

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

OPNo. 25157 of 2000 (T)

PETITIONER:

**AUGUSTINE.M.J.
HIGH SCHOOL ASSISTANT (MALAYALAM)
P.H.S.A.P.T. HIGHER SECONDARY SCHOOL
KAKKOV, VAZHAYOOR P.O., MALAPPPURAM DISTRICT
(VIA) RAMANATTUKARA, PIN-673 633.**

BY ADV. SRI.BENOY THOMAS

RESPONDENTS:

- 1. THE DIRECTOR OF HIGHER SECONDARY EDUCATION
HOUSING BOARD BUILDINGS, SHANTHI NAGAR, TRIVANDRUM-1.**
- 2. THE MANAGER
P.M.S.A.P.T. HIGHER SECONDARY SCHOOL
MALAPPURAM DISTRICT, PIN-673 633.**

*** ADDL. R3 TO R6 IMPEADED**

- 3. P. SANTHA, H.S.S.T.
P.H.S.A.P.T. HIGHER SECONDARY SCHOOL
KAKKOV, VAZHAYOOR P.O., MALAPPPURAM DISTRICT
(VIA) RAMANATTUKARA, PIN-673 633.**
- 4. V. AHMED, H.S.S.T.
P.H.S.A.P.T. HIGHER SECONDARY SCHOOL
KAKKOV, VAZHAYOOR P.O., MALAPPPURAM DISTRICT.**
- 5. P.P. DIVAKARAN, H.S.S.T.
P.H.S.A.P.T. HIGHER SECONDARY SCHOOL
KAKKOV, VAZHAYOOR P.O., MALAPPPURAM DISTRICT
(VIA) RAMANATTUKARA, PIN-673 633.**
- 6. PRADEEP KUMAR. K., GOVINDA BHAVAN
KANNADIKOYIL P.O., BALUSSERI, PIN-673 612.**

**BY ADV. SRI.T.K.MARTHANDAN UNNITHAN
BY GOVERNMENT PLEADER SMT. A. LOWSY**

*** ADDL. RESPONDENTS 3 TO 5 ARE IMPEADED AS PER ORDER DATED
08.01.2003 IN I.A. NO.62394 OF 2002**

*** ADDL. RESPONDENT 6 IS IMPEADED AS PER ORDER DATED
06.07.2007 IN C.M.P. NO.45032 OF 2000**

**THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 28-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONER'S EXHIBITS :-

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|-----------|---|--|
| EXT.P1 | - | COPY OF THE ORDER NO.8/91 DATED 20.07.1991 ISSUED BY THE 2ND RESPONDENT. |
| EXT.P2 | - | COPY OF THE B.ED. DEGREE CERTIFICATE DATED 06.02.1990 ISSUED TO THE PETITIONER FROM UNIVERSITY OF CALICUT. |
| EXT.P2(A) | - | COPY OF THE M.A. DEGREE CERTIFICATE DATED 01.02.2000 ISSUED FROM THE UNIVERSITY OF KERALA TO THE PETITIONER. |
| EXT.P3 | - | COPY OF THE ADMIT CARD BEARING ROLL NO.32230 FOR THE STATE ELIGIBILITY TEST CONDUCTED BY THE 1ST RESPONDENT. |
| EXT.P4 | - | COPY OF THE NEWS ITEM PUBLISHED IN MATHRUBHUMI DAILY DATED 30.06.2000. |
| EXT.P5 | - | COPY OF THE THE ORDER NO.SLP(C) 18236-18237/1998 DATED 07.12.1999 BEFORE THE HON'BLE SUPREME COURT OF INDIA. |
| EXT.P6 | - | COPY OF THE CIRCULAR NO.ACD/A1/2179/HSE/99 DATED 23.12.1999. |
| EXT.P7 | - | COPY OF THE ADVERTISEMENT PUBLISHED IN THE MATHRUBHUMI DAILY DATED 09.08.2000 BY THE 2ND RESPONDENT. |
| EXT.P8 | - | COPY OF REPRESENTATION DATED 16.08.2000 SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT. |
| EXT.P9 | - | COPY OF REPRESENTATION DATED 21.08.200 SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT. |
| EXT.P10 | - | COPY OF JUDGMENT IN O.P. NO.11660 OF 2001. |
| EXT.P11 | - | COPY OF ORDER DATED 07.08.2001. |
| EXT.P12 | - | COPY OF THE G.O.(MS) NO.316/01/GEN.EDN. DATED 24.10.2001. |
| EXT.P13 | - | COPY OF THE G.O.(MS) NO.6/02/GEN.EDN. DATED 03.01.2002. |
| EXT.P14 | - | COPY OF THE G.O.(MS) NO.135/04/GEN.EDN.DATED 15.05.2004. |
| EXT.P15 | - | COPY OF THE STAFF FIXATION ORDER FOR THE YEAR 2003-2004. |

[CONTD....]

- EXT.P16 - COPY OF THE G.O(P) NO.92/2005/G.EDN. DATED 19.03.2005.
- EXT.P17 - COPY OF G.O.(MS) NO.237/2000/G.EDN. DATED 15.07.2000.
- EXT.P18 - COPY OF G.O.(MS) NO.305/2000/G.EDN. DATED 02.09.2000.
- EXT.P19 - COPY OF G.O.(MS) NO.135/04/G.EDN. DATED 15.05.2004.

RESPONDENTS' EXHIBITS:-

- EXT.R2(A) - COPY OF THE RELEVANT PORTION OF THE GOVERNMENT ORDER NO.GO(MS) NO.162/98/G.EDN. DATED 13.05.1998 ISSUED BY THE GOVERNMENT OF KERALA.
- EXT.R2(B) - COPY OF THE SELECTION LIST DATED 30.08.2000 SIGNED BY THE DEO MALAPPURAM SHOWING THE NAMES OF 5 TEACHERS WHO WERE SELECTED BY THE COMMITTEE ON 30.08.2000.
- EXT.R2(C) - COPY OF THE APPOINTMENT ORDER ISSUED TO SRI. PRADEEPAKUMAR K. ON 30.08.2000 WITH EFFECT FROM 31.08.2000.
- EXT.R2(D) - COPY OF SUPREME COURT JUDGMENT DATED 14.11.2000 IN CIVIL APPEAL NO.7154/7155 OF 1999.
- EXT.R2(E) - COPY OF GOVERNMENT ORDER G.O.(MS) NO.389/2000/G.EDN. DATED 25.11.2000.
- EXT.R2(F) - COPY OF CERTIFICATE DATED 19.08.2000 ISSUED BY THE GOVERNMENT OF KERALA TO THE 3RD RESPONDENT.
- EXT.R2(G) - COPY OF THE STAFF FIXATION ORDER DATED 08.09.2000 AS PER PROCEEDINGS OF THE DISTRICT EDUCATIONAL OFFICER, MALAPPURAM.
- EXT.R2(H) - COPY OF THE STAFF FIXATION ORDER DATED 23.10.2001 AS PER PROCEEDINGS OF THE DISTRICT EDUCATIONAL OFFICER, MALAPPURAM.
- EXT.R2(I) - COPY OF THE STAFF FIXATION ORDER DATED 21.01.2003 AS PER PROCEEDINGS OF THE DISTRICT EDUCATIONAL OFFICER, MALAPPURAM.
- EXT.R2(J) - COPY OF THE ORDER DATED 26.07.2005 PASSED BY THE DIRECTOR OF HIGHER SECONDARY EDUCATION.
- EXT.R2(K) - COPY OF ORDER DATED 29.06.2015 ISSUED BY THE MANAGER TO THE PETITIONER.

[CONTD....]

EXT.R2(l) - COPY OF REPLY DATED 24.06.2015 ISSUED BY THE
PETITIONER TO THE MANAGER.

//TRUE COPY//

P.A. TO JUDGE

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K. VINOD CHANDRAN, J.

O.P. No.25157 of 2000

Dated this the 28th of October, 2015.

JUDGMENT

An intricate issue compounded in complexity by the myriad facts and law applicable; further aggravated by the long period of 15 years, when the above case was pending here, makes it a classic case, where the laws delays leaves even the adjudicator perplexed.

2. Briefly stated, the petitioner's claim is to the post of Higher Secondary School Teacher (HSST) (Malayalam), when the School was upgraded in the year 2000-2001. Admittedly, 9 posts of HSST were available, of which three were set apart to the High School Section as per the Government Order dated 13.05.1998. The said G.O. mandated selection to the posts of HSST in a School, upgraded as a Higher Secondary School; to be in the ratio of 25:75 between the qualified High School Assistants and the direct recruits.

3. The Manager appointed the addl. Respondents 3,4 and 5 to the posts of HSST's: (Arabic), (Hindi) and (English). The petitioner claimed that he was the senior most, qualified hand, available in the High School Section and he ought to have been appointed to the post of HSST (Malayalam). The manner in which the 25% was earmarked by the Manager was a purposeful attempt to exclude the petitioner, who was the senior most, is the contention. The petitioner also challenges the appointment of the 6th respondent, under the direct recruitment quota as HSST (Malayalam), which post he specifically put claim to. The petitioner's contentions are two fold. At the time when the upgradation was effected and appointments to the post of HSST (Junior) were to be made, there was no ratio permissible by virtue of the interim orders passed by the Hon'ble Supreme Court, in a batch of cases challenging the ratio. Appointments 'by transfer' alone could be made and direct recruitment resorted to only when no qualified HSA's were available. Further even if the ratio was applicable, the petitioner being the senior most qualified hand, the post of HSST (Malayalam) should have been

necessarily conceded to the 25% quota.

4. The Manager however contends that the petitioner by reason of GO(MS) No.247/2000/G.Edn. Dated 15/07/2000, would have been thrown out, in the subject year. The petitioner hence, could not have been accommodated, in the post of HSST, since he would not have been available in the rolls of the High School. It was thus, the three subjects from the High School Section were chosen, to accommodate HSAs, who would be available in the rolls of the High School Section in the said academic year. The fact that the petitioner was protected in the staff fixation order for the academic year 2000-2001 would not at all support the claim of the petitioner, for reason of this Court having consistently held that a protected hand is not a person included in the rolls of the School, argues the Manager.

5. The learned counsel for the petitioner would rely on ***Sreeramachandran v. State of Kerala [2002 (2) KLT 428]***, ***Viswanathan v. Director of Higher Secondary Education [2005 (3) KLT SN 78 (Case No.91)]*** and ***Joymon v. Asha Sindhu [2010 (3) KLT 111]*** and two unreported decisions in

WP(c) No.12881 of 2004 dated 17.05.2010 and WP(C) No.7445 of 2004 dated 08.07.2004. The learned counsel for the Manager would rely on ***Manager, Mar Sreeba U.P. School v. State of Kerala [1990 (1) KLT 626]*** and ***Prasad v. Philipose Mar Dilshus U.P. School [2005 (3) KLT 487]***.

6. There is also considerable argument addressed on the basis of the proceedings, in the challenge against the G.O. of 13.05.1998 prescribing the 25:75 quota and the eventual decision of the Hon'ble Supreme Court; which issue has to be addressed first. On the de-linking of Pre-Degree from the Colleges and introduction of the Higher Secondary Section in Schools; the State granted upgradation; both to Government Schools and aided Schools having High School. In making appointments to the Higher Secondary Section so granted, by virtue of upgradation of the High Schools, Rule 43 was being resorted to by promoting qualified teachers and direct recruitment resorted to, only when sufficient qualified teachers were not available. The Government brought out the G.O. dated 13.05.1998, prescribing a quota of 25:75 for 'by transfer' appointments and direct recruitments.

7. A challenge was made to the said G.O., through a batch of writ petitions, which was rejected by this Court by a common judgment. An S.L.P. was moved before the Hon'ble Supreme Court and by Ext.P5 interim order dated 07.12.1999, the Hon'ble Supreme Court directed that, in the case of private aided Schools, if suitable qualified candidates, among the existing teachers already working are available in those Schools, they may be appointed purely on adhoc basis as a stop-gap arrangement, subject to further orders. Such appointments were to be made on the recommendation of a Selection Committee constituted with, the Manager or his representative, Principal, and a Government nominee. Only if such suitable qualified candidates were not available, the Hon'ble Supreme Court permitted teachers to be appointed from open market; also on adhoc basis as a stop-gap arrangement; again only on the recommendation of the Selection Committee. The Government in terms of the aforesaid order brought out Ext.P6 Circular No.Acd/A1/2179/ HSE/99 dated 23.12.1999, intimating the aforesaid interim order to the Managers of all the aided Higher

Secondary Schools. It was also directed that appointments shall be made only as per the directions of the Hon'ble Supreme Court.

8. Eventually, the ratio prescribed by the Government was upheld by the Supreme Court in ***M.M. Dolichan and others v. State of Kerala and others [(2001) 1 SCC 151]***. The Hon'ble Supreme Court held that in the absence of statutory rules governing the field, the Government has power to issue administrative instructions and thus sustained the ratio. The Hon'ble Supreme Court took note of the fact that the statutory rules were in the process of being notified. There were teachers appointed to the various aided Schools on the strength of the G.O. dated 13.05.1988, on the prescribed ratio; as also on the basis of the interim orders passed by the Supreme Court. In that fact situation, it was directed that the teachers appointed, during the pendency of the cases; pursuant to the interim order and those appointed in compliance of the ratio prescribed by the G.O. of 13.05.1988 would be approved.

9. The further facts to be noticed are the dates on which the various government orders relevant to the above case were

brought out. GO(MS) No.237/2000/G.Edn. dated 15.07.2000 was brought out directing that no post of HSA (Malayalam) should be sanctioned from the beginning of the academic year 2000-2001, reckoning the number of students, learning other languages, viz. Arabic, Urdu, Sanskrit etc. The amendment to the Rules was pending issuance, was the recital in the said G.O. It is based on this G.O. that the Manager anticipated that the petitioner would be thrown out. However within no time, GO(MS) No.305/ 2000 dated 02.09.2000 was brought out, wherein it was clarified that the principle adopted in GO No.237/2000 would be followed only for appointments from 2000-2001 and the existing language teachers would not come under the purview of the above G.O.

10. Here, it is to be specifically noticed that the appointments, which are the subject matter of the above writ petition, were in the period between the aforesaid G.Os. Ie: between 15/07/2000 and 02/09/2000. Respondents 3,4 and 5, who were appointed as HSSTs, 'by transfer' from the High School Section, were so appointed on 14/08/2000. The Selection Committee interviewed the candidates for direct recruitment on

13/08/2000 and the 6th respondent was appointed on 31/08/2000. At that point of time, the learned counsel for the Manager would submit that, there was an apprehension that the petitioner, who was an excess HSA (Malayalam), would not be continued for reason of G.O. No.237/2000. The Manager's contention is that such apprehension was quite real; and he would be aware of the posts that would be approved under the KER and those which would not be. This Court has to accept that contention and would have on that premise alone, upheld the appointments made by the Manager. But; only if the staff fixation order subsequently issued, granted protection to the petitioner for reason only of GO(MS) No.305/2000/G.Edn. dated 02.09.2000; which was issued subsequent to the appointments, but prior to the staff fixation order. However, the protection granted to the petitioner herein, in the staff fixation order of the relevant year was on other grounds.

11. The staff fixation order for the subject year is produced as Ext.R2(g). The same bears Order No.D.Dis.B3/ 5901/ 2000 dated 08.09.2000. Despite the fact that GO(MS) No.305/2000

had been brought out, the petitioner and another HSA (Malayalam) were granted protection under GO(P) No.175/1999 dated 26.07.1999 and GO(MS) No.240/2000/ G.Edn. dated 24.09.2000. In this context, GO(P) No.175/1999 assumes relevance. The said GO was one issued *inter alia* to protect the teachers, who were in service as on 14.07.1996 from being thrown out, for reason only of the teacher-student ratio being revised from 1:40 to 1:45. Such teachers, who were threatened with retrenchment could be retained revising the student-teacher ratio from 1:45 to 1:40; only for the purpose of accommodating such teachers and not for creation of posts. GO(MS) No.240/2000 clarified that, all School Teachers, who were in regular service as on 14.07.1996, would be given protection, subject to the conditions specified therein. The Manager cannot feign ignorance on the said G.O.s. Despite the fact that GO No.237/2000 would have resulted in the petitioner being retrenched, the fact remains that, the petitioner would have been protected by the other G.O.s referred to herein. The contention of the Manager that the selection was made from Arabic, Hindi and English teachers in the

High School Section for reason of the petitioner, the only qualified HSA (Malayalam) being threatened with retrenchment in the said academic year, cannot hence be countenanced.

12. In this context, it is also to be emphasised that as on the day on which the Manager made the appointment, he could not also feign ignorance of Ext.P5 interim order of the Hon'ble Supreme Court and the Circular dated 23.12.1999 produced at Ext.P6. By Ext.P6, the Government had directed the Managers of all the aided Schools to comply with the interim order of the Hon'ble Supreme Court. Hence, the Manager cannot fall back upon the Government Order of 13.05.1998 prescribing the ratio, to contend that he had made the appointments in accordance with such ratio. He ought to have appointed the HSSTs, on upgradation of the School, from the High School Assistants alone. A direct recruitment could have been resorted to, only in the event of no such qualified candidate being available; as per the interim order of the Hon'ble Supreme Court, reduced to an administrative instruction in Ext.P6.

13. This Court now has to consider the contention raised by

the Manager that, it was the prerogative of the Manager to decide, as to which subjects should be earmarked, for complying with the ratio as prescribed by the Government. It has already been held that the ratio could not have been followed; in the teeth of the interim order of the Hon'ble Supreme Court. However, considerable arguments were advanced on that aspect and it is only proper that this Court refer to that. The petitioner's contentions are based on the decisions of this Court, which, according to the Manager, were long after the impugned appointments. The petitioner asserts that even if the ratio was applied the 25% set apart for 'by transfer' appointments should be earmarked in those subjects, in which there are qualified HSA's, according to their overall seniority, in the High School section.

14. The judgment relied on by the learned counsel for the petitioner is that of **K.K. Viswanathan** (Supra). The identical question, of how the ratio has to be applied, arose in the case but in the context of the academic year 1999-2000. The G.O. prescribing the ratio was relied on by the Manager therein, to

contend that the G.O. having neither stipulated the manner in which appointments 'by transfer' had to be regulated nor provided for the promotions to be based on seniority, he has been invested with the authority to follow a reasonable method. The Division Bench categorically held that *"....the reasonable method is that, when there are several teachers belonging to different subjects, entitled for consideration to few vacancies, those posts to which senior incumbents are to be considered, shall be set apart for the quota of in-service candidates, so that senior incumbent shall not be superseded by a junior incumbent, otherwise it will be arbitrary and discriminatory."*

15. In WP(C) No.12881 of 2004, a learned Single Judge of this Court followed the aforesaid judgment, which principle was upheld in appeal by another Division Bench in **Joymon** (supra). The identification and selection was held to be regulated by the principles of equity and good conscience, which would not deny a legitimate claimant or work to the undue advantage of an undeserving person. True, the above judgments were long after the subject academic year and the date of appointments, which

we are concerned with herein. However, it cannot at all be said that the norms of reasonableness and the principles of equity and good conscience would have been any different then or warranted a different consideration. There is nothing on facts or in law to show that a different principle could have been applied in the subject academic year; 2000-2001.

16. It is to be reiterated, at the risk of repetition, that the reasonableness of earmarking of posts for 'by transfer' appointments from the High School Section would have arisen only in the context of the G.O. prescribing such ratio being operative during that period. There was no question of such operation of a ratio, since the interim order of the Hon'ble Supreme Court and the Circular at Ext.P6 governed the appointments of HSST's, at that point of time. The Manager cannot wriggle out of his responsibility to comply with the extant Government Orders and administrative Circulars. Hence the conclusion can only be that at any rate there was no question of application of any ratio for the appointments and even if the ratio were applied, the petitioner's claim cannot be lightly brushed

aside; he being the senior most among the qualified hands (HSA's).

17. As to the principle of the protected hands being disentitled to be considered, a reading of the decisions relied on; does not commend the principles to be adopted in the instant case, for reason of clear distinction on facts and law. ***Manager, Mar Sreeba U.P. School*** (supra) was a case in which a protected teacher, who was thrown out and had been deployed to a Government School, staked a claim for the Headmaster's post in the parent School, which was sought to be urged on the ground, of the lien he preserved in the parent School. This Court held that the post of Headmaster should be filled up from among qualified teachers on the staff of the School and a protected teacher, who was not a member of the School, is not entitled to be considered for the post. The clear distinction on facts is that, there the protected teacher was deployed elsewhere with only a claim for the first vacancy arising in the parent School. Herein, the protection was, to be retained in the parent School and the petitioner continued in the rolls of the High School, which was

upgraded as a Higher Secondary School.

18. In **Prasad** (supra) the appellant therein had a claim for the post of Headmaster, which was negatived not only for the reason of he being protected, but also for the reason of there being other senior teachers on the date of occurrence of the vacancy and the claimant not having 5 years teaching experience after B.Ed.; when the vacancy arose. The factum of whether the claimant was continued in the very same School on protection, is not discernible from the judgment and the principle as noticed by the **Manager, Mar Sleeba U.P. School** (supra) though noticed by the Division Bench in **Prasad** (supra) does not establish a declaration to be applied, divorced from the facts.

19. It is also to be noticed that GO(MS) No.237/2000 was held to be bad for reason of the same being an executive instruction in WP(C) No.7455 of 2002 by judgment dated 08.07.2004. There was specific provision in Chapter XXIII of the KER, regulating the fixation of staff strength of teachers and appointments to aided Schools. Rule 60 of the said Chapter governed the sanction of posts of language teachers. When the

divisions, even for other languages could be reckoned for the purpose of sanctioning and approving posts of HSA (Malayalam) as per the Rules; the exclusion made of the divisions, by an executive order; was held to be bad in the eye of law. In the absence of an amendment made to the statutory rule, the G.O. was found to be inoperative. The judgment was rendered on 08.07.2004, long subsequent to the academic year 2000-2001. Even then, G.O.No.305/2000 was issued by the Government, making the application of G.O. No.237/2000 prospective and applicable only for fresh appointments in the year 2000-2001. Further, the G.O. was rendered inoperative also for the subsequent years; for the existing teachers, by Exts.P12, P13 and P14. The staff fixation order too, granted protection to the petitioner in 2000-2001; on the basis of other G.O.s.

20. In the totality of the circumstances as noticed herein above, this Court is unable to countenance the contention of the Manager that the appointment was made at a time when the petitioner was facing threat of retrenchment on account of G.O. No.237/2000, reducing substantially the divisions in Malayalam.

Further even though there was a threat of application of G.O. No.237 of 2000, on the date of the impugned appointments, the petitioner, in any event, was entitled to protection by way of GO (MS) No.175/1999 and G.O. No.240/2000, both of which were prior to the subject appointments. The threat of retrenchment hence was not real; by virtue of the earlier G.O.s, which assured protection to the petitioner. A prudent and diligent Manager could not have ignored the various G.O. issued on the subject of protection and merely relied on one, to anticipate retrenchment.

21. On the reasonableness of earmarking of posts in the Higher Secondary Section, it has been already held that there could not have been any reasonable earmarking; other than identifying the subjects of the senior most qualified High School Assistants. Even the application of such reasonableness, pales into insignificance, by reason of Ext.P5 interim order of the Hon'ble Supreme Court and Ext.P6 Circular. The Manager in compliance of the same, could have made a direct appointment only in the absence a qualified hand in the High School section.

22. Admittedly the petitioner was qualified to be appointed

as HSST (Malayalam) and was the senior most of the qualified hands in the High School section. The petitioner could not have been excluded, even if the ratio was applicable and in any event the ratio was not applicable. The judgment of the Hon'ble Supreme Court and the direction to approve appointments made, as per the G.O. prescribing 25:75 ratio, could only be taken as approval of proper appointments, made in accordance with the said G.O. It was also so held by the Division Bench in W.A. No.1037 of 2008, filed against the judgment dated 06.07.2007 in this O.P. itself. The Division Bench held that the appointment of the 6th respondent, if based on the G.O. dated 13.05.1998, then the same cannot be interfered with and further held that the question as to whether it was in terms of the G.O. is to be examined by this Court. This Court has found that the appointment made in the present case could not have been as per the G.O. of 13.05.1998, since the interim order of the Hon'ble Supreme Court and the Circular. issued on the same lines, governed appointments to Higher Secondary Schools in the aided Sector, at the time when the impugned appointments were made.

23. Now, this Court is confronted with the un-envious task of deciding on the appropriate relief to be granted; taking into account the long pendency of the case before this Court, which had once been disposed of and the Government having taken up in appeal; remanded, for fresh consideration. Counsel representing the petitioner, were changed over the years; impleading and amendments were made subsequent to the filing of the writ petition. It is also to be noticed that earlier, the learned Single Judge found that both the petitioner and the 6th respondent could be accommodated in the Higher Secondary Section as a special case, to do complete justice between the parties, which however was set aside by the Division Bench of this Court.

24. The fact remains that the petitioner filed the above writ petition, well within time, on 09.08.2000 immediately after the appointments were made. There is no challenge to the five appointments, out of the 6 direct recruits. The challenge is only to the post of HSA (Malayalam), in which the 6th respondent was appointed. The challenge to the 'by transfer' appointment of

HSSTs would have been relevant, only if there was a ratio prescribed at the instant time. As held by this Court, there was no ratio available to be applied and hence none of them could be disturbed. The question of deciding the reasonableness of earmarking of subjects, to comply with the ratio does not at all arise. It is also pertinent that their promotions would have created vacancies in the High School Section, which also would have been filled up by others who are not impleaded herein. This Court cannot interfere with the 'by transfer' appointments made; which, if attempted, would necessarily have a cascading effect on the other appointments, even in the High School section. The qualification or eligibility of those HSA's who were appointed as HSST's also are not under challenge.

25. This Court hence would not venture to test the ratio applied and the earmarking of posts and would leave alone the 'by transfer' appointments made from HSA's, as made perfectly in consonance with Exts.P5 and P6.

26. The petitioner's claim has to be confined to the post of HSST (Malayalam), which he was entitled to and was qualified

for, at the relevant time. His entitlement flows again from Ext.P5 interim order of the Hon'ble Supreme Court and Ext.P6 Circular, as no direct recruitment could have been made by the Manager, at that point of time, if qualified hands in the High School section were available. It is also to be specifically noticed that the 6th respondent is in no way responsible for the exclusion of the petitioner herein. He joined as a direct recruit and continued as HSST (Malayalam) for the last 15 years. The petitioner was illegally denied of an appointment while the 6th respondent has gone ahead with his life, secured, by the appointment made to the post of HSST. The petitioner admittedly would retire in the next year. In balancing equities one or another gets a raw deal and the consequences ought to befall on the perpetrator; which compels this Court to mould the relief in the following manner.

27. The petitioner being entitled to the post of HSST (Malayalam) shall be immediately appointed to the said post with retrospective effect and the 6th respondent shall be accommodated as an HSA (Malayalam) in the resultant vacancy arising in the High School section. The monetary benefits already

drawn by the 6th respondent in the post of HSST in 2000-2001, cannot at all be recovered from him, since he has been appointed and continued by the Manager in that post. The additional monetary benefits, that would have been available to the petitioner, had he been appointed as HSST, however has to be protected. The Manager would be liable for such amounts, which the Government would pay and recover from the Manager under Rule 7 of Chapter III KER. The petitioner, for the purpose of pension, would have reckoned, the service as HSST from the date on which the 6th respondent joined service. The 6th respondent is also entitled to the salary of an HSST, though he will now be posted as an HSA (Malayalam) and the said difference would also be the liability of the Manager, which would be paid by the Government and recovered from the Manager. If the 6th respondent refuse to serve as HSA then he would not get the benefit of the directions herein. It is also directed that, on the retirement of the petitioner, the 6th respondent would be appointed to the resultant vacancy of HSST and would have continuous reckonable service from the date of his appointment.

Before parting, it is to be observed that the Government though not cast with the liability of pay and allowances; to a person illegally denied an appointment, is nonetheless mulcted with the liability of pension reckoning the service of two; as HSST in one post. Rule 7 of Chapter III of KER does not contemplate recovery in such a situation. Nor can a statutory prescription regulate that, since the extent of pension payment is not in the realm of mathematical computation. This happens only because the authorities under the KER, are not diligent enough. The nominee in the Selection Committee is reduced to a name-sake. Unfortunate though that the State is mulcted with such pension liability; individual rights cannot be impacted for reason only of executive inefficiency. The Government would be entitled to proceed against the defaulting officers.

The writ petition is allowed with the above directions. No costs.

Sd/-
K. VINOD CHANDRAN,
JUDGE.

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P.A. to Judge.

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