

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

WP(C).No. 12330 of 2014 (M)

PETITIONER(S):

NISARANI
HSA (MALAYALAM), M.M. HIGHER SECONDARY SCHOOL
NEW MAHE, THALASSERY, KANNUR DISTRICT

BY ADVS.SRI.M.SASINDRAN
SRI.V.VENUGOPAL

RESPONDENT(S):

1. STATE OF KERALA
REPRESENTED BY THE SECRETARY TO GOV.
DEPARTMENT OF GENERAL EDUCATION
SECRETARIAT, THIRUVANANTHAPURAM
2. THE DIRECTOR OF HIGHER SECONDARY EDUCATION,
THIRUVANANTHAPURAM 695001
3. THE REGIONAL DEPUTY DIRECTOR OF HIGHER SECONDARY EDUCATION,
KOZHIKODE 673001
4. THE MANAGER,
M.M. HIGHER SECONDARY SCHOOL, NEW MAHE, 673311
KANNUR DISTRICT
5. Y.P ADUL NAZAR,
HIGH SCHOOL ASSISTANT (ARABIC)
M.M. HIGHER SECONDARY SCHOOL, NEW MAHE 673311
KANNUR DISTRICT
6. DIVYA.K,
KUNNIL HOUSE, P.O, CHANDAYAD 670692
PANOOR, KANNUR DISTRICT

R1-R3 BY ADV. GOVERNMENT PLEADER SMT SUNITHA VINOD
R4 & 5 BY ADV. SRI.V.A.MUHAMMED
R5 BY ADV. SRI.M.SAJJAD
R6 BY ADV. SRI.POOVAMULLE PARAMBIL ABDULKAREEM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
15-12-2015, ALONG WITH WPC. 22214/2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1 A TRUE COPY OF THE APPOINTMENT ORDER OF THE PETITIONER AS HSA

EXHIBIT P2 A TRUE COPY OF THE APPEAL FILED BY THE PETITIONER BEFORE THE 2ND RESPONDENT

EXHIBIT P3 A TRUE COPY OF THE JUDGMENT DATED 15-03-2012 IN WPC NO 5106 OF 2012

EXHIBIT P4 A TRUE COPY OF THE ORDER NO A4/13998/2011 DATED 24-07-2012 ISSUED BY THE 3RD RESPONDENT

EXHIBIT P4(A) A TRUE COPY OF THE ORDER DATED 01-09-2012 RECTIFYING THE MISTAKE IN EXT P4

EXHIBIT P5 A TRUE COPY OF THE ORDER DATED 12-09-2012 ISSUED BY THE 3RD RESPONDENT

EXHIBIT P6 A TRUE COPY OF THE ORDER PASSED BY THE 2ND RESPONDENT DATED 23-04-2013

EXHIBIT P7 A TRUE COPY OF THE REVIEW PETITION DATED 19-12-2013

EXHIBIT P79A) A TRUE COPY OF THE ARGUMENT NOTE SUBMITTED BY THE PETITIONER

EXHIBIT P8 A TRUE COPY OF THE ORDER DATED 08-04-2014 WHICH IS SERVED ON THE PETITIONER SO FAR

EXHIBIT P9 A TRUE COPY OF THE COMMUNICATION DATED 10-05-2013

EXHIBIT P10 A TRUE COPY OF THE JUDGMENT IN CONT. CASE NO 654 OF 2013

EXHIBIT P11: A TRUE COPY OF THE HEARING NOTE DATED 5.6.2012 OF THE REGIONAL DEPUTY DIRECTOR OF HIGHER SECONDARY EDUCATION, KANNUR

RESPONDENT(S)' EXHIBITS

EXT.R4(a): TRUE COPY of the RELEVANT PAGES OF THE SERVICE BOOK OF THE 5TH RESPONDENT

EXT.R4(b): TRUE COPY OF THE GO (MS) NO.141/2008/G.EDN DT 18.8.2008 OF THE GOVT.

EXT.R4(c): TRUE COPY OF THE OPTION OF THE 5TH RESPONDENT

EXT.R5(a): TRUE COPY OF the ORDER NO. A5/2056/2014/K.DIS. DT 28.5.2015 OF THE RDD KANNUR

EXT.R5(b): TRUE COPY OF THE NOTICE ISSUED TO SRI MUHAMMED RIYAS DT 6.12.11

EXT.R5(c): TRUE COPY OF THE REQUEST OF SRI Y P ABDUNNASIR DT 17.12.11

EXT.R5(d): TRUE COPY of the CERTIFICATE ISSUED BY JAMATH COMMITTEE DT 5.12.15

EXT.E5(e): TRUE COPY of the CERTIFICATE OF MARRIAGE DT 4 .12.15

EXT.R5(f): TRUE COPY OF THE CONSOLIDATED MARK SHEET OF M M HIGHER
SECONDARY SCHOOL, NEW MAHE

EXT.R5(G): TRUE COPY OF THE MINUTES OF SELECTION COMMITTEE

EXT.R5(H): TRUE COPY OF THE INTERIM ORDER IN I.S. NO. 575/2012 IN A.S. NO. 118/2010
DT 26.4.2012

EXT.R5(I): TRUE COPY OF the MINUTES OF THE SELECTION COMMITTEE

EXT.R5(j): TRUE COPY of the APPOINTMENT ORDER OF SRI Y P ABDUNNASIR DT 2.7.2012

EXT.R5(k): TRUE COPY of the RELIEF ORDER OF THE MANAGER DT 2.7.2012

EXT.R5(L): TRUE COPY OF THE PROCEEDINGS OF THE MANAGER 2.7.2012

EXT.R5(m): TRUE COPY OF THE APPEAL OF SRI Y P ABDUNNASIR BEFORE THE
DIRECTOR OF HSE DT 9.4.2013

EXT.R5(n): TRUE COPY OF THE REVISION OF SRI Y P ABDUNNASIR BEFORE THE
GOVERNMENT DT 19.12.2013

EXT.R5(o): TRUE COPY of the HEARING NOTE BEFORE THE GOVERNMENT DT 10.12.2013

EXT.R6(a): TRUE COPY OF the REQUEST SUBMITTED BY THE 5TH RESPONDENT

EXT.R6(b): TRUE COPY OF THE SELECTION LIST DT 18.12.2011 PREPARED BY THE
COMMITTEE

EXT.R6(c): TRUE COPY OF THE APPOINTMENT ORDER DT 21.12.2011

EXT.R6(d): TRUE COPY OF THE APPOINTMENT ORDER DT 2.7.2012

EXT.R6(e): TRUE COPY OF THE JUDGMENT DT 10.6.2013 IN WPC NO. 7885/2013

TRUE COPY

P.A TO JUDGE

jma

K. VINOD CHANDRAN, J

W.P(C) Nos. 12330 of 2014 & 22214 of 2015

Dated this the 15th day of December, 2015

J U D G M E N T

The petitioner in W.P(C) 12330/2014 is an H.S.A (Malayalam) appointed to the 4th respondent School on 16.08.2005. The 5th respondent is an admitted senior in the very same school who occupied the post of H.S.A (Arabic). The issue revolves around the claim to the post of HSST when there was a higher secondary section granted to the 4th respondent School in the academic year 2010-2011. It is the admitted case of all parties that the Manager held a selection through a selection committee as provided under Rule 5 of Chapter XXXII of Kerala Education Rules 1959 (for brevity KER). The selection process was originally scheduled on 11.12.2011 and the same was adjourned to 18.12.2011.

2. There were three senior teachers who were entitled to the post of HSST in the school. They were the H.S.A (Arabic), H.S.A (English) and H.S.A (Maths), who were respectively the 5th respondent, one K.P. Reetha and one Simmi.K. Reetha and Simmi got appointed as HSST in their respective subjects. The 5th respondent is said to have not attended the interview held by the selection committee on 18.12.2011. The petitioner claims that, on the absence of the 5th respondent, the appointment ought to have been conceded to the petitioner, she being the next senior H.S.A in the subject of Malayalam. The appointment to the post of HSST (Malayalam) however, was granted to the 6th respondent who appeared for selection in the direct quota, prescribed as per Rule 4 Chapter XXXII of KER (1:3 ratio).

3. The 5th respondent contends that he ought to have been appointed, de hors any selection, since the method prescribed is one of ascertaining the suitability and not a comparative assessment of merit. The interview as such has absolutely no relevance; is the contention of the 5th respondent. Subsequently the appointment of the 5th respondent was made, to the post of HSST (Arabic) on the basis of the selection held on 30.06.2012 and it is already approved by the educational authority. Whether the same can be sustained is also a question to be considered in the above writ petition.

4. The entire issue revolves around the absence of the 5th respondent on 18.12.2011 and whether statutorily there is a mandate on the Manager to appoint a senior even if he/she does not appear for the interview. The

petitioner's contention is that the 5th respondent having not turned up for the interview, then that vacancy ought to have been filled up by the next senior H.S.A who was the petitioner. The files of the selection have been called for which are placed before this Court by the learned Government Pleader, by way of a memo dated 08.12.2015. Preliminary objections to the claim of the petitioner are raised by the 5th and 6th respondents. The 5th respondent contends that the Manager has appointed him as HSST and the same is also approved and there could be no further challenge since he is the admitted senior. The 6th respondent contends that she cannot be embroiled in the dispute between the petitioner and the 5th respondent. She was also not heard in the appeal filed against the 5th respondents appointment and she cannot be unsettled for

reason of the same.

5. When the 5th respondent was appointed as HSST, the petitioner filed an appeal, Ext.P2 dated 05.01.2010, contending that the 5th respondent has relinquished his claim and hence the petitioner ought to have been considered for the appointment to the post of HSST (Malayalam). The petitioner specifically contended that the action of the Manager promoting the 5th respondent on a subsequent date was unheard of and not an exercise sanctioned by the KER. The petitioner also approached this Court with a writ petition which was disposed of by Ext.P3 judgment, directing consideration of the appeal.

6. The appeal filed by the petitioner was allowed as per Ext.P4 dated 24-07-2012. In Ext.P4 it was

noticed that the 5th respondent was absent in the interview and the reason cited was that he would lose the benefit of his higher grade promotion in the existing scale as H.S.A (Arabic). The appeal was allowed and the petitioner was directed to be appointed as HSST (Malayalam). By that time, the 5th respondent was appointed as HSST (Arabic) on 30.06.2012. The approval of the appointment of 5th respondent, as HSST, however, was much later, when this writ petition was pending and also, only on the basis of an interim order dated 07.04.2015, in which approval was directed to be considered, subject to the result of the writ petition. The factum of the approval, as such, of the 5th respondent in the post of HSST, may not be significant in the adjudication of the dispute, since the approval was only by virtue of the interim order. That would definitely

depend on the disposal of the writ petition itself. None can claim a benefit to be upheld, which is only by virtue of an interim order, when the writ petition itself is pending. Any benefit so obtained would depend on the final disposal of the writ petition, as has been held in (2008) 17 SCC 73 -Abhimanyoo Ram v. State of Uttar Pradesh.

7. If the 5th respondent is found to have relinquished the post or is found to be dis-entitled to be appointed for reason of his default, then necessarily the petitioner would have to be appointed as HSST in place of the 5th respondent. This Court is conscious of the fact that this would result in the displacement of the 6th respondent who was appointed as HSST (Malayalam) by direct recruitment. This is because the petitioner and the 5th respondent has a claim for 'by transfer' appointment to the

post of HSST, but are to be accommodated in the subject in which they are qualified. When the 5th respondent's appointment is unsettled, then, the petitioner would have to be accommodated in the 6th respondent's vacancy and a fresh person recruited to the post of HSST (Arabic). Such displacement is only a consequence of the adjudication of the rival claims and this Court cannot dwell too much upon the misfortunes that are visited on a person, by reason only of a fair adjudication. The petitioner cannot be denied her rightful claim, merely because the rejection of her claim would ensure, employment for all parties.

8. It is pointed out by the learned counsel for the 6th respondent that it is of some relevance that the petitioner, did not challenge the 6th respondent's appointment as HSST (Malayalam), on direct recruitment.

The 6th respondent was also not a party in the appeal in which Ext.P4 order was passed. Per contra it is to be noticed that, the approval of the 6th respondent stood declined by Ext.P5, on the ground of petitioner's claim for 'by transfer' appointment. The claim of the petitioner for by transfer appointment would have a direct bearing on the appointment of the 6th respondent. This is for the reason of, the law laid down by this court as to how the posts for 'by transfer' appointments are to be identified, especially when the higher secondary section is sanctioned for the first time. This Court has held that it is not for the Manager to decide who among the HSA's would be promoted, arbitrarily. The ratio for by transfer appointments is to be maintained by promoting the senior most among the HSA's, thus setting apart their subjects in

the post of HSST, for by transfer appointment.

9. Further, The 6th respondent had filed an application before the Director of Higher Secondary Education challenging Ext.P5, in which all the parties were heard, i.e: the petitioner, the 5th respondent, the 6th respondent and the Manager. The 6th respondent has filed the other writ petition seeking implementation of the order of the government, impugned by the petitioner. All parties were heard before the government and now before this Court. There could hence be no ground raised of no hearing having been granted. The preliminary objections having been dealt with, the claim of the 5th respondent has to be now addressed.

10. Before the Director, in the first revision, against Ext:P-4, the 5th respondent claimed that he had to

participate in a pre-planned religious function and hence he could not attend the interview. It was also contented that the interview on 18.12.2011, was adjourned on the request of the 5th respondent. The management dispute prevented an interview being held immediately thereafter. Eventually a fresh interview was conducted and he was selected and appointed on 02.07.2012, is the essential argument. The Director of Higher Secondary Education, rejected the contentions and found that the petitioner has to be appointed to the post of HSST (Junior) (Malayalam) and the appointments of 5th and the 6th respondents ought to be set aside.

11. A further revision was filed by both 4th and 6th respondents before the Secretary to Government. The 5th respondent is also said to have filed a revision which is

produced as Ext.R5(h), which however, was not seen considered in Ext.P7. In any event, the Manager was supporting the 5th respondent and his contentions were considered in Ext.P8, so was the 5th respondent heard.

12. The Government found that the petitioner has not produced any supporting documents to prove her allegation of the 5th respondent having relinquished his claim. The 5th respondent was found to be the senior and his appointment was found to be proper. The 5th respondent was found to be liable to be appointed as HSST (Junior) (Arabic) and the 6th respondent as HSST (Junior) (Malayalam) which order is challenged by the petitioner before this Court.

13. Rule 5 of Chapter XXXII of KER provides a note which reads as follows:-

“Appointments to teaching post shall be made on the recommendation of a selection committee consisting of the Manager or his nominee (Chairman), Principal of the school and a representative of the Government selected by the Manager from a panel of Officers not below the rank of a Deputy Collector or officers not below the rank of Deputy Secretary to Government prepared by the Director Higher Secondary Education for every academic year.”

The said note speaks of an appointment to be made on the recommendation of the selection committee consisting of

the Manager or his nominee, Principal of the School and the representative of the Government, selected by the Manager from a panel of Officers, prepared by the Director of Higher Secondary Education for every academic year. The implementation of the ratio of 1:3 ratio, of 'by transfer' and direct appointments has also been held to be based on the seniority of HSA's; the subjects which they handle being kept apart for 'by transfer' appointments, by the judgment in W.P(C) 12881/2014 dated 17.05.2010. The appointment under Chapter XXXII Rule 4 which deals with the ratio of 1:3 between the 'by transfer' and direct appointment for selection to the post of HSST, has been held to be seniority cum suitability by a decision of this Court in Sebastian Joseph v. Director of Higher Secondary Education, Tvm (2011 (2) KHC 149). The

Manager, it has been held, is bound to make 'by transfer' appointments, prior to the appointment by way of direct recruitment in *Prasannakumary v. Director of Higher Secondary Education* (2006(1) KLT 356). The later decision cited may not have much significance now, since the same was with respect to appointments made prior to the Special Rules introduced in the KER, as per Chapter XXXII. The declaration made therein that, there would be no requirement for reference to a selection committee, in the context of reservation of appointments to HSA's, would not now be relevant, since Chapter XXXII draws no such distinction, in the Note extracted above. Both direct recruitment and 'by transfer' appointment has to be on the recommendation stipulated in the 'Note'.

14. The position of law which emerges from the

above precedents and a reading of the provisions of Chapter XXXII, is that an assessment of comparative merit is not contemplated at all, by the selection committee and what is contemplated is a recommendation based on seniority-cum-suitability. The suitability also, going by Rule 5, is to be assessed on the basis of the qualification of the H.S.A and the incumbency details, to determine the seniority and not on the basis of any assessment of comparative merit by the selection committee. It is also fairly well established that the vacancy set apart have to be on the basis of the seniority, assigning the subjects of the senior most H.S.A's in the High School, to be set apart for 'by transfer' appointments as HSST', in the 1:3 ratio in the higher secondary section.

15. Be that as it may, the recommendation

definitely has to originate from the selection committee and especially considering the fact that there is a Government nominee, in the committee, it could only be done after at least an interface with the candidate, when the suitability and seniority is ascertained; whether it be called an interview or otherwise. Though a merit based assessment may not be necessary such an interface would be made possible only through an interview.

16. An examination of the files would disclose that the 4th respondent School was sanctioned one Science Batch and one Commerce batch in the academic year 2010-2011. The files also disclose that the Manager did not set apart the subjects as mandated in W.P(C) No.12881/2004 and notified all the vacancies in a vernacular daily "Malayala Manorama" dated 18.11.2011

calling for applications within 25.11.2011. The notification called for applications in the subjects of Malayalam, Arabic, Physics, Chemistry, Zoology, Botony, Computer Applications and Mathematics in the Higher Secondary stream. The interview was first scheduled on 11.12.2011 and then adjourned to 18.12.2011. Admittedly the 5th respondent did not appear in the interview, before the selection committee as scheduled. It is also evident from the files, produced by the government, that the 5th respondent,s candidature was not even considered by the selection committee on that date. The 5th respondent did not even make an application pursuant to the notification.

17. It is seen from the files that both the other H.S.As Reetha and Simmi, were considered and their certificates verified and their appointment recommended

by the selection committee. The minutes of the selection committee, available in the files and produced as Ext:R-5 (g), would reveal only 10 persons having been recommended on the said date, two of which were 'by transfer' appointments.

18. The Manager in his counter affidavit contends that since there was no requirement of comparative assessment of merit and the 5th respondent having not relinquished his claim for 'by transfer' appointment, he could not be overlooked. The 5th respondent too contend that he had a personal difficulty on the said date and that he had communicated the same to the Manager, in writing, by Ext:R-5(c). The alleged communication is seen acknowledged by the Manager too on 17-12-2011, as per the endorsement in the letter. If that

be so, the Manager could have placed the details of the 5th respondent before the selection committee on the date of interview. Or at least the Manager should have placed the alleged request for leave of absence, made by the 5th respondent, before the selection committee, so as to grant another date for the interview. The leave of absence said to have been made to the Manager is not found in the files nor is the 5th respondents candidature considered by the selection committee on 18.12.2011. The selection committee considered the suitability of the other H.S.A.'s and recommended their appointment, on 'by transfer' mode. The service book and the certificates of the two other HSA's were placed before the selection committee and is available in the files.

19. Definitely if it was the default of the

Manager, in not having placed the candidature of the senior most hand before the selection committee, that cannot prejudice the claim of a senior HSA. Hence one has to examine the case set up by the 5th respondent also. The 5th respondent at the time of disposal of the appeal by the Deputy Director evidenced by Ext.P4, is said to have cited the reason of loss of benefit of his higher grade promotion in the existing scale as H.S.A (Arabic), if he attended the interview on 18.12.2011 and accepted the 'by transfer' appointment. The learned counsel for the 5th respondent submits that the same is factually incorrect since the 5th respondent had 29 years of service as on the date of selection and as on 01.07.2011 his grade was sanctioned. However, it is to be noticed that the 5th respondent has not challenged Ext.P4 order at least to the extent which the 5th

respondent was found to have voluntarily refused to take up the appointment, for reason of losing the benefit of his higher grade. The petitioner claims to have challenged Ext.P4 by Ext.R5(m) on 09.04.2013. The order at Ext.P4 is dated 24.07.2012. It is also evident that 5th respondent has not thought it fit to pursue Ext.R5(m), even if the same was filed, at least when the Director of HSE, considered Ext:P-6. Having filed Ext.R5(m), the 5th respondent ought to have pursued it, and got the observations in Ext.P4 removed if the same was contrary to facts. When hearing was conducted by the Director of HSE, the 5th respondent too was heard and he could have very well sought for his revision also to be heard, which was not attempted.

20. Again in Ext.P6, the Director has stated that the 5th respondent had explained his absence on 18.12.2011

citing the reason of a pre-planned religious function. Now, the 5th respondent asserts, that on the particular day, the 5th respondent's daughter's engagement was held in his house. It is highly unlikely that the daughters marriage would be styled as a mere religious function. The 5th respondent has also produced Ext.R5(d) and Ext. R5(e) to prove the said contention. Immediately looking at Ext.R5 (d), the same is issued by the Secretary of a Juma Masjid, which cannot be relied upon by this Court. EXT:R-5(d) is also dated 05.12.2015 and certifies a 'nikah' (a muslim marriage), having taken place on 18-12-2011. The marriage certificate, issued by the Registrar of Marriages, produced at Ext.R5(e) indicates that the marriage was actually held on 20.09.2013. Hence the 5th respondent's contention that the absence at the time of interview was by

the reason only of the marriage of the 5th respondent's daughter remains unsubstantiated. It was also never stated before; neither in the alleged request made for condoning his absence at the interview or before any of the statutory authorities. For the first time it was argued before this Court and on this Court pointing out the lack of evidence, the 5th respondent has now produced Ext: R-5 (d) & (e); which in effect disproves the contention.

21. The 5th respondent also contends in his affidavit that the candidates for 'by transfer' appointment were orally informed by the Manager, to attend the interview scheduled on 18.12.2011. The said contention is belied by the fact that the minutes of the selection committee {Ext: R-5(g)} clearly indicate that the Manager had received applications from the candidates pursuant to

a notification and that individual call letters were issued to each of the candidates. The Manager contends, no records are available with him and that the files disclose no application from either of the candidates. The absence of all the applications in the government files would work against the defense set up, since admittedly eight direct recruitment's were made on the said date, which could not have been without proper applications. The Manager obviously did not forward the applications to the department, which is also not a mandate as per the rules.

22. No records are also available to indicate that the alleged leave of absence was filed or whether the same was placed before the selection committee, in which the Government nominee was also a party. As was noticed above, the 5th respondent is not seen to have even filed an

application in pursuance to the notification issued by the Manager. In such circumstance, it cannot be said that the 5th respondent would have made a leave of absence at the interview. Ext.R5(c) in fact, conveyed the petitioner's inconvenience to attend the interview in view of “a serious personal matter” which again is not substantiated. It was also requested that the application of the 5th respondent be considered. Hence the 5th respondent contends in his alleged application for leave of absence, that he filed an application. This Court does not find any such application having been made by the 5th respondent nor the certificates produced, as has been done by the other H.S.As who were in the service of the 4th respondent School. The 5th respondent also does not produce his call letter and produce that of another, Ext.R5(b).

23. The petitioner filed an application pursuant to the notification, which however, was considered only for direct appointment as per the 1:3 ratio. The 6th respondent is said to have received more marks than the petitioner and hence the 6th respondent was appointed in the post of HSST(Malayalam) on direct appointment. The 5th respondent as has been noticed earlier was subsequently appointed as HSST (Arabic) after about six months. The 5th respondent contends that it was due to a civil suit pending, where there was a management dispute raised. However the delay in constituting the second interview is not the crucial issue. The entire controversy is as to whether the 5th respondent applied pursuant to the notification and whether he appeared for the interview and what is the consequence of his absence.

24. Ideally, the 4th respondent ought to have first conducted an interview to the 25% quota and then to the notified vacancies for direct recruitment, even if it is scheduled on the same day. The Manager would also be aware of who should be considered for the post of HSST by transfer from HSA's which obviously has to be considered on the basis of the seniority of the teachers and a mere ascertainment of their suitability; the latter being only consideration of the educational qualification of the respective incumbents. Hence, when a senior most has is not present or has not applied then, the next senior most has to be considered. Even if the next senior HSA, is not present, then the interview should stand adjourned. Herein the next senior was present, since the petitioner was available and had applied for the post of has (Malayalam).

25. The 5th respondent would reiterate, that the entire details, with respect to the 5th respondents service and educational qualifications would be available with the Manager and the selection committee could look into it and decide on the suitability and make a recommendation. However, when the 5th respondent has not even applied for the post pursuant to a notification made by the Manager, it cannot be said that the 5th respondent ought to have been considered. Even if an application is found to be unnecessary, the 5th respondent ought to have attended the interview. The 5th respondent admits that he was informed of the interview allegedly orally; in which event he is bound to explain as to why he did not attend the interview. His explanations were not consistent and none of which are also believable.

26. Admittedly, the interview/selection was conducted on the very same day of all the applicants who applied pursuant to the notification. HSST(English) and HSST (Maths) were filled from the two senior H.S.A's. When the 5th respondent's application for the post of HSST (Arabic) was not available with the Management and he was not present; there was no warrant for keeping aside the selection of the one HSST post remaining reserved for 'by transfer' appointment. Definitely the next senior most H.S.A, who was available, ought to have been considered. The petitioner was the next senior most H.S.A and she was present for the interview. The H.S.A (Arabic) did not turn up for selection and had not even applied for selection. An interview was conducted for H.S.A (Malayalam), for direct recruitment; but despite the fact that the incumbent H.S.A

(Malayalam), the petitioner, was lower down in the rank list; she had a claim for being appointed on 'by transfer' appointment if the 5th respondent was not available. The absence of the 5th respondent can only be said to be a deemed relinquishment. In such circumstance, this Court cannot uphold the order of the Government at Ext.P8. Ext.P8 would stand set aside.

27. The petitioner would have to be appointed as HSST (Malayalam), on 'by transfer' appointment with effect from the date on which the 6th respondent was appointed. The 6th respondent, having worked as HSST (Malayalam) in the intervening period, her salary would be disbursed to her. The difference in salary entitled to the petitioner for the post of HSST, when she was illegally kept out of employment, shall be paid by the Government

and recovery steps initiated against the Manager under Rule 7 Chapter III. The 5th respondent also having worked as HSST (Arabic) for the intervening period from the date of his appointment shall be entitled to his salary and shall also be entitled to be continued, since otherwise the Manager would have to make a fresh appointment. The petitioner shall be appointed as HSST within a period of three weeks from the date of receipt of a certified copy of this judgment. In equity and also to ensure that justice is done, the 6th respondent shall be offered appointment as H.S.A, in the vacancy arising on the appointment of the petitioner as HSST, and also appointed to the next arising vacancy of HSST (Malayalam), since she was the victim of the default committed by the Manager.

W.P(C) No.12330/2014 is allowed setting aside

WPC.No.12330/2014 &22214/2015

: 33 :

Ext P-8. The said order is sought to be implemented in W.P
(C) No.22145/2015, and hence that writ petition would
stand dismissed. No costs.

Sd/-
(K. VINOD CHANDRAN, JUDGE)

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“W.P(C) No.22145/2015” mentioned at page 33 of the
common judgment dated 15/12/2015 in W.P(C)
Nos.12330/2014 and 22214/2015 is corrected and
substituted as “W.P(C) No.22214/2015” as per order dated
12/08/2016 in I.A No.11577/2016 in W.P(C) No.12330/2014.

Sd/-
Registrar (Judicial)