open clear vacancies are available. It is held that a vacancy arising out of a mutual transfer cannot be insisted to be filled up by an HSA (English) because no vacancy is created and that there is no question of

appointment of any HSA(English). On the facts of the case at hand, it is evident that no open vacancy of HSA in (core subject) was available at DBHS, Vamanapuram since Sri.T.S.Babu, an HSA (Maths) under the Corporate management was having a lien to be adjusted against the vacancy which arose consequent to the promotion of Smt. Ratna Bai.

12. Under the above mentioned circumstances this court is of the considered opinion that there is no illegality, error or impropriety with respect to the impugned decision taken by the Government in disposing the revision. Accordingly the challenge raised in WP(C).1491/2009 fails. Consequently the said writ petition is hereby dismissed. With regard to relief sought for in WP(C).No.1294/2009 this court finds that the educational authorities concerned are bound to implement the above said Government order. Therefore the said writ petition is allowed to the extent of directing the educational authority concerned to take necessary steps to implement the Government order by approving appointment of Sri. T.S.Babu as HSA (Maths) for the period from 2.6.2004 to 14.9.2006 in DBHS, Vamanapuram and to pay the consequential benefits due to him

without any further delay, at any rate within a period of two months from the date of receipt of a copy of this judgment.

C.K.ABDUL REHIM, JUDGE

Pmn/

C.K.ABDUL REHIM, J.

WP(C).NOS.1294 & 1491 of 2009

Dated this the 6th day of March, 2015

JUDGMENT