

The State of Kerala, vs Biju E,

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Court : Kerala

Decided On : Apr-13-2023

Judge : Honourable Mr. Justice P.B.Suresh Kumar, Honourable Mrs. Justice Sophy Thomas

Appeal No. : WA/302/2023

Appellant : The State of Kerala,

Respondent : BIJU E,

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR & THE HONOURABLE MRS. JUSTICE SOPHY THOMAS THURSDAY, THE 13TH DAY OF APRIL 2023 / 23RD CHAITHRA, 1945 WA NO. 302 OF 2023 AGAINST THE JUDGMENT DATED 05.01.2023 IN WP(C) 17115/2022 OF HIGH COURT OF KERALA APPELLANTS/RESPONDENTS 1 TO 5 IN WPC:

1 THE STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY TO GOVERNMENT, SECRETARIAT, THIRUVANANTHAPURAM-695 001. 2 THE SECRETARY, FINANCE

DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM - 695 001. 3 THE REGIONAL DEPUTY
DIRECTOR, HIGHER SECONDARY EDUCATION, REGIONAL OFFICE,
KOZHIKODE - 673 003. 4 THE DIRECTOR OF TREASURIES,
DIRECTORATE OF TREASURIES, THYCAUD,
THIRUVANANTHAPURAM - 695 014. 5 THE SUB TREASURY
OFFICER, PERAMBRA, KOZHIKODE - 673 525., PIN - 67352 BY ADV
A.J.VARGHESE SR.GP.

RESPONDENTS/PETITIONER & 6TH RESPONDENT IN WP(C): 1 BIJU
E, S/O. BALAN NAIR, H.S.S.T. POLITICAL SCIENCE, VADAKKUMPAD
HIGHER SECONDARY SCHOOL, PALERI TOWN P.O., KOZHIKODE,
RESIDING AT VAZHAYIL HOUSE, KUTTIYADI, PALERI P.O.,
KOZHIKODE - 673 508., PIN - 673508 Writ Appeal No.302 of 2023 2 2
THE MANAGER, VADAKKUMPAD HIGHER SECONDARY SCHOOL,
PALERI, KUTTIYADI, KOZHIKODE - 673 508. BY ADVS. ELVIN PETER
P.J. V.RAJENDRAN M.S.MOHAMMED ANSARY(K/260/1981) SOHAIL
MOHAMMED ANSARY(K/915/2016) AMEENA.R(K/001602/2018) THIS
WRIT APPEAL HAVING COME UP FOR ADMISSION ON 13.04.2023,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: Writ
Appeal No.302 of 2023 3 P.B.SURESH KUMAR & SOPHY THOMAS, JJ.
----- Writ Appeal No.302 of 2023
----- Dated this the 13th day of April, 2023

JUDGMENT

P.B.Suresh Kumar, J.

This appeal is directed against the judgment dated 05.01.2023 in W.P.(C) No.17115 of 2022. The appellants are respondents 1 to 5 in the writ petition. Parties and documents are referred to in this judgment for convenience, as they appear in the writ petition.

2. Sans unnecessary details, the facts of the case are the following : The petitioner was an Upper Primary School Teacher in an aided Higher Secondary School.

While the petitioner was working as such, a few additional Higher Secondary batches Writ Appeal No.302 of 2023 4

were sanctioned to the School in the academic year 2010-2011. Later, when the Government sanctioned additional posts of Higher Secondary School Teachers for the School to conduct the additional batches, the Manager appointed the petitioner by transfer as Higher Secondary School Teacher in one of the

vacancies on 30.08.2013. The said appointment of the petitioner was not approved by the competent authority then, as a senior teacher in the School staked a claim for appointment in the vacancy in which the petitioner was appointed. Later, the Regional Deputy Director considered the rival claims and directed the Manager to appoint the senior teacher in the place of the petitioner. Though the petitioner challenged the decision of the Regional Deputy Director in appeal, the Appellate Authority affirmed the decision of the Regional Deputy Director. The petitioner took up the matter in revision before the Government and the Government upheld the claim of the petitioner. The senior teacher challenged the decision of the Government in a writ petition before this Court. The petitioner also instituted a writ petition for implementing

Writ Appeal No.302 of 2023 5 the decision of the Government. The writ petitions were disposed of in terms of Ext.P7 judgment, among others directing the Regional Deputy Director to approve the appointment of the petitioner with effect from 30.08.2013. Pursuant to Ext.P7 judgment, the Regional Deputy Director

approved the appointment of the petitioner as Higher Secondary School Teacher in the school on 04.08.2021 with effect from 30.08.2013, in terms of Ext.P8 order. Thereupon, the Principal of the School had drawn and submitted the salary bill of the petitioner for the period from 01.09.2013 to 31.01.2016 for payment before the fifth respondent, the Sub Treasury Officer. Ext.P9 is the proceedings issued by the Principal of the school in this regard on 16.04.2022. The Sub Treasury Officer returned the salary bill of the petitioner taking

the stand that in the light of Ext.P12 circular of the Government, the arrears of salary payable to the petitioner could only be transferred to his Provident Fund

account. Ext.P11 is the Note issued by the Sub Treasury Officer in this regard. The writ petition was instituted in the above Writ Appeal No.302 of 2023 6

background challenging Ext.P11 Note and for a direction to the official respondents to draw and disburse the arrears of salary to the petitioner. The case set out by the petitioner in the writ petition is that the Government have directed to approve certain appointments made in aided schools from the academic year 2011-2012 which were not approved with effect from the respective dates of appointments by applying a revised teacher-student ratio as per G.O.(P) No.29 of 2016, subject to the condition that the arrears of salary payable to the teachers on account of such approval will be transferred to their Provident Fund accounts and that Ext.P12 circular is one issued by the Government reiterating the said direction of the Government and the same cannot have any application to the

facts of the present case. It was also the case of the petitioner

in the writ petition that inasmuch as the salary due to him consequent on the approval of his appointment being a property falling within the scope of Article 300A of the Constitution of India, the payment of the same cannot be deferred otherwise than in accordance with law and that there Writ Appeal No.302 of 2023 7 is no law in force which enables the Government to withhold the salary of the petitioner in the manner indicated in Ext.P12 circular, if at all it applies to the petitioner.

3. A counter affidavit was filed in the writ petition on

behalf of the State contending that Ext.P12 circular applies to situations like one involved in the present case as well and that the State is competent to issue directions to credit the arrears of salary of teachers in aided schools in their respective Provident Fund accounts for a term.

4. The learned Single Judge found that Ext.P12

circular is one intended only to cover the beneficiaries of G.O(P) No.29 of 2016 dated 29.01.2016 and that the same cannot have any application to the facts of the present case. The learned Single Judge also found that the right flowing from

the approval of the appointment of a teacher in an aided school to receive salary in terms of the Kerala Education Act (the Act) and the Kerala Education Rules (the KER), cannot be curtailed or limited by a circular issued by an Additional Secretary to Government. The learned Single Judge further found, placing

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reliance on the decision of the Andhra Pradesh High Court in Dinavahi Lakshmi Kameswari v. State of A.P., (2020) SCC OnLine AP 600 and the decision of the Apex Court affirming the same in appeal, that inasmuch as the salary payable to a teacher would form part of the property of an individual attracting Article 300A of the Constitution, such rights cannot be taken away, except by an authority of law, by issuance of an executive order. In the light of the said findings, the writ petition was allowed, Ext.P11 Note was quashed and the official respondents were directed to honour the salary bill of the petitioner. The State and its officials are aggrieved by the said decision of the learned Single Judge.

5. Heard the learned Government Pleader as also the learned counsel for the petitioner.

6. The learned Government Pleader contended that

Ext.P12 circular applies not only to the beneficiaries of G.O.(P) No.29 of 2016 dated 29.01.2016, but also to persons like the petitioner whose appointment as teacher in an aided school was approved with retrospective effect. It was also contended Writ Appeal No.302 of 2023 9

by the learned Government Pleader that merely for the reason that Ext.P12 circular was one issued by an Additional Secretary to the Government, it cannot be said that it is invalid, inasmuch as the same was one issued strictly in accordance with the Rules of Business of the Government of Kerala framed under Article 166 of the Constitution. Placing reliance on Rule 10(5) of Chapter XXX KER, it was also contended by the learned Government Pleader that the said provision enables the Government to direct transfer of the arrears of salary of teachers of aided schools to their Provident Fund accounts for a term. According

to the learned Government Pleader, in the light of the said statutory provision, it cannot be said that Ext.P12 circular is one issued without authority of law. The learned Government Pleader reinforced the said submission pointing out that even otherwise, Section 12(1) of the Act which confers power on the State Government to prescribe conditions of service of aided school teachers including the conditions relating to their pay, enables the State Government to issue a circular in the nature of Ext.P12. It was also argued by the

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learned Government Pleader that the judgment of the Division Bench of the Andhra Pradesh High Court in Dinavahi Lakshmi Kameswari cannot have any application to the facts of the present case, as the proposition laid down in the said case is only that the deferment of salary cannot be made without authority of law. The learned Government Pleader also argued that during the period from 2013 to 2021, the Government

issued two pay revision orders enhancing the pay of Government employees, including aided school teachers, and, at any rate, the benefit of the said pay revisions, as far as the petitioner is concerned, can certainly be directed to be deposited in his Provident Fund account as stipulated in the pay revision orders issued by the Government in this regard.

7. Per contra, the learned counsel for the

petitioner submitted that a combined reading of G.O.(P) No.29 of 2016 dated 29.01.2016 and Ext.P12 circular would indicate that Ext.P12 applies only to the beneficiaries of G.O.(P) No.29 of 2016. As regards the submission made by the learned Government Pleader based on Rule 10(5) of Chapter XXX KER, Writ Appeal No.302 of 2023 11

it was pointed out by the learned counsel for the petitioner that only the arrears of pay or allowances or both payable to teachers of aided schools under a scheme or revision of pay implemented with retrospective effect, could be directed to be deposited in the Provident Fund account of the teachers as per the said Rule. It

was also pointed out by the learned counsel that the said Rule cannot have application in a case of the

instant nature, since the amount covered by the salary bill which is the subject matter of Ext.P11 Note is neither the arrears payable to the petitioner under any scheme nor arrears due to the petitioner on account of any revision of pay or allowances.

8. We have given our thoughtful consideration to the arguments advanced by the learned counsel for the parties on either side.

9. As noted, the appointment of the petitioner by

transfer as Higher Secondary School Teacher in the School with effect from 30.08.2013 was against a sanctioned post. The materials indicate that it is not on account of any reason Writ Appeal No.302 of 2023 12

attributable to the petitioner that his appointment was not approved by the competent authority. Instead, it is on account of a rival claim raised by a senior teacher, that the appointment of the petitioner could not be approved then and there by the competent authority. The said dispute was resolved by this Court finally, in terms of Ext.P7 judgment and immediately thereupon, the appointment of the petitioner was approved. In the circumstances, according to us, the first and foremost question to be decided is whether the State Government is empowered, in the exercise of its executive powers, to direct deposit of the arrears of salary payable to a teacher in an aided school due to delay in the approval of his appointment, in his

Provident Fund account. If this question is answered in the negative, it is unnecessary to consider the questions viz, whether Ext.P12 circular applies to teachers like the petitioner who are not beneficiaries of G.O.(P) No.29 of 2016 dated 29.01.2016 and whether an Additional Secretary to the Government is empowered to issue a circular in the nature of Ext.P12, if at all it applies to the case of the petitioner. Writ Appeal No.302 of 2023 13

10. Dinavahi Lakshmi Kameswari was a case in

which the decision taken by the Government of Andhra Pradesh to defer a portion of the salary payable to its employees including the employees in Government aided institutions for a term, was challenged. A Division Bench of the Andhra Pradesh High Court held in the said case that though the Constitution permits the State to deprive any person the right in property by authority of law, the respondents were unable to show any provision which authorises the State to defer payment of a portion of the salary of its employees and consequently, declared that the impugned decision is illegal and arbitrary. The said decision was affirmed in appeal by the Apex Court. It was placing reliance on the said decision of the Andhra Pradesh High Court that the learned Single Judge held that the Government cannot direct deposit of the arrears of salary payable to a teacher, in the Provident Fund account.

11. The learned Government Pleader did not dispute the proposition of law laid down in *Dinavahi Lakshmi Kameswari*. Instead, as noted, the attempt of the learned Writ Appeal No.302 of 2023 14

Government Pleader was to show that unlike the case dealt with by the Andhra Pradesh High Court, as far as the teachers and non-teaching staff of the aided schools in the State are concerned, Section 12(1) of the Act and Rule 10(5) of Chapter XXX KER confer authority on the State Government to direct deposit of the arrears of salary payable to them in their Provident Fund accounts. Section 12 of the Act reads thus:

12. Conditions of service of aided school teachers.- (1)

The conditions of service of teachers in aided schools, including conditions relating to pay, pension, provident fund, insurance and age of retirement, shall be such as may be prescribed by the Government.

(2) No teacher of an aided school shall be dismissed, removed

or reduced in rank by the manager without the previous sanction of the officer authorised by the Government in this behalf, or placed under suspension by the manager for a continuous period exceeding fifteen days without such previous

sanction. No doubt, Section 12(1) of the Act confers authority on the State Government to prescribe the conditions of service of teachers in aided schools including conditions relating to their pay. Section 9 of the Act provides that the Government shall Writ Appeal No.302 of 2023 15 pay the salary of all teachers in aided schools direct or through the Headmaster of the school. In the light of the provision contained in Section 9 of the Act, it is obligatory for the State Government to pay the salary of all teachers in the manner in which the salary of Government employees are being

disbursed. There is no dispute to the fact that the salary of teachers and non-teaching staff of aided schools in the State are being disbursed in the manner in which the salary of Government employees are being disbursed as provided for under the Financial Code of the State Government. Section 12 of the Act if understood in the light of Section 9 of the Act, it cannot be said that the former Section confers power on the State Government to withhold the salary payable to a teacher in an aided school by directing the same to be deposited in his Provident Fund account, for such an interpretation would defeat the provision contained in Section 9 of the Act. The argument advanced by the learned Government Pleader based on Section 12(1) of the Act, in the circumstances, is liable to be rejected and we do so.

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12. Let us now examine whether Rule 10(5) of

Chapter XXX KER empowers the State Government to direct deposit of arrears of salary payable to a teacher of an aided school on account of delayed approval of the appointment, in the provident fund account. The relevant portion of Rule 10 of Chapter XXX KER reads thus:

10. (1) The amount of subscription shall be fixed by the subscriber himself subject to the following conditions, namely:-

(a) It shall be expressed in whole rupees; and

(b) It may be any sum, so expressed which shall not be less than 6 percent of his emoluments.

Note:-If 6 percent of emoluments represents a sum not expressible in whole rupees of the fraction of a rupee will be rounded to the nearest whole rupee, 50 Paise or more counting as the next higher rupee. xxxx xxxxx

(5) Notwithstanding anything contained in sub-rule (1) the

Government may, by order direct that the whole or any part of the arrears of pay or allowances or both payable to subscribers under a Scheme or revision of pay or allowances or both implemented with retrospective effect shall be

credited to the Fund and every subscriber to whom such order

Writ Appeal No.302 of 2023 17 applies shall comply with such order.

Chapter XXX KER deals with the Provident Fund Rules of employees of aided schools. It is compulsory for all aided school teachers to subscribe to the Fund constituted in terms of the Rules made in Chapter XXX KER namely, the Kerala Aided Schools Employees' Provident Fund. Rule 10(1) of Chapter XXX KER provides that the amount of subscription payable to the Fund shall be fixed by the subscriber himself, subject to the conditions stipulated therein. As noted, Rule 10(5) of Chapter XXX KER provides that notwithstanding anything contained in sub-rule(1), the Government may by order direct that the whole or any part of the arrears of pay or allowances or both payable to subscribers under a Scheme or revision of pay or allowances or both, implemented with retrospective effect shall be credited to the Fund and every subscriber to whom such order applies shall comply with such order. A close reading of the extracted Rule would indicate that the same confers power on the State Government to direct deposit of the arrears of pay or allowances or both due to the subscribers in their respective

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accounts. In the case on hand, what is directed to be deposited is not the arrears of pay or allowances payable to the petitioner under any scheme or arrears of pay

or allowances payable to the petitioner on account of revision of his pay or allowances implemented with retrospective effect. On the other hand, the amount which is directed to be deposited in the Provident Fund account of the petitioner is actually the salary payable to him for having worked in the school as a Higher Secondary School Teacher pursuant to his appointment and the same had to be received as arrears since the approval of the appointment was delayed due to reasons not attributable to him. According to us, the salary payable to a teacher in an aided school for the period from the date of joining the school pursuant to the appointment till the date of approval of the appointment cannot be treated as arrears of pay, falling within the scope of Rule 10(5) of Chapter XXX KER. It is all the more so since the scheme of Chapter XIVA KER dealing with the conditions of service of aided school teachers is such that orders could be passed on proposals for approval of the appointment of teachers only after

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the teachers join duty and the appointment is effective from the date on which the teacher is admitted to duty. In other words, the approval of the appointment would always be with retrospective effect. Going by the prevailing situation, the approval of all the appointments are delayed either due to administrative reasons or due to rival claims as in the case on hand and in every case, the salary payable to a teacher consequent on the approval of the appointment is being drawn and disbursed as arrears. If the argument advanced on behalf of the State is accepted, such payments could also be directed to be deposited in the Provident Fund account of the teacher. We have no doubt, therefore, in our minds that Rule 10(5) of Chapter XXX KER does not confer on the State Government any authority to direct the salary payable to a teacher on account of delayed approval of the appointment, to be deposited in his Provident Fund account. Needless to say, the direction in Ext.P12 circular, even if it is construed as a valid executive

order covering cases in the nature of one involved in this

matter, is bad in law inasmuch as it violates the right of the Writ Appeal No.302 of 2023 20

petitioner under Article 300A of the Constitution. We take this view also for the reason that if Ext.P12 circular is taken as a valid executive order conferring power on the State to withhold the salary payable to a teacher as arrears on account of the delayed approval of his appointment, the same would be per se arbitrary too, for in that event, the approval process of the appointment could be delayed, so that the arrears of salary payable to teachers can be directed to be deposited in their Provident Fund accounts. Similarly, in that event, the decision would be discriminatory too, for naturally there will be delay in the approval process in cases where there are rival claims and teachers involved in such cases may not get their salaries, as in the case on hand for the period during which the rival claims are pending adjudication either before the statutory authorities or before court, which may not be a reason to treat the teachers involved in such cases differently.

For the aforesaid reasons, we do not find any reason to interfere with the impugned decision. The writ appeal is accordingly, dismissed. However, this judgment will not Writ Appeal No.302 of 2023 21 preclude the competent authorities from directing the benefit of any pay revisions due to the petitioner to be deposited in his Provident Fund account if so provided in the pay revision orders. Sd/- P.B.SURESH KUMAR, JUDGE. Sd/- SOPHY THOMAS, JUDGE.
YKB

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