

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

WP(C) .No. 9662 of 2012 (G)

PETITIONER:

SARANYA M.NAIR,
AGED 23 YEARS, W/O.PRASANTH,
LOWER PRIMARY SCHOOL ASSISTANT, AIDED MAPPILA
LOWER PRIMARY SCHOOL, KUNDILPARAMBA,
P.O THENNALA, MALAPPURAM DISTRICT

BY ADV. SRI.P.N.MOHANAN

RESPONDENTS:

1. THE MANAGER,
AIDED MAPPILA LOWER PRIMARY SCHOOL
KUNDILPARAMBA, P.O THENNALA, MALAPPURAM
DISTRICT 676 511.

2. THE ASSISTANT EDUCATIONAL OFFICER
VENGARA-676 501.

3. THE DEPUTY DIRECTOR OF EDUCATION
MALAPPURAM-676 505.

4. THE DIRECTOR OF PUBLIC INSTRUCTION,
THIRUVANANTHAPURAM-695 001.

5. STATE OF KERALA,
REP.BY THE SECRETARY TO GOVERNMENT,
GENERAL EDUCATION DEPARTMENT,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695 001.

6. FATHIMATH RAHEENA. V.,
LOWER PRIMARY SCHOOL ASSISTANT,
AIDED MAPPILA LOWER PRIMARY
SCHOOL, KUNDILPARAMBA, P.O THENNALA,
MALAPPURAM DISTRICT-676 511.

7. NEEMA SUDHAKARAN,
LOWER PRIMARY SCHOOL ASSISTANT,
AIDED MAPPILA LOWER PRIMARY
SCHOOL, KUNDILPARAMBA, P.O THENNALA,
MALAPPURAM DISTRICT-676 511.

R7 BY ADV. SRI.ZUBAIR PULIKKOOL
R6 BY ADV. SRI.R.K.MURALEEDHARAN
R2-R5 BY GOVERNMENT PLEADER SRI.V.K. RAFAEEK.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY
HEARD ON 18-12-2015, ALONG WITH WPC. 16474/2012, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P. (C) NO.9662 OF 2012

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 - TRUE COPY OF THE PETITIONER'S APPOINTMENT ORDER DATED 17/12/2008.

EXT.P2 - TRUE COPY OF THE APPOINTMENT ORDER SHOWING THE APPROVAL OF THE PETITIONER.

EXT.P3 - TRUE COPY OF THE PETITIONER'S APPOINTMENT ORDER DATED 1/6/2010.

EXT.P4 - TRUE COPY OF THE STAFF FIXATION ORDER FOR THE ACADEMIC YEAR 2010-11.

EXT.P5 - TRUE COPY OF THE ORDER OF THE DIRECTOR OF PUBLIC INSTRUCTIONS DATED 17/6/2011.

EXT.P6 - TRUE COPY OF THE GOVERNMENT ORDER, G.O. (Rt) 184/12/G.Edn. DATED 11/1/2012.

EXT.P7 - TRUE COPY OF THE PROCEEDINGS OF THE MANAGER DATED 01/02/2012.

EXT.P8 - TRUE COPY OF THE ORDER OF THE ASSISTANT EDUCATIONAL OFFICER DATED 5/3/2012.

RESPONDENTS' EXHIBITS:

EXT.R7(a) - TRUE COPY OF THE ORDER OF THE DIRECTOR OF PUBLIC INSTRUCTION DATED 19/9/2014.

//true copy//

P.S. to Judge

K. HARILAL, J.

W.P. (C) Nos.9662 & 16474 of 2012

Dated this the 18th day of December, 2015

JUDGMENT

In these writ petitions, the parties and the matters in issue involved are same. So, both writ petitions are heard together and disposed of accordingly.

2. The 1st respondent/Manager has three schools viz., Aided Mappila Lower Primary School, Kundilparamba, Aided Mappila Upper Primary School, Kundilparamba, and Aided Lower Primary School, Pullithara. The petitioner was initially appointed as Lower Primary School Assistant (LPSA) in a leave vacancy that arose on 17/12/2008 to 30/4/2009 by the 1st respondent, who is the Manager of the School, by Ext.P1. Thereafter,

another vacancy was available in the school consequent on the leave availed of by one Abdulrahiman.K., for a period from 1/6/2009 to 25/4/2013 and the 1st respondent re-appointed the petitioner to the said vacancy on 1/6/2009 and the said appointment was approved by Ext.P2. Now, a permanent vacancy arose in the school consequent upon the resignation tendered by one Sri. A. Pramod with effect from 1/6/2010 and the Manager, by Ext.P3, appointed the petitioner in the said permanent vacancy. In the academic year 2006-2007 onwards several vacancies arose in the above schools. Accordingly, the 1st respondent, in spite of the fact that the Government had issued ban on appointments as per Government Order, G.O. (P) No. 317/05/G.Edn. dated 17/8/2005, appointed the respondents 6 and 7 in the additional division vacancies with effect from 25/7/2007 and 15/7/2006 respectively. Since both the appointments were in the additional division vacancies, the Educational

Authorities rejected the claim of their approval; but, at the same time, the appointment of the petitioner as 'LPSA' was approved by the Department as per Ext.P2 and she was drawing salary in the scale. In the academic year 2010-11 there was reduction of two posts consequent on the reduction in number of students in the school. Accordingly, two posts were abolished as per Ext.P4 staff fixation order issued by the 2nd respondent. In the meantime, there arose two permanent vacancies of Lower Primary School Assistants in the school, consequent on the resignation of one Sri. M.V. Babu and another Sri. A. Pramod, who also tendered resignation with effect from 14/7/2009 and the Manager appointed one Sri. Deepak in one of the resignation vacancies available in the school. At that juncture, the 6th and 7th respondents filed WP.(c) Nos.38643/2010 and 37923/2010 before this Court seeking a direction to consider their approval by the Director of Public Instructions and on the basis of the direction issued

by this Court, the Director of Public Instructions heard the matter and passed Ext.P5 order; whereby the Director of Public Instructions ordered to shift the appointments of the 6th and 7th respondents to the resignation vacancies and the petitioner was directed to be shifted to the leave without allowance vacancy of Sri. Abdulrahiman.K. The Manager, challenged the said order by filing a revision before the Government. The Government, by Ext.P6, affirmed Ext.P5 on a finding that the revision deserves no consideration. The grievance of the petitioner is that the Government has not considered the issue in its correct and true perspective.

3. On the basis of Ext.P6, the Manager issued orders shifting the petitioner to the leave without allowance vacancy, by Ext.P7. Consequently, the Assistant Educational Officer also issued Ext.P8 order approving the appointments of the respondents 6 and 7 from 15/7/2010 onwards. Though the appointments of the respondents 6 and 7 were from

25/7/2007 and 15/7/2006 respectively, the same have not so far been approved by the educational authorities till date and the same was barred under the ban on the appointment issued by the Government as per G.O. (P) No.317/05/G.Edn. dated 17/8/2005; whereas the appointment of the petitioner from 1/6/2009 was a valid one approved by the authority. Therefore, shifting of the petitioner from a permanent vacancy to a leave vacancy without allowance on the basis of Exts.P5, P6, P7 and P8 orders are liable to be quashed, invoking the jurisdiction under Art.226 of the Constitution of India.

4. Per contra, the averments in the W.P.(C) No.16474/2012 filed by the 6th respondent in W.P.(c) No.9662/2012 is as follows: The petitioner/6th respondent was appointed on 25/7/2007 as Lower Primary School Assistant (LPSA) by the 1st respondent by Ext.P1 and at that time, sufficient students' strength was available in the school to sanction additional division in the school for the

year 2007-08. The additional post in which the 6th respondent was appointed in the year 2007-08 was not sanctioned in the staff fixation by the Assistant Educational Officer due to the ban on creation of additional divisions imposed by the 1st respondent as per the G.O.(P) No.317/2005/G.Edn. dated 17/8/2005 referred above. But, the petitioner was working from 25/7/2007 onwards without any interruption. While so, two resignation vacancies of LPSA arose in AMLP School, Kundilparamba and Pullithara with effect on 13/7/2009 due to the resignation of Babu.M.V. and Pramod.A. for joining Government service. Since both schools are under the Management of the 1st respondent and the 6th respondent was working from 25/7/2007 onwards, she is entitled to get appointment in one of the aforesaid permanent vacancies. However, the Manager appointed the petitioner with effect from 1/6/2010 onwards in the resignation vacancy of Promad.A., Shameer with effect from 1/6/2010 onwards in the resignation

vacancy of Babu.M.V. of AMLPS, Pullithara, and Deepak.P. in the leave without allowance vacancy from 1/6/2010 to 25/4/2013. According to the 6th respondent, the Teachers, who were appointed ignoring the right of the petitioner, are not having service earlier to her and the Manager was bound to shift the petitioner to the regular vacancies arose in the school, rather than appointing her juniors. It is also submitted that the Government issued Ext.P2 GO(P) No.10/10/G.Edn. dated 12/1/2010 permitting the approval of Teachers appointed in the additional divisions during the period from 2006-2007 onwards, on condition that the Manager shall appoint equal number of protected teachers in the future vacancies; but the Manager was not willing to execute the bond and appointed fresh hands in the vacancies overlooking the claim of the petitioner. Since the appeal filed by the Manager against the rejection of the proposal for approval was pending, the 6th respondent approached this Court and

obtained an order in W.P.(c) No.22108/2010 directing expeditious disposal of the appeal rejecting the claim of the 6th respondent to be shifted to the regular vacancy by Ext.P3 order. Aggrieved by Ext.P3, the 6th respondent has preferred a revision before the Director of Public Instructions and the Director of Public Instructions heard all the concerned parties and issued an order directing the Manager to appoint the 6th respondent with effect from 15/7/2010 onwards and the appointments of two fresh hands were cancelled by Ext.P4. As per Ext.P4 order, the 2nd respondent directed the 3rd respondent to regularise the appointments and to approve them as per G.O.(P) No.10/10/G.Edn. dated 12/1/2010, if it is otherwise in order. The claim of the 6th respondent in the additional division during 2007-08 was ordered to be approved on receipt of proposal in terms of G.O. (P) No.10/10 G.Edn. dated 12/1/2010. Though, the Manager challenged the said order, in revision, before the Government, as

per the order of this Court in W.P.(c) No.20394/2011, the Government also disposed the revision by Ext.P5 upholding Ext.P4 order of the Director of Public Instructions and rejected the revision filed by the Manager. Pursuant to Exts.P4 and 5 orders of the Government and the Director of Public Instructions, the Assistant Educational Officer approved the appointment of the petitioner based on the proceedings of the Manager requesting to approve the appointment of the 6th respondent by Ext.P6 with effect from 15/7/2010 onwards. The 6th respondent has been attending the school from the date of her appointment i.e., 25/7/2007 to 14/7/2010 without any break and the same is certified by Ext.P8. Since the Manager has not submitted the proposal in terms of Ext.P2 order of the Government, the 6th respondent's appointment from 25/7/2007 onwards has not been approved by the 3rd respondent and she is seriously prejudiced by the action of the Manager. In the meantime, the

petitioner, who was appointed in the resignation vacancy of Pramod.A. from 1/6/2010 onwards, challenged Exts.P4 and P5 orders in the above writ petition. According to the 6th respondent, since the petitioner was appointed on daily wages from 17/12/2008 to 30/4/2009 and subsequently for the period from 1/6/2009 to 25/4/2013 she will not have any better claim than the 6th respondent for appointment in the regular vacancy. Hence, in W.P. (c) No.16474/2012, the 6th respondent prayed for issue of a writ of mandamus or any other writ or direction directing the Manager to comply with the conditions in Ext.P2 Government Order and to send a proposal for approval of the appointment of the 6th respondent as per Ext.P1 appointment order from 25/7/2007 onwards and further direct the Assistant Educational Officer to approve the appointment from 25/7/2007 to 14/7/2010 with all consequential benefits.

5. The 7th respondent also filed a counter

affidavit claiming that she is the senior most among the three incumbents, as her initial appointment was on 15/6/2006, and thereafter, she was continuing in service without interruption up to the arrival of regular vacancy. The approval was delayed due to the ban imposed by the Government. But, by the subsequent Government Order dated 12/1/2010, the ban stands lifted retrospectively. So, she is entitled to be regularised towards the first regular vacancy

6. Heard the learned counsel for the petitioner in W.P.(c) No.9662/2012 and the learned counsel for the petitioner in W.P.(c) No.16474/2012 in extenso. They have advanced arguments in support of their respective averments in the writ petitions and rival pleas set up thereon.

7. The learned counsel for the petitioner in W.P. (c) No.9662/2012 vehemently contended that the service of the 6th and 7th respondents are not approved service; and thereby their service cannot

be considered to regular vacancy. The learned counsel relied on the decisions in *Praseetha.S.V. v. District Educational Officer, Palakkad and others* [2006 (1) KLJ 45] and *Beeba K. Nath v. State of Kerala* [2015 (3) KLT 541]. According to the learned counsel, their appointments cannot be treated as the appointments made under Rule 7 of the KER and such unapproved service cannot be reckoned for regular appointment.

8. Per contra, the arguments advanced by the learned counsel for the 6th respondent contended that the appointment of the 6th respondent was duly made appointment towards additional divisions; but the approval was not effected due to the ban imposed by G.O.(P) No.317/2005 dated 17/8/2005. But, the Government subsequently lifted the ban by another G.O.(P) No.10/10 dated 12/1/2010 and the authorities were permitted to approve the earlier appointments made after 2006-2007 with retrospective effect. Therefore, in view of the

subsequent Government Order dated 12/1/2010 the initial appointments can never be treated as unapproved service. The aim and object of the subsequent Government Order is to give approval to all appointments, made towards additional divisions with retrospective effect. The learned counsel for the 7th respondent also advanced arguments in support of the arguments made by the learned counsel for the 6th respondent.

9. The relevant date of appointments, nature of appointments and the duration of service periods of the petitioner and the 6th and 7th respondents are not disputed; but the dispute centers around the nature and extent of the rights that accrued to each of them from their admitted service for regularisation to the permanent vacancy only. Put it differently, whether the petitioner has better claim than the respondents 6 and 7, for regularisation to the permanent vacancy.

10. Two permanent vacancies arose with effect

from 1/6/2010 onwards due to the resignation of Pramod.A. and Babu. M.V. The petitioner was appointed as 'LPSA' in the leave vacancy that arose on 17/12/2008 to 30/4/2009 and thereafter, appointed against another leave vacancy that arose on 1/6/2009 to 25/4/2013; whereas the 6th and 7th respondents were appointed on 25/7/2007 and 15/7/2006 respectively against two additional vacancies. It follows that the appointments of the 6th and 7th respondents are much earlier than that of the petitioner and thereby their tenure of service is much longer than that of the petitioner. The general principle is that the senior appointee awaiting approval has to be given priority than the junior, in the matter of regularisation, the 7th respondent is the senior most among the three and the 6th respondent comes next and the petitioner is the junior most among the three, by virtue of the appointment order in Form No.27 issued under Rule 7 Chapter XIVA of the KER.

11. But, it is the case of the petitioner that even though the respondents 6 and 7 are senior and their appointments were made before the appointment of the petitioner, they are not entitled to get regularised to the permanent vacancy, as their initial appointments on 25/7/2007 and 15/7/2006 were made in violation of the ban imposed by the G.O.(P) No.317/2005/G.Edn. dated 17/8/2005. Secondly, even though the said ban was lifted by G.O.(P) No.10/2010 dated 12/1/2010, the Manager has not executed a bond in terms of the said Government Order, agreeing to appoint the protected teachers in the ratio specified in the said Government Order. Thus, it is contended that in view of the ban under order dated 17/8/2005 and non-execution of the bond specified under the subsequent Government Order dated 12/1/2010, the appointments of the 6th and 7th respondents cannot be treated as duly made appointments under the KER.

12. As regards the ban of appointment under

order dated 17/8/2005, it is not in dispute that subsequently, the said ban was lifted by G.O.(P) Nbo.10/2010 dated 12/1/2010, which permitted the educational authorities to grant approval to the appointments effected by the Managers during the period from 2006-07 to 2010 with retrospective effect, subject to the compliance of the condition specifically prescribed therein. It means, all appointments made from 2006-07, in accordance with the KER, against the additional vacancies were allowed to be approved and regularised with retrospective effect from the date of appointment, on certain conditions; mainly that the Managers have to execute bond agreeing to appoint the protected teachers equal to the teachers appointed from the period 2006-07 to 2010 towards the vacancies that may arise in future.

13. It is true that the Manager has not executed the bond; but the effect of non-execution of the bond as condition for regularisation was considered by this

Court in various decisions and in W.P.(c) No.15998/2015, this Court held as follows:

“In the orders passed by the educational authorities rejecting approval to the appointment of the petitioner, the main ground stated is that, the 5th respondent Manager did not execute any bond as required in terms of G.O.(P).No.10/10/G.Edn. dated 12.01.2010. In this connection, I note that by Exts.P14 and P15 judgments that were passed by this Court in writ petitions preferred by teachers similarly placed as the petitioner who were appointed during the ban period, and whose appointments were not approved by the educational authorities citing the same reason namely, the non-submission of a bond by the 5th respondent Manager, this Court had found that the mere non-execution of a bond by the Manager could not be a reason for denying approval to the appointment of the petitioners in those writ petitions. In the said judgments, it was also held that the educational

authorities were to consider the issue of approval of the appointment of the petitioners therein by treating the 5th respondent as having executed the bond in terms of G.O.(P). No.10/10/G.Edn. dated 12.01.2010. Taking cue from the said judgment, and finding that the said cases pertained to the same school of which the 5th respondent in the instant writ petition is the Manager, I am of the view that, in the instant case also the respondent educational authorities cannot deny approval to the appointment of the petitioner solely on the ground that, the 5th respondent Manager has not executed a bond as required in G.O.(P). No. 10/10/G.Edn. dated 12.01.2010".

What is discernible from the above decision is that the non-execution of the bond by the Manager could not be a reason for denying approval of the teachers who were appointed during the period from 2006-2007 to 2010. If the non-execution of the bond has no consequences at all, it stands undisputed that the

ban imposed by the Government lifted with retrospective effect enabling to regularise all appointments made after 2006-07. If that be so, being the senior among the three, the 6th and 7th respondents have better claim than the petitioner as their first appointment can be treated as duly made appointments under the KER and thereby they are entitled to be regularised towards the permanent regular vacancies.

14. Further, the order dated 12/1/2010 lifting the ban imposed by the order dated 17/8/2005 against the future new appointments, it is specifically stated that despite the ban, the Managers of various aided schools made several appointments and considering the request made by the Managers to regularise such appointments made after 2006-07, the ban is lifted enabling the Managers to regularise such appointments made after 2006-07 and thereby the permission is granted to regularise those appointments on execution of a

bond; but this Court found that the non-execution of the bond is of no consequence at all and the same cannot be treated as a ground to deny the regularisation and the Managers are bound to regularise the appointments made after 2006-07 notwithstanding the non-execution of the bond.

15. In view of the Government Order dated 12/1/2010 lifting the ban imposed by the Government Order dated 17/8/2005, the 6th and 7th respondents are entitled to get their service regularised against permanent vacancy notwithstanding the non-execution of the bond. Indisputably, the 6th and 7th respondents' appointment was on 25/7/2007 and 15/7/2006 respectively and the petitioner was appointed only on 17/12/2008 and that too on daily wages. Needless to say, the 6th and 7th respondents are having better claim for the benefit under Rule 51A of the KER than the petitioner. They are entitled to get regularised to the permanent vacancy that arose

when M.V. Babu and A. Pramod resigned with effect from 14/7/2009. Therefore, the service of the 6th and 7th respondents from 25/7/2007 and 15/7/2006 can be deemed to be approved service and no kind of legal infirmity can be attributed to the service from the aforesaid dates till the date of approval of regular vacancy. In this view of the matter, all the decisions cited by the learned counsel for the petitioner, pale to insignificance and irrelevance. In this analysis, there is no illegality or impropriety in Ext.P6 order passed by the Government and there is no reason to interfere with Ext.P7 invoking the jurisdiction under Art.226 of the Constitution of India.

16. Coming to W.P.(c) No.16474/12, the 6th respondent, prayed for a direction to the 4th respondent to comply with the conditions in Ext.P2 Government Order and sent the proposal for approval of the appointment of the 6th respondent as per Ext.P1 appointment order from 25/7/2007 onwards and further to direct the 3rd respondent to

approve the appointment from 25/7/2007 to 14/7/2010 with all consequential benefits. Here, the question to be considered is whether the 6th respondent is entitled to get approval of her service from 25/7/2007. It stands admitted that the initial appointment of the 6th respondent was on 25/7/2007 and the 6th respondent gets the status of Rule 51A claimant and also, she is senior than the petitioner, considering her initial appointment on 25/7/2007. Admittedly, the additional division was functioning in the school during the period between 25/7/2007 to 14/7/2010. Ext.P8 would show that the 6th respondent has been working from 25/7/2007 to 14/7/2010, without fail. The validity of G.O.(P) No.10/2010/G.Edn. Datd 12/1/2010 lifting the ban on approval in additional division vacancy from 2006-07 onwards, was challenged before this Court and this Court in *Manager, Eravannoor A.U.P. School & others v. State of Kerala & Others* [2011 (2) KLJ 788] upheld that validity of the Government Order and

subsequently in the decision referred above, this Court held that the approval cannot be denied on the reason that the Manager has not executed the bond. If that be so, there is no reason to deny her approval from 25/7/2007 onwards and the denial of approval from 25/7/2007 is arbitrary and unsustainable.

17. Consequently, the 2nd respondent is directed to approve the appointment of the petitioner in W.P. (c) No.16474/2012 from 25/7/2007 to 14/7/2010 with all consequential benefits within a period of three months from the date of receipt of a copy of this judgment.

The W.P.(c) No.9662/2012 will stand dismissed and W.P.(c) No.16474/2012 will stand allowed.

Sd/-

(K. HARILAL, JUDGE)

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//true copy// P.S. to Judge