

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V. ASHA

FRIDAY, THE 25TH DAY OF SEPTEMBER 2015/3RD ASWINA, 1937

WA.No. 1556 of 2015 () IN WP(C).144/2009

AGAINST THE ORDER/JUDGMENT IN WP(C) 144/2009 of HIGH COURT OF KERALA
DATED 10-04-2015

APPELLANT(S)/PETITIONER:

MANAGER, ST AUGUSTINE UPS
THURAVOOR NORTH, ANGAMALY, ERNAKULAM.

BY ADVS. SRI. S. P. PARAVINDAKSHAN PILLAY
SMT. N. SANTHA
SRI. K. A. BALAN
SRI. PETER JOSE CHRISTO
SRI. S. A. ANAND
SMT. L. AMMU PILLAI

RESPONDENT(S)/RESPONDENTS:

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1. THE GOVERNMENT OF KERALA
REPRESENTED BY THE SECRETARY TO GOVERNMENT
GENERAL EDUCATION DEPARTMENT, GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM - 695 001.
 2. THE DIRECTOR OF PUBLIC INSTRUCTION
THIRUVANANTHAPURAM - 695 001.
 3. ASSISTANT EDUCATIONAL OFFICER
ANGAMALY, ERNAKULAM DISTRICT - 683 572.
 4. THE DISTRICT EDUCATIONAL OFFICER
ALUVA - 683 101.
 5. SRI. P. N. MAGY
HEADMISTRESS, ST. AUGUSTINE'S U.P. SCHOOL
THURAVOOR NORTH, ANGAMALY - 683 586.
 6. SONA GEORGE
U.P.S.A, ST. AUGUSTINE'S U.P. SCHOOL, THURAVOOR NORTH
ANGAMALY - 683 586.

R5 BY ADV. SRI. GEORGE POONTHOTTAM
R6 BY ADV. SRI. MILLU DANDAPANI

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 25-09-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WA.1556/15

APPELLANTS' EXHIBITS:

ANNEXURE I: TRUE COPY OF THE APPOINTMENT ORDER OF SMT.SICILY M.D.

ANNEXURE II: TRUE COPY OF the ORDER NO.C-1161/2015/K.DIS DATED 23.4.2015 OF THE 3RD RESPONDENT.

ANNEXURE III: TRUE COPY OF THE LETTER NO.C-1848/15 DATED 6.7.2015 OF THE 3RD RESPONDENT.

ANNEXURE IV: TRUE COPY OF THE APPEAL DATED 6.5.2015 FILED BY THE PETITIONER BEFORE THE 4TH RESPONDENT.

RESPONDENTS' EXHIBITS:

ANNEXURE R6(a): TRUE COPY OF THE RELEVANT PORTION OF THE SENIORITY LIST.

ANNEXURE R6(b): PHOTOCOPY OF LETTER DATED 3.9.2015 ADDRESSED TO THE 3RD RESPONDENT BY THE APPELLANT.

ANNEXURE R6(c): PHOTOCOPY OF NOTIFICATION NO.STAUPS/HM/2 DATED 7.9.2015 PUBLISHED BY THE APPELLANT.

ANNEXURE R6(d): PHOTOCOPY OF NOTIFICATION NO.STAUPS/HM/2 DATED 7.9.2015 PUBLISHED BY THE APPELLANT.

/TRUE COPY/

PS TO JUDGE

ANTONY DOMINIC & P.V.ASHA, JJ.

W.A.No.1556 of 2015

Dated this the 25th day of September, 2015

JUDGMENT

Antony Dominic, J.

- 1.The petitioner in w.P(C).144/09 has filed this writ appeal aggrieved by the judgment of the learned single Judge dismissing the writ petition. Briefly stated facts of the case are as follows:
- 2.Appellant is the Manager of St.Augustine's Upper Primary School, Thuravoor, an aided U.P.School governed by the provisions of the Kerala Education Act and the Rules. Ext.P5 dated 7.8.2008 is the proceedings of the National Commission for Minority Educational Institutions established under the National Commission for Minority Educational Institutions Act, 2004 (the 'Minority Act', for short), declaring that St.Augustine's U.P. School Thuravoor is a minority educational institution covered under Article 30 of the Constitution of India.
- 3.On 1.6.2006, there arose a vacancy of Headmaster in the school. At that time, the 5th respondent who was

a HSA in the high school section was deployed on protection in a Government school. On the occurrence of vacancy of Headmaster in the U.P.School, the Manager made an application to the Deputy Director of Education, who, by Ext.P1 order, permitted the Manager to recall the 5th respondent to the parent school. Though Ext.P1 order is dated 30.5.2006, Ext.P2 order of the Manager dated 23.5.2006 shows that in the purported exercise of their right as a minority educational institution, the 5th respondent was appointed as Headmistress in the U.P. School with effect from 1.6.2006.

4.The 6th respondent, who is a teacher in the U.P. School itself and has a longer service in the school, objected to the appointment of the 5th respondent by filing Ext.P3 before the second respondent. The second respondent considered the matter and issued Ext.P4, directing appointment of the 6th respondent as Headmistress of the U.P.School. That order was challenged by the Manager in W.P(C).899/07, producing Ext.P4 herein as Ext.P9 therein. That writ petition was disposed of by judgment dated 27.2.2007, setting

aside Ext.P4 and directing the third respondent to consider the request of the Manager for approval of appointment of the 5th respondent with notice to the 6th respondent also. Accordingly, the matter was considered by the third respondent and by Ext.P6 order, the appointment of the 5th respondent as Headmistress was approved.

5. Aggrieved by Ext.P6, the 6th respondent filed an appeal before the 4th respondent which resulted in Ext.P7 order directing cancellation of Ext.P6 order of approval, in which, reliance was placed on Ext.P4, which, as already stated, was set aside by this Court in the judgment in W.P(C).899/07. Ext.P8 order was issued by the second respondent cancelling the appointment of the 5th respondent and with a direction to appoint a senior claimant. The Manager challenged Ext.P8 in Ext.P9 revision filed before the Government and the Government issued Ext.P11 order holding that though the school is a minority educational institution, being a High School Assistant, the 5th respondent could not have been appointed as the Headmistress in an Upper Primary school. On that

basis, the Government upheld Ext.P8 order. It was challenging the above proceedings, the Manager filed W.P(C).144/09.

6.At the stage of admission, interim orders were passed by this Court, on the strength of which, the 5th respondent who was appointed by Ext.P2 order, continued as Headmistress and retired from service on 31.3.2015. That vacancy is now attempted to be filled up by the Manager by inviting applications from eligible teachers. The writ petition was heard by the learned single Judge and was dismissed. It is accordingly, this appeal is filed.

7.Though the ineligibility of a HSA deployed on protection to be appointed as Headmistress of the U.P.School was not disputed before us, the contention raised by the counsel for the appellant was that by Ext.P5, the school has been recognised as a minority educational institution. Relying on the judgment of the Apex Court in Ammad v. Emjay High School [1998 (2) KLT 828], learned counsel contended that declaration of an institution as a minority

educational institution is only a recognition of an existing fact. Therefore, according to him, in the light of the principles laid down by the Full Bench of this Court in the judgment in Kurian Lizy v. State of Kerala [2006 (4) KLT 264], the management was entitled to appoint a suitable person, irrespective of the seniority of the teachers. It is stated that it was in exercise of that right, the management had appointed the 5th respondent. Therefore, according to him, Exts.P8 and P11 are illegal. The second contention raised was that the 5th respondent who was deployed on protection was entitled to be appointed to the post of Headmistress in view of the provisions contained in Note 1A to Rule 51 A of Chapter XIV A KER. This contention of the learned counsel appearing for the 5th respondent was supported by the counsel for the Manager also.

8. On the other hand, learned senior counsel appearing for the 6th respondent relied on Rule 45 of Chapter XIV A KER and contended that the 6th respondent being a teacher in the U.P.School was entitled to be appointed to the post of Headmistress. She also

referred to us the judgments of this Court in T.V.Luciamma v. State of Kerala [1990 (1) KLJ 137], Manager Mar Sheba U.P.School v. State of Kerala [1990 (1) KLJ 605], Rahelamma v. State of Kerala [1997 (2) KLT 429] and Prasad v. Philipose Mar Dilshus U.P.School [2005 (3) KLT 487] to support her contention that the vacancy should have been filled up on the basis of Rule 45 and that a protected teacher deployed to another school did not have any claim to the vacancy in question. She also referred to us the judgment of the Division Bench of this Court in Manager, M.M.L.P.School v. Sajitha V.B. [ILR 2014 (2) Ker 822].

9. We have considered the submissions made. Rule 45 of Chapter XIV A KER, subject to Rule 44 in so far as it is relevant, provides that if the post of Headmaster of a U.P.School is vacant, the post shall be filled up from among the qualified teachers of the school or schools under the educational agency according to seniority as per the seniority list prepared and maintained under Rule 34. Therefore, going by this rule, it is obvious that when there is a vacancy of

Headmaster, the post shall be filled up from among the qualified teachers on the staff of the school or schools under the educational agency and seniority shall be the criterion. However, in so far as the minority educational institutions are concerned, a departure has been recognised by this court and in Kurian Lizy (supra), it was held thus:

"After answer to the question directly covering the issue in hand with regard to appointment of Headmaster or Principal, nothing else survives for determination. It would be unnecessary in this order in probing further the matter. We, thus, hold that the management of a minority educational institution would have freedom to appoint Headmaster or Principal. R.44 (1) of the Rules of 1959 would have no control over the powers conferred under Art.30(1) of the Constitution, although such institution has necessarily to evolve a rationale procedure for selection of the Headmaster or Principal. In this context, we feel that some directions should be issued to the Managements of minority educational institutions, to evolve a procedure for selection to the post of Headmaster, in the light of the observations in the answer to question 5(c) in T.M.A.Pai Foundation's case (supra) quoted above. We notice that in many cases senior teachers belonging to the minority community,

which runs the institution are superseded without assigning any reason. Art.30(1) of the Constitution of India is an armour to protect the minority against the legislative and executive actions of the State, which is normally controlled by the majority. The said armour cannot be used as a weapon against other members of the same minority community. The protection under Art.30 (1) is to the minority community and for the minority community. The Manager may supersede the members of other communities and also members of the minority community, who are found unsuitable for promotion to the post of Headmaster. But there may be teachers, who are, in every respect, qualified and suitable to head a minority educational institution. The management may select the best among them. The selection procedure should be fair, reasonable and transparent. The eligible members of the minority community may not have a feeling that they have been superseded without any valid grounds. So, all minority educational institutions, which propose to select the best person to the post of Headmaster/Principal of a School or College, as the case may be, ignoring seniority in the feeder category or ignoring the available teachers, should frame and publish regulations or bye-laws, containing a transparent procedure, governing such selection. The publication can be made in the Notice Board of the educational institution concerned and a copy of it should be available in school/college library for reference. When superseding a senior qualified member of

the minority community the reasons thereof should be clear from the records. The question as framed in the beginning of this order is thus answered accordingly."

10. This principle laid down by the Full Bench in Kurian Lizy (supra) has been upheld by a subsequent Full Bench in Belsi v. Corporate Management of Latin Catholic Schools [2010 (2) KLT 134]. However, the issue that arises in this case is whether the appellant management is entitled to the benefit of the aforesaid principle.

11. As we have already stated, the declaration of minority status obtained by the appellant is by Ext.P5 dated 7.8.2008. It is true that in the judgment in Ammad (supra), considering the implications of minority status declared by the Government, the Apex Court held in Paragraph 12 that when the Government declared a school as a minority school, what is recognised is the factual position that the school was established and is being administered by a minority community and that the declaration is only an open acceptance of a legal

character which should necessarily have existed antecedent to such declaration.

12. In so far as this case is concerned, even the appellant has no case that there was any declaration made by the Government recognising the school as a minority educational institution. The school in question was recognised as a minority educational institution only by Ext.P5 proceedings dated 7.8.2008 of the National Commission for Minority Educational Institutions, constituted under section 3 of the Minority Act. The effect of such a declaration made by the Commission directly came up for consideration of a Division Bench of this Court in the judgment in Sajitha (supra), where, while dealing with the contention of the learned counsel for the management that the provisions in the Minority Act regarding certification do not appear to apply to minority educational institutions which were already in existence at the commencement of the Act, this Court held thus :

"21. It was much after **N.Ammad** was decided by the Hon'ble Supreme Court in 1998 that the

NC Act came into force on 6th January, 2005. That Act was one to constitute a National Commission for Minority Educational Institutions and to provide for matters connected therewith or incidental thereto. Chapter III of that Act deals with the rights of a minority educational institution. Sub-section 1 of Section 10 provides that any person who desires to establish a Minority Educational Institution may apply to the competent authority for the grant of no objection certificate for the said purpose. Sub-section 2 provides the procedure for decision on application by the competent authority and Sub-section 3 provides a presumptive grant of certificate with efflux of time. Sub-section 4 of Section 10 provides that on the grant of a no objection certificate or where the competent authority has to be deemed to have granted the no objection certificate, the applicant shall be entitled to commence and proceed with the establishment of a Minority Educational Institution in accordance with the rules and regulations, as the case may be, laid down by or under any law for the time being in force. Clause (f) of Section 11 provides that notwithstanding anything contained in any other law for the time being in force, the Commission shall decide all questions relating to the status of any institution as a Minority Educational Institution and declare its status as such. Clause (g) of Section 2 defines "Minority Educational Institution" to mean a college or institution (other than a University) established or maintained by a person or group of persons from amongst the

minorities. Adv.Sri.V.M.Kurian, learned counsel appearing for the management in W.A.Nos.568 and 580 of 2013 argued that the provisions in the NC Act regarding certification do not appear to apply to minority educational institutions which were already in existence at the commencement of that Act and no new certification is actually required. If that were so, the ratio of **N.Ammad** does not come to the aid of the management for two reasons. Firstly, that precedent is only to the effect that the Government having declared the school involved in that litigation as a minority school, such declaration would apply to the earlier point of time as well. There is no declaration by the Government at any pointy of time, in relation to the school involved in this litigation. Secondly, if the declaration given by the competent authority under the NC Act is for the purpose of the commencement and proceeding with the establishment of a new minority educational institution, as argued by the learned counsel for the management, that certificate cannot be utilised by any existing institution as a declaration of its status. Jurisprudentially, while Their Lordships of the Supreme Court in deciding **N.Ammad** appear to have applied, among other principles, the logic reflected in the permissive presumption at Illustration (d) in Section 114 of the Evidence Act, such reasoning cannot be applied to a situation where a certification is only for the purpose of future acts, that is to say, commencement and establishment of a new minority educational institution. Taking all these

together, when a declaration is granted by the competent authority under the NC Act, such declaration would be relevant to operate only as regards acts done by the management of that institution on and from the date of grant or the date of presumptive grant of certificate in terms of sub-section 3 or sub-section 4, as the case may be, of Section 10 of that Act. In this view of the matter, what the management has produced as Ext.P-1 in WP(C) No.24745 of 2010 could be relied upon by the educational authorities only for actions and matters in relation to the management of the institution on and after 15-7-2010, the date of its grant. Therefore, the production of that notification before this Court, in writ jurisdiction, could not have set at naught the decisions of the statutory authorities under the Kerala Education Act and the Rules thereunder, unlike in statutory appeals or revisions, subject of course to the restrictions, if any, to take note of subsequent events and admit further pleadings and evidence."

13. Reading of the principles thus laid down in the judgment in Sajitha (supra) shows that it has been categorically held that when a declaration is granted by the competent authority under the Minority Act, such declaration would be relevant to operate only as regards acts done by the management of that

institution on and from the date of grant or the date of presumptive grant of certificate in terms of section 10(3) or 10(4) as the case may be. Therefore, Ext.P5 proceedings dated 7.8.2008 of the Commission cannot now be relied on by the management to legitimise the appointment made by them to a vacancy that arose on 1.6.2006. As on that date, when there was not even a declaration made by the Government, in view of the law laid down in Sajitha (supra), the vacancy of Headmaster should have been filled up on the basis of Rule 45 of Chapter XIV A KER.

14. Another contention raised by the learned counsel for the 5th respondent and supported by the counsel for the appellant was that in view of note 1A to Rule 51A of Chapter XIV A KER, the 5th respondent was entitled to be appointed. Rule 51A recognises rights of appointment in favour of teachers who are thrown out of service. Note 1A to the said rule inserted by Government Order dated 17.6.2005 reads thus:

"Note 1A:- Fresh appointments to vacancies arising in the same or higher or lower category of teaching posts under the Educational Agency shall be made only after providing re-appointment to such teachers thrownout from service and protected teachers available under the Educational Agency."

15. Reading of the above rule shows that said note would operate as a rider to rule 51A only. In other words, this note cannot have any impact on the scope and ambit of Rule 45 of Chapter XIV A KER. Therefore, note 1A relied on by the learned counsel cannot have any relevance in so far as the controversy in question is concerned.

16. The sum and substance of the above discussion is that as on 1.6.2006, when the vacancy of Headmaster arose in the school, that ought to have been filled up in the manner as provided in Rule 45 of Chapter XIV A KER. This obligation of the Manager was not, in any manner, diluted by note 1A to Rule 51A of Chapter XIV A KER. If that be so, the 5th respondent who was an HSA and was on deployment in a Government school on protection, could not have been appointed

as Headmistress in the Upper Primary school, when the vacancy arose on 1.6.2006.

17. At this stage, referring to Annexure R6(a) common seniority list as on 1.1.2010, learned counsel for the Manager submitted that there was another teacher by name O.J. Infanta who was senior to the 6th respondent and therefore, according to him, even if it is accepted that the 5th respondent could not have been appointed to the vacancy which arose on 1.6.2006, the vacancy would not have gone to the 6th respondent.

18. However, referring to Ext.P3 and the observations contained in Ext.P11, learned counsel for the 6th respondent contended that Smt. Infanta had relinquished her claim and that therefore, the Manager could have denied appointment to her. We do find force in the submission of the counsel for the 6th respondent because the contention that Smt. Infanta had relinquished her claim was urged by the 6th respondent in Ext.P3 filed by her as early as on 30.8.2006. This was also noticed by the Government

in Ext.P11 order. Not only that, at no stage, did the Manager dispute this assertion made by the 6th respondent. It is also relevant to note that till date, Smt.Infanta has not staked her claim for the post of Headmistress. That apart, in all proceedings in relation to the above claim of the 6th respondent, all authorities of the department had treated the 6th respondent as the seniormost claimant for appointment to the post of Headmistress. Therefore, the contention of the Manager that Smt.Infanta is a senior claimant is only an afterthought and cannot be accepted.

19. Therefore, we have to proceed on the basis that the 6th respondent was the rightful claimant who ought to have been appointed to the vacancy of headmistress that arose on 1.6.2006. However, it is a fact that though erroneously, the 5th respondent was appointed and her appointment was also approved. It is also a fact that though this appointment was interfered with by the superior authorities, on the strength of the orders passed by this Court, she continued in service as Headmistress and retired from that post on

31.3.2015. In such circumstances, at this distance of time, we do not think it just or proper to pass any order upsetting that factual position. Therefore, with the hope that it will give a quietus to the dispute, without upsetting the appointment of the 5th respondent, we dispose of this writ appeal with the following directions:

(a)The appointment of the 5th respondent in the vacancy of Headmaster with effect from 1.6.2006 is sustained for the limited purpose of enabling her to receive her emoluments and other eligible terminal benefits.

(b)The 6th respondent, who ought to have been appointed in the vacancy to which the 5th respondent was appointed, shall be appointed to the vacancy of Headmaster that arose in the school consequent on the retirement of the 5th respondent with effect from 1.4.2015 and on such appointment, the same shall be approved.

(c)The appellant shall issue order appointing the 6th respondent as Headmistress, at any rate within three weeks from the date of receipt of a copy of this judgment.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
P.V.ASHA, Judge.

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PS to Judge