

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

MONDAY, THE 26TH DAY OF OCTOBER 2015/4TH KARTHIKA, 1937

W.P.(C).No.865 of 2014 (G)

PETITIONER(S):-

RADHAKRISHNAN K.N.,
H.S.A., C.A.H.S.S., COYALMANNAM,
PALAKKAD-678702.

BY ADVS.SRI.N.N.SUGUNAPALAN (SENIOR ADVOCATE)
SRI.S.SUJIN.

RESPONDENT(S):-

1. DIRECTOR OF HIGHER SECONDARY EDUCATION,
HOUSING BOARD BUILDING, SHANTHI NAGAR,
THIRUVANANTHAPURAM - 695 001.
2. REGIONAL DEPUTY DIRECTOR,
HIGHER SECONDARY EDUCATION, EDAPPALLY,
ERNAKULAM - 682 024.
3. SECRETARY TO GOVERNMENT,
GENERAL EDUCATION (T) DEPARTMENT,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM - 695001.
4. MANAGER
CAHSS (CHAMY AIYER HIGHER SECONDARY SCHOOL),
COYALMANNAM, PALAKKAD-678702.
5. SMT.DIVYA.A
HSST ECONOMICS,
CAHSS (CHAMY AIYER HIGHER SECONDARY SCHOOL),
COYALMANNAM, PALAKKAD-678702.

* ADDL.6TH RESPONDENT IMPEADED:

ADDL.R6. THARA,
HSST (JUNIOR),
CAHSS, COYALMANNAM,
PALAKKAD - 678 702.

*[ADDITIONAL 6TH RESPONDENT IS IMPEADED AS PER ORDER ON
I.A.NO.14126 OF 2014 DATED 26.10.2015]

R1 TO R3 BY GOVERNMENT PLEADER SMT.ALOWSY
R4 BY ADVS. SRI.V.A.MUHAMMED
SRI.M.SAJJAD
R5 BY ADV. SRI.U.BALAGANGADHARAN.
R6 BY ADV. SRI.S.M.PRASANTH.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
26-10-2015, ALONG WITH W.P.(C).NOS.31505 OF 2013-K & 1837 OF 2014-D,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No.865 of 2014 (G)

APPENDIX

PETITIONER(S)' EXHIBITS:-

EXHIBIT-P1: TRUE COPY OF THE ORDER DATED 7.9.2012 ISSUED BY THE
1ST RESPONDENT.

EXHIBIT-P2: TRUE COPY OF THE ORDER DATED 29.11.2013 OF THE
3RD RESPONDENT.

EXHIBIT-P3: TRUE COPY OF THE REPRESENTATION DATED 7.12.2013
BEFORE THE 4TH RESPONDENT.

EXHIBIT-P4: TRUE COPY OF THE REPRESENTATION PREFERRED BY THE
PETITIONER BEFORE THE REGIONAL DEPUTY DIRECTOR,
ERNAKULAM.

RESPONDENT(S)' EXHIBITS:-

EXHIBIT R4(a) TRUE COPY OF THE G.O.(MS) NO.211/2011 G.EDN.
DATED 24.10.2011.

vku/-

[true copy]

K. Vinod Chandran, J

W.P.(C).Nos.865 of 2014-G,
31505 of 2013-K & 1837 of 2014-D

Dated this the 26th day of October, 2015

JUDGMENT

The issue revolves around a narrow compass, as to who among the petitioners is entitled to be posted as Higher Secondary School Teacher [Junior] in Economics in the academic year 2011-2012 when there was an upgradation made of the High School and one batch of Higher Secondary was sanctioned. The parties are referred to by their names and documents are referred to from W.P.(C).No.865 of 2014.

2. The sanction of Higher Secondary School Teacher [for brevity "HSST"] posts were made by Exhibit P1 order dated 24.10.2011. Radhakrishnan.K.N. was a High School Assistant [for brevity "HSA"] (Social Science), who, at the time of Exhibit R4(a) order, did not have the qualification prescribed for the post. Thara P.O. was a Lower Primary School Assistant [for brevity "LPSA"] in the very same school; but, however, qualified to be appointed as an HSST [Junior] in Economics, having State Eligibility Test [for

brevity "SET"] qualification also. Divya.S. was nowhere in the picture, since she raises her claim to the post by virtue of the direct appointment made to the post sanctioned in the school. Her claim also is on the strength of her appointment as a Guest Lecturer in the HSST section, which commenced in the academic year 2011-12.

3. The Manager appointed Divya to the post of HSST [Junior] in Economics. There were ten posts sanctioned as per Exhibit R4(a) order; out of which the appointments were to be made in the ratio of 25 : 75 as per Rule 4 of Chapter XXXII of the Kerala Education Rules, 1959 [for brevity "KER"]. The 25% vacancies reserved for the teachers in the very same school was first to be made from the HSAs and on no qualified hand being available in the HSAs; from qualified UPSAs/LPSAs. Only if no qualified hands are available in both the sections, could there be a direct recruitment.

4. Radhakrishnan, at the time of upgradation and sanction of posts, i.e., on 24.10.2011, did not have the SET qualification and, hence, he cannot be considered to be a qualified hand. Radhakrishnan's claim arises from the fact that he had sat for

the SET examination on 25.09.2011, the results of which were published on 08.11.2011. Radhakrishnan qualified in the SET examination, which qualification itself was prior to the notification issued for selection. The Manager had, on the basis of Exhibit R4 (a) dated 24.10.2011, made a notification on 23.11.2011 and conducted the interview on 05.12.2011. Radhakrishnan, the HSA; Thara, the UPSA; and Divya, the Guest Lecturer were interviewed. The Manager appointed Divya. There can be no separate claim raised on the ground of Guest Lecturership, since there is no provision for such reservation in Chapter XXXII. The appointment of Divya, hence, can only be taken as a direct recruitment; which could be made only if there were no qualified hands, either among the HSAs or among the UPSAs/LPSAs.

5. Radhakrishnan's claim is on the basis of his qualification of SET on 08.11.2011. The Manager, however, contends that the identification of qualified hands in the feeder category has to be made on the basis of the date of occurrence of vacancy. The Manager also relies on the decisions in ***Jenany v. Rajeevan* [2010 (2) KLT 630 (SC)]**, ***Jayasree v. Director of H.S.E.* [2009 (2) KLT 352]** and ***Manager, Evans School v. P.J. Usha***

Kumari [2011 (2) KHC 523 (DB)]. The learned counsel appearing for Thara would also rely on the unreported judgment of this Court in **O.P.No.14295 of 2002** dated 03.06.2002 [**Abdul Rahim & Ors. v. Director, H.S.E. & Anr.**].

6. Considering identical appointment under Chapter XXXII, in the ratio of 25 : 75 a vacancy which arose on 16.01.2006, by a resignation, was found to be liable to be filled up by direct recruitment if no candidate is qualified for 'by transfer' appointment in **Jayasree [supra]**. The Division Bench approved the declaration in **Neema Rajan v. Jyothi Chandran [2001 (3) KLT SN 25 (C.No.35)]** that “the Manager cannot wait till the teacher of his choice gets qualified” (*sic*). The Hon'ble Supreme Court also in **Jenany [supra]** approved the aforesaid proposition and held that the promotion should be made from persons possessing the prescribed qualifications at the time of occurrence of vacancy.

7. A different issue came to fore in **P.J. Usha Kumari (supra)**. There, the vacancy arose during the vacation; but by virtue of Rule 7A(2) of Chapter XIV-A, the effective date of posting could only be from the commencement of the next academic year. Therein, an UPSC who was eligible for promotion was offered the

post when the vacancy arose during the vacation. The teacher asked for deferring her promotion till the school re-opens fully aware of the fact that on the re-opening of the schools she would be entitled to be promoted as Headmistress of the UP School, which vacancy would arise on the re-opening day. The dispute raised was with respect to the claim to the post of Headmistress. While upholding the claim of the UPSA to the post of Headmistress, it was held that since the appointment would be effective only from the date of commencement of the next academic year, there was no defect in the teacher having sought for time to be promoted; after the vacation. However, considering the scope of Rule 7A(2), it was categorically held that though the effective date of appointment would be the commencement of the academic year, the qualification would have to be considered as on the date of occurrence of vacancy.

8. The unreported decision in **O.P.No.14295 of 2002**, relied on by the learned counsel appearing for Thara, projected a contrary situation in which the petitioners therein were not included in the select list, who, however, obtained qualification of SET before the vacancy arose. Such persons were entitled to be

included in the select list, was the finding of this Court.

9. Hence, the well-established precedent is that identification of qualified hands has to be made as on the date of occurrence of vacancy. This is so, with a definite purpose, to ensure that already qualified hands are to be appointed to the vacancies and the Manager does not wait for an unqualified hand to acquire such qualification. What has been stated with respect to the vacancies equally applies in the case of new sanction of posts. Herein, the sanction of posts was on 24.10.2011. The retrospective application of such sanction was from 06.08.2011, as has been indicated in Exhibit R4(a), again with the definite purpose that sanction is made in aided sector simultaneous to the sanction in Government schools. Admittedly no person is entitled to wages on the basis of such retrospective sanction and an appointment would be regularised only from the date of joining for duty.

10. The mere fact that the notification was issued on 23.11.2011, after Radhakrishnan acquired SET qualification would not enure to his benefit, since the identification of qualified hands has to be related back to the date of sanction of posts. If not, as has been noticed earlier, the Manager could wait, and issue a

notification after an unqualified hand acquires qualification, who would also be senior to the person or as in the present case, included in the first category, being the post of HSAs.

11. Rule 4 in Chapter XXXII of KER specifically provides 25% reservation for two categories, which are exclusive to each other. Hence, a 'by transfer' appointment has to be made first from the category of HSA, and only if no qualified HSAs are available, could there be a selection from the category of UPSA/LPSA. Only on dearth of qualified hands in the above categories could there be a direct recruitment made. Radhakrishnan, definitely, was not qualified to be appointed as an HSST as on the date of sanction of vacancy, being 24.10.2011. His acquisition of SET qualification subsequent to the sanction of posts would be irrelevant insofar as considering him for the appointment to a vacancy sanctioned prior to that. However, Thara, who was a UPSA, was qualified to be appointed and was also interviewed. In the absence of qualified hands in the High School Section, Thara would necessarily be the next person to be considered and appointed.

12. Radhakrishnan has a further case that the present order which he seeks implementation of, has been diverted to the

benefit of Thara, who had not challenged the selection of Divya. The litigation, in fact, was initiated by Radhakrishnan when he was denied appointment and Divya was appointed by direct recruitment. Eventually by Exhibit P2 order passed by the 3rd respondent, the appointment of Divya was found to be bad. However, there was no specific direction to appoint Radhakrishnan, which he seeks in the writ petition. True, Thara had not challenged the order appointing Divya and the said appointment was set aside in a challenge made by Radhakrishnan. However, the direct appointment having been set aside, law has to take its course and merely because the challenge was made by Radhakrishnan, he would not get the post unless he has acquired the SET qualification as on the date of sanction of post.

13. It has already been found that Radhakrishnan did not have the qualification at the time of sanction of post, at which point the vacancy arose. Then, the only consequence would be that Thara would be considered for such appointment; being a qualified UPSA in the same school. The Manager has, in fact, accommodated Thara in the vacancy which arose on 24.10.2011, which cannot be interfered with.

In the above circumstance, W.P.(C).No.865 of 2014 and 31505 of 2013 would stand dismissed. W.P.(C).No.1837 of 2014 is disposed of, directing regularisation of Thara to the post of HSST [Junior] in Economics, which arose on 24.10.2011; but, however, with benefits of salary and allowance from the date of appointment. The seniority and other fixation has to relate back to 24.10.2011 in the case of Thara; but, however, only notional; since Thara never challenged the appointment of Divya. The question of eligible payment to Divya for the period she has worked by virtue of an appointment made by the Manager would be left open; however, making it clear that the State would have no liability for the said amounts. Parties are directed to suffer their respective costs.

Sd/-

K.Vinod Chandran
Judge.

vkul/-

[true copy]