

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

THURSDAY, THE 20TH DAY OF AUGUST 2015/29TH SRAVANA, 1937

WP(C).No. 27917 of 2009 (H)

PETITIONERS:

1. JASEELA.P.K., LPSA,
AML P SCHOOL, THIRUTHIKKUNDU, MALAPPURAM DISTRICT.
2. A.RANJITH, LPSA,
AML P SCHOOL, THIRUTHIKKUNDU, MALAPPURAM DISTRICT.

BY ADVS.SRI.K.JAJU BABU (SENIOR)
SMT.M.U.VIJAYALAKSHMI
SRI.BRIJESH MOHAN
SRI.T.R.SADEESAN
SRI.T.S.SHYAM PRASANTH

RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY
SECRETARY TO GOVERNMENT,
GENERAL EDUCATION DEPARTMENT
GOVT. SECRETARIAT, TRIVANDRUM.
2. THE DIRECTOR OF PUBLIC INSTRUCTIONS,
TRIVANDRUM.
3. THE ASST.EDUCATIONAL OFFICER,
EDAPPAL, MALAPPURAM DISTRICT.
4. THE MANAGER,
AML P SCHOOL, THIRUTHIKKUNDU, MALAPPURAM DISTRICT.

R1 TO R3 BY GOVERNMENT PLEADER SRI.P.P.PADMALAYAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12.08.2015, THE
COURT ON 20.08.2015 DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS:

Ext.P1 : TRUE COPY OF APPOINTMENT ORDER APPROVED AS PER ORDER NO.K.DIS.F/2176/04 DATED 25.08.04 BY THE 3RD RESPONDENT TO THE 1ST PETITIONER.

Ext.P2 : TRUE COPY OF THE APPOINTMENT ORDER APPROVED AS PER ORDER NO.K.DIS.F/2176/04 DATED 25.09.2004 BY THE 3RD RESPONDENT TO THE 2ND PETITIONER.

Ext.P3 : TRUE COPY OF THE ORDER NO.C/2729/05 DATED 30.05.09 ISSUED BY THE 3RD RESPONDENT.

Ext.P4 : TRUE COPY OF THE CIRCULAR NO.H1/20811/05/DPI DATED 4.5.05 ISSUED BY THE 3RD RESPONDENT.

Ext.P5 : TRUE COPY OF G.O.(P) NO.46/2006/G.EDN. DATED 1.2.06 ISSUED BY THE 1ST RESPONDENT.

Ext.P5(a): TRUE COPY OF G.O.(RT) NO.975/06/G.EDN. DATED 3.3.06 ISSUED BY THE 1ST RESPONDENT.

Ext.P6 : TRUE COPY OF JUDGMENT DATED 26.10.06 IN W.P.(C) NO.17238/05 OF THIS HON'BLE COURT.

Ext.P7 : TRUE COPY OF THE ORDER DATED 21.2.07 IN R.P.NO.18/07 IN W.P.(C) 17238/05 OF THIS HON'BLE COURT.

Ext.P8 : TRUE COPY OF THE JUDGMENT DATED 3.4.07 IN writ appeal.886/07 OF THIS HON'BLE COURT.

Ext.P9 : TRUE COPY OF THE ORDER NO.G2/21355/07/KDIS./DPI DATED 24.7.07 ISSUED BY THE ADDL. DIRECTOR OF PUBLIC INSTRUCTIONS.

Ext.P10: TRUE COPY OF ORDER NO.F/3188/07 DATED 4.10.07 ISSUED BY THE 3RD RESPONDENT.

Ext.P11 : TRUE COPY OF HEARING NOTICE NO.G.2/3381/2008/DPI DATED 19.8.09 ISSUED BY THE 2ND RESPONDENT.

Ext.P12: TRUE COPY OF THE REQUEST SUBMITTED BY THE 4TH RESPONDENT TO THE 3RD RESPONDENT ON 25.08.09.

Ext.P13 : TRUE COPY OF THE OBJECTION GIVEN BY THE 1ST PETITIONER TO THE 2ND RESPONDENT DATED 28.08.2009.

Ext.P14: TRUE COPY OF THE OBJECTION GIVEN BY THE 2ND PETITIONER TO THE 2ND RESPONDENT DATED 28.08.09.

Ext.P15: TRUE COPY OF THE ORDER NO.G2/3381/08/DPI/K.DIS. DATED 17.9.09 ISSUED BY THE 2ND RESPONDENT.

RESPONDENTS' ANNEXURES: NIL

//TRUE COPY//

P.A. to Judge

smv

SHAJI P. CHALY, J.

W.P.(C). No.27917 of 2009

Dated this the 20th day of August, 2015**JUDGMENT**

This writ petition was filed by the petitioners seeking to quash Ext.P15 order passed by the 2nd respondent and for other related reliefs. By Ext.P15 order, 2nd respondent cancelled the order dated 04.10.2007 bearing No.F/3168/05 of the 3rd respondent, regularizing approval of the petitioners as Lower Primary School Assistants (hereinafter called LPSA).

2. Brief facts for the disposal of writ petition are as follows:

3. First petitioner was appointed as LPSA under the 4th respondent management in the promotion vacancy of one Smt.P.Radha w.e.f. 02.06.2004 and the said appointment was approved on 25.08.2004. Similarly 2nd petitioner was appointed as LPSA under the 4th respondent in the retirement vacancy of Smt.Indira. V.N. w.e.f. 02.06.2004 and the said appointment was approved by the 3rd respondent as per order dated 25.08.2004 which are evidenced by Exts.P1 and P2. Without issuing any notice, on 30.05.2005 as per Ext.P3, 3rd respondent directed the

Headmaster of the school to stop claiming salary of the petitioners and also directed to refund the salary so far paid to them. Apparently Ext.P3 was issued on the basis of a circular issued by the 2nd respondent on 04.05.2005 against filling up of vacancies in newly opened/upgraded aided schools without appointing protected teachers. The 4th respondent school was opened in the year 1979 and the said school accommodated one protected teacher as LPSA from 27.08.1992 to 04.08.1993 until the teacher in question was re-posted in her parent school.

4. To cut a long story short, aggrieved by Ext.P3 order, petitioners have preferred W.P.(C) 17238/2005 before this Court. During the pendency of the writ petition Government issued Ext.P5 order, G.O.(P) 46/2006 dated 01.02.2006 and directed approval of 402 teaching and non-teaching staff appointed upto 31.12.2004 who were denied approval on account of the objections pursuant to non-appointment of protected teachers in the concerned school. Again as per Ext.P5(a) order, Government had issued direction to approve 20 teaching and non-teaching staff appointed in a newly upgraded aided school without accommodating a single protected teacher and in that case the direction to approve appointment was given subject to the condition that the Manager will fill up all the next arising

vacancies with protected teachers.

5. It was submitted that Ext.P3 was not implemented pursuant to the interim order passed by this Court in the writ petition referred supra and when the said writ petition came up for hearing a copy of Ext.P5 was produced as Ext.P8 and 3rd respondent conceded that the petitioners come within the purview of Government order and their appointments are also covered by the said order.

6. Taking into account the said aspect, by Ext.P6 judgment, this Court held that Ext.P3 order impugned therein was liable to be reviewed. Against the said judgment, R.P.18/2007 was filed by respondents 1 to 3 which was dismissed on 21.02.2007 as per Ext.P7 order. Aggrieved by the said order respondents 1 to 3 filed Writ Appeal No.886/2007 and by Ext.P8 judgment the Division Bench of this Court took the view that since the appointment evidenced by Exts.P1 and P2 were already approved by the 3rd respondent, it is for the higher authorities, if at all to revoke such appointments, if the law permits, after due notice to the parties. Accordingly the Division Bench vacated the direction in Exts.P6 and P7 to the 3rd respondent to re-consider the matter.

7. Even though permission was granted in Ext.P6 judgment,

2nd respondent did not invoke revisional jurisdiction under Rule 8A of Chapter XIVA the Kerala Education Rules (hereinafter called 'the Rules') to interfere with the approval of appointment of the petitioners as per Exts.P1 and P2. But on the other hand the request of the 3rd respondent to cancel the approval granted as per Exts.P1 and P2 was turned down by the 2nd respondent as per Ext.P9 order dated 24.07.2007. The said order has become final and conclusive. The 3rd respondent has also issued Ext.P10 proceedings dated 04.10.2007 regularizing the approval granted as per Exts.P1 and P2.

8. Thereafter, after two years, petitioners were served with Ext.P11 notice dated 19.08.2009 from the office of the 2nd respondent directing petitioners to be present for a personal hearing on 28.08.2009. Since the said notice did not contain any details, 4th respondent has made Ext.P12 request to the 3rd respondent to furnish information with regard to the issuance of Ext.P11, a copy of which was send back, engrossing the reply that a communication similar to Ext.P11 was received by the 3rd respondent also, but he was unaware of the details of the same.

9. Any how petitioners, submitted Exts.P13 and P14 objections after they were heard in accordance with the stipulation contained in Ext.P11. At the time of hearing

petitioners were informed that in the audit report the Accountant General had raised objections which was the reason for issuing Ext.P11 notice. Thereupon, Ext.P15 order was passed by the 2nd respondent by which Ext.P10 order passed by the 3rd respondent was cancelled. It is thus aggrieved by Ext.P15, this writ petition was filed.

10. The 1st respondent has filed a counter affidavit and contended that in view of Ext.P8 Division Bench judgment of this Court since the appointment was approved by the Assistant Educational Officer it was for the higher authorities to revoke such appointment after due notice to the parties. Under that circumstances it was contended that the 3rd respondent heard the petitioners accordingly and requested the 2nd respondent to cancel the approval granted as per Exts.P1 and P2. Thereupon Personal hearing was conducted by the Additional Director of Public Instruction (Academic) on 13.7.2007 and all concerned were heard and thereafter 3rd respondent was directed to regularize the approval of the petitioners after obtaining declaration on stamp paper from the Manager to the effect that he will preserve the next arising vacancy for absorbing protected hands permanently as per the Office Order No.G2/21355/07 dated 24.7.2007 in view of the judgment of this Court in Exts.P6,

P7 and P8. Thereafter, on getting direction from the 2nd respondent, 3rd respondent issued Ext.P10 proceedings regularizing the approval granted as per Exts.P1 and P2. It was further contended that as there was no provision in GO(P) 46/2006/GE to approve the appointment of teacher after obtaining a declaration on stamp paper from the Manager to the effect that the next arising vacancy will be preserved for absorbing protected teachers, it was observed that the orders in Ext.P9 is not in accordance with the G.O. cited supra dated 01.02.2006. Hence review of the matter has been made suo motu by the 2nd respondent with notice to the petitioners and the Manager and all concerned were heard and the 2nd respondent found that the appointment of the petitioners was against the Government Orders pertaining to deployment of protected retrenched teachers and the same was valid and a speaking order. It was also the further contention that the petitioners could not produce any relevant information proving that the appointments were regular and that the objections raised by the Accountant General were baseless. It was also stated that Ext.P9 order was irregular and contrary to the existing Government orders and was issued misinterpreting the directions contained in Ext.P8 judgment of this Court and hence it was reviewed and

cancelled.

11. It appears that during the pendency of this Writ Petition, I.A. 10767/2013 was filed by the petitioners seeking clarification that the above Writ Petition will not stand in the way of sanction and disbursement of higher grade to the petitioners referred to be sanctioned as per Exts.P16 and P17 orders dated 6.8.2012 and 8.2.2013 respectively produced along with the said IA. It appears that when the said IA came up for consideration on 13.8.2013, this Court directed the respondents to file a statement answering the contentions raised in the above IA. Accordingly a statement was filed dated 30.9.2013 contending that during the period 2004-2005 as many as 21 protected teachers were available in the Malappuram revenue district. A copy of the said list was produced along with the statement as Annexure-R5(a) and refuted the contention of the petitioners that at the time of their appointment no protected hands were available in Malappuram revenue district. It was further stated that as per instructions received from the Deputy Director of Education, Malappuram, list of protected teachers mentioned above is seen communicated from time to time by putting the same in the notice board. With the above exercise of publishing the list of protected teachers in Malappuram District the

requirement under law carried out having published the list both in the office of the Deputy Director of Education as well as in the office of the concerned Assistant Educational Officers. Further it was stated that the list of protected teachers mentioned above has been published in the notice board of the 3rd respondent during the relevant period and therefore, the Educational Authorities have fulfilled the obligation cast upon by preparing the list of protected teachers and also publishing the same in the notice board of the Educational Authorities concerned.

12. Heard learned counsel for the petitioners and the learned Government Pleader.

13. Learned counsel for the petitioners contended that so far as the approval of the appointment of petitioners were concerned, same was regularised pursuant to Exts.P9 and P10 orders and the same have become final. It was also contended that those orders were not under challenge at any point of time. But by a strange proceedings, the 2nd respondent has initiated suo motu action by issuing Ext.P11 notice, which did not contain any information as to the purpose for which said notice was issued by the 2nd respondent. It was further contented by the learned counsel that since Ext.P11 notice did not contain any information, the petitioners could not file a proper

representation to the same prior to the hearing and Exts.P13 and P14 objections were filed after the hearing was concluded. Thereupon he contended that Ext.P11 notice itself was bad for violative principles of natural justice. Learned Counsel further contended that so far as Ext.P15 order was concerned, same was also a non speaking order, apart from narrating the factual aspects pertaining to the appointment of the petitioners, the details of the judgment rendered by this Court in Exts.P6, P7 and P8 no reasons are spelt out in order to identify as to why the regularization of the appointments pursuant to Exts.P9 and P10 was cancelled. Learned counsel also contended that even though as per Ext.P15, the regularization of the appointment was cancelled, the approval of appointment of the petitioners was never cancelled and the same is remaining intact. Therefore, the learned counsel sought to quash Ext.P15 order passed by the 2nd respondent.

14. On the other hand, learned Government Pleader contended that Ext.P11 notice was issued pursuant to objections raised by the Audit Department concerning the regularization of the approval of the petitioners in view of their appointment made overlooking the appointment of protected teachers in Malappuram District. Learned Government Pleader also

contended that in view of Ext.P8 judgment the higher authorities were given liberty to pass appropriate orders concerning the appointment of the petitioners and therefore the suo motu review by the 2nd respondent was in order. The learned Government Pleader also contended that Ext.P15 was a legal and valid order and the same did not suffer from vice of arbitrariness and the same was passed observing the principles of natural justice.

15. Learned counsel for the petitioners has also brought to my notice the manner in which the list of protected teachers was published. The list was published by the statutory authorities in the respective notice boards and the same was never communicated to the 4th respondent management. Learned counsel has brought my attention to the notification bearing No.178/2002 dated 28.6.2002 and contended that the list of protected teachers, if any, should have been forwarded to the 4th respondent to have followed the procedures, if any, contemplated under law. This factual and legal circumstances was not disputed by the Government in the counter affidavit but on the other hand same was admitted in the statement filed by the Government.

16. I have considered the rival submissions made by the

counsel, perused the pleadings, documents, counter affidavit and the statement filed by the Government. Apparently Exts.P9 and P10 orders passed by the appropriate statutory authorities have become final. Ext.P9 order was passed two years prior to the issuance of Ext.P11 notice. It was also disclosed that Ext.P11 notice was a suo motu proceeding initiated by the second respondent. Even though the power under which discretion was exercised by the second respondent was not discernible from Ext.P11, I presume that 2nd respondent has invoked the powers conferred on him under Rule 8A of the Kerala Education Rules. Rule 8A confers power on the 2nd respondent to revise orders relating to approval of appointments issued by the subordinate officers on his own motion or otherwise by calling for records relating to such orders. Therefore, in my view the 2nd respondent was vested with power to re-open the order passed by the subordinate officer relating to approval of appointments, subject to the proviso to Rule 8A which reads as follows:

“Provided that order affecting the interest of a person shall not be passed under this Rule unless the person concerned has been given an opportunity of making a representation which he may wish to make against such orders”.

17. Therefore, reading of the proviso shows that no order

affecting the interest of a person shall be passed unless the person concerned was provided with an opportunity of making any representation which he may wish to make against such orders. In my view going by the imperative expressions contained in the proviso, 2nd respondent was duty bound to issue a notice explaining the circumstances under which the concluded proceeding was re-opened and should have provided an effective opportunity to the petitioners to make a representation objecting to or explaining the circumstances by which the 2nd respondent was not entitled to re-open the proceedings. On a perusal of Ext.P11 notice, it was very explicit that the 2nd respondent had not stated anything at all regarding the revision of Ext.P10 nor it contained even the basic details enabling the petitioners to make a representation against the intention of the 2nd respondent to re-open the concluded proceedings. Therefore, in my view Ext.P11 notice which led to Ext.P15 order was basically defective for want of compliance with provisions of law. Moreover, principles of natural justice demanded providing necessary details to the petitioners to make a representation as contemplated under law. That apart what I could gather from Exts.P13 and P14 objections and argument notes filed by the petitioners, the same were filed by the

petitioners on the date of hearing and subsequent to the date of hearing respectively i.e. the argument notes were filed on the date of hearing and the objections were filed after hearing since it contained details of information received during the course of arguments. According to me, as per the proviso to Rule 8A, petitioners were entitled to know the proceedings and make a representation after understanding the reasons for re-opening the concluded proceedings and thereafter only the hearing should have been conducted. But on the other hand, Ext.P11 notice contained only a direction to the petitioners to file argument notes, and that too without furnishing any details.

18. That apart Ext.P15 order reveals that Ext.P11 notice was issued based on an audit objection, the details were never furnished in Ext.P11 nor in Ext.P15 order. Moreover, the 2nd respondent, in the order impugned had traced the history of the case but no relevant circumstances required for re-opening of concluded proceedings were recited. In my view relevant reasons relating to the action initiated for revising the proceedings should have found a place in Ext.P11 notice. But for reasons best known to 2nd respondent same are lacking. This was vivid from the last paragraph of Ext.P15 which read thus:

“The issue has been examined in detail along with the

report of Assistant Educational Officer, Edappal, arguments on hearing, argument notes, direction of Government and the objection raised by Accountant General, Kerala. It is observed that the direction contained in the order read as 9th paper above was irregular as it was contrary to the existing Government Orders and it was issued misinterpreting the direction in the judgment of Honourable High Court of Kerala vide order read as 6th paper above. As such, the order issued from this office read as 9th paper above and order No.F/3168/05 dated, 04.10.2007 of Assistant Educational Officer, Edappal are cancelled with immediate effect. The Assistant Educational Officer, Edappal will take necessary action in this regard."

19. In my view Ext.P15 did not contain any details regarding the circumstances under which Ext.P11 notice was issued for re-opening of a concluded proceeding. So also I found that 2nd respondent relied on direction of Government, objections raised by the Accountant General and certain Government orders. According to the learned counsel for the petitioners no documents so relied on by the 2nd respondent were provided to the petitioners. That was a grave lapse occurred on the part of the 2nd respondent for not providing the documents relied on by the 2nd respondent while exercising his power to upset Exts.P9 and P10 proceedings. So also Ext.P15 can never said to be a speaking order for the reason that it did not contain any material

facts justifying the circumstances under which 2nd respondent has invoked his suo motu powers provided under Rule 8A.

20. In my view, having not provided an opportunity to submit a representation first and then an opportunity of hearing, was violative of the principles of natural justice. Principles of natural justice demanded supply of sufficient materials to the petitioners to answer the proceeding instituted against them. Facts of this case revealed that the petitioners did not get an opportunity to represent their case properly and effectively. The condition precedent to the exercise of power was not satisfied by the 2nd respondent, but on the contrary ignored Rule 8A and thereby it lead to a situation violative of principles of natural justice. Further Exts.P13 and P14 reveal that certain contents thereon were materials collected during the course of hearing which according to me was a glaring example of patent arbitrariness. Therefore, according to me Ext.P15 was not a speaking order at all. When the Rule empowers 2nd respondent to do an act in a specified manner, it was imperative on him to act accordingly and further exercise of such discretion, must be explicit and clear in order to enable all concerned to understand whether such discretion was exercised properly. Moreover, it is a well settled proposition of law, that the discretion must always

be exercised in a judicial and judicious manner and the reason for exercising discretion must be cogent and convincing and same should be apparent on the face of the record. Thus altogether, Ext.P15 order was not a sustainable order, when factual circumstances were tested against the provisions of law and the principles of natural justice. Therefore, the same suffers from the vice of patent arbitrariness and liable to be struck down.

Accordingly, I set aside Ext.P15 order passed by the 2nd respondent and direct the 2nd respondent to issue fresh notice to the petitioners with relevant details enabling them to make suitable representations and pass orders thereon within a period of three months from the date of receipt of a copy of this judgment after providing sufficient opportunity of hearing to the petitioners.

Sd/-
SHAJI P. CHALY
JUDGE

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