

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

THURSDAY, THE 5TH DAY OF JANUARY 2023 / 15TH POUSHA, 1944

WA NO. 944 OF 2022

AGAINST THE JUDGMENT IN WP(C) 18584/2021 OF HIGH COURT OF

KERALA

APPELLANTS/RESPONDENTS 1,2,4 & 5 IN WPC:

- 1 STATE OF KERALA
REPRESENTED BY SECRETARY,
DEPARTMENT OF GENERAL EDUCATION,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM - 695001
- 2 THE DISTRICT EDUCATIONAL OFFICER
160, AYILAM RD., ATTINGAL,
THIRUVANANTHAPURAM, PIN - 695101
- 3 THE ACCOUNTANT GENERAL
INDIAN AUDIT AND ACCOUNTS DEPARTMENT,
OFFICE OF THE ACCOUNTANT GENERAL,
THIRUVANANTHAPURAM, PIN - 696039
- 4 SECRETARY TO GOVERNMENT
FINANCE DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM, PIN - 695001

BY SR. GOVERNMENT PLEADER SMT. VINITHA B

RESPONDENTS/PETITIONER & 3RD RESPONDENT IN WPC:

- 1 RAVEENDRAN PILLAI S
S/O. SUKUMARA PILLAI, OFFICE ATTENDANT,
GRADE IV(RTD) (PEN 181782), V.H.S.S.,
KARAVARAM, THIRUVANANTHAPURAM DISTRICT.
RESIDING AT KUNNICHAN VILAKKATHU VEEDU,
MULLARANKODE, KALLAMBALAM P.O.,

-: 2 :-

THIRUVANANTHAPURAM DISTRICT, PIN - 695605

2 THE MANAGER
KARAVARAM VOCATIONAL HIGHER SECONDARY SCHOOL,
KARAVARAM, THIRUVANANTHAPURAM, PIN - 695605

BY ADVS.
MANJUSHA K
M.T.SURESHKUMAR
R.RANJITH
SANTHAN V.NAIR

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON
05.01.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

C.R.

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

Writ Appeal No.944 of 2022

Dated this the 5th day of January, 2023

JUDGMENT

P.B.Suresh Kumar, J.

This appeal is directed against the judgment dated 28.02.2022 in W.P.(C) No.18584 of 2021. Respondents 1, 2, 4 and 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 Full Time Menial in an aided school namely, Karavaram Vocational Higher Secondary School (the School) on 22.08.1987. He was thrown out from service on 15.07.1990 for want of requisite students' strength. Though the petitioner was reappointed in a few leave vacancies in the School thereafter and he had worked in such vacancies, he was appointed in a substantive vacancy in the School only on 01.12.2000. The petitioner retired from service thereafter on 30.04.2021. In Ext.P8

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 shown only as 23 years, excluding the interruptions and the service rendered in leave vacancies. According to the petitioner, the interruptions and the service rendered by him in leave vacancies are also liable to be reckoned as qualifying service for grant of pensionary benefits. It is stated by the petitioner that if the said periods are also reckoned, his qualifying service for pension would be 30 years 11 months and 14 days. The writ petition, in the circumstances, was instituted challenging Ext.P8 verification report insofar as it limits his qualifying service for pension to 23 years, and seeking a declaration that his qualifying service for pension would be 30 years 11 months and 14 days.

3. A counter affidavit was filed in the writ petition on behalf of the State mainly contending that in light of the amendments made to Rule 14E(a) of Part III of the Kerala Service Rules (KSR) in terms of G.O.(P) No.128/2018/Fin dated 10.08.2018 and G.O.(MS) No.401/2019/Fin dated 28.10.2019, the interruptions and the service rendered by the petitioner in leave vacancies are not liable to be reckoned as

qualifying service for pension.

4. It is seen that as far as the services rendered by the petitioner in leave vacancies are concerned, the learned Single Judge took the view that insofar as the said services have been rendered after the regular appointment of the petitioner, the same is liable to be reckoned as qualifying service. The learned Single Judge did not consider the claim of the petitioner as regards interruptions in his service. Nevertheless, the writ petition was allowed as prayed for. The State and its officials are aggrieved by the said decision of the learned Single Judge and hence, this appeal.

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

6. It was submitted by the learned Government Pleader that the entitlement of the petitioner for pension is regulated by the Rules contained in Part III KSR as amended from time to time and there is no provision in Part III KSR which enables the petitioner to reckon the interruptions in service as also the services rendered in leave vacancies, as qualifying service for pension. It was pointed out that Rule 14E of Part III KSR on the other hand, specifically provides that only regular full time aided school service shall qualify for

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pensionary benefits, indicating clearly that service in a leave vacancy is not liable to be reckoned for grant of pensionary benefits. It was also argued by the learned Government Pleader that interruptions in the service of the petitioner are governed by Rule 31 of Part III KSR and the case of the petitioner does not fall within the scope of the said provision.

7. Per contra, the learned counsel for the petitioner contended that inasmuch as the petitioner has been granted increments and time bound higher grades, reckoning the services rendered by him in leave vacancies, it cannot be said that the said service cannot be reckoned as qualifying service for pension. In Ext.P6 statement prepared by the teacher-in-charge of the School in Form No.2B of Appendix X of Part III KSR for forwarding the pension papers of the petitioner, the services rendered by the petitioner in leave vacancies are shown as qualifying service. Placing reliance on Ext.P6 statement, it was argued by the learned counsel that in light of the said statement, the officers attached to the Accountant General cannot be heard to contend that the said services will not be reckoned as qualifying service. It was also argued by the learned counsel, placing reliance on Government decision No.8 beneath Rule 14E of Part III KSR

that the interruptions in the service of the petitioner are liable to be reckoned as qualifying service, as the same happened due to reduction of the staff strength in the School.

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

9. In the case on hand, the petitioner does not dispute the fact that both spells of his regular service have been reckoned for pension. The question that falls for consideration therefore is as to whether the services rendered by the petitioner in leave vacancies and the interruptions in his service are liable to be reckoned as qualifying service for pension.

10. Ruling to Rule 11 of Part I KSR as applicable to the petitioner provides that an officer's claim to pension is regulated by the rules in force at the time when the officer is discharged from the service of the State. Rule 3 of Chapter XXVII B of the Kerala Education Rules provides that the rules on retirement benefits and all the conditions for grant of the same as applicable to Government servants, laid down in Part III KSR as amended from time to time, shall *mutatis mutandis* apply to the teachers of aided schools as well. Rule 4 of Part III KSR provides that no claim to pension is admitted when an

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employee is appointed for a limited time only, on the completion of which he is to be discharged. The relevant portion of the said Rule 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.

(b) xxxxxx”

Rule 14E(a) of Part III KSR, as it stood at the time of retirement of the petitioner, reads thus :

“14E(a) Aided school service put in by Government employees prior to entry in Government service qualifies, subject to the following conditions, namely:-

(i) Only regular full time aided school service rendered after the introduction of Direct Payment System in aided school shall be reckoned for pension:

(ii) In cases of resignation of the appointment in aided school for the purpose of taking up appointment in Government, break, if any, between the aided school service and Government service shall not exceed the joining time admissible under the service rules, plus public holidays. Service prior to resignation for other purposes shall not be counted.”

A combined reading of Rule 4 and Rule 14E(a) would indicate beyond doubt that no claim to pension is admissible when an employee is appointed for a limited period and that the period of regular full time service of a pensioner in an aided school alone shall qualify for pension. The petitioner does not dispute

the fact that he was liable to be discharged and he was in fact discharged after completion of service in the leave vacancies. The appointments of the petitioner in the leave vacancies can be regarded only as appointments for a limited time and in light of Rule 4 of Part III KSR, no claim to pension is admissible for the services rendered by the petitioner in the said vacancies, especially in light of the clarification made in Rule 14E(a) that only regular full time aided school service shall be reckoned for pension. This aspect has, in fact, been clarified by the Government in Ext.P10 order. In the light of Rule 11 of Part III KSR, the power of the Government to issue an order in the nature of Ext.P10 cannot be questioned. If that be so, the same binds the petitioner, unless he is able to succeed in a challenge against the same. Ext.P10 order was not under challenge in the writ petition. Needless to say, the petitioner is not entitled to reckon the services rendered by him in leave vacancies as qualifying service for pension.

11. We are fortified in the aforesaid view by a few judgments of this Court. In the context of the services rendered in leave vacancies in aided colleges, interpreting an identical provision contained in Rule 14E(b) of Part III KSR, it was held by this Court in the judgment in W.P.(C) No.29356 of

2016 and connected cases 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 the service rendered by an employee to count for pension. It was also held by this Court in the said judgment 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 22 and 23 of the said judgment read thus:

“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

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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. 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 has 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 appeal 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 the Division Bench 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”

12. Now let us come back to the impugned judgment and the arguments advanced by the learned counsel for the petitioner to support the same. The view taken by the learned Single Judge that the services rendered by the petitioner in leave vacancies are liable to be reckoned as qualifying service since the same were rendered after his initial regular appointment is unsustainable in law as it does not have the backing of any statutory provision. Similarly, the argument advanced by the learned counsel for the petitioner that inasmuch as the petitioner has been granted increments and time bound higher grades reckoning the services rendered by him in leave vacancies, he is entitled to reckon the same as qualifying service for pension, is also not of any substance. Increments and placements in higher grades are governed by different set of rules, and merely for the reason that the service rendered in leave vacancies are reckoned for the purpose of grant of increments or for placements in higher grades, it cannot be said that the same shall be reckoned for

the purpose of grant of pensionary benefits as well. A similar argument advanced in the context of the service rendered in leave vacancies in aided colleges was repelled by the Division Bench of this Court in **Shameer Ali** (*supra*). There is also no merit in the argument advanced by the learned counsel for the petitioner based on Ext.P6 statement. Ext.P6 is only a statement forwarded from the School in terms of the provisions contained in Part III KSR so as to enable the petitioner to claim pension. True, the leave services of the petitioner are shown therein as qualifying service. Merely for the reason that a statement contrary to Rule has been made in such a statement, the petitioner cannot take advantage of the same.

13. The surviving is the issue relating to the interruptions in the service of the petitioner in between the two regular spells of appointments. Rule 31 of Part III KSR dealt with the interruptions in service. The said Rule had also undergone a change in terms of S.R.O.No.938/2019 with effect from 27.11.2019, in terms of which the earlier provision was substituted thus:

“31(a) Interruption in the service of an employee will not count for pension:

Provided that the regular service before interruption is

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eligible to be reckoned as qualifying service for pension and the period of such interruption shall be condoned, unless otherwise specified.

(b)Where the period of interruption in the service on account of participation in strike is treated as "Dies-Non", such period shall count for pension."

It is evident from the said provision that interruption in service will count for pension only if the regular service before the interruption is eligible to be reckoned as qualifying service for pension and the period of such interruption is condoned by an order regularising the same. The petitioner has no case that the period of interruption in his service is one that could be condoned by an order of regularisation, or that the interruption has been condoned. Instead, he relies on decision No.8 below Rule 14E of Part III KSR to contend that since the appointment before the interruption was not provisional, and since the break was due to reduction of staff strength of the institution, the same is liable to be treated as qualifying service. True, Government decision No.8 below Rule 14E provided that break in the service shall be reckoned as qualifying service in cases where appointments before the break was not provisional and the break was due to the reduction of staff strength of the institution. The said provision was as under:

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“8(i) The benefit of counting periods of break as per note 3 below Rule 31, part III Kerala Service Rules will be allowed in cases where the appointment before the break was not provisional or for limited period and the break was due to reduction of staff strength of the institution.

(ii) In cases not covered by (i) above the actual period of service excluding the periods of break will be reckoned for qualifying service.

(iii) In cases covered by (i) above the certificate that termination of appointment was due to reduction of staff strength of the institution should be countersigned by the pension sanctioning authority or Heads of the Departments.”

But, it is seen that since Rule 31 including Note 3 to the said rule as referred to in the said ruling has been substituted with effect from 27.11.2019, Government decision No.8 below Rule 14E of Part III KSR was also deleted in terms of the very same amendment. In other words, the said provision was not in existence at the time when the petitioner retired from service. The aforesaid argument of the petitioner is also therefore without any substance.

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.

APPENDIX OF WA 944/2022

PETITIONER ANNEXURES

- Annexure I** TRUE COPY OF THE AMENDMENT 2018 (GO(P) NO. 128/2018/FIN DATED 10.08.2018)
- Annexure II** TRUE COPY OF G.O(P) 50/2019/ FIN DATED 03.05.2019
- Annexure III** TRUE COPY OF S.R.O NO.938/2019 IN G.O(P)NO.165/2019 FIN DATED 27.11.2019.
- ANNEXURE R1 (A)** TRUE PHOTOSTAT COPY OF THE RELEVANT PAGES OF THE SERVICE BOOK OF THE PETITIONER IN THE IA
- ANNEXURE R1 (B)** TRUE PHOTOSTAT COPY OF THE APPOINTMENT ORDER DATED 1/12/2000 ISSUED BY THE MANAGER
- ANNEXURE R1 (C)** TRUE PHOTOSTAT COPY OF THE KER CERTIFICATE DATED 27/10/2020 ISSUED BY THE TEACHER-IN-CHARGE, VHSS, KARAVARAM
- ANNEUXRE R1 (D)** TRUE PHOTOSTAT COPY OF THE VERIFICATION REPORT NO.P.R.2102065646 DATED 1/2/2021 ISSUED BY THE SENIOR ACCOUNTS OFFICER, INDIAN AUDIT ACCOUNTS, THIRUVANANTHAPURAM.