IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 12TH DAY OF JULY 2022 / 21ST ASHADHA, 1944

WA NO. 264 OF 2022

AGAINST THE JUDGMENT IN WP(C) 38875/2015 OF HIGH COURT OF KERALA

APPELLANTS/RESPONDENTS IN WPC:

1 **THE STATE OF KERALA**
REPRESENTED BY SECRETARY TO GOVERNMENT,
DEPARTMENT OF GENERAL EDUCATION, SECRETARIAT,
THRUVANANTHAPURAM, PIN - 695001

2 **THE DIRECTOR OF PUBLIC INSTRUCTIONS,**
THIRUVANANTHAPURAM, PIN - 695001

3 **THE DEPUTY DIRECTOR OF EDUCATION,**
KANNUR , PIN - 670001

4 **THE DISTRICT EDUCATIONAL OFFICER,**
TALIPARAMBA, PIN - 670141

5 **THE ASSISTANT EDUCATIONAL OFFICER,**
IRIKKUR, PIN - 670593

BY SR. GOVERNMENT PLEADER SMT.V.VINITHA

RESPONDENTS/PETITIONERS IN WPC:

1 **MANAGER,**
NIDUVALOOR A.U.P. SCHOOL,
CHUZHALI.P.O, KANNUR , PIN - 670142

2 **SHYLAJA.K.V.**
ASSISTANT TEACHER(UPSA),
NIDUVALOOR A.U.P SCHOOL,
CHUZHALI.P.O, KANNUR, PIN - 670142

3 SMITHA.V
W/O. BIJU.M, UPPER PRIMARY SCHOOL ASSISTANT,
NIDAVALOOR A.U.P SCHOOL, CHUZHALI.P.O,
KANNUR, PIN - 670142

BY ADVS. SRI.KALEESWARAM RAJ
SRI.VARUN C.VIJAY
SMT.THULASI K. RAJ

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 12.07.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R.

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

Writ Appeal No.264 of 2022

Dated this the 12th day of July, 2022

JUDGMENT

P.B.Suresh Kumar, J.

This appeal is directed against the judgment dated 07.02.2019 in W.P.(C) No.38875 of 2015. The appellants are the respondents in the writ petition. Parties and documents are referred to in this judgment, unless otherwise mentioned, as they appear in the writ petition.

2. The first petitioner is the Manager of an aided Upper Primary School. He appointed petitioners 2 and 3 in the school as Upper Primary School Assistants on 04.06.2004 and 07.01.2005 respectively. The Educational Officer declined to approve the appointments of petitioners 2 and 3 on the ground that they were made overlooking the superior claims of two other teachers namely, Smt.K.K.Sathi and Smt.K.Thankamani under Rule 51A of Chapter XIVA of the Kerala Education Rules (the Rules), framed under the Kerala Education Act (the Act).

Even though the Manager appointed Smt.K.K.Sathi later on 04.10.2005, Smt.Thankamani was not appointed. Smt.Thankamani, in the circumstances, filed W.P.(C) No.27067 of 2007 before this Court, and in terms of Ext.P1 judgment dated 9.1.2012, this Court directed the Manager to appoint Smt.Thankamani against the vacancy in which the second petitioner was appointed on 04.06.2004. Pursuant to the said judgment, although Smt.Thankamani was appointed on 05.12.2012 as directed by this Court, the Educational Officer approved her appointment only notionally till 22.01.2013, the date on which she had joined duty.

3. After the appointment of Smt.Thankamani, the Manager preferred Exts.P6 and P7 representations before the Educational Officer seeking orders to rearrange the appointments of petitioners 2 and 3 with effect from 04.06.2004 and 07.01.2005 respectively. Those representations were rejected as per Exts.P8 and P9 orders on the ground that there were no vacancies on those dates. Petitioners 2 and 3 challenged Exts.P8 and P9 orders before the Government in revision petitions under Rule 92 of Chapter XIVA of the Rules. In terms of Ext.P13 order, the Government

disposed of the said revision petitions directing the Educational Officer to approve the appointment of the second petitioner with effect from 04.10.2005. There was no direction in the said order in respect of the third petitioner as there were only three vacancies in toto for making the rearrangement and all the three vacancies would be filled up with the appointment of the second petitioner. The writ petition was filed thereupon challenging Exts.P8, P9 and P13 orders. The petitioners have also sought a direction to the Government to direct the Educational Officer to approve the appointment of the second petitioner from 04.06.2004 to 04.10.2005 and the appointment of the third petitioner from 07.01.2005 to 01.06.2010 for payment of salary, as they had worked in the school during the relevant periods.

4. A counter affidavit has been filed by the Educational Officer contending, among others, that petitioners 2 and 3 are not entitled to salary for the period during which they worked in the school pursuant to the appointments which were not approved.

5. The learned Single Judge found that since the appointment of Smt.Thankamani was approved only notionally

upto the date of joining viz, 22.01.2013, the second petitioner who was working in the school from 04.06.2004 to 04.10.2005 in the vacancy in which Smt.Thankamani was appointed is entitled to salary for the said period. As regards the claim of the third petitioner for salary for the period from 07.01.2005 to 01.06.2010 on the sole basis that she had worked in the school during the said period, the learned Single Judge took the view that the same is one to be considered by the Educational Officer. Accordingly, the writ petition was disposed of declaring that the second petitioner is entitled to get her appointment approved for the period from 04.06.2004 to 04.10.2005 for the purpose of payment of salary, and directing the respondents to pass consequential orders granting salary to the second petitioner for the said period. The Educational Officer was also directed in terms of the judgment to consider the claim of the third petitioner for payment of salary for the period from 07.01.2005 to 01.06.2010 with the observation that if payment of salary to the third petitioner would not amount to double payment, she shall be paid salary for the said period. The official respondents are aggrieved by the decision of the learned Single Judge.

6. Heard the learned Government Pleader as also the learned counsel for the petitioners in the writ petition.

7. Although there was a prayer in the writ petition for a declaration that petitioners 2 and 3 are entitled to get their appointments approved with effect from 04.06.2004 and 07.01.2005 respectively, the learned Single Judge did not grant the said relief. Instead, as far as the second petitioner is concerned, the direction in the judgment was that she shall be paid salary for the period during which she had worked in the school. In other words, the view taken by the learned Single Judge in this regard is that a teacher who has worked in a school pursuant to the appointment against a sanctioned post is entitled to salary, even if the appointment is not approved. As far as the third petitioner is concerned, the direction in the judgment was that she shall be paid salary for the period during which she had worked in the school pursuant to her appointment, if the payment of salary during the said period would not amount to double payment. In other words, the view taken by the learned Single Judge in this regard is that a teacher who has worked in a school pursuant to the appointment is entitled to salary, if payment of salary would

not create an additional burden to the Government, even if the appointment is not made against any sanctioned post.

8. The learned Government Pleader submitted that in terms of the provisions of the Act and the Rules, the Government is obliged to pay salary only to a teacher who is appointed against a sanctioned post and whose appointment is approved by the Educational Officer. The learned Government Pleader has placed reliance on a few provisions in the Act and Rules as also several judgments of this Court and the Apex Court, in support of the said submission. We are not referring to the statutory provisions and the judgments on which reliance has been placed by the learned Government Pleader for the present, as we propose to deal with the same elaborately a short while later.

9. Per contra, the learned counsel for the petitioners contended that since the second petitioner had worked in the school from 04.06.2004 to 04.10.2005 in a sanctioned post and since salary was not paid to any other teacher for the said period, she is entitled to be paid salary for the said period for having worked in the said post. As far as the third petitioner is concerned, the submission made by the

learned counsel was that even though there was no post to accommodate the third petitioner during the period from 07.01.2005 to 01.06.2010, since salary was paid only to two teachers among the three who were entitled to appointment against the three sanctioned posts, she ought to be paid salary for the said period as she had worked in the school during the said period pursuant to the appointment made by the Manager. The learned counsel has relied on the decisions of the Apex Court in **Man Singh v. State of Uttar Pradesh**, 2022 SCC Online SC 726, **Selvaraj v. Lt.Governor of Island, Port Blair and Others**, (1998) 4 SCC 291, **District Basic Education Officer, Alahabad v. Sushila Jaiswal (Dead) Through Her Legal Representatives and Others** (2018) 16 SCC 506 and **Virender Kumar, General Manager, Northern Railways, New Delhi v. Avinash Chandra Chadha and Ors,** (1990) 3 SCC 472 and the decisions of this Court in **Bindu Thomas v. State of Kerala**, 2007 SCC Online Ker 605, **Jolly v. State of Kerala**, 2003 (2) KLT 192 and the decision of this court in W.A.No. 1428 of 2021 in support of the said contention. It was also argued by the learned counsel that even if it is found that the scheme of the Act and the Rules is

such that salary cannot be paid to a teacher without the appointment being approved by the competent authority, having regard to the peculiar facts of this case, this Court would certainly be justified in directing payment of salary to teachers who had worked in the school pursuant to the appointments made by the Manager, especially when the Government has not paid salary to anyone else for the said period, in exercise of the power under Article 226 of the Constitution of India. The learned counsel has relied on the decisions of the Apex Court in **Bandhura Mukti Morcha v. Union of India,** (1984) 3 SCC 161, **Dwaraka Nath v. ITO** (1965) 3 SCR 536, **G. Veerappa Pillai v. Raman and Raman Ltd.**, AIR 1952 SC 192 and the decision of the Orissa High Court in W.P.(C) No. 10228 of 2006. in support of the said proposition. It was also contended by the learned counsel that at any rate, the appointments of petitioners 2 and 3 are protected by Turquand's Rule and *de facto* doctrine. The learned counsel concluded his arguments pointing out that the direction in the impugned judgment to pay salary to teachers who had worked in the school pursuant to the appointments made by the competent authority being only a direction in

tune with the mandate under Articles 14 and 21 of the Constitution of India, this court shall not interfere with such a direction. To bring home the said point, the learned counsel has relied on the decisions of the Apex Court in **Olga Tellis and Others v. Bombay Municipal Corporation**, (1985) 3 SCC 545 and **O.Konavalov v. Commander Coastguard Region,** (2006) 4 SCC 620.

10. On a query from the Court, the learned Government pleader conceded that some of the judgments relied on by the learned counsel for the petitioners have laid down the proposition that the appointee shall be paid salary if work is extracted from him/her. According to the learned Government Pleader, those decisions being rendered either *per incuriam* or *sub silentio,* they cannot have the force of law in terms of Article 141 of the Constitution of India. The learned Government Pleader has relied on several judgments of this Court and the Apex Court to substantiate the said point.

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

12. Before dealing with the arguments advanced

by the learned counsel for the parties, it is necessary to understand the scheme of the Act and the Rules as regards appointment of teachers in aided schools and payment of their salary. Section 9 of the Act provides that the Government shall pay salary to all teachers in aided schools. Section 10 of the Act provides that Government shall prescribe the qualification to be possessed by persons for appointment as teachers in Government and private schools. Section 11 of the Act provides that subject to the rules and conditions laid down by the Government, teachers of the aided schools shall be appointed by the Managers of such schools from among persons who possess the qualifications prescribed under Section 10. Section 12 of the Act provides that conditions of service of the teachers in aided schools shall be such as may be prescribed by the Government. Chapter XIVA of the Rules deals with the conditions of service of aided school teachers. Rule 7 of Chapter XIVA provides 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 the appointment is duly

approved. Rule 51A of Chapter XIVA provides that qualified teachers who are relieved as per Rule 49 or Rule 52 or on account of termination of vacancies shall have preference for appointment to future vacancies in the same or higher or lower category of teaching posts for which he is qualified, that may arise if there is no claimant under Rule 43 in the lower category in schools under the same educational agency provided, they have not been appointed in permanent vacancies in schools under any other educational agency. Form 27, in terms of which appointment of teachers are to be made, contains a clause to the effect that the appointment is subject to the provisions in the Act and the Rules. In **Nair Service Society v. Government of Kerala,** 2015 (2) KLT 625, a Division Bench of this Court held that the right of the Manager of an aided school to appoint teachers is not an absolute or unbridled right and exercise of such right is regulated and restricted by the provisions of the Act and Rules. The essence of the statutory provisions and the decision of this Court referred to herein-above is that even though the Government is obliged to pay salary to the teachers, the said obligation is subject to the condition that only persons who possess the

requisite qualification as prescribed by the Government shall be appointed and that such appointments shall be in accordance with the Rules. It is also clear from the said provisions that appointments shall be effective only from the date on which the teacher is admitted to duty, that too, only if the appointment is duly approved.

13. In **State of Kerala v. E.C.Elsy & Others**, 1987 (2) KLT 882, a Full Bench of this court, while considering the question whether the State is liable to pay salary to a teacher, whose preferential claim for appointment in terms of the Rules was overlooked by the Manager, held that a teacher appointed by the Manager does not become an employee of the State and payment of salary to approved teachers is only a form of aid. It was also held by this court in the said case that Section 9 of the Act which imposes a statutory liability on the State Government to pay salary to the teachers of aided schools is not in recognition of any pre-existing right of such teachers against the Government and that the primary liability to pay salary to teachers in aided schools is that of the employer namely the aided school. The ratio of the case was that a teacher whose claim for re-appointment has been

overlooked by the Manager is not entitled to salary from the State for the period during which he was deprived of re-appointment on account of the wrongful action of the Manager. In **Hymavathy v. Addl.Secretary**, 1988 (2) KLT 741, having regard to the scheme of the Act and the Rules, this court has reiterated the position that the Manager of an aided school can make appointment only in accordance with the provisions of the Rules, and the obligation of the Government to pay salary arises only when the appointment is duly approved. It was also clarified by this court that the Government will not have any obligation to pay salary to a teacher for the mere reason that he/she had worked pursuant to the appointment. Further, it was held in the said case that even though the right of the teacher to be remunerated for the work extracted from him cannot be disputed, the Manager who has made the illegal appointment has the obligation to pay the teacher, if the appointment was not in accordance with the Rules. Paragraph 4 of the said judgment reads thus:

> "The Manager of aided schools can appoint teachers only according to the provisions of the Education Rules. The Government has obligation to pay salary etc, only of teachers who are duly appointed and whose appointments are approved according to the Rules. The only fact that the Manager appointed a teacher and the latter is qualified is no

> reason to hold the Government liable to approve the appointment and pay the teacher. Nor does the Government have any obligation to pay salary of the teacher for the only reason that he had worked pursuant to the order of appointment. The right of the teacher to be remunerated for the work extracted from her cannot be disputed. But if the appointment was not in accordance with the rules, it is the Manager who made the irregular appointment and not the Government that has the obligation to pay the teacher. To hold otherwise will be to put a premium on the waywardness of the Managers. I am therefore not in a position to agree that the only fact that the teacher is entitled to be remunerated for the work extracted from her casts an obligation on the respondents to approve her appointment and pay her the salary for the period from 11-6-1982 to 13-8-1982."

The aforesaid proposition has been reiterated by this court in **Praseetha S.V. v. The District Educational Officer Palakkad & Othrs,** 2006 (1) KLJ 45, by holding that so long as the concerned Educational Officer does not approve the appointment made by the Manager, the appointment will not enable the appointee to receive any emoluments from the Government including salary.

14. A similar question as to the liability of the State to pay salary to a teacher appointed in a recognised school arose before the Apex Court in **Government of Andhra Pradesh and Others v. K.Brahmanandam and Others,** (2008) 5 SCC 241, wherein it has been held that if the

obligation of the State to pay salary arises under a statute, the State is not liable to pay the salary as no legal right accrues in favour of those who had been appointed in violation of the mandatory provisions of the statute. Paragraph 14 of the said judgment reads thus:

> "The liability of the State to pay salary to a teacher appointed in the recognised schools would arise provided the provisions of the statutory rules are complied with, subject to just exception. The right to claim salary must arise under a contract or under a statute. If such a right arises under a contract between the appointee and the institution, only the latter would be liable therefore. Its right in certain situation to claim reimbursement of such salary from the State would only arise in terms of the law as was prevailing at the relevant time. If the State in terms of the statute is not liable to pay the salary to the teachers, no legal right accrues in favour of those who had been appointed in violation of mandatory provisions of the statute or statutory rules."

The Apex Court further held that appointments made in violation of the mandatory provisions of a statute would be illegal and void. Paragraph 16 of the judgment reads thus:

> "Appointments made in violation of the mandatory provisions of a statute would be illegal and, thus, void. Illegality cannot be ratified. Illegality cannot be regularised, only an irregularity can be."

The proposition that an appointment made in contravention of statutory provisions is illegal and void *ab initio* has been reiterated by the Apex Court in **Shesh Mani Shukla v.**

District Inspector of Schools Deoria and Others, (2009) 15 SCC 436 also in the context of an appointment made in a recognised school violating the provisions of the Statute. It was also held by the Apex Court in the said case that if the appointment of the teacher is not approved by the statutory authority, no exception can be taken only because the appellant had worked for a long time and a writ cannot be issued for approval of the appointment on that basis, for it is well established that for the said purpose, the writ petitioner must establish a legal right. Paragraph 19 of the judgment in the said case reads thus:

> "19. It is true that the appellant has worked for a long time. His appointment, however, being in contravention of the statutory provision was illegal, and, thus, void ab initio. If his appointment has not been granted approval by the statutory authority, no exception can be taken only because the appellant had worked for a long time. The same by itself, in our opinion, cannot form the basis for obtaining a writ of or in the nature of mandamus; as it is well known that for the said purpose, the writ petitioner must establish a legal right in himself and a corresponding legal duty in the State. (See *Food Corpn. of India v. Ashis Kumar Ganguly*.) Sympathy or sentiments alone, it is well settled, cannot form the basis for issuing a writ of or in the nature of mandamus. (See *State of M.P. v. Sanjay Kumar Pathak*.)"

15. As noted, in the case on hand, the appointments of the petitioners were not approved by the

competent authority as they were made ignoring the preferential claim of two other teachers under Rule 51A of Chapter XIVA of the Rules. In other words, the appointments of the petitioners in the school with effect from 04.06.2004 and 07.01.2005 respectively were illegal, being contrary to the provisions contained in Chapter XIVA of the Rules and hence void. If the appointments are illegal and void, the scheme of the Act and the Rules envisages that the Government does not have any obligation to pay the salary to the teachers, for grant of salary to such teachers would amount to a premium on the conduct of the Manager in flouting the statutory provisions. As noted, the learned Single Judge did not accept the case of the petitioners that they are entitled to get their appointments in the school approved with effect from 04.06.2004 and 07.01.2005 respectively. Instead, as far as the second petitioner is concerned, the view taken by the learned Single Judge is that she is entitled to be paid the salary for the period during which she had worked in the school in a sanctioned post, even though her appointment for the said period was not duly approved. Similarly, as far as the third petitioner is concerned, the view taken by the learned Single Judge is that

she shall be paid salary for the period during which she had worked in the school, even though her appointment for the said period was not against any sanctioned post, if payment of salary would not amount to an additional burden to the State. We are of the opinion that the views of the learned Single Judge on the basis of which the impugned judgment is rendered, are unsustainable in law.

16. The decisions of the Apex Court in **Man Singh** *(supra)* and **Selvaraj** *(supra)* are decisions rendered on the principle that if work is extracted from a person, he shall be paid remuneration for the same. There cannot be any dispute at all to the said proposition, but as has been clarified by this Court in **Hymavathy** *(supra)*, if the appointment defies the Act and the Rules, it is the Manager who is responsible and the Government has no obligation to pay salary to the teacher. The said judgments cannot, therefore, have any application to the facts of the present case where the teachers do not dispute the fact that their appointments, pursuant to which they have worked in the school, were not in accordance with the provisions of the Act and the Rules.

17. True, in **Bindu Thomas** *(supra)*, a Division

Bench of this Court has observed that a teacher who was appointed ignoring the preferential claim of another under Rule 43 of Chapter XIVA of the Rules is entitled to salary for the period during which she had worked. The relevant paragraph in which the observation is made reads thus:

> "We however, make it clear that since Lilly had not worked in the post of H.S.A. in the leave vacancy which arose on 1-6-1999 and later in the regular vacancy on 5-6-2002 she would not be entitled to get salary or monetary benefits for the period she had not worked. All the same she is entitled to get notional benefits in the post of HSA (Malayalam) from 1-6-1999 onwards. Bindhu Thomas who is working as H.S.A. (Malayalam) has to give way for Lilly. Bindhu Thomas is however, entitled to get salary for the period she had worked. Counsel appearing for Bindhu Thomas submitted that once Lilly is promoted as H.S.A. there will be a vacancy of U.P.S.A. in the school and direction be given to the Manager to accommodate Bindhu Thomas in that vacancy. It is open to her to take up the matter with the Manager and it is for him to decide that request on which we express no opinion. O.P. No. 5099 of 2001 would stand allowed. W.A. No. 1645 of 2003 and O.P. No. 32623 of 2001 would stand dismissed."
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> (underline supplied)

The solitary statement in the judgment aforesaid, according to us, cannot be considered as law declared to have a binding effect as is contemplated by Article 141. In this context, we deem it apposite to refer to a passage from the decision of the Apex Court in **Arnith Das v. State of Bihar,** (2000) 5 SCC

488 which reads thus:

> "20. A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined. (See *State of U.P.* v. *Synthetics & Chemicals Ltd.* [(1991) 4 SCC 139, para 41] SCC, para 41.)"

Similarly, in **Jolly** *(supra)*, the main question which arose before the Full Bench of this Court was whether the official respondents were justified in not sanctioning the posts of Physical Education Teacher to accommodate the petitioners in the cases dealt with therein. Insofar as appointments have been made in those cases in anticipation of the sanctioning of the required number of posts, an incidental question as to whether such appointees who had worked, are entitled to salary for the period during which they had worked also arose for consideration. As the main question was answered in the affirmative, this Court while considering the incidental question, held that insofar as the teachers had worked in the school, the action in not paying them salary is arbitrary and unfair. The relevant paragraphs 40 and 41 dealing with the said question read thus:

> “40. It was contended on behalf of the petitioners that they have not been paid salary since 1988. The factual position was not disputed. However, on behalf of respondents it was pointed out that the posts had not been sanctioned after 1989. If the Managements have continued with the incumbents in position, the responsibility to pay the salaries rests on them.
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> 41. In case the teachers have continued on the posts, the action in not paying them salary is wholly arbitrary and unfair. A person who performs his duties is entitled to the payment of his salary. The dispute between the school and the State cannot result in denial of salary to the teacher. The payment, if not already made, the needful should be done without delay. However, it looks difficult to believe that the teachers would continue to teach for more than 14 years without getting their wages. In this situation, it appears fair to direct the competent authority to ascertain the factual position from the employees and the employers. In case it is found that the payment has not been made, the Government shall pay for the duration for which the incumbent had actually worked without getting the wages. However, it is clarified that it shall be entitled to recover, if permissible under law, from the Managements that had appointed the teachers or illegally allowed the incumbents to continue in position. It shall not, however, confer on the incumbents of the posts a right to claim continuance in service or of the posts held by them. The second question is accordingly answered in the above terms.”

The specific contention raised by the learned Government Pleader as regards this decision is that insofar as it relates to the incidental issue, it is one given *per incuriam* being rendered in ignorance of the terms of the statute as also the binding judgments of the Apex Court. The learned Government

Pleader has relied on several judgments of the Apex Court and this Court to bring home the point that the decision in **Jolly** *(supra),* insofar as the issue referred to above is concerned, cannot be considered as law declared to have a binding effect as is contemplated by Article 141. It is unnecessary to consider the various decisions cited by the learned Government Pleader as we find that in the light of the decisions of the Apex Court in **K.Brahmanandam** *(supra)* and **Shesh Mani Shukla** *(supra)*, the decision in **Jolly** on the question aforesaid cannot be said to be good law being one rendered not in consonance with the views expressed by the Apex Court [See **Shah Faesal v. Union of India,** (2020) 4 SCC 1 and **Sundeep Kumar Bafna v. State of Maharashtra,** (2014) 16 SCC 623]. It is seen that in **Suma Chandranath** *(supra)*, following **Jolly**, a Division Bench of this Court directed payment of salary to a teacher who is appointed without there being a sanctioned post for a period during which she was pursuing litigation for approval of her appointment. Paragraphs 9 and 11 of the judgment in the said case read thus:

> "9. For the period from 14.6.1990 to 16.7.1996 however, we find that the appointment of the writ petitioner was apparently made by or on behalf of the Manager of the school and her continuance till 16.7.1996 as a teacher of the school can be probably justified

> on the ground that, that was the period during which she was actually pursuing the case for approval of the said appointment. For the said period we also feel that the writ petitioner may be able to get the benefit contemplated in the judgment of the Full Bench of this Court in Jolly v. State of Kerala (supra). To that extent alone, therefore, we find that the directions of the learned single Judge in the impugned judgment can be justified.
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> x x x x x
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> 11. In the result, we modify the directions in the impugned judgment of the learned single Judge and direct the Government to pay the salary and emoluments due to the petitioner for the period that she worked in the school between 14.6.1990 and 16.7.1996. We make it clear that the said amounts paid by the Government at first instance can be recovered from the Manager of the school, the appellant in WA No. 157 of 2022. We further hold that the writ petitioner shall not be entitled to any amount for the period, if any, that she worked in the school after 16.7.1996, the date on which her revision petition was rejected by the Government. The amounts directed to be paid to the petitioner as above shall be disbursed to her by the Government within three months from the date of receipt of a copy of this judgment."

Insofar as it is found by us that the decision in **Jolly** cannot be said to be good law, the decision in **Suma Chandranath** also cannot be considered as law declared to have a binding effect as is contemplated by Article 141. Needless to say, the arguments advanced by the learned counsel for the petitioners based on the decisions of this Court in **Bindu Thomas** *(supra)*, **Jolly** *(supra)* and **Suma Chandranath** *(supra)* are only to be

rejected and we do so.

18. There is no merit in the argument advanced by the learned counsel for the petitioners that this Court would be certainly justified, having regard to the peculiar facts of this case, in directing payment of salary to teachers who had worked in the school pursuant to the appointments made by the Manager, especially when the Government has not paid salary to anyone else for the said period, in exercise of the power under Article 226 of the Constitution. As noted, the petitioners have sought in the writ petition, directions in the nature of a writ of mandamus directing the Government to approve their appointments for the period during which they have worked in the school, for payment of salary to them. It is now trite that a writ of mandamus can be issued only when a legal right exists in favour of the petitioner and when there is a corresponding legal duty on the part of the respondent. No writ can be issued in the absence of any legal right, on the basis of sympathy alone [See **Food Corporation of India v. Ashis Kumar Ganguly,** (2009) 7 SCC 734 and **State of M.P. v. Sanjay Kumar Parhak,** (2008) 1 SCC 456]. As found by us, going by the scheme of the Act and the Rules, petitioners 2

and 3 do not have any legal right to claim salary for the period during which they had worked in the school otherwise than in accordance with the provisions of the Act and the Rules. That apart, as observed earlier, if directions are issued to pay salary to teachers whose appointments are void *ab initio*, the same would amount to giving a premium for those who are flouting the law, and it is trite that the power conferred under Article 226 cannot be invoked for perpetuating a palpable illegality.

19. In **Bandhua Mukti Morcha** *(supra)*, the Apex Court has reiterated that the jurisdiction of the High Courts under Article 226 is wider because High Courts are required to exercise jurisdiction not only for enforcement of fundamental rights but also for enforcement of other legal rights. Similarly, in **Dwaraka Nath** *(supra)*, it was held by the Apex Court that Article 226 is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. **Veerappa Pillai** *(supra)* is a case where the Apex Court has explained the scope of the power of the High Court under Article 226. In **Ramesh Chandra Pani** *(supra)*, the Orissa High Court has reiterated that while exercising the power under Article 226, the Court is

acting as a court of equity as well and it will have to be mindful of the interest of justice and ensure that in rigidly applying technical rules of procedure, miscarriage of justice does not result. The aforesaid judgments, according to us, have no application to the facts of the present case.

20. The arguments advanced by the learned counsel for the petitioners based on the Turquand's Rule and *de facto* doctrine are also misplaced. The doctrine of indoor management known as Turquand's Rule after **Royal British Bank v Turquand** [(1856) 6 E&B 327 : (1843-60) All ER Rep 435] only means that persons dealing with companies and similar entities are entitled to presume that the internal requirements prescribed in their rules are properly observed [See **MRF Ltd. v. Manohar Parrikar,** (2010) 11 SCC 374]. *De facto* doctrine saves acts performed *de facto* by officers within the scope of their assumed official authority as if they were performed by officers *de jure* [See **Central Bank of India v. C.Bernard,** (1991) 1 SCC 319]. The above doctrines have absolutely no application to the facts of the present case.

21. The argument advanced by the learned counsel for the petitioners based on the decisions of the Apex

Court in **Olga Tellis** *(supra)* and **O.Konavalov** *(supra)* are also misplaced as those are cases dealing with rights of those who are lawfully appointed to claim wages for the work done. The said judgments also do not have any application to the facts of the present case.

In the light of the discussion aforesaid, the writ appeal is allowed and the impugned judgment is set aside.

Sd/-
P.B.SURESH KUMAR, JUDGE

Sd/-
C.S.SUDHA, JUDGE

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