

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

THURSDAY, THE 26TH DAY OF FEBRUARY 2015/7TH PHALGUNA, 1936

WP(C).No. 24156 of 2009 (L)

PETITIONER(S):

P.VEENA,
D/O.P.V.ACHUTHAN NAMBIAR, AGED 24 YEARS
FORMERLY LOWER PRIMARY SCHOOL ASSISTANT
CHERUPAZHASSI A.L.P.SCHOOL (RESIDING AT DEVILAS
KADOOR, CHERUPAZHASSI, KANNUR - 670 601).

BY ADVS.SRI.V.A.MUHAMMED
SRI.K.E.HAMZA

RESPONDENT(S):

1. THE STATE OF KERALA, REPRESENTED
BY ITS SECRETARY TO GOVERNMENT
GENERAL EDUCATION DEPARTMENT, SECRETARIAT, TRIVANDRUM.
2. THE DIRECTOR OF PUBLIC INSTRUCTION,
JAGATHY, TRIVANDRUM - 14.
3. THE DEPUTY DIRECTOR OF EDUCATION
KANNUR, P.O.KANNUR-2.
4. THE DISTRICT EDUCATIONAL OFFICER
KANNUR, P.O.KANNUR-2.
5. THE ASSISTANT EDUCATIONAL OFFICER
TALIPARAMBA SOUTH, P.O.TALIPARAMBA, KANNUR DISTRICT.
6. SRI.P.C.SUDHEER,
MANAGER, CHERUPAZHASSI A.L.P.SCHOOL, KOLACHERY
KANNUR - 670 601.
7. THE HEADMISTRESS,
CHERUPAZHASSI A.L.P.SCHOOL, KANNUR - 670 601.
8. SRI.SREEJITH KUNHIKKANDY,
TEACHER (UN-APPROVED),
CHERUPAZHASSI A.L.P. SCHOOL, KOLACHERY,
KANNUR 670 601.
9. SMT.C.O.SANTHAKUMARI,
FORMERLY MANAGER-DO-(RESIDING AT
CHENGOONI OTHAYOTH, PURAMACHERY,
KOLAHERY, KANNUR 670 601.

R6 & 7 BY ADV. SRI.MAHESH V RAMAKRISHNAN
R8 BY ADV. SRI.N.N.SUGUNAPALAN (SR.)
R8 BY ADV. SRI.S.SUJIN
R1 TO 5 BY ADV. GOVERNMENT PLEADER SRI.P.M.JOSEPH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26-02-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

- P1. COPY OF THE GOVT. ORDER DTD.5.9.2007.
- P2. COPY OF THE JUDGMENT OF THIS COURT IN W.P.(C).No. 28308/2007.
- P3. COPY OF THE JUDGMENT OF THIS COURT IN W.A.NO.2393/2007.
- P4. COPY OF THE ORDER OF APPOINTMENT DTD.18.11.2004.
- P5. COPY OF THE ORDER DTD.22.10.2007 OF R5.
- P6. COPY OF THE ORDER DTD.15.3.2008 OF GOVT.
- P7. COPY OF THE ORDER DTD.30.4.2008 OF THE GOVT.
- P8. COPY OF THE ORDER DTD.9.5.2008 OF THE GOVT.
- P9. COPY OF THE REPRESENTATION DTD.3.3.2008 TO GOVT.
- P10. COPY OF THE JUDGMENT OF THIS COURT IN W.P.(C).No. 13873/2008.
- P11. COPY OF THE GOVT. ORDER DTD.19.8.2009.
- P12. COPY OF THE DECISION REPORTED IN 1993 (2) KLT.SHORT NOTE PAGE 27 DTD.2.8.1993.
- P13. COPY OF THE ATTENDANCE REGISTER.
- P14. COPY OF THE DOCUMENT TO SHOW THAT THE PETITIONER IS ATTENDING EXAM. DUTY.
- P15. COPY OF THE RELEVANT PAGES OF VISIT NOTE DTD.19.9.1917.
- P16. COPY OF THE ORDER OF APPOINTMENT DTD.18.11.2004.
- P17. COPY OF THE JUDGMENT OF THIS COURT IN W.P.(C).No. 29160/2004.
- P18. COPY OF THE STAFF FIXATION ORDER 17.9.2004.
- P19. COPY OF THE JUDGMENT OF THIS COURT IN W.P.(C).No. 1262/2007.
- P20. COPY OF THE VISIT NOTE DTD. 5.2.1957
- P21. COPY OF THE GOVT. ORDER DTD.1.6.1988.
- P22. COPY OF THE JUDGEMENT OF THIS COURT IN W.P.(C).No. 28308/2007.

RESPONDENT(S)' EXHIBITS:

R6(A) COPY OF THE PROMOTION RECORD OF CHERUPAZHASSI ALP SCHOOL FOR THE YEAR 2004-05.

R6(B) COPY OF THE RELEVANT PAGES OF REGISTER OF SUBMISSION OF TEACHING MANUAL OF CHERUPAZHASSI ALP SCHOOL FROM 1.11.2004 TO 30.6.2005.

- R8(A) COPY OF THE ORDER OF APPOINTMENT DTD.5.6.2006 BY R6.
- R8(B) COPY OF THE INFORMATION OBTAINED FROM THE PUBLIC INFORMATION OFFICER, OFFICE OF AEO, TALIPARAMBA SOUTH.
- R8(C) COPY OF THE STAFF FIXATION ORDER FOR 2004-05.
- R8(D) -DO- 97-98.
- R8(E) COPY OF THE JUDGEMENT OF THIS COURT IN R.P.NO.851/2009.
- R8(F) COPY OF THE ATTENDANCE REGISTER FOR THE MONTH OF NOV.2004-05.
- R8(G) COPY OF THE CIRCULAR DTD.28.5.2001 BY THE DIRECTOR GENERAL EDUCATION, KERALA.
- R8(H) COPY OF THE ORDER DTD.11.4.2008 OF THE DEO, KANNUR.
- R8(I) COPY OF THE EXTRACT FROM THE INSPECTION BOOK FRO 28.6.66 TO 25.6.1976.
- R8(J) COPY OF THE FITNESS CERTIFICATE FOR 2000-2001.
- R8(K) COPY OF THE FITNESS CERTIFICATE FOR 2004-05.
- R8(L) COPY OF THE SKETCH AND PLAN DTD.10.7.98 OF THE SCHOOL BUILDING.
- R8(M) COPY OF THE SKETCH PLAN DTD.15.7.11 OF THE SCHOOL BUILDING.
- R8(N) COPY OF THE STAFF FIXATION ORDER FOR 2007-08.S

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///True copy///

P.S. to Judge

ALEXANDER THOMAS, J.

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W.P.(C).No. 24156 of 2009

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Dated this the 26th day of February, 2015

J U D G M E N T

The petitioner herein was appointed as Lower Primary School Assistant (LPSA) in the respondent Cherupazhassi A.L.P. School, Kannur, with effect from 18.11.2014 (as referred to in Ext.P-4) against an anticipated post for the year 2004-05, on the basis of the higher level verification conducted by the 4th respondent-DEO, Kannur. In the higher level verification conducted by the DEO on 17.8.2014 in the respondent school, it was found that there were 51 pupils on the rolls of the school on the sixth working day and that 48 students were physically present on the date of the visit. But the appointment of the petitioner was not approved by the 5th respondent DEO, Thaliparamba on the following grounds:

- (i) One pupil in Std.III was removed from the roll with transfer certificate on 20.7.2004 and admitted to another school and hence roll strength is 50 instead of 51 and the roll strength on 25.11.2014 is 48 instead of 51.
- (ii) There is no sufficient/adequate accommodation available for sanctioning one additional division in the school.

These aspects are also evident from Ext.P-18 staff fixation order. The then manager of the school (respondent No.9) challenged the

above decision of the AEO by filing appeal before the Deputy Director of Education, Kannur, praying to sanction an additional division and consequentially an additional post for Std.III in the school. This was rejected by the Deputy Director and consequentially, the matter was again challenged before the Director of Public Instructions, which also ended in rejection. Thereupon, the petitioner herein preferred a revision petition under Rule 92 of Chapter XIV-A of the KER, which led to the Ext.P-1 order dated 5.9.2007 passed by the 1st respondent Government. The Government found in Ext.P-1 that based on Rule 12 of Chapter XXIII KER, though the verified attendance is 48, the total student strength has to be statutorily calculated as 51 by adding the increment of 5% as mandated in that rule and that as thus the total student strength is 51, an additional division is allowable for the respondent lower primary school and that consequentially, one additional post of LPSA in the respondent school is allowable for 2004-2005 and that the claim of the petitioner is thus allowed. It is stated that the petitioner herein had worked as LPSA in the school for 2004-05 for the period from 18.11.2004 to 31.3.2005. It is not in dispute that in the next staff fixation order for 2005-2006, the said additional post was not allowable and therefore the petitioner could not continue in

service beyond 31.3.2005. In pursuance of Ext.P-1, the 5th respondent AEO issued Ext.P-5 revised staff fixation order dated 22.10.2007, whereby the above said additional post of LPSA was also sanctioned to the school for 2004-2005. Consequently, the appointment of the petitioner with effect from 18.11.2004 as LPSA in the respondent school in 2004-2005 was approved by the 5th respondent AEO as per proceedings dated 31.10.2007 endorsed in Ext.P-4.

2. The petitioner is said to have worked in the respondent school for the period from 18.11.2004 to 31.3.2005 for the academic year 2004-05. It is not in dispute that for the next academic year, viz. 2005-06, the above said additional post of LPSA was not allowable in the school based on the student strength and consequential staff fixation order. Therefore, the petitioner could not continue in service beyond 31.3.2005. A vacancy of LPSA had arisen in the school in 2006-07 and the petitioner staked her claim under Rule 51A of Chapter XIVA KER, requesting that she be appointed in the said vacancy in consideration of her prior appointment as per Ext.P-4. At this juncture, the incumbent in the post of the manager of the school had changed and the 6th respondent manager refused to appoint the petitioner in the said

vacancy and had appointed the 8th respondent herein. This led to disputes between the petitioner and the 8th respondent. The 6th respondent herein (manager) challenged Ext.P-1 herein by filing W.P.(C).No.28308/2007. This Court, as per Ext.P-2 judgment, dismissed W.P.(C).No.28308/2007 on 25.9.2007 holding that the 1st petitioner therein (8th respondent herein) cannot challenge the sanction of the additional division and that additional post for 2004-2005, as he is stated to have been appointed by the new manager only from 2006-2007 and further that the 2nd petitioner therein (6th respondent herein) as the manager of the school cannot challenge a decision of the department to sanction an additional vacancy in the school, which is favourable to the school. The 8th respondent herein challenged Ext.P-2 judgment by filing W.A.No. 2393/2007. The Division Bench as per Ext.P-3 judgment rendered on 7.11.2007 dismissed that Writ Appeal holding that the only question that is to be decided by the Division Bench is as to whether Ext.P-1 herein (Government order dated 5.9.2007) passed by the Government is legal or not and that the Bench is of the considered opinion that it is not tainted with any illegality and that consequentially the judgment of the learned Single Judge as per Ext.P-2 herein is confirmed and that the appeal is dismissed.

However, the Bench made it clear in Ext.P-3 judgment that the correctness or otherwise of the approval granted to the appointment of the 6th respondent therein (the petitioner herein) is not the subject matter of the Writ Petition, which led to Ext.P-2 judgment. The 8th respondent herein preferred Review Petition, R.P.No.851/2008 in W.A.No.2393/2007. The Division Bench as per the order dated 13.1.2009 [Ext.R-8(e)] disposed of that Review Petition holding that the Division Bench in Ext.P-3 herein has already held that the correctness or otherwise of the approval of the appointment of the 6th respondent therein (the petitioner herein) is not the subject matter of the said Writ Petition and that the Bench is not expressing any opinion with regard to the grant of the approval by the AEO and that the only question that was considered by the Division Bench in Ext.P-3 herein is as to whether Ext.P-1 herein passed by the Government is legal or not, which, in the view of the Bench, is not tainted with any illegality. Thus, the Bench in Ext.R-8 (e) order held that no final opinion was expressed in Ext.P-3 judgment regarding the grant of approval or Rule 51A rights of any of the teachers and that that has to be decided by the appropriate authority or court untrammelled by any of the observations made in the judgment under review.

3. Challenging the approval granted to the petitioner as per Ext.P-4 proceedings, the 6th respondent herein, the then manager, filed an appeal before the DEO concerned, which led to Ext.R-8(h) order dated 11.4.2008, whereby the DEO held that the approval granted to the petitioner herein is not correct as there was no accommodation for conducting the additional division sanctioned by the Government and that there were only four divisions in the school and that therefore the approval granted to the petitioner herein was interfered with and the matter was remitted to the AEO for consideration in the light of that order. The petitioner herein challenged the correctness of Ext.R-8(h) order passed by the DEO before the Government by filing representation dated 24.4.2008 referred to as 5th paper in Ext.P-7 and this led to the Government passing Ext.P-7 proceedings dated 30.4.2008 finding that Ext.R-8 (h) order passed by the DEO is against the orders of the Government contained in Ext.P-1 herein and that therefore the DEO is directed to reconsider Ext.R-8(h) order dated 11.4.2008 after examining the case in detail in the light of Ext.P-1 G.O. The petitioner had also complained before the Government that she was not allowed to work in the new vacancy that occurred in the school for 2006-07 by honouring her Rule 51A claim and the Government in Ext.P-7 also

directed that the petitioner herein should be reinstated in consonance with Ext.P-1 order. Directions were also issued by the Government in Ext.P-7 that disciplinary action will be taken against the then Headmistress of the school for not permitting the petitioner to work in the school in the new vacancy by honouring her Rule 51A claim, etc. The Government also had issued Ext.P-6 proceedings dated 15.3.2008 directing to take disciplinary action against the then Headmistress for not allowing the petitioner to work in the school.

4. The petitioner herein filed W.P.(C).No.13873/2008 before this Court seeking appropriate directions for enforcing her consequential rights on the basis of Ext.P-1 herein and other related issues for upholding her Rule 51A claim in the new vacancy. The 8th respondent herein had filed W.P.(C).No.14252/2008 before this Court impugning Ext.P-7 herein. The then Headmistress filed W.P.(C).No 14236/2008 impugning the action taken against her on the basis of Ext.P-6 herein and Ext.P-7 herein.

5. All the three Writ Petitions were disposed of as per a common judgment (Ext.P-10) on 5.3.2009 by this Court by recording that all the parties agree that the Government may be directed to re-hear the matter with notice to all the respective

petitioners and accordingly, the Government was directed to conduct a re-reading with notice to all the petitioners therein and any other affected parties within a period of four months. It is also ordered that the interim order passed in the Writ Petitions will continue until final orders are passed by the Government as directed in Ext.P-10 judgment.

6. In pursuance of Ext.P-10 judgment, the Government passed Ext.P-11 order dated 19.8.2009 holding in page 10 thereof as follows:

“The following points are noted during the course of examinations of the facts:

1. On the Higher Level Verification day the student strength in class II is 16 and Class IV is 33 but in class III is 48.
2. The appointment made by the Manager against an anticipated vacancy should be from the reopening day of the academic year. But in this case the appointment was made by the Manager on 18.11.2004.
3. Smt.P.Veena who was appointed by the former Manager has suppressed the fact that the post was not sanctioned due to the lack of accommodation on Ext.P8 representation in the W.P.(C).No. 33578/2005 (V).
4. In the G.O(Rt) No.4058/2007/GEdn dated 05.09.2007, while examining the Ext.P8 representation in the W.P.(C). No. 33578/2005, the above reasons are not seen taken into consideration.

In the circumstances, the additional division and post of LPSA sanctioned in Cherupazhassi ALP School, Kannur during 2004-05 as per the Government Order dated 05.09.2007 is cancelled. The Ext.P8 representation submitted by Smt.P.Veena in W.P.(C).No. 33578/05 stands rejected as the same is against truth to the acts. The action taken against the Headmaster and the Manager as per Government letter No.5505/P3/08/GEdn dated 30.04.2008 is dropped. The

approval of appointment made by Assistant Educational Officer, Thaliparamba (South) vide K.Dis/C-2319/08 dated 31.10.2007 is set aside as the same is against rules. The appointment made by the present Manager, consequent on retirement of Headmaster on 05.06.2006 is to be considered by the Assistant Educational Officer, Thaliparamba (South) in the light of the rules in force.”

As a result of the issuance of Ext.P-11 order, decision was rendered by the Government in favour of the claims of the 8th respondent herein and the 6th respondent herein and the claim of the petitioner for approval of appointment for 2004-2005 and her consequential Rule 51A claim for the new next vacancy, which occurred in 2006-07 was rejected by the Government. It may be noted that in view of Ext.P-11, the Government cancelled Ext.P-1 order herein and had also interfered with the orders produced herein as Ext.P5 and Ext.P-4 in the matter of sanction of additional vacancy and approval of the appointment of the petitioner for 2004-05. It is also inter alia found in Ext.P-11 order that the Headmaster of the school had reported that there were only four divisions in the school until 2004-05 and that there was no accommodation to provide a fifth class in the school and that Std.III was not bifurcated, etc. Aggrieved by Ext.P-11 order, the petitioner herein has filed the instant Writ Petition with the following prayers:

“(i) call for the records relating to Exhibit P-11 and quash the original of the same by the issue of a writ of certiorari or other appropriate writ or order.

(ii) issue a writ of mandamus or other appropriate writ order or direction commanding Respondents to disburse the pay and allowances due to the Petitioner in view of Exhibit P-1 to P-5.

(iii) issue a writ of mandamus or other appropriate writ order or direction commanding the 6th respondent to grant reappointment to the Petitioner in the School with effect from 1.6.2006 with attendant benefits as Lower Primary School Assistant.

(iv) pass such other order or direction which this Hon'ble Court may deem fit and proper to grant in the circumstances of the case."

7. The petitioner has contended on the basis of Ext.P-13 attendance registers and Ext.P-14, etc. that she had actually worked in the school for the period from 18.11.2004 to 31.3.2005. Further it is contended that the school is housed in pre-KER buildings as evident from Ext.P-18 staff fixation order and that in view of the decision of the Division Bench of this Court in Manager, Vengeri A.U.P. School v. State of Kerala, reported in 2009 (2) KLT 856, that the provisions in sub sections 4 and 5 of Sec.3 of the Kerala Education Act would clearly indicate that the stipulations in the Kerala Education Rules (K.E.R) were meant to take effect only prospectively, so as to govern establishment of new schools or opening of any higher class in the existing private schools and that the said provisions would also indicate that all the existing schools were deemed to have been established in accordance with the Act, though they were not in fact so established and that since this is the

position, such existing school buildings, if they are strong and have fitness certificates, can be used for running classes, even if they do not conform to the specifications contained in the K.E.R. The submission of the petitioner is that the school is a pre-KER institution as also evident from Exts.P-15 and P-20, which show that the school functioned during pre-KER period as a basic school with standards I to V, instead of the KER pattern of having only Std. I to IV for an L.P school. The contention is that the school had functioned earlier with five class rooms for Standards I to V for the pre-KER basic school and that therefore it was competent for the school authorities to function five divisions in the school even for 2004-05, based on the protection of the pre-existing rights, etc. It is also contended that the petitioner was appointed by the manager as evident from Ext.P-4 and that she had worked in the school from 18.11.2004 to 31.3.2005 and that it is the duty of the headmaster concerned to bifurcate Std.III after the issuance of Ext.P-4 appointment order and that neither the manager, who issued Ext.P-4 appointment order, nor the petitioner herein can be in any way blamed for the alleged the non-bifurcation of Std.III and that the benefits that are due to the petitioner on the basis of her appointment and consequent approval should have been granted to

her. If that be so, she had a valid Rule 51A claim as against the new vacancy that arose in the school from 2006–07, to which, the 8th respondent herein was appointed in violation of the above said Rule 51A claim of the petitioner, etc. Various submissions are also made to challenge the correctness of impugned Ext.P–11 order.

8. The Government has filed a counter affidavit dated 5.6.2010 rebutting the claims and contentions of the petitioner. It is stated in para 5 of the said counter affidavit that the fact as to whether there was sufficient accommodation to function the second division in Std.III was neither examined nor mentioned in Ext.P–1 order and that as per G.O(P) No.169/2004/G.Edn. dated 15.6.2004, vacancies which have less than one academic year duration has to be filled up on daily wage basis and that the Government was bound to rectify the situation by annulling the additional division and the post of LPSA sanctioned in the respondent school. That the additional division in Std.III never sanctioned and that the petitioner herein also did not handle the classes and that her claim for salary is not sustainable. However, it is admitted in para 7 of the counter affidavit that the petitioner herein had attended the school for the period from 18.11.2004 to 31.3.2005. But that Std.III has not been bifurcated since there was not sufficient accommodation and that

the petitioner was not assigned sufficient work and that the petitioner attended the school for the period from 18.11.2004 to 31.3.2005 and that the petitioner had not performed any work as the additional division did not function and that the claim for salary and consequential benefits are not sustainable. It is also stated in Ext.P-11 and in the counter affidavit that the petitioner herein has suppressed the fact that the post was not sanctioned due to lack of accommodation in her revision petition, which led to Ext.P-1 order herein.

9. The Government has also filed an additional counter affidavit dated 4.5.2012 contending that the contention of the petitioner that the school is housed in pre-KER building is factually incorrect and that the school buildings as it stand now are in accordance with the post-KER norms and that during 2004-05, only four classes had actually functioned and that no separate attendance was maintained for the additional division in Std.III, etc.

10. The 8th respondent herein has filed counter affidavit and additional counter affidavit mainly raising contentions to support the decision of the Government in Ext.P-11. It is also contended therein that though the school had functioned during pre-KER period, later the old buildings were demolished and reconstructions

were conducted twice on the basis of the specifications in the post-KER norms as evident from Exts.R-8(i) to R-8(n) proceedings. Therefore, it is contended that the protection of the pre-KER existing facilities on the basis of the aforementioned Division Bench judgment reported in 2009 (2) KLT 856 could have been claimed only if the school was physically housed in pre-KER building, but in a situation where the old buildings in pre-KER school are demolished and new constructions are effected after the coming into force of the KER on the basis of KER specifications, then there is no question of protection of any pre-existing rights and the state of affairs have to be evaluated on the basis of the norms for the housing of the class rooms in the buildings which should necessarily conform to the KER specifications. On this basis, it is contended that there were actually only four class rooms in that school and therefore there is no additional accommodation to house the additional division sanctioned in Ext.P-1 for Std.III of the respondent school. On this basis, it is urged that even though the decision of the Government in Ext.P-1 for sanctioning of an additional division in the school based on the student strength may be justifiable, no actual appointment should have been done as against the said consequential vacancy, as there was no physical

accommodation to house the class for the new division in Std.III. It is also contended by the 8th respondent that the petitioner has not actually worked in the school for 2004–2005. Accordingly, it is urged that since the approval of the appointment granted to the petitioner as per Ext.P–4 was illegal, she cannot validly make any Rule 51A claim as against the new vacancy, which occurred in the school from 2006–07 onwards and that therefore the Government was right in taking a decision in favour of the 8th respondent herein as per the impugned order.

11. Heard Sri.V.A.Muhammed, learned counsel appearing for the petitioner, the learned Government Pleader appearing for official respondents 1 to 5 and Sri.Mahesh P.Ramakrishnan, learned counsel appearing for respondent Nos.8 and 6.

12. At the outset it is to be noted that in view of the concluded judgments of this Court as per Ext.P–2, P–3 and R–8(e), the issue as to the sanction of the additional division for the school as per Ext.P1 order herein, has attained finality and it is not open to challenge. However, in view of Ext.P–3 judgment and Ext.R–8(e) order of the Division Bench in the Review Petition, the questions as to the approval of the appointment of the petitioner for 2004–2005 and the validity of her consequential Rule 51A claim are certainly

open to challenge. Though the appointment of the petitioner for 2004-2005 was approved by the AEO as per the endorsement in Ext.P-4, the same was interfered with by the DEO in Ext.R-8(h) order. This again in turn was interfered with by the Government in Ext.P-7 in favour of the petitioner. Therefore, these issues relating to the approval granted to the appointment of the petitioner for 2004-05 and the consequential Rule 51A claim made by her as against the new vacancy which occurred from 2006-07 are to be considered. At this juncture, it would also be relevant to note that it is the case of the 8th respondent that he has actually worked in the school from the academic year 2006-07. However, the appointment of the 8th respondent for the period from 2006-07 upto 2010-11 has not been approved due to the stay order issued by this Court in this Writ Petition and he has not been paid salary during this period. However, it is brought to the notice of this Court by the petitioner and the 8th respondent that pursuant to the subsequent interim order passed by this Court on 6.9.2011, the appointments of the petitioner and the 8th respondent as against the two vacancies since 2011-12 have been approved by the department and both have been getting their respective salaries since the academic year 2011-2012. The 8th respondent had subsequently resigned from the

service of the respondent school on 15.6.2012 and has joined in a Government school pursuant to regular appointment secured by him. So the essential dispute is as to the validity of the approval granted to the petitioner for 2004-05 and as to who among the petitioner or the 8th respondent should be granted approval for the appointment as LPSA in the school from the academic years 2006-07 upto 2010-11.

13. It can be seen that mainly four grounds have been stated by the Government in Ext.P-11 for arriving at the conclusions therein. The first ground as mentioned in page 10 of Ext.P11 is that “on the higher level verification day the student strength in class II is 16 and Class IV is 33, but in Class III is 48”. As already held herein above, the issue as regards the admissibility of an additional division in Std.III of the respondent school has attained finality and the conclusiveness, in view of the judgments of this Court as per Exts.P-2, P-3 and R-8(e) herein on that issue. More over, it is clearly admitted in Ext.P-11 that the student strength in class III on the higher level verification day was 48. In Ext.P-1 also the Government, based on the uncontroverted records has come the finding that the verified attendance for class III on the day in question is 48 and that by virtue of the statutory operation of Rule 12 of Chapter XXIII, an

increment of 5% has to be added thereto, which makes the total student strength as 51 and that therefore it automatically leads to the admissibility of the additional division for Std.III. Therefore, the aforementioned first ground stated in Ext.P-11 in page 10 thereof, is unsustainable and it has no legs to stand.

14. The second ground stated in the impugned Ext.P-11 is that, "the appointment made by the Manager against an anticipated vacancy should be from the reopening day of the academic year. But in this case, the appointment was made by the Manager on 18.11.2004". This ground is so stated on the basis of G.O(P).No.169/2004/GEdn. dated 15.6.2004, wherein it has been stipulated in para 6 thereof that hereafter the claim for reappointment under Rule 51A of KER will be limited to those who have been appointed against regular/leave vacancies having a duration not less than one academic year and that vacancies having duration less than one academic year will be filled by on daily wage basis. The above said executive order contained in G.O.(P).No.169/2004/G.Edn. dated 15.6.2004 was statutorily incorporated only by introduction by amendment of Rule 7A(3) of Chapter XIV A KER with effect from 27.4.2005. This Court in the judgment dated 27.7.2006 in W.P.(C).No. 32706/2005 held that the said amendment was brought in the KER as per Rule 7A (3) of

Chapter XIVA KER only with effect from 27.4.2005 and that the provisions in the executive order in the G.O (P). dated 15.6.2004 are liable to be ignored. In other words, the above said provisions can be invoked to the detriment of the claimants only with effect from 27.4.2005, the date of coming into force of Rule 7A (3) by statutory amendment of the KER and not with effect from 15.6.2004, the date of issuance of G.O (P) No.169/2004/G.Edn. In the instant case, the appointment effected on 18.11.2004 as per Ext.P-4 is for the academic year 2004-05 and therefore the provisions of the said executive order issued on 15.6.2004 cannot be invoked so as to prejudice to the claim of the petitioner and at best it could have application from the academic year 2005-06. Moreover, the aforementioned claim of the petitioner is one emanating from the admissibility of additional division as borne out from Exts.P-1 and P-5 and therefore it cannot be said to be a leave vacancy or regular vacancy having duration of less than one academic year. Therefore, the aforementioned ground stated in Ext.P-11 is also unsustainable and irrelevant.

15. The third ground stated in the impugned Ext.P-11 is that "Smt.P.Veena who was appointed by the former Manager has suppressed the fact that the post was not sanctioned due to the lack of accommodation on

Ext.P8 representation in the W.P.(C).No.33578/2005". The gist of the matter in this aspect is that the petitioner herein had submitted the above said Ext.P-8 representation, which is a Rule 92 revision petition by her, before the Government to challenge the decision of the AEO, Deputy Director and DPI, who had declined her approval. That in the said revision petition, the petitioner herein had suppressed the fact that the post was not sanctioned due to lack of accommodation in the school concerned. It is to be noted that the AEO had specifically refused to grant approval to the petitioner with effect from 18.11.2004 on the ground that there was no sufficient/adequate accommodation available for sanctioning additional division. Yet another ground was also stated therein regarding the student strength. The fact that the AEO had declined to grant her approval on these grounds is fully evident from the above said order of the AEO, which was the subject matter of challenge before the Government in the Rule 92 Revision Petition. This aspect is clearly evident from Ext.P-1 revisional order of the Government, as can be seen from the internal page 2 of Ext.P-1 G.O. Therefore, it was fully and clearly projected before the Government that one of the grounds for the rejection of the approval of the appointment was due to alleged lack of accommodation in the school for housing the

additional division. Therefore, this Court fails to understand as to the factual basis of the allegation in Ext.P-11 that the petitioner herein had suppressed the fact regarding the alleged lack of accommodation in the school, etc. The main fact in issue before the Government in the Rule 92 revision petition, which led to Ext.P-11 revisional order, was regarding the legality and correctness of the orders of the AEO, Deputy Director and the DPI. On these aspects of the matter and mere reading of page 2 of Ext.P-1 G.O, would make it beyond the shadow of any doubt that the Government was fully cognisant regarding the alleged lack of accommodation in the school for housing the additional division. Therefore, the aforementioned grounds stated in Ext.P-1 are also absolutely untenable and unsustainable. Maybe that the Government in Ext.P-1 had not given due consideration on this aspect regarding the alleged lack of accommodation in the school. But to allege that the petitioner herein had suppressed the fact regarding the alleged lack of accommodation is absolutely factually wrong and baseless.

16. The fourth ground stated in Ext.P-11 is that, "In the G.O. (Rt).No. 4058/2007/GEdn. dated 5.9.2007, while examining Ext.P-8 representation in W.P.(C).No. 33578/2005, the above reasons are not seen taken into consideration". As the aforementioned first three grounds

are found to be untenable and unsustainable, the fourth ground is also equally unsustainable. The gist of the matter projected therein is that the aforementioned first three grounds have not been taken into consideration in Ext.P-1 revisional order by the Government and that therefore Ext.P-1 Government order is vitiated by irrelevant consideration, etc. The said fourth finding in Ext.P-11 is also thus equally unsustainable due to the aforementioned reasons.

17. For these reasons, the impugned Ext.P-11 Government order is vitiated by irrelevant considerations and also for not taking into consideration the crucial relevant aspects. Accordingly, the impugned decision in Ext.P-11 is quashed. But the mere quashment of Ext.P-11 will not automatically lead to the situation of this Court issuing a positive mandamus to the Government to straightaway approve the appointment of the petitioner with effect from 18.11.2004 as covered by Ext.P-4 herein and to pay her salary for the period 2004-05 or that any directions in the matter of recognizing consequential the Rule 51A claim of the petitioner from the academic years 2006-07 onwards. Those issues can be decided only after adjudication of certain crucial relevant aspects of the matter to be stated hereinafter and as such relevant aspects have not gained the attention of the Government of Ext.P-11, this Court

is of the considered opinion that the matter has to be remitted to the Government for adjudicating such relevant aspects.

18. The petitioner has a contention that the school is a pre-KER institution on the basis of Exts.P-18, P-15 and P-20 and that therefore the issues relating to the accommodation of classes in respondent school, are to be determined on the basis of pre-KER parameters, in view of the Division Bench decision of this Court reported in *Manager, Vengeri A.U.P. School v. State of Kerala*, reported in 2009 (2) KLT 856. The 8th respondent has raised a contra contention in this regard that though the school started functioning during the pre-KER period, all the old buildings were demolished and reconstructed twice long after coming into force of the KER and that all the present buildings of the school are on the basis of KER specifications as borne out by Ext.R-8 (i) to Ext.R-8(n). On this basis, it is contended by the 8th respondent that the protection of the existing rights regarding the pre-KER institutions as noted in the Division Bench judgment stated above, can be claimed only if the buildings are in fact constructed during the pre-KER times and are fit for use and are being used at the time of making of the claim. That in a case where the old buildings of the pre-KER school have been demolished and new constructions have

been made based on the KER specifications, then the parameters are to be adjudged on the basis of the stipulations and specifications in the KER and that consequentially, the petitioner cannot claim the benefit of such pre-existing rights in respect of the school buildings in question. The Government should consider these aspects of the matter. It will be open to the Government to depute a competent officer of the department to conduct an inspection of the school and report about the exact facilities of the school buildings and also aspects regarding the disputed issue of accommodation for housing the additional division in Std.III for 2004-2005. The petitioner's contention based on Exts.P-13 and P-14 that she had actually worked in the school is also a matter that should be examined by the Government. In this regard, it will be equally open to the Government to direct the departmental officer concerned to make any enquiry in those aspects, if found necessary. The copy of such report of the departmental officer shall be given to the petitioner, R-8, R-6 and R-9. The petitioner and the 8th respondent will be at liberty to submit detailed representations in aid of their respective contentions. If it is found by the Government that the petitioner's appointment for 2004-05 is liable to be approved, then the consequential contentions of the petitioner regarding her claimed

Rule 51A right for the new vacancy arisen in the school since 2006-07 is also to be considered in the light of the judgments of this Court in Joshi v. Krishna P.Rajan reported in 2007 (2) KLT SN 63 (Case No.85), Geetha v. Geo Thomas reported 2009 (4) KLT 514, Ext.P-19 judgment in W.A.No. 1262/2007, etc. It is made clear that it is not open to the Government to reopen the issue regarding the admissibility of the additional division and the consideration of the Government shall be primarily directed to the issue regarding the accommodation in the school for housing the division and Std.III and the other consequential issues stated herein above. It is further made clear that if the Government decides that the approval of the appointment of the petitioner on 18.11.2004 as per Ext.P-4 is not liable to be approved, then the Government may issue necessary directions in the matter of the claim of the 8th respondent for appointment as L.P.S.A. in the school for the academic years 2006-07 onwards. It is further made clear that the approval already granted to the appointments of the petitioner and the 8th respondent with effect from the academic year 2011-12 based on the interim order dated 6.9.2011 may not be disturbed in any way, irrespective as to the finding of the Government on the aforementioned claim of the petitioner for appointment made on

18.11.2004. It is further made clear that the admissibility of the additional division in Std. III for 2004-05 as ordered in Ext.P-1 will not automatically lead to the approval of the appointment of the petitioner on 18.11.2004 and the issues in that regard as mentioned above will have to be adjudicated by the Government and a decision be taken thereon, as already held by the Division Bench of this Court in Ext.P-3 and Ext.R-8(e) judgments. The petitioner and the 8th respondent will submit their representations before the Government along with photocopies of the decisions of this Court that they may rely on and along with certified copy of this judgment, within two weeks from the date of issuance of the said certified copy. The Government shall give a reasonable opportunity of being heard to the petitioner, and the 6th, 8th and 9th respondents. Final decision in the matter shall be taken by the Government within the outer time limit of four months from the date of production of a certified copy of this judgment.

With these observations and directions, the Writ Petition (Civil) stands finally disposed of.

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///True copy///

Sd/-
ALEXANDER THOMAS, JUDGE

P.S. to Judge

