

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

THURSDAY, THE 16<sup>TH</sup> DAY OF MARCH 2023 / 25TH PHALGUNA, 1944

WP(C) NO. 2494 OF 2021

PETITIONER:

XAVIER T.J  
AGED 56 YEARS  
SON OF JOSEPH T.V, HIGH SCHOOL ASSISTANT (PHYSICAL  
SCIENCE) (RETIRED), ST. SEBASTIAN'S HIGH SCHOOL,  
PUNNAKKAL, (VIA), THIRUVAMBADY, THAMARASSERY, KOZHIKODE  
DISTRICT-673 603, (RESIDING AT THEKKETHOTTIYIL,  
P.O.THIRUVAMBADY, KOZHIKODE-673 603).  
BY ADVS.  
V.A.MUHAMMED  
SRI.M.SAJJAD

RESPONDENTS:

- 1 THE STATE OF KERALA  
REPRESENTED BY ITS SECRETARY TO GOVERNMENT, GENERAL  
EDUCATION DEPARTMENT, SECRETARIAT ANNEXE 11,  
THIRUVANANTHAPURAM-695 001.
- 2 THE DIRECTOR OF GENERAL EDUCATION,  
JAGATHY, THIRUVANANTHAPURAM-695 014.
- 3 THE DEPUTY DIRECTOR OF EDUCATION,  
MANANCHIRA, KOZHIKODE-673 001.
- 4 THE DISTRICT EDUCATIONAL OFFICER,  
THAMARASSERY, KOZHIKODE DISTRICT-673 573.
- 5 THE MANAGER,  
ST. SEBASTIAN'S HIGH SCHOOL , PUNNAKKAL, (VIA),  
THIRUVAMBADY, THAMARASSERY, KOZHIKODE DISTRICT-673 573.
- 6 THE CORPORATE MANAGER,  
DIOCESE OF THAMARASSERY, KOZHIKODE, KOZHIKODE DISTRICT-  
673 573.
- 7 SRI. K.J.JOSE,  
ST. SEBASTIAN'S HIGH SCHOOL, PUNNAKKAL, (VIA),  
THIRUVAMBADY, THAMARASSERY, KOZHIKODE DISTRICT-673 573.  
BY ADVS.  
JOHN JOSEPH VETTIKAD  
C.JOSEPH JOHNY  
SMT.NISHA BOSE, SR.GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION  
ON 16.03.2023, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

**CR**

**P.V.KUNHIKRISHNAN, J.**

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**W.P.(C).No.2494 of 2021**  
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**Dated this the 16<sup>th</sup> day of March, 2023**

**JUDGMENT**

The petitioner, Sri. Xavier T.J commenced service as High School Assistant (Physical Science) (for short, 'HSA(PS)') from 17.07.1989 onwards on a regular basis at St. Sebastian's High School, Punnakkara (hereinafter referred to as the, 'School'), which is an aided School in terms of Kerala Education Act and Rules. Ext.P1 is the proceedings of the 4<sup>th</sup> Respondent, The District Educational Officer, Kozhikode, which would reveal that the petitioner was appointed with approval on a regular basis from 17.07.1989 as HSA(PS) and the 7<sup>th</sup> respondent, Sri. K.J. Jose, another teacher in the school was appointed with approval from 23.10.1989 as HSA(PS). Therefore, the dispute on seniority between the petitioner and the 7<sup>th</sup> respondent was settled in favour of the petitioner who commenced service on a regular basis from 17.07.1989 onwards. It is the case of the petitioner that, while continuing as HSA(PS), the petitioner acquired the

departmental test qualification with a pass in the Account Test (Lower) and (Higher) under the Kerala Education Act and Rules. Exts.P2 to P4 are the certificates to show that the petitioner has qualified the tests. Hence it is contented by the petitioner that he became qualified for promotion as Headmaster of the School under Rule 43 r/w Rule 44A of Chapter XIV(A) of Kerala Education Rules,1959 (hereinafter referred to as, 'KER').

2. It is submitted that the incumbent Headmaster named Shalee A. Jose, of the School retired on superannuation on 31.05.2018. Thus, a vacancy of Headmaster arose in the School with effect from 01.06.2018. It is the case of the petitioner that the 7<sup>th</sup> respondent was appointed as the Headmaster of the School in the vacancy of Smt. Shalee A. Jose as per Ext.P5 order dated 05.06.2018. According to the petitioner, the 7<sup>th</sup> respondent being junior to the petitioner and an excess HSA(PS) on being retrenched during 2008-09 from the 5<sup>th</sup> respondent School was working on deployment on protection in another School namely the Government High School, Cheruvady at the time when the vacancy of Headmaster arose in the 5<sup>th</sup> respondent's School.

It is the definite case of the petitioner that, as per the proviso to Rule 37, it is provided that the period of service rendered in the parent School or in another School by a teacher, who is relieved under Rule 52 shall be reckoned for seniority only on his re-appointment in the parent School. Therefore, it is submitted that the 7<sup>th</sup> respondent being retrenched and working on deployment at the time when the vacancy of Headmaster arose can claim seniority for promotion only on being re-appointed to the parent School as HSA(PS). Hence it is submitted that the 7<sup>th</sup> respondent cannot be promoted straight away as the Headmaster of the School while working as HSA in another School on protection without being re-appointed as HSA first in his parent school. It is also submitted that a vacancy of HSA(PS) will arise in the 5<sup>th</sup> respondent School only after promoting an existing HSA as Headmaster. Therefore, it is submitted that a vacancy of HSA had not arisen in the School as the senior-most HSA on the roll namely the petitioner was not promoted. Hence it is submitted that an HSA working on deployment in another School can be re-appointed in the parent School only after a vacancy of HSA has arisen in the parent School and hence the

7<sup>th</sup> respondent cannot straight away be promoted as Headmaster. It is submitted that the 7<sup>th</sup> respondent was relieved from the Government High School, Cheruvady with effect from 04.06.2018 and he was illegally appointed by the 6<sup>th</sup> Respondent, the Corporate Manager straight away as Headmaster with effect from 05.06.2018. This is also in violation of the provisions of the Rules, is the submission. However, when the proposal for approval of the promotion of the 7<sup>th</sup> respondent was taken up with the 4<sup>th</sup> respondent, his promotion was rejected on the ground that the amalgamation of St. Sebastian's High School with the Corporate Management has been cancelled by the 2<sup>nd</sup> respondent, The Director of General Education, Thiruvananthapuram. Ext.P6 is the proceedings of the District Educational Officer. It is submitted that, as per Ext.P7, the 2<sup>nd</sup> respondent had rejected the amalgamation of St. Sebastian's High School with the Corporate Management of the Diocese of Thamarassery.

3. According to the petitioner, the appointment of the 7<sup>th</sup> respondent violates the seniority of the petitioner and the statutory right of the petitioner under Rule 43 r/w Rule 44A of

Chapter XIV(A) of KER. It is submitted that the petitioner submitted Ext.P8 representation before the Vicar of St. Sebastian's Church, Vilakkamthode and the Manager, St. Sebastian's High School, Punnakkal on 31.05.2018. But no decision has been taken on Ext.P8 is the submission. While the Petitioner was continuing as HSA(PS) without promotion, he retired from service on 31.05.2000. According to the petitioner, he is entitled for the promotion as Headmaster with effect from 01.06.2018 with all service benefits and fixation of his pay with effect from 01.06.2018 as the Headmaster. The petitioner also relied on Rule 7(4) of Chapter III of KER which states that, in the case of a Manager who commits serious irregularities in promoting a teacher, the Manager is liable to pay the monetary benefits to the teacher. Under such circumstances, the petitioner approached the 1<sup>st</sup> Respondent, the Government with a revision under Rule 92 of Chapter XIV(A) of KER. But the Government rejected the revision as per Ext.P9. Aggrieved by the same, this writ petition is filed with the following prayers:

*"(i) call for the records relating to Exhibit P-5 appointment order of the 7th Respondent and set aside the original of the same by the issue of a writ of certiorari or*

*other appropriate writ or order.*

*(ii) call for the records relating to Exhibit P-9 and set aside the original of the same by the issue of a writ of certiorari or other appropriate writ or order.*

*(iii) declare that the Petitioner is entitled for promotion as Headmaster with effect from 01.06.2018 and entitled for the attendant benefits.*

*(iv) issue a writ of mandamus or other appropriate writ, order or direction commanding the 5th Respondent to promote the Petitioners as Headmaster from 01.06.2018 and disburse the attendant benefits,*

*(v) pass such other order or direction which this Hon'ble Court may deem fit and proper to grant in the circumstances of the case.”[SIC]*

4. Heard the counsel appearing for the petitioner and the learned Government Pleader. I also heard the counsel appearing for the 7<sup>th</sup> respondent.

5. Counsel for the petitioner reiterated the contentions raised in this writ petition. But the counsel conceded the fact that the School obtained minority status now. But it is the submission of the petitioner that, Ext.P5 appointment order is not by invoking the rights of the minority school. It is submitted that, if the appointment of the 7<sup>th</sup> respondent is based on the minority status, the same should be mentioned in Ext.P5 order itself. The counsel submitted that Ext.P5 is a

standard form of appointment order. In that form, it is clearly stated that a certification from the manager is necessary that there is no qualified teacher existing in service under the Educational agency. The above clause in Ext.P5 form is not even scored off is the contention of the petitioner. The counsel also submitted that there is no dispute on the fact that the petitioner is senior to the 7<sup>th</sup> respondent. It is the submission of the petitioner that, when the vacancy arose, the petitioner was available in the School and the 7<sup>th</sup> respondent was not available in the School. It is further submitted that a retrenched teacher who is not available in the parent School cannot be promoted to the post of Headmaster unless he rejoins the parent School in the vacancy of HSA. Therefore, it is submitted that the promotion of the petitioner as Headmaster based on Ext.P5 order is unsustainable.

6. Counsel appearing for the 7<sup>th</sup> respondent supported Ext.P9 order passed by the Government. The counsel submitted that all the contentions of the petitioner were considered by the Government and thereafter Ext.P9 order was passed. The counsel also submitted that the petitioner is



trying to get the post of Headmaster after his retirement. It is the case of the petitioner that, even if the petitioner has got any right to get promoted as the Headmaster, the same is lost because he was sleeping over his rights. The counsel also submitted that there is no dispute over the fact that the School is a minority institution. Under such circumstances, the Management is free to appoint a candidate of their own choice overlooking the seniority. The counsel submitted that the petitioner has not submitted any claim for the post of Headmaster till his retirement.

7. The Government Pleader also supported Ext.P9 order of the Government. The Government Pleader submitted that the petitioner raised the claim for the first time after a period of 25 months from the date of appointment of the 7<sup>th</sup> respondent as the Headmaster. The Government Pleader also submitted that the minority institutions have got a right to appoint Headmasters overlooking the seniority of other teachers.

8. This Court considered the contentions of the petitioner and the Government Pleader. There is no dispute on the fact that the School is a minority institution. There is

no dispute on the fact that a minority institution has the right to establish and administer educational institutions of their choice. Therefore the first question to be decided in this case is whether the 7<sup>th</sup> respondent was appointed by invoking the powers of the minority institutions. Ext.P5 is the appointment order of the Manager appointing the 7<sup>th</sup> respondent as the Headmaster. Ext.P5 order is issued as per Form 27 of KER. Rule 7 of Chapter XIV(A) of KER states that, as soon as a teacher is appointed in a school, the Manager shall immediately issue an appointment order to the teacher in Form 27 and the appointment shall be effective from the date on which the teacher is admitted to duty, provided that the appointment is duly approved. Form 27 of KER is a standard form for issuing appointment orders. It will be better to extract Form 27 of KER hereunder:

**"FORM 27**

(See Rule XIV (A)-7)

APPOINTMENT ORDER

Station:

Date:

Shri.....(name and address  
of teacher) .....is appointed as a permanent/

probationery/ acting teacher under this management on a pay of Rs.....per mensem in the scale of Rs.....and is posted as..... (Designation) in the..... (Name of School) from.....to.....in the vacancy of.....who has.....

This appointment is subject to the provisions of the Kerala Education Act and the Rules thereunder and such other rules or orders issued from time to time by the Government or other competent authority.

Certified that there is no qualified teacher existing in service under this Educational Agency who is eligible for promotion to the vacancy for which the above appointment is made.

Signature of Manager

Signature of Teacher

The appointment is approved

Certified that the above appointment has been made after satisfying that no qualified person retrenched from any of the aided high schools in the Education District or aided primary Schools in the Education sub Districts after putting in 2 years of service and drawing 2 vacation salaries is available for absorption to the post in the school.

Signature and Designation of  
Educational Officer"

9. A perusal of Form 27 will show that a certification is necessary from the Manager that there is no qualified teacher

existing in service under that Educational agency is eligible for promotion to the vacancy for which the above appointment is made.

10. A perusal of Ext.P5 appointment order will show that the above portion is not scored off in the order by the Manager. According to the Manager and the 7<sup>th</sup> respondent, the 7<sup>th</sup> respondent was appointed in the school by exercising the minority rights vested with the Manager. But there is no bar for promoting a teacher as Headmaster following the seniority principle even in Minority Institutions. There is no law that in all Minority Institutions the promotion can be made only by violating seniority. Of course, there is also no prohibition for promoting a teacher overlooking the seniority of a teacher by the Manager of a minority school based on the minority rights vested on him. How does the Department know that the Manager appointed a Headmaster by exercising the minority rights vested on him is the question that needs to be answered. It is an admitted fact that there is no separate 'Form' for appointment as Headmaster in a school by a Manager by exercising the rights of minority status. Whether the appointment is made as per seniority or by

exercising the powers of the minority status, the 'Form 27' is prescribed under the KER. Under such circumstances, in my opinion, the Manager should specifically score off the 3<sup>rd</sup> paragraph of form 27, if the appointment is invoking the minority status of the school, which reads like this:

*"Certified that there is no qualified teacher existing in service under this Educational Agency who is eligible for promotion to the vacancy for which the above appointment is made."*

11. As long as the above portion is there in the appointment order, it can only be treated as an appointment based on seniority. Otherwise, the Manager has to score off the above portion from Form 27. Therefore, as long as the above portion is there in the appointment order, it has to be presumed that the Manager has not appointed the Headmaster or teacher by exercising the rights of the minority-status institution. Unless such a stipulation is there, I am of the considered opinion that the appointment orders issued by the Managers invoking the Minority status will be a false declaration to the Department. Therefore, as long as the 3<sup>rd</sup> paragraph of Form 27 of KER is not scored off, it should be presumed that the appointment is based on seniority.

12. The counsel appearing for respondent 7<sup>th</sup> respondent submitted that in paragraph No.2 of the writ petition, it is conceded by the petitioner himself that the appointment was made by invoking the minority rights in terms of Article 30(1) of the Constitution of India. The department also proceeded based on the belief that the appointment was made by invoking the powers of minority rights under Article 30(1) of the Constitution of India. Therefore, the contention of the petitioner before this court will not stand. I am not in a position to accept the above contention. First of all, if this contention is accepted, this Court has to endorse the false declaration submitted by the Manager in paragraph No.3 of Ext P5 appointment order. Simply because the department and the petitioner proceeded with a notion that the appointment was made by invoking the powers under Article 30(1) of the Constitution, the defect in the appointment order will not disappear. The counsel for the 7<sup>th</sup> respondent produced the certificate showing that the Educational institution is a minority institution. There is no dispute on that. The counsel also relied on the judgment of this Court in **Saji Thomas v. State of Kerala and Others**

[2022 (6) KHC 474]. The relevant portions of the above judgment relied by the counsel appearing for the 7<sup>th</sup> respondent is extracted hereunder:

"25. In view of the decisions in Ammad, James Mathew and Sisters of St. Joseph of Cluny (supra), the manager is entitled for the benefits under Art.30(1) of the Constitution of India. Though the petitioner is senior to the 3rd respondent and became qualified to the post of Principal on 15/07/2006 as per clause 6(1)(3) of Chapter XXXII of KER read with Note 1 thereto, since the school is a minority educational institution, the manager has availed the rights under Art.30(1) of the Constitution and appointed the 3rd respondent who became qualified for the post of Principal on 24/08/2010, with effect from 02/07/2012. In the circumstances, I find no reason to interfere with Ext.P14 order of appointment of the 3rd respondent as Principal and Ext.P20 order passed by the Government. The challenge against Exts.P14 and P20 fails. W.P. (C) Nos. 5842 of 2012 and 5731 of 2014 are, accordingly, dismissed. Consequently, the 1st respondent has to comply with the directions in Ext. P20."

13. The above decision only deals with the right of the management of minority Educational institutions. There is no dispute on that aspect. Then the counsel appearing for the 7<sup>th</sup> respondents relied on paragraph No.9 of the judgment of this Court in **Anilkumar S. and Others v. K. G. Giriprasad and Others** [2019 (3) KLT 541]. Paragraph No.9 of the above judgment is extracted hereunder:

"9. It is true that 'every person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years'. The dictum as above in *Rabindranath Bose and others v. Union of India*, 1970 KHC 379 : 1970 (1) SCC 84 : AIR 1970 SC 470 : 1970 (2) SCR 697 has been followed in *C. C. Gupta and others v. N. K. Pandey and others*, 1988 KHC 876 : 1988 (1) SCC 316 : 1988 SCC (L&S) 260 : 1987 (5) ATC 329 : AIR 1988 SC 654 : 1988 Lab IC 522 : AIR 1988 SC 268."

14. On this point also, there is no dispute. But according to the Management and the 7<sup>th</sup> respondent, the petitioner has not raised any claim for the post of Headmaster, till he retired from service. Whether the appointment of the 7<sup>th</sup> respondent as Headmaster can be justified simply because the petitioner has not raised any claim for promotion to the post of Headmaster? According to the petitioner, he submitted Ext.P8 on 31.05.2018 itself, claiming the post of Headmaster to the Manager. The petitioner also claimed that he submitted Exts.P12 and P13 also to the Manager on 30.05.2018 and 20.05.2019 respectively claiming the right to be appointed as the Headmaster. Even if such a claim is not there, whether the appointment of the 7<sup>th</sup> respondent can be justified is the



question. I already found that the contention of the respondents that the appointment was made by invoking the powers of minority status is not clear from Ext P5 appointment order therefore, this Court cannot accept the appointment of the 7<sup>th</sup> respondent as an appointment invoking the minority status right. At this stage, Rule 44 of Chapter XIV(A) of KER is important. It will be better to extract Rule 44 of Chapter XIV(A) of KER hereunder:

*"44. 1) The appointment of Headmasters shall ordinarily be according to seniority from the seniority list prepared and maintained under clauses (a) and (b) as the case may be of rule 34. The manager will appoint the Headmaster subject to the Rules laid down in the matter. A teacher if he is aggrieved by such appointment will have the right of appeal to the Department.*

*Note :- Whenever the Manager intends to appoint a person as Headmaster other than the senior claimant, the Manager shall obtain a written consent from such senior claimant renouncing his claim permanently. Such consent shall have the approval of the Educational Officer concerned.*

*(2) An appeal under sub-rule (1) shall lie to the Educational Officer.*

*(3) A second appeal shall lie to the District Educational officer against the order of the Assistant Educational Officer passed on an appeal preferred under Sub-Rule (2). In the case of an order passed by the District Educational Officer under sub-rule (2), the second appeal shall lie to the Deputy Director (Education)*

*(4) No appeal or second appeal preferred under these rules shall be entertained unless it is preferred within one month of the date of receipt of the order appealed against."*

15. Note to Rule 44 (1) of Chapter XIV(A) of KER clearly states that whenever the Manager intends to appoint a person as Headmaster other than the senior claimant, the Manager shall obtain a written consent from such senior claimant renouncing his claim permanently. In this case, admittedly, there is no such written consent obtained from the petitioner. Therefore, simply because a senior teacher kept mum when the Manager appointed his junior as Headmaster, that appointment cannot be approved unless a written consent is obtained from the senior claimant renouncing his claim permanently in the light of the Note to Rule 44(1) of KER. Therefore, I am not in a position to accept the contention of the Manager, the 7<sup>th</sup> respondent and the Government in Ext.P9 that the petitioner kept mum for a period of 25 months thus, he is not entitled to raise the claim for promotion after 25 months, in the light of the fact that no written consent is obtained from the petitioner, who is admittedly senior to the 7<sup>th</sup> respondent, in accordance to Note to Rule 44(1) of Chapter XIV(A) of KER. It is also an admitted

fact that there is no written consent obtained from the petitioner who is admittedly senior to the 7<sup>th</sup> respondent for appointing the 7<sup>th</sup> respondent as the Headmaster. Therefore, the delay in raising the claim for the post of Headmaster will not stand in this case because no consent was obtained from the petitioner as per the Note to Rule 44 (1) of Chapter XIV(A) of KER.

16. The Apex Court considered the minority status right of the Educational institutions in the judgment dated 31.01.2017 in Civil Appeal No.1257/2017. The relevant portions of the above judgment are extracted hereunder:

"9. We have given our anxious consideration to the rival submissions. There is no dispute with the proposition laid down in the case of **T. Jose** (supra), that right to choose a principal is a part of a right of minority institution under Article 30(1) of the Constitution and the said right is not affected merely because aid is extended by the State to a minority institution. In **T. Jose** (supra), this Court held that Section 57(3) of the Kerala University Act, 1974 which required appointment of senior most lecturer as Principal did not apply to a minority institution. However, the decision of this Court cannot be read as laying down a principle that a minority institution could act arbitrarily or unfairly in dealing with the selection out of the eligible candidates. The minority institution may not be compelled to go by seniority alone but it must follow a criteria which is rational.

.....  
.....

13. In **M. Nagaraj & Ors. v. Union of India & Ors.**<sup>1</sup> it was observed:

“ 31. At the outset, it may be noted that equality, rule of law, judicial review and separation of powers are distinct concepts. They have to be treated separately, though they are intimately connected. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation was not a matter of judicial scrutiny or judicial review and judicial relief and all these features would lose their significance if judicial, executive and legislative functions were united in only one authority, whose dictates had the force of law. The rule of law and equality before the law are designed to secure among other things, justice both social and economic.

106. .... According to the Constitutional Law of India, by H.M. Seervai, 4th Edn., p. 546, equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of “guided power”. This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred, would be corrected by the courts.

118. The constitutional principle of equality is inherent in the rule of law. However, its reach is limited because its primary concern is not with the content of the law but with its enforcement and application. The rule of law is satisfied when laws are applied or enforced equally, that is, even-handedly, free of bias and without irrational distinction. The concept of equality allows differential treatment but it prevents distinctions that are not properly justified. Justification needs

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<sup>1</sup> (2006) 8 SCC 212

each case to be decided on case-to-case basis.”

14. The above decisions clearly show that autonomy of a minority institution does not dispense with the requirement to act fairly and in a transparent manner and the High Court in exercise of its power of judicial review is entitled to examine fairness of selection process. Grievance of a citizen that he was treated unfairly cannot be ignored on the ground that a minority institution has autonomy or right of choice. Exercise of right of choice has to be fair, non-discriminatory and rational. ” (Underline supplied).

The right of the minority institution has to be looked into in the light of the above principle laid down by the Apex Court.

17. In the light of the above discussions, it is to be concluded that the 7<sup>th</sup> respondent was appointed violating the seniority right of the petitioner, especially in the light of the fact that the 3<sup>rd</sup> paragraph of Ext.P5 appointment order was not scored off. It is an admitted fact that, in the light of Ext.P1, the petitioner is senior to the 7<sup>th</sup> respondent. Ext.P1 would reveal that there was a seniority dispute between the petitioner who was appointed with approval on a regular basis from 17.07.1989 as HSA(PS) and the 7<sup>th</sup> respondent who was initially appointed against the leave vacancy from 23.10.1989 as HSA(PS). The dispute was finally settled in favour of the

petitioner who commenced service on a regular basis from 17.07.1989 onwards. So, there is no dispute regarding the seniority between the petitioner and the 7<sup>th</sup> respondent and admittedly, the petitioner is senior to the 7<sup>th</sup> respondent.

18. Moreover, the 7<sup>th</sup> respondent is a retrenched teacher as on the date on which the vacancy arose. Ext.P11 is a judgment of this Court in **Manager, Mar Sleeba U.P. School v. State of Kerala** [1990 KHC 138]. It will be better to extract the relevant portions of **Manager, Mar Sleeba U.P. School's case** (supra) hereunder:

7. *"Protection is given to qualified retrenched aided school teachers by G.O.(MS) No.104/69/Edn dated 6-3-1969. That order inter alia provides that lien of protected teachers should be retained under the management of the aided schools in which they were working at the time of retrenchment. It also provided that the period during which the protected teachers out of service will be treated as on eligible leave or on leave on loss of pay Since the Government have recognised the protected teachers' lien in the parent school, it is contended that the teacher should be treated as a member of the staff of the parent school. If so treated his claim for promotion to the post of Headmaster should also be considered along with the other members of the teaching staff in the school. I find it difficult to accept this argument. 'Lien' made mention of in G.O.(MS) 104/69/Edn dated 6-3-1969 cannot be understood in the sense that word is defined in the Kerala Service Rules. A protected teacher cannot have a right to claim the post in the*

*parent school. As and when a vacancy arises he can put forward a preferential claim under R.51 A of Chapter XIV-A, K. E. R. If no such vacancy arises till the protected teacher attains the age of superannuation he will have to keep out. In his volition he cannot ask for a posting in the school. If such a right is recognised on admitting the protected teacher in the parent school another teacher will have to be sent out because the staff strength depends on the number of students. In these circumstances, the word 'lien' used in G.O.(MS) 104/69/Edn dated 6-3-1969 cannot be understood as it is defined in the K. S. R. It can only be given the meaning of "a preferential claim for appointment to the future vacancies" as provided in R.51 A, Chapter XIV-A, K. E. R.*

*8. Appointment of Headmasters in Upper Primary schools is governed by R.45 and 45A of Chapt. XIV-A, K. E. R. It states that the post of Headmaster should be filled up from among qualified teachers on the staff of the school. A protected teacher, being not a member of the staff of the school, is not entitled to be considered for the post. Being a protected teacher deployed to a Government school, 5th respondent cannot put forward any claim to the post of Headmaster in his parent school. The contrary view taken by the Deputy Director of Education is against the statutory provisions contained in the Kerala Education Rules. So, the direction given to the Manager to appoint 5th respondent as Headmaster of the school cannot be sustained." (Underline supplied)*

19. Admittedly, the 7<sup>th</sup> respondent was a protected teacher. In the light of the above dictum laid down in the above decision, a protected teacher who is not a member of

the staff of the school is not entitled to be considered for the post of Headmaster. On this score also, I am of the opinion that the petitioner will succeed.

20. Admittedly, as on today, the appointment of the 7<sup>th</sup> respondent based on Ext.P5 is not approved. I am of the considered opinion that the finding in Ext.P9 will not stand and the petitioner is entitled for promotion with retrospective effect. Since the petitioner is not in service and he never discharged the duties of Headmaster, the petitioner is not entitled monetary benefits. But he is entitled promotion as Headmaster with effect from 01.06.2018 and entitled to refix his pensionary benefits based on the same. The upshot of the above discussion is that the writ petition is to be allowed.

Therefore, this writ petition is allowed with the following directions:-

- 1) Exts.P5 and P9 are set aside.
- 2) Declare that the petitioner is entitled for promotion as Headmaster w.e.f. 01.06.2018 notianally. He is entitled pensionary benefits based on the same.
- 3) There will be a direction to the 5<sup>th</sup> respondent to issue formal order promoting the petitioner as Headmaster



w.e.f. 01.06.2018 notionally as expeditiously as possible, at any rate, within a period of one month from the date of receipt of a copy of this judgment and forward the same to the competent authority for approval.

- 4) The competent authority among Respondent Nos. 1 to 4 who receive the proposal for promotion of the petitioner as Headmaster w.e.f. 01.06.2018 is directed to approve the same as expeditiously as possible, at any rate, within a period of one month from the date on which the proposal is received.
- 5) Respondent Nos. 1 to 4 are directed to disburse all consequential benefits based on the promotion of the petitioner as Headmaster w.e.f. 01.06.2018 notionally, as expeditiously as possible, at any rate, within a period of four months from the date on which the proposal for appointment as Headmaster is approved.

Sd/-

**P.V.KUNHIKRISHNAN  
JUDGE**

**APPENDIX OF WP (C) 2494/2021**

PETITIONER EXHIBITS

- EXHIBIT P1 TRUE COPY OF THE PROCEEDING NO K.DIS 4267/93 DATED 22.11.1993 OF THE DEO, KOZHIKODE
- EXHIBIT P2 TRUE COPY OF THE CERTIFICATE NO 2142/10 DATED 11.5.2010 IN ACCOUNT TEST (LOWER) OF THE PETITIONER ISSUED BY THE KERALA PUBLIC SERVICE COMMISSION
- EXHIBIT P3 TRUE COPY OF THE CERTIFICATE NO 2143/10 DATED 11.5.2010 IN ACCOUNT TEST (HIGHER) OF THE PETITIONER ISSUED BY THE KERALA PUBLIC SERVICE COMMISSION
- EXHIBIT P4 TRUE COPY OF THE CERTIFICATE NO 2144/10 DATED 11.5.2010 IN (KERALA EDUCATION ACT AND RULES) OF THE PETITIONER ISSUED BY THE KERALA PUBLIC SERVICE COMMISSION
- EXHIBIT P5 TRUE COPY OF THE APPOINTMENT ORDER OF THE 7TH RESPONDENT (SRI K.J. JOSE), DATED 5.6.2018
- EXHIBIT P6 TRUE COPY OF THE LETTER NO B2/5659/2018/L.DIS DATED 18.7.2018 OF THE DEO, THAMARASSERY ADDRESSING SRI K.P ANIL KUMAR, PUBLIC INFORMATION OFFICER, THAMARASSERY
- EXHIBIT P7 TRUE COPY OF THE ORDER NO EM3/16419/2017/DPI/K.DIS DATED 16.11.2017 OF THE DIRECTOR
- EXHIBIT P8 TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE PETITIONER BEFORE THE VICAR OF ST. SEBASTIAN'S CHURCH, VILAKKAMTHODE AND MANGER, ST. SEBASTIAN'S HS, PUNNAKKAL DATED 31.5.2018
- EXHIBIT P9 TRUE COPY OF THE GO(RT) NO 3348/2020/G.EDN DATED 18.12.2020
- EXHIBIT P10 TRUE COPY OF THE JUDGMENT IN WA NO 864/2019 DATED 5.8.2019

RESPONDENT EXHIBITS

- Exhibit R7(A) THE TRUE COPY OF THE JUDGMENT OF THIS HON'BLE COURT DATED 08.06.2022 IN WP(C) NO. 15879 OF 2022.

PETITIONER EXHIBITS

- Exhibit P-11 True copy of the decision reported in 1990 KHC 138 dated 02.03.1990
- Exhibit P-12 True copy of the representation submitted before the Manager dated 31.05.2018
- Exhibit P-13 True copy of the representation submitted by the Petitioner before the Corporate Manager dated 20.05.2019

RESPONDENT EXHIBITS

- Exhibit R6(A) The true copy of the order No F.No 1462 of 210-50592 dated 22-2-2011 of the National

	Commission for Minority Institution
Exhibit R6(B)	The true copy of the judgment in reported in (2022 (6) KHC 474)
Exhibit R6(C)	The True of the Judgment reported in 2009 (4) KHC 4

**True copy**

**P.A.TO JUDGE**