

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

WEDNESDAY, THE 4TH DAY OF JANUARY 2023 / 14TH POUSHA, 1944

WA NO. 1460 OF 2022

AGAINST THE ORDER/JUDGMENT DATED 07.06.2022 IN WP(C)

19394/2019 OF HIGH COURT OF KERALA

APPELLANTS/RESPONDENTS 1 TO 5 IN W.P. (C) :

- 1 STATE OF KERALA REP. BY THE SECRETARY TO GOVERNMENT, HIGHER EDUCATION DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM, PIN - 695001
 - 2 THE DIRECTOR OF COLLEGIATE EDUCATION, VIKAS BHAVAN, THIRUVANANTHAPURAM, PIN - 695033
 - 3 THE DEPUTY DIRECTOR OF COLLEGIATE EDUCATION, THRISSUR, PIN - 680001
 - 4 THE PRINCIPAL ACCOUNTANT GENERAL (A & E) KERALA, THIRUVANANTHAPURAM, PIN - 695001
 - 5 THE SENIOR ACCOUNTS OFFICER, OFFICE OF THE PRINCIPAL ACCOUNTANT GENERAL (A & E), KERALA, THIRUVANANTHAPURAM, PIN - 695001
- SMT.B.VINITHA SR.GP

RESPONDENTS/PETITIONER AND 6TH RESPONDENT IN W.P. (C) :

- 1 DR.SUSHAMA S,
ASSOCIATE PROFESSOR (RETIRED),
NSS COLLEGE,
OTTAPALAM
RESIDING AT KARTHIKA,
16TH STREET,
HARINAGAR,
POONKUNNAM,
THRISSUR, PIN - 680 002

2 THE PRINCIPAL,
N.S.S COLLEGE,
OTTAPALAM, PIN - 679103

BY ADVS.
SANTHOSH MATHEW
P.GOPAL

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON
04.01.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

CR

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Writ Appeal No.1460 of 2022

Dated this the 4th day of January, 2023.

JUDGMENT

P.B.Suresh Kumar, J.

This appeal is directed against the judgment dated 07.06.2022 in W.P.(C) No.19394 of 2019. Respondents 1 to 5 in the writ petition are the appellants. Parties and documents are referred to in this judgment for convenience, as they appear in the writ petition.

2. The petitioner was appointed as Lecturer in a private college affiliated to the University of Calicut (the University) on 02.02.1994. The college is covered by the Direct Payment Scheme of the State Government. The appointment of the petitioner was against a vacancy that arose by reason of the grant of leave without allowance to a regular teacher in the college. Ext.P1 is the order of appointment of the petitioner.

The appointment of the petitioner was approved by the University as also the Directorate of Collegiate Education with effect from 04.02.1994, the date on which the petitioner joined duty pursuant to the appointment. While the petitioner was working as such, a regular vacancy arose in the college on 01.04.1997 and the appointment of the petitioner was consequently shifted by the management to that vacancy. Later, the petitioner was placed as Senior Scale Lecturer with effect from 04.02.1999 and as selection grade lecturer with effect from 04.02.2004. The placements aforesaid of the petitioner were also approved by the University and the Directorate of Collegiate Education. While so, the petitioner retired from service on 30.03.2019.

3. In Ext.P9 verification report issued by the office of the Accountant General (A&E) in connection with the sanctioning of pensionary benefits to the petitioner, the qualifying service of the petitioner was, however, shown as 22 years excluding the period between 04.02.1994 and 31.03.1997 during which the petitioner had worked in the leave

vacancy. According to the petitioner, the said period is also liable to be reckoned as qualifying service for grant of pensionary benefits to her. The petitioner, therefore, preferred a representation before the Director of Collegiate Education for appropriate orders for reckoning the service rendered by her in the leave vacancy also as qualifying service. The said representation was rejected as per Ext.P14 communication informing the petitioner that she is not entitled to reckon the said period as qualifying service. The writ petition was instituted, in the above background, challenging Ext.P9 verification report to the extent it provides that the qualifying service of the petitioner for pension would be only 22 years, and Ext.P14 communication. The case set out by the petitioner in the writ petition is that insofar as the service rendered by her in the leave vacancy has been reckoned for granting increments as also for placements in the senior scale and selection grade, she is entitled to reckon the said period for the purpose of pensionary benefits as well. The learned Single Judge took the view that the nature of vacancy in which the

petitioner was initially appointed would not be of any consequence in the matter of fixing her qualifying service for pension inasmuch as the placements of the petitioner in the senior scale as also in the selection grade, reckoning the period during which she had worked in the leave vacancy, were approved by the Director of Collegiate Education. Consequently, the writ petition was allowed at the admission stage itself quashing Ext.P9 verification report to the extent to which it was challenged as also Ext.P14 communication and directing the official respondents to issue fresh orders sanctioning pensionary benefits to the petitioner. The State and its officials are aggrieved by the said decision of the learned Single Judge and hence, this appeal.

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

5. It was submitted by the learned Government Pleader that the entitlement of pension for teachers of private colleges is regulated by the Rules contained in Part III of the Kerala Service Rules (KSR) as amended from time to time, and

there is no provision in Part III KSR enabling the petitioner to reckon the service rendered by her in the leave vacancy as qualifying service for pension. On the other hand, it was pointed out by the learned Government Pleader that Rule 14E(b)(i) of Part III KSR specifically provides that the actual period of regular full-time service in aided private colleges alone shall qualify for pensionary benefits, indicating clearly that prior service in leave vacancies in private colleges, shall not be reckoned for grant of pensionary benefits. The learned Government Pleader cited a number of judgments also in support of her arguments. We are not referring to the said judgments for the present, as we propose to deal with the same elaborately in the later part of this judgment.

6. Per contra, placing reliance on the provisions contained in the First Statutes in respect of Pension, Provident Fund, Gratuity, Insurance and Age of Retirement of Teachers of Private Colleges, 1976, (1976 Statutes), the learned counsel for the petitioner submitted that the petitioner is entitled to reckon her continuous service for claiming pensionary benefits,

irrespective of the nature of the vacancy in which she was initially appointed. He relied on the definition of “service” as contained in Statute 2(h) of the Calicut University (Conditions of Service of the Teachers and Members of Non Teaching Staff) First Statutes, 1979 (1979 Statutes) to bring home the said point, as “service” is defined in the said provision as continuous service rendered in a college without reference to the nature of the vacancy in which the appointment is made. It was also argued by the learned counsel alternatively that inasmuch as the incumbent in whose leave vacancy the petitioner was appointed initially is not entitled to any benefits whatsoever including pension in respect of the leave period, the lien of that teacher to that post shall be deemed to have been suspended during the said period. According to the learned counsel, the appointment of the petitioner against such a vacancy can, therefore, be treated only as an appointment against a substantive vacancy. The learned counsel relied on the definition of “substantive vacancy” in Statute 2(i) of the 1979 Statutes in support of the above argument. It was argued

by the learned counsel that if the initial appointment of the petitioner is treated as one made against a substantive vacancy, the service rendered by the petitioner pursuant to the said appointment is liable to be treated as regular full-time service as provided for in Rule 14E(b)(i) of Part III KSR and if that be so, it cannot be said that the said service is not liable to be reckoned for granting pensionary benefits.

7. In reply to the submissions made by the learned counsel for the petitioner, the learned Government Pleader submitted that a vacancy which arose on account of grant of leave without allowance, cannot be treated as a substantive vacancy, for the officer who availed the leave holds a lien to that post.

8. We have considered the arguments advanced by the learned counsel for the parties on either side.

9. The questions that fall for consideration are (1) whether the appointment of the petitioner against the vacancy that arose by reason of the grant of leave without allowance to a regular incumbent, can be regarded as an appointment made

against a substantive vacancy and (2) whether service rendered by the petitioner in the leave vacancy preceding her absorption without break in the regular establishment, shall qualify for pensionary benefits.

10. Question (1): "Substantive vacancy" is defined in Statute 2(i) of the 1979 Statutes thus :

"Substantive Vacancy" means a vacancy which has arisen permanently by reason of the retirement of a person holding a permanent appointment in that post or by reason of a temporary post being made permanent by an order of the competent authority or by reason of the termination or suspension of the lien of a person holding a permanent appointment in that post."

As noted, the argument is that inasmuch as the incumbent in whose leave vacancy the petitioner was appointed initially is not entitled to any benefit whatsoever including pension in respect of the leave period, the lien of that teacher to that post shall be deemed to have been suspended during the said period. Of course, going by the definition of "substantive vacancy" contained in Statute 2(i), a vacancy which has arisen by a reason of the suspension of lien of a person holding a permanent appointment in that post, is to be regarded as a

substantive vacancy. Parts I & II of KSR also apply to teachers of private colleges. “Lien” is defined in Part I KSR thus:

18. Lien.- means the title of an Officer to hold substantively, either immediately or on termination of a period or periods of absence, a permanent post to which he has been appointed substantively.

Rules 17 and 18 of Part I KSR dealing with “suspension of lien” read thus:

17. Unless his lien is suspended under Rule 18 or transferred under Rule 20 an officer holding substantively a permanent post retains a lien on that post-

(a) while performing the duties of that post;

(b) while on foreign service or holding a temporary post, or officiating in another post;

(c) during joining time on transfer to another post, unless he is transferred substantively to a post on lower pay, in which case his lien is transferred to the new post from the date on which he is relieved of his duties in the old post;

(d) while on leave;

(e) while under suspension; and

(f) while under training.

18(a). The Government shall suspend the lien of an officer on a permanent post which he holds substantively if he is appointed in a substantive capacity—

(1) to a permanent post outside the cadre on which he is borne, or

(2) provisionally to a post on which another officer would hold a lien had his lien not been suspended under this rule.

(b) The Government may, at their option, suspend the lien of an Officer on a permanent post which he holds substantively, if he is transferred to foreign service or in circumstances not covered by clause (a) of this rule, is transferred, whether in a substantive or officiating capacity to a post in another cadre, and if in any of these cases there is reason to believe that he will remain absent from the post on which he holds a lien for a period of not less than three years.”

A combined reading of Rules 17 and 18 extracted above would indicate that under circumstances not covered by clause (a) of Rule 18, unless an order is passed by the Government suspending the lien, an officer holding substantively a permanent post retains a lien on that post while on leave. The case on hand is not one falling within the scope of clause (a) of Rule 18. In other words, in the absence of an order by the Government suspending the lien of the teacher in whose leave vacancy the petitioner was initially appointed, the said teacher was retaining a lien on that post. If that be so, the initial appointment of the petitioner cannot be said to be an appointment made against a substantive vacancy. Needless to say, the appointment of the petitioner against the vacancy that arose by reason of the leave without allowance granted to a

regular incumbent, cannot be regarded as an appointment made against a substantive vacancy. The question is answered accordingly.

11. Question (2): Statute 5 of the 1976 Statutes provides that teachers of private colleges are entitled to receive the same pensionary benefits as are allowed to similar categories of teachers in Government Colleges and all the conditions for the grant of the same as applicable to Government Servants as laid down in Part III KSR as amended from time to time shall *mutatis mutandis* apply to such teachers as well. Rule 1(a) of Part III KSR provides that pensions of all employees to whom KSR would apply are regulated by the Rules in that part. Rule 4 of Part III KSR provides that no claim to pension is admitted when an employee is appointed for a limited time only, on the completion of which he is to be discharged. The relevant portion of Rule 4 reads thus:

“4. In the following cases, no claim to pension is admitted: -

(a) When an employee is appointed for limited time only, or for specific duty, on the completion of which he is to be discharged.

x x x x x x”

Rule 14E(b) provides that aided private college service, both teaching and non-teaching of Government employees prior to their entry in Government service, shall qualify for pensionary benefits subject to the conditions specified therein. Condition (i) to Rule 14E(b) provides that the actual period of regular full time service rendered shall be counted for pensionary benefits.

The relevant portion of Rule 14E(b)(i) reads thus:

“14E(a) x x x x x x

(b) Aided private college service, both teaching and non-teaching, of Government employees prior to their entry in Government service shall qualify for pensionary benefits, subject to the following conditions, namely:-

(i) The actual period of regular full time service rendered from the date of actual introduction of Direct Payment System in the aided private college shall be counted.

(ii) x x x x x x”

It is evident from Rule 4 referred to above that no claim to pension is admitted when an employee is appointed for a limited time only. Similarly, it is evident from Rule 14E(b) referred to above that only the period of regular full time service of the pensioner in a private college shall qualify for pensionary benefits.

12. Reverting to the facts, the petitioner does not dispute the fact that her initial appointment was against a vacancy that arose by reason of the grant of leave without allowance to a teacher who was regularly appointed in the college. In other words, the petitioner cannot dispute the fact that she was liable to be discharged when the teacher in whose vacancy she was appointed, re-joins duty. Of course, while the petitioner was working in the said leave vacancy, her appointment was adjusted against a substantive vacancy with effect from 01.04.1997. In other words, going by the provisions contained in Rule 4, the service rendered by the petitioner from 04.02.1994 to 01.04.1997 can be regarded only as an appointment for a limited time. In light of the provisions contained in Rule 4, no claim to pension is admissible for the service rendered by the petitioner for the said period. It is all the more so since the said period cannot be regarded as a regular full time service in terms of Rule 14E(b). Of course, in terms of the provisions contained in 1976 statutes, a teacher is entitled to reckon his continuous service for claiming

pensionary benefits. The expression “service” is defined in Statute 2(h) of the 1979 Statutes thus:

“(h) “Service” means continuous service rendered in a college affiliated to any University in the State or any service rendered in a college affiliated to the University of Travancore or the Madras University by a person who is at the commencement of these Statutes, working in any college affiliated to any of the Universities in this State.”

True, the definition aforesaid does not provide that service would begin only on a regular appointment in a substantive vacancy. But, insofar as the right to pensionary benefits of a teacher in a private college is governed by the provisions contained in Part III KSR, in the matter of adjudicating the claim of a teacher for pension, the service has to be understood as the regular service pursuant to an appointment made against a substantive vacancy.

13. Let us now deal with the judgments cited by the learned Government Pleader. It is seen that on 5.8.2016, the Government had issued G.O.(P)No.113/16/Fin, clarifying that regular/broken spells including leave vacancy of aided college service of regular aided college staff shall not be

counted for pension with full-time regular aided college service. The said order was under challenge in W.P.(C) No.29356 of 2016 and connected cases. This court dismissed the writ petitions repelling the contentions raised holding that the Government Order only clarifies the position in respect of prior service in aided colleges which is already governed by the statutory provisions contained in clause (b) of Rule 14E of Part III KSR and that a Government employee is not entitled to pensionary benefits for the provisional service, unless there is any specific order under Rule 11 of Part III KSR which enables the Government to allow service rendered by an employee to count for pension. It was also held by this court in the said case that insofar as teachers of Government colleges are not entitled to reckon the provisional service/broken spells of service in leave vacancies in private colleges for pension, except in accordance with Rule 14E(b) of Part III KSR, the petitioners therein are not entitled to the said benefit. Paragraphs 20, 22 and 23 of the said judgment read thus:

“20. Therefore, the impugned orders only clarify the position in respect of prior service in aided colleges, which is

already governed by statutory provisions contained in clause (b) onwards of Rule 14E of Part III KSR.

x x x x

22. A Government employee is not entitled to pensionary benefits for the provisional service, unless there is any specific order under Rule 11 of Part III KSR.

23. As per Rule 3 of Part I KSR, provisions contained in KSR would not apply to persons for whose appointment and conditions of employment special provision is made by or under any other law; persons in respect of whom conditions of service, pay and allowances, pension, leave or any of them, special provisions have been made in pursuance of provisions of Rule 8. Note to Rule 3 provides that the Rules as a whole shall not apply to persons appointed to service of the Government temporarily under Rule 9 of Part II of KS&SSR except to the extent specified by the Government. Temporary appointments under Government service is made under Rule 9(a)(i) of KS&SSR. Therefore, going by the note to Rule 3, temporary appointees are not governed by the provisions contained in the KSR as a whole, in the absence of any specific provisions or rule. The petitioners claim that they are entitled to pensionary benefits as applicable to teachers of Government colleges. Teachers of Government colleges do not get the benefit of provisional service/broken spells of service/service in leave vacancies in private colleges counted for pension except in accordance with clause (b) of Rule 14E of Part III KSR.”

The judgment aforesaid has been challenged in appeal, among

others, on the ground that insofar as the service rendered in broken spells including leave vacancies are reckoned for grant of increments, it is arbitrary to hold that the said service is not liable to be reckoned for pension. The Division Bench which dealt with the appeal, affirmed the decision of the learned Single Judge in **Shameer Ali E v. Deputy Director of Collegiate Education, Kollam and Others**, 2018 (3) KHC 361, repelling the ground aforesaid.

14. It is seen that later Rule 14E(b) of Part III KSR itself was under challenge in a batch of writ petitions before this court to the extent it stipulated that only regular service rendered by teachers in private aided colleges, prior to the regular service rendered by them in the aided/Government colleges, would be reckoned for the purpose of computation of their pensionary benefits. Though the learned Single Judge allowed the writ petitions by striking down the expression “regular” in clause (i) of Rule 14E of Part III KSR, the decision in the writ petitions was reversed by the Division Bench in **State of Kerala v. Sumayamma George**, 2022 (1) KLT 426, holding

that going by the scheme of KSR, it is the occupancy of a post together with a lien thereto either limited or absolute that entitles the lien holder to the pensionary benefits attached to that post and that a person appointed in a leave vacancy does not obtain any lien to the post, he merely officiates or occupies that post till the original incumbent returns after leave. It was also held by this court in the said case that even in the absence of the word 'regular' that qualified the service that was included for the purposes of pensionary benefits in Rule 14E(b), the service envisaged thereunder was only such provisional or other service that conferred a lien to the post on the employee concerned and that the writ petitioners who have rendered service in leave vacancies never obtained any vested right to count their service in leave vacancies for the pensionary purposes. Paragraphs 8 and 9 of the said judgment read thus;

"8. In the case of provisional service rendered against a sanctioned post, the incumbent to the post obtains a limited lien to the post, co-terminus with his engagement on provisional basis. As against this, the distinguishing feature of a service rendered in a leave vacancy is the fact that the lien to the post is all along held by another person, in whose absence from the place of work, the incumbent gets an

opportunity to work in the post. The scheme under the KSR, read with the Government Orders issued from time to time, clearly indicates that it is the occupancy of a post together with a lien thereto - either limited or absolute - that entitles the lien holder to the pensionary benefits attached to that post. The person appointed in a leave vacancy merely officiates or occupies that post till the original incumbent returns after leave and, while doing so, he does not obtain any lien to the post.

9. When the issue is considered in the light of the above discussion, it becomes apparent that even in the absence of the word 'regular' that qualified the service that was included for the purposes of pensionary benefits in Rule 14E(b), the service envisaged thereunder was only such provisional or other service that conferred a lien to the post on the employee concerned. The claim of the writ petitioners being in respect of service rendered in leave vacancies, they were not in any way entitled to the beneficial provisions of either the Government orders referred above, or to the provisions of Rule 14E(b) and, in that sense, they never obtained any vested right to count their service in leave vacancies for the pensionary purposes. As observed in a recent judgment of the Supreme Court in *Manish Kumar v. Union of India* (2021 (1) KLT OnLine 1049 (SC) = (2021) 5 SCC 1), rights are 'vested' when the right to enjoyment, present or prospective, has become the property of some particular person or persons as present interest. A mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws, does not constitute vested rights. A right vests when all the facts have occurred which must by law occur in order for the person in question to have the right. In the instant case, the

writ petitioners could not point to any provision, either in the Government orders or under the statutory rules, that conferred on them a right to include service rendered in leave vacancies in the qualifying service reckoned for pensionary benefits. A challenge to the vires of an amendment to the Rule 14E(b) of Part III KSR which in no way affect them, could not have been maintained at their instance”

In this context, it is relevant to point out that in **Sajeev Joseph v. State of Kerala**, 2021 SCC OnLine Ker 14001, in an exactly identical fact situation, a Division Bench of this court has repelled an identical claim, following the decision of the Division Bench in **Shameer Ali** taking the view that unless the teacher in question satisfies the requirement in Rule 14E(b) of Part III KSR, the prior service rendered in the aided private colleges prior to entering into regular service in the same college, could not be reckoned for the purposes of pension. The relevant portion of the judgment reads thus:

“We might in this context usefully refer to the judgment of the Division Bench of this Court in Shameer Ali (supra) where while dealing with an identical issue of reckoning of prior service rendered in aided private colleges while determining pensionary benefits consequent to superannuation/retirement from Government/aided colleges, the Division Bench found that unless the teacher in question satisfied the six specific conditions mentioned in Rule 14E (b) of Part III KSR, the prior

service rendered in the aided private colleges prior to entering into regular service in the same college, could not be reckoned for the purposes of pension. On the facts of the case before us, we have not been shown any material that would suggest that the appellant satisfied the conditions mentioned in Clauses I to VI under Rule 14E (b) of Part III KSR. Under such circumstances, we see no reason to interfere with the judgment of the learned Single Judge, which we affirm inasmuch as it has merely followed the judgment of the Divisions Bench of this Court in *Shameer Ali* (supra)."

The aforesaid was also a case where the teacher was working in a leave vacancy when he was absorbed without break in the regular establishment. In light of the discussion aforesaid, we hold that the service rendered by the petitioner in the leave vacancy preceding her absorption without break in the regular establishment, shall not qualify for pensionary benefits.

In the result, the writ appeal is allowed, the impugned judgment is set aside and the writ petition is dismissed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

C.S.SUDHA, JUDGE.

YKB