

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 3RD DAY OF DECEMBER 2015/12TH AGRAHAYANA, 1937

WP(C).No. 19386 of 2006 (G)

PETITIONER(S):

SIJI ABRAHAM , HSST COMMERCE (JUNIOR)
MKM HIGHER SECONDARY SCHOOL, PIRAVOM
NOW RESIDING AT PUTHURKUDILIL, PERUMBADAVOM PO.
AVARMA.

BY ADVS.SRI.BENOY THOMAS
SRI.PAULSON THOMAS

RESPONDENT(S):

1. STATE OF KERALA
THE SECRETARY, GENERAL EDUCATION DEPARTMENT
THIRUVANANTHAPURAM.
2. DIRECTOR OF HIGHER SECONDARY EDUCATION,
DIRECTORATE OF HIGHER SECONDARY EDUCATION
HOUSING BOARD BUILDING, THIRUVANANTHAPURAM.
3. MANAGER, MKM HIGHER SECONDARY SCHOOL,
PIRAVOM, ERNAKULAM DISTRICT.
4. ELIZABETH P.M., HSST (COMMERCE),
MKM HIGHER SECONDARY SCHOOL, PIRAVOM
ERNAKULAM DISTRICT.

R1,R2 BY ADV. GOVERNMENT PLEADER SRI S JAMAL
R4 BY ADV. SRISAJI VARGHESE KAKKATTUMATTATHIL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
03-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

- EXT.P1 : TRUE COPY OF THE APPOINTMENT ORDER ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER DT 18.10.2001
- EXT.P2 : TRUE COPY OF THE APPROVAL ORDER ISSUED BY 2ND RESPONDENT NO. AC.A1/16059/HSE/01 DATED 29.08.2003
- EXT.P3 : TRUE COPY OF THE GOVERNMENT ORDER G.O (RT) NO 135/2004/G.ED. DT 08.01.2004 ISSUED BY THE 1ST RESPONDENT
- EXT.P4 : TRUE COPY OF THE GOVERNMENT ORDER G.O(RT) NO.135/2004/G.EDN DATED 8.1.2004 ISSUED BY THE 1ST RESPONDENT
- EXT.P5 : TRUE COPY OF THE APPROVAL ORDER OF RDD ERNAKULAM
- EXT.P6 : TRUE COPY OF THE APPROVAL ORDER OF DHSE DT 14.2.2008
- EXT.P7 : TRUE COPY OF THE SET CERTIFICATE OF THE PETITIONER
- EXT.P8 : TRUE COPY OF GO(MS) NO. 91/2007/ G.EDN. DT 7.5.2007
- EXT.P9 : TRUE COPY OF G.O(MS) NO.377/98/GEN.EDN DT 25.9.98
- EXT.P10 : TRUE COPY OF GO(MS)NO.110/99/G.EDN DT 13.05.1999
- EXT.P11 : TRUE COPY OF GO(MS)NO50/2000/G.EDN DT 28.1.2000
- EXT.P12 : TRUE COPY OF GO(MS)NO.361/2000/GEN.EDN DT 16.11.2000
- EXT.P13 : TRUE COPY OF BED CERTIFICATE OF THE PETITIONER
- EXT.P14 : TRUE COPY OF THE JUDGMENT IN WPC NO.2803/2008 DT 20.3.2009
- EXT.P15 : TRUE COPY OF THE SLP NO.33877/2009 DT 8.7.2013
- EXT.P16 : TRUE COPY OFHTE GO MS NO.9/2014/GEN.EDN DATED 8.1.2014
- EXT.P17 : TRUE COPY OF THE JUDGMENT IN WPC NO.28447/2002 DT 14.2.2003
- EXT.P18 : TRUE COPY OF THE JUDGMENT IN WPC 35729/2003 DATED 30.7.2004
- EXT.P19 : TRUE COPY OF THE JUDGMENT IN WPC 35729/2003 DATED 30.7.2004
- EXT.P20 : TRUE COPY OF THE G.O RT NO. 124/2005/GEN.EDN DATED 6.1.2005

RESPONDENTS' EXHIBITS:

- EXT.R 4(a) : TRUE COPY of the APPOINTMENT ORDER OF THE 4TH RESPONDENT DT 21.10.2002
- EXT.R4(b) : TRUE COPY OF THE JUDGMENT DT 4.10.2002 IN W.A. NO. 2139/2002 OF THE HON'BLE HIGH COURT
- EXT.R4 (c) : TRUE COPY OF the APPOINTMENT LETTER DT 1.7.2010 ISSUE DBY THE 3RD RESPONDENT TO THE PETITIONER
- EXT.R4(D) : TRUE COPY of the JUDGMENT DT 16.10.2006 IN RP NO.921/2006 IN W.A. 1000/2006 OF THE HON'BLE HIGH COURT OF KERALA

//TRUE COPY//

P.A. TO JUDGE

K. VINOD CHANDRAN, J

W.P(C) No. 19386 of 2006

Dated this the 03rd day of December, 2015

J U D G M E N T

The petitioner and the 4th respondent are claiming the post of HSST (Commerce) in the 3rd respondent aided School. The petitioner claims promotion under Chapter XXXII Rule 4 of the Kerala Education Rules. The 4th respondent's claim is on the basis of the direct appointment made by the Manager to the post of HSST(Junior). The petitioner's claim though upheld by the Director of Higher Secondary, that order was overturned by Ext.P4 in a revision before the Government. The petitioner assails the said order.

2. The petitioner was appointed as an HSST (Junior) Commerce on 18.10.2001 and his appointment was approved. The required qualification, for appointment as an HSST, is a Post Graduation with B.Ed and pass in State Eligibility Test (SET). When the petitioner's appointment was made, Chapter XXXII of

the Kerala Education Rules (for short “KER”) was not introduced. However, by executive orders issued by the Government, an exemption was granted insofar as the persons who do not have B.Ed, provided they have a Post Graduation with 50% marks and SET qualification; with a further rider that they would have to acquire the B.Ed qualification within five years.

3. The petitioner after approval of his appointment had been on leave from 07.08.2002 for taking his B.Ed. While so, one Sabu George, who was an HSST, resigned from the 3rd respondent School. The petitioner's contention is that the petitioner ought to have been promoted to the said post and that though he was on leave, he has a preferential claim and after effecting the promotion, the Manager could have appointed the 4th respondent as an HSST (Junior) in Commerce.

4. The learned counsel appearing for the 4th respondent however, would contend that the petitioner was not entitled to be promoted since his probation was not declared and

he did not have the necessary qualification and further the petitioner was on leave. To buttress the contention that the petitioner, a probationer could not have been promoted, the learned counsel places reliance on 2009 (1) KLT 722 (Manju Varghese v. State of Kerala). Reliance is also placed on 2009 (1) KLT 808 (Ajithakumari, v. Shamma) to advance the contention of the petitioner not being entitled for reason of his having no B.Ed qualification.

5. With respect to the contention that the petitioner was on leave, the same is only to be noticed to be rejected, since even if the available HSST (Junior) is on leave, he ought to have been considered for promotion and on promotion, the resultant vacancy should have been filled by the direct recruit. This is especially so since there is no question of selection to the post of HSST and suitability is the only criteria, by which seniority alone assumes relevance. On appointing the direct recruit as HSST Junior, necessarily for the leave period, the HSST (Junior) could

have been promoted as HSST and continued till the leave period expires.

6. Manju Varghese (Supra) is specifically in the context of the special rules of the Higher Secondary Education State Service Rules, 2001 (Kerala) and the Kerala State and Subordinate Services Rules, 1958 (for short "K.S & S.S.R"). The said rules are not applicable in the present case, as has been clarified by a Division Bench in 2005(4) KLT 64 (Balakrishnan v. A.E.O., Vadakara). The mere fact that the petitioner was a probationer does not disentitle him from a promotion and there is no express prohibition for such promotion in the KER.

7. The further contention is with respect to his qualification. The learned counsel for the petitioner would contend that the petitioner having been exempted from the qualification of B.Ed as per executive order, from the date of his appointment he should be deemed to be qualified to occupy the post of HSST (Junior) and also deemed to be entitled promotion to the post of

HSST, which has the same qualification and in which post also the very same exemption was applicable. The only reservation would be that the petitioner would be liable to get the B.Ed qualification within a period of five years. Here the petitioner admittedly got the B.Ed qualification and he was on leave only since he had been undergoing the course. The petitioner would also place reliance on Ext.P18 judgment of this Court in WP(C) No.28447/2002 dated 14.02.2003.

8. Ext.P18 was a case in which an identical situation arose, where an HSST who had M.Phil degree, was exempted by general executive orders from acquiring the qualification of B.Ed with a similar rider to acquire such qualification within a period of three years. The HSST who was the petitioner therein, though was approved in service and his probation declared, challenged the subsequent cancellation on the ground that his probation could be declared only on the acquisition of B.Ed qualification. This Court found that the exemption order deems the HSST to be qualified

and there cannot be any subsequent condition prescribed, much less by the educational authority, when the executive orders of the Government rules the field. If at all; the entitlement would seize only on the expiry of the period of exemption, without the teacher acquiring the necessary qualification.

9. Herein also the petitioner was entitled for exemption for a period of five years and the petitioner had been undergoing the B.Ed course, on leave, when the vacancy arose. Further it is also to be noticed that Rule 4(2) specifies the method of appointment to the post of Higher Secondary School Teacher. The selection has to be made first “by transfer from Junior Lecturers” in the subject concerned under the management. Only in the absence of such qualified hands could clause (2) of Rule 4(2) be resorted to. Clause (2) refers to a 1:3 ratio of appointment “by transfer” and by “direct appointment”. Here what assumes significance is the qualification prescribed under Chapter XXXII by Rule 6 (2) (27) which deals with Commerce. Rule 6(2)(27) note

(2) reads as under:

In the case of Philosophy, Psychology and Commerce in the absence of B.Ed degree holders, candidates having Master's degree with not less than 50% marks and who have passed State Eligibility Test will be considered. Preference will be given to Ph.D/M.Phil degree holders or those qualified at Junior Research Fellowship/National Eligibility Test. The Teachers appointed under this provision will have to acquire B.Ed. Degree at their own expense within five years from the date of entry in service.

10. A reading of the above extracted note along with Rule 4 (2)(1) would indicate that first the selection has to be made from HSST Juniors and in the event of there being absence of B.Ed Degree holders then, the selection has to be made from persons with Masters Degree with not less than 50% marks and who have passed State Eligibility Test. Only after such consideration could the management resort to the mode prescribed under clause (2) of

Rule 4(2). Hence the petitioner being in the rolls of the school as an HSST (Junior), qualified to be appointed by virtue of an exemption, has to be first considered and only then could a direct recruitment be made. Hence the petitioner is declared to have been promoted as on 16.09.2002 when there arose a vacancy in the 3rd respondent School as HSST (Commerce). And the 4th respondent's appointment shall be regularised as HSST (Junior) (Commerce). However, since the petitioner was continuing on leave, for the leave period the 4th respondent's appointment shall be approved in the post of HSST, in the leave vacancy. The salary due to an HSST for the balance period of leave from the date of her appointment shall be paid to the 4th respondent. However on the petitioner rejoining duty, the petitioner shall be deemed to be the HSST – Commerce and 4th respondent, shall only be entitled to the salary due to the HSST (Junior) (Commerce). It is submitted that the 4th respondent has subsequently resigned from service, hence as per the aforesaid declaration, the 4th respondent's service

shall be approved and her salary paid if not paid till date. The petitioner shall be approved as an HSST from 16.9.2002 and shall be entitled to all service benefits and on rejoining after leave, shall be entitled to the salary of HSST in the School.

Writ petition allowed. No costs

Sd/-

(K. VINOD CHANDRAN, JUDGE)

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P.A to Judge