

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

WEDNESDAY, THE 19TH DAY OF AUGUST 2015/28TH SRAVANA, 1937

WP(C).No. 25087 of 2013 (I)

PETITIONER(S):

**V.INDU
W/O.C.GIREESH KUMAR, CLUSTER CO-ORDINATOR
BRC (SSA)NILAMBOOR, MALAPPURAM DISTRICT.**

**BY ADVS.SRI.V.A.MUHAMMED
SRI.M.SAJJAD**

RESPONDENT(S):

- 1. THE STATE OF KERALA
REPRESENTED BY ITS SECRETARY TO GOVERNMENT
GENERAL EDUCATION DEPARTMENT, SECRETARIAT
THIRUVANANTHAPURAM-695001.**
- 2. THE DIRECTOR OF PUBLIC INSTRUCTIONS
JAGATHY, THIRUVANANTHAPURAM-695014.**
- 3. THE DEPUTY DIRECTOR OF EDUCATION
DOWN HILL, MALAPPURAM-676519.**
- 4. THE DISTRICT EDUCATIONAL OFFICER
WANDOOR, MALAPPURAM DISTRICT-679328.**
- 5. THE MANAGER
SREE VIVEKANANDA HIGHER SECONDARY SCHOOL, PALEMAD
MALAPPURAM DISTRICT-679331.**

**R5 BY ADV.SRI.T.S.JOHN
R5 BY ADV.SRI.JESTIN MATHEW
R5 BY ADV.SRI.T.D.SAMUEL
R3 BY GOVERNMENT PLEADER SRI.T.R.RAJESH**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
19-08-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1 : TRUE COPY OF THE APPOINTMENT ORDER OF THE PETITIONER DT.8-6-2005.

EXHIBIT P2 : TRUE COPY OF THE LETTER NO.SVM/93/09 DT.8-9-2009 OF THE MANAGER.

EXHIBIT P3 : TRUE COPY OF THE ORDER NO.K.DIS.A3/7089/09 DT.7-4-2010 OF R4.

EXHIBIT P4 : TRUE COPY OF THE ORDER NO.K.DIS.B2/11859/2010 DT.1-11-2010 OF THE DEPUTY DIRECTOR.

EXHIBIT P5 : TRUE COPY OF THE ORDER NO.EM3/1328/2011/DPI/K.DIS DT.1-8-2011 OF R2.

EXHIBIT P6 : TRUE COPY OF THE REVISION FILED BEFORE THE GOVERNMENT DT.12-9-2011 BY THE MANAGER.

EXHIBIT P7 : TRUE COPY OF THE HEARING NOTICE OF THE GOVERNMENT DT.13-9-2012.

EXHIBIT P8 : TRUE COPY OF THE HEARING NOTE SUBMITTED ON BEHALF OF THE PETITIONER WITHOUT ANNEXURES

EXHIBIT P9 : TRUE COPY OF THE GO(RT)NO.104/2013/G.EDN. DT.7-1-2013 OF THE GOVERNMENT.

EXHIBIT P10 : TRUE COPY OF THE STAFF FIXATION ORDER 2009-2010 DT.5-1-2010.

EXHIBIT P11 : TRUE COPY OF THE DECISION REPORTED IN 2007(1)KLT 766 DT.18-10-2006.

EXHIBIT P12 : TRUE COPY OF THE CIRCULAR OF THE GOVERNMENT DT.4-4-2005.

EXHIBIT P13 : TRUE COPY OF THE GO(RT)NO.103/2012/G.EDN. DT.6-1-2012 OF THE GOVERNMENT.

EXHIBIT P14 : TRUE COPY OF THE ORDER OF THE HON'BLE SUPREME COURT DT.8-5-2008.

EXHIBIT P15 : TRUE COPY OF THE ORDER OF THE DEPUTY DIRECTOR OF EDUCATION DT.18-6-2012.

RESPONDENT(S)' EXHIBITS: NIL.

//TRUE COPY//

P.S. TO JUDGE

A.K.JAYASANKARAN NAMBIAR, J.

W.P.(C).NO.25087 OF 2013 (I)

Dated this the 19th day of August, 2015

J U D G M E N T

The petitioner was appointed as HSA (English) in the 5th respondent School with effect from 8.6.2005 by Ext.P1 order. The said appointment was approved by the educational authorities. Subsequently, with effect from 15.7.2008, the post itself was abolished, and accordingly, the petitioner was retrenched from service. The petitioner was then re-appointed with effect from 13.10.2009, by Ext.P2 order. This time around, the approval to the appointment of the petitioner was denied by the educational authorities as evidenced by Exts.P3, P4 and P5 orders of the 4th respondent, 3rd respondent and the 2nd respondent respectively. On a revision preferred by the 5th respondent Manager before the Government, the Government also did not find merit in the revision petition filed by the Manager, and by Ext.P9 order dated 7.1.2013, the Government rejected the said revision petition. The reason for denial of approval to the appointment of the petitioner with effect from 13.10.2009, is stated as follows:

“The question to be considered in this case is whether a claimant may be appointed against an arising vacancy, when a teacher is retained in the school under 1:40 ratio. There is no doubt, if the teacher is in the 1:40 ratio it is to be absorbed first then only comes the claim of 51 A claimant if the subject ratio is in order. All the teachers retained under 1:40 as HSA(C.S) and they were also appointed before 2002 ie. before the new cadre came into force, they are eligible to be appointed against the post of HSA(English) as per the old subject ratio. The claim of a 51 A claimant can be protected, only after protecting the interest of existing HSA(CS) teachers.

Hence Smt.Indu V. has no claim for the post of HSA (English), while Smt.Soosamma, HSA (NS), the senior most teacher retained under 1:40 is to be absorbed against the post.

In the circumstances the request of the petitioner is rejected.”

2. Exts.P3, P4, P5 and P9 orders are impugned in the present writ petition, where a direction is also sought to the respondents to approve the appointment of the petitioner for the period from 13.10.2009 onwards.

3. A counter affidavit has been filed on behalf of the official respondents, wherein, Ext.P9 order is sought to be justified on the basis of the reasons contained therein.

4. I have heard the learned counsel for the petitioner, the learned counsel for the 5th respondent as also the learned Government Pleader for the official respondents.

5. On a consideration of the facts and circumstances of the case as also the submissions made across the bar, I find that, it is now well settled through Ext.P14 judgment of the Supreme Court that whenever a question of promotion arises, the first question that has to be examined is the subject requirement of that vacancy and only such persons could be appointed who have the minimum qualification for teaching that subject. This finding of the Supreme Court was rendered in the context of the interpretation to be placed on the first proviso to Rule 43 of Chapter XIVA of the Kerala Education Rules [KER]. In the backdrop of the said decision, and the interpretation so placed on the provisions of Rule 43, referred to above, the finding in Ext.P9 order that a teacher, who is retained in the School under a 1:40 ratio, has to be preferred over the petitioner who, not only was a Rule 51 A claimant but also a beneficiary of the interpretation given by the Supreme Court to the provisions of Rule 43 of Chapter XIVA of

the KER, cannot be legally sustained. While it is trite that a right that is granted pursuant to a Government order cannot take precedence over a right that is confirmed by a statutory rule, I also note that the decision of this Court in **Manager, P.K. High School and Others v. State of Kerala and Others - [2011 (4) KHC 179]** recognises that a right of a promotee under Rule 43 will get precedence over protected teachers from Schools under other educational agencies. Thus, in any view of the matter, the superior right of the petitioner to the post of HSA (English) in the vacancy that arose with effect from 13.10.2009, cannot but be recognised since those teachers retained under the 1:40 ratio, can trace their right to be retained in the School only to the Government order that was in force during the relevant time. Such a right has necessarily to give way to the right of another that is traceable to a statutory Rule. Resultantly, I quash Ext.P9 order, as well as Exts.P3, P4 and P5 orders which have since merged into Ext.P9 order, and direct the respondents to approve the appointment of the petitioner as HSA (English) in the School for the period from 13.10.2009 onwards. The respondents shall pass consequential orders to this effect, within a period of one month from the date of receipt of a copy of this judgment, and pay the consequential

monetary benefits flowing from the said approval, to the petitioner, within a period of three months thereafter.

The writ petition is disposed as above.

A.K.JAYASANKARAN NAMBIAR
JUDGE

prp