

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.T.RAVIKUMAR

FRIDAY, THE 30TH JULY 2010 / 8TH SRAVANA 1932

WP(C).No. 20908 of 2010(K)

PETITIONER(S):

**FYSAL.C.K., ARABIC TEACHER (F.T.),
A.U.P.SCHOOL, KARUMANAMKURISSI
PALAKKAD DISTRICT.**

**BY ADVS. SRI.K.JAJU BABU,
SMT.M.U.VIJAYALAKSHMI,
SRI.BRIJESH MOHAN,
SMT.DHANYA CHANDRAN,
SRI.T.S.SHYAM PRASANTH.**

RESPONDENT(S):

- 1. STATE OF KERALA, REP. BY SECRETARY TO
GOVERNMENT, GENERAL EDUCATION DEPARTMENT,
GOVT. SECRETARIAT, TRIVANDRUM-695 001.**
- 2. THE ADDITIOAL DIRECTOR OF PUBLIC
INSTRUCTIONS, TRIVANDRUM-695 001.**
- 3. THE DISTRICT EDUCATIONAL OFFICER,
OTTAPPALAM-679 101.**
- 4. THE ASSISTANT EDUCATIONAL OFFICER,
CHERPLASSERY, OTTAPPALAM, PALAKKAD-679 503.**

R1 TO R4 BY GOVERNMENT PLEADER SRI. DILIP MOHAN

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 30/07/2010, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

Kss

WPC.NO.20908/2010 K

APPENDIX

PETITIONER'S EXHIBITS:

- P1: COPY OF APPOINTMENT ORDER DTD. 28/11/07 WITH THE ENDORESEMENT OF APPROVAL DTD. 31/07/08 ISSUED TO THE PETITIONER BY THE 4TH RESPONDENT.**
- P2: COPY OF ORDER NO.B4/6978/08/K.DIS. DTD. 13/03/09 ISSUED BY THE 3RD RESPONDENT.**
- P3: COPY OF ORDER NO.G1/36703/09/DPI/K.DIS. DTD. 16/09/09 ISSUED BY THE 2ND RESPONDENT.**
- P4: COPY OF G.O.(RT) O.1963/10/G.EDN. DTD. 10/05/2010 ISSUED BY THE 1ST RESPONDENT.**

RESPONDENT'S EXHIBITS: N I L

/TRUE COPY/

P.S. TO JUDGE

Kss

C.T.RAVIKUMAR, J.

W.P.(C)No.20908 of 2010

Dated 30th July, 2010

JUDGMENT

The questions to be decided in this case are as follows:-

- (1) Whether G.O.(P) No.104/08/G.Edn. dated 10.6.2008 are contrary to Rule 7A of Chapter XIVA of the Kerala Education Rules, 1959 (for short 'KER') and are valid ?
- (2) Whether Rule 7A of Chapter XIVA of KER speaks of duration of vacancy and not duration of appointment ?

These questions came up for consideration before this Court in W.P.(C) No.25176 of 2008 filed by one Unni Narayanan and certain connected matters and they were heard and allowed by this Court as per a common judgment dated 6.4.2009. The said common judgment in **Unni Narayanan** v. **State of Kerala** was reported in **2009 (2) KLT 604**.

3. In all those writ petitions G.O.(P)No.104/08/G.Edn. dated 10.6.2008 is challenged to the extent it directs that if the term of appointment of an incumbent does not extend to one academic year, even if duration of vacancy, in which he/she is appointed, is one academic year or more, appointment shall be approved only on daily wage basis. The offending clauses in the said Government order dated 10.6.2008, viz., Clause 5(i) and (ii) are as follows:-

"(i) If the period of appointments does not cover one academic year (i.e. from the re-opening day of the

school after summer vacation to the closing day for summer vacation), the appointment shall be made only on daily wages.

- (ii) If the period of appointment commences after the beginning of the re-opening day but extends over the next academic year/years, the period up to the first vacation shall be approved on daily wages only. Re-appointment can be approved on regular basis, only if the duration of the period of re-appointment completes one academic year. If the period of re-appointment is also less than one academic year, that re-appointment will also be considered only on daily wages basis. In short, fractions of an academic year will not be considered for approval on regular basis."*

The said Government order is challenged in the light of the provisions under Rule 7A of the KER and it, in so far as relevant for decision of the issues involved in this case reads thus:-

"Rule 7A.(1) xxxxx

(2) *Posts that may fall vacant on the closing date shall not be filled up till the reopening date except in the case of posts of non-vacation staff.*

(3) *Vacancies, the duration of which is less than one academic year, shall not be filled up."*

The Division Bench after considering the aforesaid provisions under Rule 7A held as follows:-

"7. In certain circumstances, the Government may be able to issue executive instructions, but they have no efficacy to override the statutory provisions.

We agree with the contentions of the writ petitioners that the offending conditions in Ext.P2 Government Order cannot stand with the statutory rules. Therefore, for enforcing them, the relevant rules require amendment. As long as the rules are not amended, Ext.P2 cannot be pressed into service by the Government. In this context, we notice R.7A of Chap.XIVA of the K.E.R., which reads as follows:-

"Rule 7A.(1) xxxxx

(2) *Posts that may fall vacant on the closing date shall not be filled up till the reopening date except in the case of posts of non-vacation staff.*

(3) *Vacancies, the duration of which is less than one academic year, shall not be filled up."*

8. We notice that sub-r.(3) of R.7A speaks of vacancies, the duration of which is less than one academic year. In other words, if the vacancy is having a duration of one academic year or more, appointment can be made to fill up the same. The term of appointment need not be co-terminus with the term of the vacancy. If, in fact, the vacancy is having a duration of one academic year or more, even if, there is some delay in making the appointment, such appointment will have to be approved. The reason is that R.7A speaks of duration of vacancy and not duration of appointment. So, we are of the view that if appointments are made to vacancies, having duration of one academic year or more, they are liable to be approved."

4. A scanning of the contentions in this writ petition would reveal that the petitioner was appointed against a retirement vacancy.

Indisputably, the impugned orders in this writ petition are liable to be interfered with in the light of the Division Bench decision in **Unni Narayanan's** case (supra) as the appointment of the petitioner was approved only on daily wage basis solely in the light of the aforesaid Government order dated 10.6.2008 ignoring the provisions under Rule 7A of Chapter XIV-A of the KER. In **Unni Narayanan's** case (supra) the Division Bench upheld the contentions of the petitioner that the said Government order dated 10.6.2008 could not be pressed into service, without amending the Rules and rejected the contentions of the Government to the contrary. In **Unni Narayanan's** case (supra) viz., W.P.(C)No.25176 of 2008 Ext.P1 order of approval of appointment of the petitioner on daily wage basis up to 31.3.2009 was quashed and it was directed to be approved in a time scale from 6.10.2008 to 7.7.2013 and to retain the said petitioner in service as HSA till the vacancy is available. Consequently, it was directed to issue orders of approval and to release the salary, within six weeks from the date of production of a copy of the said judgment. In all other connected writ petitions orders, if any passed, approving their appointments on daily wage basis, relying on the said Government order dated 10.6.2008 were quashed and consequential directions were issued to the effect that all appointments

concerned, whether pending approval or already rejected, shall be considered/reconsidered by the concerned Educational Officers and fresh orders shall be passed in the light of the decision in W.P.(C)No.25176 of 2008 filed by Unni Narayanan and for granting consequential benefits.

5. In this case, besides reiterating the contentions heard and decided against by the Division Bench in **Unni Narayanan's** case (supra) the learned Government Pleader submitted that against **Unni Narayanan's** case reported in **2009 (2) KLT 604**, i.e., W.P.(C) No.25176 of 2008 and connected writ petitions, Special Leave Petitions (Civil) were filed before the Hon'ble Apex Court and the Hon'ble Apex Court in SLP (Civil) No.22260 of 2009 and connected cases passed an interim order as follows:-

"Delay condoned.

Issue Notice in those SLPs in which notice is already not issued.

In the meanwhile, we direct that the respondents will continue to receive their salaries/allowances as per the impugned G.O. till the present matters are decided."

6. The learned counsel for the petitioner in this writ petition contended that the said interim order would apply only to the party respondents in the SLPs pending before the Hon'ble Apex Court and that

apart, relying on a decision of a Division Bench of this Court reported in **Abdu Rahiman v. District Collector, Malappuram** (2009 (4) KLT 485), contended that even when a decision of a Division Bench was stayed by the Supreme Court, the decision of the Division Bench continues to be a binding precedent.

7. On perusal of the interim order passed by the Hon'ble Apex Court, produced as Ext.R3(c) in W.P.(C)No.31639 of 2009, which is extracted above, I am of the view that the decision of the Division Bench in **Unni Narayanan's** case (supra) was not stayed as such by the Hon'ble Apex Court whilst as per Ext.R3(c) the Hon'ble Apex Court only directed that the respondents therein would continue to receive their salaries/allowances as per the impugned Government order viz., Government order dated 10.6.2008 till the present matters are decided. In the said circumstances, I am bound by the Division Bench decision in **Abdu Rahiman's** case (supra) wherein it was held:-

"The learned Single Judge should not have ignored the two Division Bench decisions on the ground that in the appeal filed against one of the said decisions before the Apex Court, there was a stay against it. Even when a decision of Division Bench of this Court is stayed by the Apex Court, the learned Single Judges of this Court are bound to follow the decision of the Division Bench, as it continues to be a binding precedent for them. The interim order of stay only

relieves the concerned parties from obeying the judgment under appeal. "

In view of the discussions above, this writ petition is disposed of as hereunder:-

The impugned orders viz., Exts.P2 to P4 are quashed. Accordingly, this writ petition is disposed of with a direction to reconsider the revision petition dated 8.10.2009 and submission dated 4.3.2010 filed by the petitioner and pass orders afresh in the light of the decision in **Unni Narayanan v. State of Kerala** reported in **2009 (2) KLT 604**, within a period of two months from the date of receipt of a copy of this judgment . Needless to say, after such consideration the petitioner shall be given the consequential benefits including monetary benefits.

Sd/-
C.T.RAVIKUMAR
Judge

TKS