

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.VASHA

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

W.A.No. 863 of 2015 IN W.P(C)11826/2004

AGAINST THE JUDGMENT IN WP(C) 11826/2004 of HIGH COURT OF KERALA DATED 08-01-2015

APPELLANT:

THE CORPORATE MANAGER
VICAR, ST.AUGUSTINE R.C. CHURCH, THURAVOOR
ANGAMALY, ERNAKULAM.

BY ADVS.SRI.S.PARAVINDAKSHAN PILLAY
SMT.N.SANTHA
SRI.PETER JOSE CHRISTO
SRI.S.A.ANAND

RESPONDENT:

1. V.FSHEELA, W/O P.V.DEVASSY
LPSA, LITTLE FLOWER L.P.SCHOOL, THURAVOOR
ANGAMALY, PIN 683 586, ERNAKULAM DISTRICT.
2. ASSISTANT EDUCATIONAL OFFICER, ANGAMALY
3. THE DISTRICT EDUCATIONAL OFFICER, ALUVA
4. DEPUTY DIRECTOR (EDUCATION), ERNAKULAM
5. THE DIRECTOR OF PUBLIC INSTRUCTION
THIRUVANANTHAPURAM.
6. STATE OF KERALA
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT
DEPARTMENT OF GENERAL EDUCATION
GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM

R1 BY ADV. SRI.MILLU DANDAPANI
R BY GOVERNMENT PLEADER

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 16-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V.ASHA, JJ.

Writ Appeal No.863 of 2015

Dated this the 16th day of October, 2015

JUDGMENT

Asha, J.

The Corporate Manager of St. Augustine R.C. Church, Thuravur, who was the fifth respondent in W.P.(C)11826/04, has filed this writ appeal challenging the judgment of the learned Single Judge directing the District Educational Officer to compute the loss caused to the writ petitioner and to recover the same from the Manager of the school under the provisions of the Revenue Recovery Act.

2. The writ petitioner had approached this Court praying for a declaration that she is entitled to salary as H.S.A. for the period from 15.7.1991 to 22.3.1992 and from 27.2.1993 to 26.3.1993 and from 16.11.1998 to 21.10.2001.

3. The facts which lead to the impugned judgment are as follows:

A vacancy of H.S.A (Mathematics) arose in the school under the 5th respondent Management on 15.7.1991. Writ petitioner who was working in St. Augustine's UP School as UPSA, was having the requisite

qualification for promotion as H.S.A.(SS). The manager appointed a fresh hand Smt.Maggie as H.S.A.(Maths) from outside. Claiming promotion, under the proviso to Rule 43 of Chapter XIVA of Kerala Education Rules, 1958 ('KER' for short), petitioner approached the manager and the educational authorities upto Govt. When all of them rejected her claim, she approached this Court by filing O.P.14873/93. That original petition was dismissed by judgment dated 24.6.1994 on the ground that the subject ratio of 1:1:1 between the core subjects- Social Studies, Mathematics and Science has to be observed while filling up the vacancies. Petitioner challenged the same in W.A.892/94 and that writ appeal was referred to a Full Bench. The Full Bench, by its judgment dated 25.5.2001 in Philomina v. Babu Varghese 2001 (2) KLT 519 (F.B.) held that in case sufficient number of H.S.As are available for teaching the subject in which vacancy arises, that vacancy of HSA can be filled up by promotion of qualified UPSA irrespective of the subject in which the vacancy arose, without observing the subject ratio of 1:1:1 between core subjects. It was further held that the senior most UPSA though he or she is not UPSA in the same subject in

which vacancy arose, should be promoted. In view of the Full Bench decision, the orders passed by the educational authorities rejecting the claim of the petitioner were set aside, directing the Government to issue fresh orders. Accordingly, Government passed Ext.P5 order on 22.10.2001 in which Government found that as the minimum subject requirement was satisfied, petitioner was the rightful claimant for promotion as H.S.A.(SS) with effect from 15.7.1991. It was ordered that she should be given notional appointment w.e.f 15.7.1991, with all other subsequent benefits, without arrears of pay. The Deputy Director of Education and the DEO were directed to take action and to sanction all eligible benefits to her. Due to the inaction on the part of the authorities concerned to implement the same, petitioner approached this Court again in O.P.38366/01, claiming all consequential benefits including arrears of salary. This court disposed of the writ petition on 4.3.2003 by Ext.P7 judgment, directing the District Educational Officer to approve the appointment of the petitioner with effect from 15.7.1991, within a period of one month. It was declared that petitioner was entitled to get salary with effect from 22.10.2001, the date of Ext.P5 order. Regarding

the claim for arrears of salary, it was found that the Manager had already promoted the petitioner against another vacancy of HSA(SS) with effect from 22.3.1992 onwards and she continued there till 15.11.1998 and that the petitioner was already paid salary in the post of HSA for the period from 22.3.1992 to 25.3.1993. There was also a direction to the DEO to consider the claim for salary in the post of HSA with effect from 26.3.1993 to 15.11.1998 and to pay her salary in the post of HSA in case there was an additional post to accommodate her, as per the staff fixation orders and in case petitioner had actually worked as HSA. The prayer for salary for the period from 15.7.1991 to 22.3.1992 was not granted.

4. Thereafter, the District Educational Officer passed Ext.P8 order on 14.8.2003. In this order, it was found that the petitioner was not entitled to arrears of salary for the period from 15.7.1991 to 22.3.1992 as her appointment was notional. For the period from 23.3.1992 to 26.2.1993, she was already paid salary. From 27.2.1993 onwards, it was found that she had been paid salary in the scale of pay of UPSA only. Therefore, it was directed that the arrears of salary for the period from

27.2.1993 should be paid. Further, it was found that, though petitioner was reverted from 15.11.1998, she was eligible for protection from reversion and protection of pay, and hence to continue as HSA, extending the benefits available to those who were in service as on 14.7.1997. Therefore, she was entitled to protection of her pay in the post of H S A. Accordingly, the Headmaster of the school was directed to submit bill claiming arrears. This writ petition is filed thereafter claiming arrears of salary for the entire period, alleging that Ext.P8 order has not been complied with by the respondents concerned till date. The petitioner has filed this writ petition with the following prayers:

"1. to issue a declaration that the petitioner is entitled to salary as HSA from 15.7.1991 to 22.3.1992 and from 27.2.1993 to 26.3.1993 and from 16.11.1998 to 21.10.2001 after deducting the salary paid as UPSA.

2. to direct the respondents to implement Ext.P8 order and grant salary as HSA for the period from 15.7.1991 to 22.3.1992 from 27.2.2003 to 26.3.1993 and from 16.11.1998 to 21.10.2001 after deducting the Lower Grade Salary already paid.

3. to issue such other further reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of this case."

5. It is clear that the the reason for non payment of salary to the petitioner as HSA for the period from 27.2.1993 to 25.3.1993 and from 16.11.1998 to 21.10.2001 is that, at the relevant time, she was working as UPSA in the school and there was no post available to accommodate her. Therefore the learned Single Judge directed that the loss caused to petitioner towards salary of H S A for the period from 27.2.1993 to 25.3.1993 and from 16.11.1998 to 21.10.2001 should be recovered from the petitioner, in the light of judgment of this Court in ***Manager, M.M.H.S. v. Deputy Director*** [1994 (1) KLT 321, wherein it was held that a person having the right to get employment under Section 51A is entitled to claim damages on account of delay caused in giving appointment. The learned Single Judge found that eventhough the petitioner is not entitled to get salary for the period during which she had not actually worked as HSA, she is entitled to get compensation in lieu of the salary for the above period. It is as against this direction that, the Manager approached this court.

6. We heard the learned counsel on both sides and have considered the rival contentions.

7. The question to be examined is whether there was any circumstance which justifies initiation of revenue recovery proceedings against Manager for realising the monetary loss caused to petitioner towards salary in the the post of HSA, . It is seen that in implementation of the judgment of the Full Bench, Government passed Ext.P5 order, in which Govt determined the benefits due to petitioner. It was found that petitioner was entitled to get appointment with effect from 15.7.91 notionally, without arrears of pay. It is subsequent to that, this Court in Ext P7 judgment in O.P. 38366/01 found that she was not entitled to arrears of salary for the period from 15.7.1991 to 22.3.1992. Regarding the period from 23.2.1993 to 15.11.1998, it was found that there was no post to accommodate her and she worked only as H S A.

8. It was on the basis of the directions in Ext.P7 judgment that, the Deputy Director of Education issued Ext.P8 order. Petitioner has not challenged either the order Ext P5 or the judgment Ext P7 in which her entitlements for the benefit of arrears for various spells declared . In the consequential order Ext.P8, the Deputy Director of Education, while re-iterating the inadmissibility of pay for the period

from 15.7.1991 to 22.3.1992, found that the petitioner was entitled to protection for the period from 14.7.97 and for salary, on account of the fact that she was eligible for protection as HSA. None of the authorities have found that it was the Manager who was responsible for the ineligibility. In view of the above facts, we do not find any reason for saddling the manager for payment of salary.

9. We find that when the vacancy of HSA Mathematics arose on 15.7.91, Manager filled up the vacancy by a qualified hand in Mathematics, by fresh appointment from outside in accordance with the settled position of law which prevailed at the relevant time i.e, to maintain the subject ratio of 1:1:1 between core subjects. The claim of the petitioner for promotion was not accepted by any of the authorities until the judgment of the Full Bench was pronounced, unsettling the mandate till that time to observe the subject ratio. It was only thereafter, that Government issued orders on 22.10.2001, determining the entitlement of petitioner for notional appointment with effect from 15.7.1991. In the meanwhile, the manager had already appointed the petitioner against another vacancy of H.S.A.(SS) with effect from

22.3.1993. Subsequent to the Government Order passed on the basis of the Full Bench judgment, there was no complaint raised by the petitioner as against the Manager and the Manager was in no way involved in the further proceedings of granting any of the benefits to her. The benefits on account of the judgment are paid by the Government. It is only when there is a deliberate disobedience of the orders passed by the educational authorities or deliberate violation of the rules in denying or dealing with the appointment, the provisions contained in Chapter 3 Rule 7 can be invoked against the Manager. The judgment in **Manager, M.M.H.S. v. Deputy Director [1994 (1) KLT 321]** relied on by the learned Single Judge was rendered in such a circumstance. We are unable to find any circumstance in this case, which warrants action against the manager, as held in the judgment relied on, by the learned Single Judge.

10. Whatever salary is payable to the petitioner in accordance with law, which is already covered by Ext P7 judgment and P8 order, is liable to be paid by the Government and not by the manager. We therefore absolve the manager from the liability saddled upon him by

the learned Single Judge. It is made clear that the Government need pay only that salary which is found legally admissible to her, as per the orders issued. We direct that the arrears of pay due to the petitioner shall be paid to her within a period of three months from the date of receipt of a copy of this judgment.

The writ appeal is allowed with the above observations.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
P.V.ASHA
JUDGE

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The date "22.3.1993" occurring in paragraph 9 at page 9 of the judgment dated 16/10/2015 in W.A.863/2015 is corrected and substituted as "23.3.1992" as per order dated 21/01/2016 in I.A.29/2016 in W.A.863/2015.

Sd/-
Registrar (Judicial)