

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

TUESDAY, THE 17TH DAY OF MARCH 2015/26TH PHALGUNA, 1936

WP(C).No.2763 of 2010 (U)

PETITIONER:

**FASEELA.K.P,W/O.ASHRAF,PADINJARA THANAPARAMBIL,
NADUVATHUNGAR P.O,AROOKUTTY,ALAPPUZHA DISTRICT.**

**BY ADVS.SRI.KKM.SHERIF
SRI.LAL K.JOSEPH
SRI.A.A.ZIYAD RAHMAN
SRI.P.MURALEEDHARAN (THURAVOOR)
SRI.V.R.REKESH**

RESPONDENT'S:

- 1. STATE OF KERALA REPRESENTED BY ITS
SECRETARY,GENERAL EDUCATION (H) DEPARTMENT,
SECRETARIAT,THIRUVANANTHAPURAM.**
- 2. THE DISTRICT EDUCATIONAL OFFICER,
CHERTHALA,ALAPPUZHA DISTRICT.**
- 3. THE ASSIST. EDUCATIONAL OFFICER,
THURAVOOR,ALAPPUZHA DISTRICT.**
- 4. THE MANAGER,NADUVATHUL ISLAM,
U.P.SCHOOL,NADUVATHUNAGAR,
AROOKUTTY,ALAPPUZHA DISTRICT.**
- 5. SABIRA.K,LOWER PRIMARY SCHOOL ASSISTANT,
NADUVATHUL ISLAM U.P.SCHOOL,
NADUVATHUNAGAR P.O,AROOKUTTY.**
- 6. ANSARI P.A,UPPER PRIMARY SCHOOL ASSISTANT,
NADUVATHUL ISLAM U.P.SCHOOL,
NADUVATHUNAGAR P.O,AROOKUTTY**

R1 TO R3 BY GOVT. PLEADER SRI.SOJAN JAMES

R4 BY ADVS.SRI.V.A.MUHAMMED

SRI.K.E.HAMZA

SRI.T.V.VIJAYARAJAN

SRI.M.SAJJAD

SRI.GOPALAKRISHNAN

R5 & R6 BY ADV.SRI.P.M.PAREETH

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 17-03-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1:TRUE COPY OF THE CERTIFICATE DATED 15.7.2006 ISSUED BY
DR.RANI J.S., ASSISTANT SURGEON,GENERAL HOSPITAL,ERNAKULAM.

EXT.P2:TRUE COPY OF THE COMPLAINT DATED 28.7.2005.

EXT.P3:TRUE COPY OF THE COMMUNICATION NO.C/2482/2005 DATED 21.2.2006.

EXT.P4:TRUE COPY OF THE APPEAL WITH THE ENDORSEMENT OF THE DEPUTY
DIRECTOR OF EDUCATION.

EXT.P5:TRUE COPY OF THE ORDER NO.1669/06 DATED 9.12.2006.

EXT.P6:TRUE COPY OF THE CIRCULAR DATED 17.8.2004.

EXT.P6(a):TRUE COPY OF THE CIRCULAR DATED 11.10.2004.

EXT.P7:TRUE COPY OF THE GOVERNMENT ORDER NO.GO(RT) 5022/06/G.EDN.
DATED 20.11.2006.

EXT.P8:TRUE COPY OF THE REPORT DATED 5.8.2006.

EXT.P9:TRUE COPY OF THE COMMUNICATION BEARING NO.C/1795/2006
DATED 17.7.2006.

EXT.P10:TRUE COPY OF THE ORDER DATED 16.3.2009 IN WP(C) NO.2901/2007.

EXT.P11:TRUE COPY OF THE ORDER BEARING NO.G.O(RT) NO.5417/2009/G.EDN
DATED 28.12.2009.

RESPONDENT'S EXHIBITS:

EXT.R4(a):TRUE COPY OF THE RECEIPT/VOUCHER DATED 23.09.2004.

EXT.R4(b):TRUE COPY OF THE -DO- DATED 4.11.2004.

EXT.R4(c):TRUE COPY OF THE -DO- -DO- DATED 10.12.2004.

EXT.R4(d):TRUE COPY OF THE -DO- -DO- DATED 4.1.2005.

EXT.R4(e):TRUE COPY OF THE -DO- -DO- DATED 17.1.2005.

EXT.R4(f):TRUE COPY OF THE -DO- -DO- DATED 2.2.2005.

EXT.R4(g):TRUE COPY OF THE APPOINTMENT ORDER OF SMT.SABIRAAND
APPROVAL THEREOF DATED 8.11.2004/16.12.2006.

EXT.R4(h):TRUE COPY OF THE DECISION REPORTED IN 2005 (4) K.L.T.SHORT
NOTES PAGE 16 CASE NO.19.

EXT.R4(i):TRUE COPY OF THE JUDGMENT OF THIS HONOURABLE COURT IN
W.A.NO.254/1972.

WP(C).No.2763 of 2010 (U)

**EXT.R5(a):A TRUE PHOTOCOPY OF THE APPROVAL OF APPOINTMENT IN
RESPECT OF THE 5TH RESPONDENT ISSUED BY THE 3RD
RESPONDENT.**

**EXT.R5(b):A TRUE PHOTOCOPY OF THE GOVERNMENT LETTER
NO.6807/H2/2010/G.EDN DATED 9.3.2010 ISSUED BY THE 1ST
RESPONDENT TO THE 3RD RESPONDENT.**

**EXT.R5(c):A TRUE PHOTOCOPY OF THE ORDER OF APPROVAL OF
APPOINTMENT DATED 17.3.2010 IN RESPECT OF THE 6TH
RESPONDENT ISSUED BY THE 3RD RESPONDENT.**

//TRUE COPY//

P.S. TO JUDGE

pk

C.K. ABDUL REHIM, J.

W.P.(C)No.2763 of 2010

Dated this the 17th day of March, 2015

JUDGMENT

The petitioner is challenging Ext.P11 order passed by the Government through which the claim of the petitioner for appointment as Lower Primary School Assistant (LPSA) in the 4th respondent's school, against a substantive vacancy which arose on 13/08/2004, was rejected, and consequently the appointment of 5th respondent to the said post was approved.

2. Case of the petitioner in brief is that, she was appointed by the 4th respondent as LPSA during the Academic year 2004-2005 against a leave vacancy which arose consequent to leave availed by one Smt.Shamla Beevi, LPSA, during the month of June 2004, exactly from 02/06/2004. Subsequently Smt.Shamla Beevi died on 13/08/2004 and the petitioner continued in the said post. In a subsequent leave vacancy of LPSA which arose consequent to the leave availed by one Smt.Sukruthavally Amma, the 5th respondent was appointed with effect from 09/08/2004. According to the petitioner the 5th respondent was not qualified for appointment

at that time because she was only awaiting the result of her TTC final examination. The appointment order of the petitioner was not forwarded for approval by the 4th respondent and it was not approved because the approval of two other senior teachers were pending at that time. It is admitted that the petitioner was given payment only at Rs.1250/month by the 4th respondent, which according to her was on the basis of an undertaking that the amount will be adjusted when her appointment will be approved by the Department. Meanwhile, the petitioner availed maternity leave from 18/02/2005 onwards. But she was not permitted to re-join duty by the 4th respondent when the leave period expired in June 2005. Then only the petitioner came to know that the 4th respondent in collusion with the 5th respondent and her husband, who is the 6th respondent, was cheating her without issuing any formal appointment order and without forwarding the requisite documents for approval of the appointment to the Educational Officer. The petitioner came to know that the 5th respondent, who acquired qualification subsequently, was appointed against the regular vacancy which arose due to death of Smt.Shamla Beevi, with effect

from 08/11/2004. Subsequently, during the year 2005, the 4th respondent had appointed two other teachers against the retirement vacancies which arose in the school. The petitioner submitted a complaint before the 3rd respondent with respect to non issuance of appointment order by the 4th respondent. But the 3rd respondent rejected the complaint through Ext.P3 letter stating that the Manager being the appointing authority has to issue the order of appointment and then only the question of approval would arise. Since the Manager had not submitted any papers in this regard, the complaint deserves no consideration, is the decision. The petitioner appealed the matter before the Deputy Director of Education, Alappuzha. The Deputy Director relegated the petitioner to the 2nd respondent. The 2nd respondent, after conducting an enquiry, had issued Ext.P5 proceedings finding that, from the Attendance Register kept at the school it is revealed that the petitioner had worked during the relevant period. Therefore it was concluded that the petitioner was working in the school during 2004-2005 and hence directed the 3rd respondent to initiate action for approval of her appointment. In the meanwhile the Government have issued Ext.P7 order

approving appointment of the 5th respondent as LPSA in 4th respondent's school from 08/11/2004 onwards, consequent to the approval of appointment granted with respect to two other senior teachers.

3. Having aggrieved by Ext.P7 the petitioner approached this court earlier in WP(C) No.2901/2007. In Ext.P10 judgment this court observed that a revision petition filed by the 4th respondent against Ext.P5 order is pending before the Government. Therefore the Government was directed to dispose of the said revision petition after affording opportunity to all parties concerned including the 5th respondent. It was specifically directed that the Government should take due consideration of the findings contained in Ext.P5 to the effect that the 4th respondent had tampered the Attendance Register, with respect to which an enquiry is allegedly pending. It was clarified that the appointment and approval of the 5th respondent as well as the other senior teachers would depend upon the order to be passed by the Government. Ext.P7 was quashed to the extent it approved appointment of the 5th respondent, subject to the above said directions. Ext.P11 is the order passed by the Government consequent to directions

contained in Ext.P10 judgment, which is impugned in this writ petition.

4. In Ext.P11 order, the Government found that the enquiries conducted by the 2nd respondent had revealed that the petitioner had worked in three distinct spells in the school in question, and marked attendance in the Attendance Register, which was subsequently erased from the records. It was observed that the petitioner would not have worked in the school without knowledge of the Manager. Therefore the contention raised by the 4th respondent that the Headmaster alone is responsible for permitting the petitioner to work in the school, as well as the contentions raised with respect to the tampering of the Attendance Register, were repelled. But it was observed that appointment of the petitioner was never brought before the Educational authorities for approval, whereas the appointment order with respect to the 5th respondent was duly forwarded and approved by the Educational Officer. It is categorically found that, in the case of the petitioner the Manager had failed to forward the appointment order as required under Rule 8(1) of Chapter XIV A of KER. The Rule does not permit issuance of an

appointment order with retrospective effect. The procedure contemplated under Rule 7 and 8 of Chapter XIV A KER has not been followed in the matter of appointment of the petitioner. Specifically referring to Rule 8(4) of Chapter XIV A, the Government observed that, if the appointment order and other required particulars are not forwarded in the manner prescribed under the Rules within the time limit, it should be deemed that no such appointment has taken effect. Further it is found that the Manager had paid only a sum of Rs.1250/- per month as salary to the petitioner and such an appointment is not permissible under the existing provisions. Hence it is concluded that the alleged appointment of the petitioner cannot be considered for approval.

5. Contention of the petitioner is that she was appointed against the leave vacancy of Smt.Shamla Beevi from 02/06/2004 onwards and she continued under such appointment till 18/02/2005, till she went on maternity leave. According to the petitioner she was continuing in the regular vacancy which arose consequent to the death of Smt.Shamla Beevi on 13/08/2004. It is contended that the 5th respondent was appointed only against another leave vacancy of

Smt.Sukruthavally Amma, which arose on 09/08/2004. Despite the fact that the death vacancy of Smt.Shamla Beevi arose on 13/08/2004, the 5th respondent was appointed only on 08/11/2004, when she acquired qualification of TTC. Since the petitioner was continuing in the said post on the basis of the appointment made by the 4th respondent, she could have been regularised in the vacancy which arose on 13/08/2004, is the contention. It is further contended that if the 4th respondent would have issued appointment order and forwarded it for approval on the basis that the petitioner was appointed on 02/06/2004. In such case she would have been an eligible claimant under Rule 51A for the permanent vacancy which arose consequent to death of Smt.Shamla Beevi on 13/08/2004. By committing fraud and cheating on the petitioner, the 4th respondent had refrained from issuing any proper appointment order and thereby deceived the petitioner, is the case. It is pointed out that the 2nd respondent was convinced of the above aspects through the enquiry conducted and had issued direction to the 3rd respondent to approve the appointment. That being so, the Government went highly erred in approving the appointment of the 5th respondent

against the said vacancy. Instead necessary directions ought to have been issued to approve the appointment of the petitioner against the said vacancy. It is contended that the 4th respondent cannot be permitted to take advantage of a fraud committed, because any fraud committed through evident misrepresentation, would vitiate the entire action. Since it is convincingly proved about the existence of such a fraud, the Government could have set it right by approving the appointment of the petitioner and by rejecting the approval of appointment of the 5th respondent, is the contention. It is also pointed out that there exists malafide action on the part of the 4th respondent because the 5th respondent is a close relative of the 4th respondent.

6. Under the relevant provisions of the KER, the Manager is the appointing authority with respect to teachers in an aided school coming within the direct payment scheme. Rule 7 of Chapter XIV A provides that as soon as a teacher is appointed in a school, the Manager should immediately issue an appointment order in the form prescribed and the appointment shall be effective from the date on which the teacher is admitted to duty, provided the appointment is duly

approved. Rule 8 of chapter XIV A deals with the procedure with respect to approval of the appointments. Sub-rule (1) of Rule 8 casts an obligation on the Manager to forward the appointment order, duly signed with all details and particulars and documents as may be required, for approval to the Educational Officer, within 15 days from the date of joining duty of the candidate. Of course, the delay in this regard can be condoned based on specific orders of competent authorities. Sub-rule (2) deals with the procedure for granting approval by the Educational Officer. It provides that after the approval, one copy of such approval should be communicated to the teacher concerned by the Educational Officer through the Manager and another copy need to be forwarded to the Manager to be kept in the school records. The Educational Officer is bound to take a decision with respect to the approval within 30 days from the date of receipt of the appointment order and other documents. Under Sub-rule (3) the Educational Officer is bound to intimate the reason if any for declining the approval of the appointment to the teacher and to the Manager. Sub-rule (4) of Rule 8 provides that if the appointment order and other required particulars are not

forwarded in the manner prescribed, within the time specified, it shall be deemed that no such appointment has taken effect.

7. In the case at hand it is not in dispute that the 4th respondent had not issued any appointment order with respect to the petitioner as required under Rule 7 of Chapter XIV A. Nor he had forwarded any such appointment order for approval of the Educational Officer as required under Rule 8. There was no occasion for the Educational Officer to consider the approval of appointment of the petitioner at any point of time. Therefore considering sub-rule (4) of Rule 8 it has to be deemed that no appointment of the petitioner has taken effect. Learned counsel for the petitioner contended that the factum of appointment stands proved through the enquiry conducted by the 2nd respondent, which is revealed in Ext.P5 order. It is pointed out that the Government was also convinced about the said fact, as reflected in Ext.P11. At the same time, contention of the 4th respondent as reflected in the counter affidavit is that it was only on the basis of a permission granted by the Management to the Headmaster to engage a teacher in the short leave vacancy, the petitioner was engaged to work in the school in three different spells from 02/06/2004 to

20/08/2004, 01/09/2004 to 23/12/2004 and 03/01/2005 to 18/02/2005. Specific case is that the Manager had never appointed the petitioner as a teacher and had not issued any appointment order in that regard. It is contended that the petitioner had accepted payment of wages from the Management for the said period, as evidenced from Ext.R4 series vouchers. The above documents would indicate that the petitioner had received salary from the Management at the rate of Rs.1250/month. It is contended that Ext.P5 order issued by the 2nd respondent is without considering the relevant provisions contained in Rule 8(1) to (4) of Chapter XIV A KER.

8. Learned counsel for the 4th respondent had relied on a decision of this court in **Swayamprabha v State of Kerala [1981 KLT SN 93(Case No.166)]** wherein it is held that any approval granted for a period for which no appointment order was issued by the Manager, is illegal. It is further contended that the 5th respondent was duly appointed against the vacancy in question, which arose consequent to death of Smt.Shamla Beevi and that the Government have approved such appointment. According to the 4th respondent, the claim

of the petitioner under Rule 51 A for appointment against the vacancy would have existed only if the original appointment was approved. Since there was no appointment made, the petitioner could not raise any such claim. Hence it is contended that Ext.P11 order of the Government does not suffer from any infirmity. Counsel appearing for respondents 5 and 6 have also raised identical contentions, supported through their counter affidavit containing similar averments.

9. Direction issued by the 2nd respondent in Ext.P5 was not implemented. Considering the provisions contained in Rule 8 of Chapter XIV A KER, such a direction could not be implemented without there being any appointment order issued or forwarded for approval. By virtue of the order of the Government, which is impugned in this writ petition, the said direction stands reversed. However, it is evident that the authorities became convinced about the fact that the petitioner was permitted to work in the school during the relevant period and that there occurred tampering in the Attendance Register. But whether that fact by itself can be considered for granting approval of appointment of the petitioner, even without there being any appointment order issued by the Manager, is the

question. Contention raised by learned counsel for the petitioner is that, since the misrepresentation, fraud and deceit committed by the Manager stands proved, action of the Manager in appointing the 5th respondent and in getting approval of such appointment, will stand vitiated. But neither the authorities concerned nor this court can arrive at any such conclusion, because even if any such fraud has been committed with respect to appointment of the petitioner, it cannot be construed that she was duly appointed in the leave vacancy and that she became an eligible claimant to be appointed against the death vacancy which arose on 13/08/2004. The alleged fraud, even assuming as stands proved, could not be considered as sufficient reason to set aside the appointment and approval of the 5th respondent. This is because, the petitioner was never appointed in compliance with the mandate of the relevant Rules nor her appointment was approved at any point of time. Sub-rule (4) of Rule 8 assumes importance in this respect. It is only when the appointing authority makes an appointment and forward the same for approval to the Educational Officer along with required particulars and documents, the authority can take

note of the appointment and approve the same. Then only the appointment will take effect, making the teacher eligible for approval of the appointment and for consequential benefits arising under the direct payment scheme of the Government.

10. Learned counsel had placed reliance on a decision of the hon'ble Supreme Court in **Ram Chandra Singh v. Savithri Devi and Others [2003 KHC 1609]**. It is held therein that if a judgment and a decree has been obtained by practicing fraud on the court, the principles of *res judicata* would not stand in the way of granting relief by nullifying such fraud and setting right the position in favour of the aggrieved party. It is found therein that, even a fraudulent misrepresentation can lead to a deceit, and if leading a person concerned to the damage was based on the belief and acts made on such representations, the court cannot allow to keep an advantage which has obtained by way of fraud, since the fraud unravels everything. In another decision of the hon'ble Supreme Court in **State of Assam and Others v. M/s. Banshidhar Shew bhagavan and Co. [1981 KHC 694]** it is held that if any authority had exercised power conferred on him by law in bad faith or for collateral purpose, it is an abuse

of power and a fraud on the statute.

11. As already discussed, question mooted for decisions is as to whether the petitioner can be granted relief declaring the appointment and approval of such appointment with retrospectivity, even when there was no issuance of an appointment order and approval of the same. Going by the specific provisions contained in Chapter XIV A KER, with respect to issuance of appointment orders and its approval by the Educational Officer, no such relief can be granted, even assuming that there occurred any misrepresentation or fraud. However, apart from the concluded findings that the petitioner had worked in the school during the relevant period and was permitted to sign the Attendance Register, there is no concrete evidence forthcoming to the effect that she was ever appointed in any specific vacancy by issuing an appointment order as required under the relevant Rules. Therefore it is not possible to declare that the petitioner was duly appointed and that such appointment was liable to be approved. If the petitioner is aggrieved by the alleged misrepresentation or fraud committed by the 4th respondent and if any consequential damages has been caused to her by virtue of

such alleged misrepresentation or fraud, it is left open to her to work out the remedies available under law against the 4th respondent. But that by itself will not entitle the petitioner to seek for a declaration with respect to the appointment and approval. Further if the 4th respondent is guilty of violating any statutory provisions or directions issued by the Educational authorities it is left open to the authorities concerned to initiate appropriate action against him as contemplated under specific provisions of the KER. But those aspects cannot be taken note of by this court to grant any relief as prayed for by the petitioner.

12. Under the above mentioned circumstances, the writ petition is hereby dismissed, without prejudice to the liberty of the petitioner to proceed against the 4th respondent in appropriate steps, to the extent sustainable under law.

Sd/- **C.K. ABDUL REHIM**
JUDGE