

**(2009) 02 KL CK 0050**  
**In the High Court Of Kerala**  
**Case No : WP (C) No. 19776 of 2007 (D)**

Abdulrahiman N.K.

APPELLANT

Vs

Government of Kerala and Others

RESPONDENT

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**Date of Decision :** 13-02-2009

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2009) 1 ILR (Ker) 864 : (2009) 1 KLJ 721 : (2009) 2 KLT 105

**Hon'ble Judges :** M.L. Joseph Francis, J;K. Balakrishnan Nair, J

**Bench :** Division Bench

**Advocate :** K.D. Babu and T. Venugopalan, for the Appellant; Noble Mathew (G.P.), N.L. Krishnamoorthy, K. Lakshminarayanan, Sathy Shrepriya, V.A. Muhammed and K.E. Hamza, for the Respondent

**Final Decision :** Allowed

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## Judgement

K. Balakrishnan Nair, J.—The petitioner was appointed as a Cook in a leave vacancy in the 4th respondent's school on 10-7-2003. It is a special school meant for visually challenged children. On termination of the vacancy, he was relieved from service on 30-11-2003. The said appointment was approved by the District Educational Officer (D.E.O.). The petitioner submits that, thus he became a Rule 51A claimant for future vacancies that may arise in the said school. Later, a vacancy arose in the post of Scavenger on 1-7-2005. The petitioner was not appointed in that vacancy. Still later, another vacancy arose in the post of Cook on 5-6-2006. Even then, he was not considered for appointment. Claiming the vacancy in the post of Scavenger, the petitioner preferred Ext. P2 representation before the Manager on 12-9-2005. It was followed by Ext. P3 representation dated 10-10-2005 filed, before the D.E.O. Since the said officer did not take any action, the petitioner preferred Ext. P4 representation dated 17-5-2006 before the Director of Public Instruction. Since those representations were not considered, he filed Ext. P5 representation dated 20-7-2006 before the Government. But, the Government also did not take any effective action.

2. The vacancy in the post of Scavenger was filled up by appointing the 5th respondent and the vacancy in the post of Cook was filled up by appointing the 6th respondent. When he was not considered even for appointment to the post of Cook, the petitioner filed Ext. P6 representation before the Manager, followed by Ext. P7 representation dated 18-6-2007 before the third respondent, D.E.O.

3. Finally, the petitioner moved the Assistant Public Information Officer attached to the office of the D.E.O. under the Right to Information Act and pursuant to that the said officer issued Ext. P8 communication to him, pointing out that he was not appointed in the post of Scavenger because of the relinquishment letter given by him on 14-12-2005. Feeling aggrieved by the appointments of respondents 5 and 6 and also the refusal of the Educational Authorities to interfere with the same, this writ petition was filed, seeking the following reliefs:

i) call for the records leading to the appointment of 5th respondent and 6th respondent by 4th respondent and subsequent action taken by the 3rd respondent and issue a writ of certiorari quashing the same.

ii) declare that the petitioner is entitled to be appointed in the vacancy which arose on 1-7-2005 in which post the 5th respondent was appointed and alternatively in the post in which R6 was appointed.

iii) to issue a writ of mandamus directing the 4th respondent to appoint the petitioner in the vacancy which arose on 1-7-2005 and the 3rd respondent to approve the same.

4. The 4th respondent has filed a counter affidavit, in which it is submitted that the petitioner has given Ext. R4(a) relinquishment letter dated 14-12-2005, relinquishing his claim for appointment as Scavenger. It was executed in the presence of the D.E.O. and other witnesses. Pursuant to that, the 5th respondent was appointed as Scavenger and the said appointment was approved also. There was yet another reason for not considering the petitioner for the said post. The vacancy arose in the Girls Hostel. The rooms, where the blind girls are residing, are to be cleaned and the children have to be led to the toilet and therefore a male scavenger cannot be appointed. In view of the relinquishment letter, the petitioner is not entitled to claim the post of Cook also. So, the 6th respondent was appointed in the vacancy of Cook, which was available from 5-6-2006 to 8-3-2008. The said appointment was approved by the D.E.O. as evidenced by Ext. R4(c). Therefore, the 4th respondent prayed for dismissal of the writ petition.

5. The 6th respondent has filed a counter affidavit on behalf of respondents 5 and 6. They supported the stand of the Manager. According to them, in view of the relinquishment letter given by the petitioner, he has no right to claim re-appointment in the school.

6. The D.E.O. has filed a counter affidavit, stating that the petitioner has relinquished his claim for posting as Scavenger. It is also submitted that the

appointments of both the 5th and 6th respondents, were approved by the D.E.O. It is also submitted that the appointment of the 6th respondent was approved, relying on the declaration of the Manager that there is no claimant waiting for appointment to the post of Cook.

7. When the writ petition came up before the learned Single Judge, it was pointed out that there were conflicting decisions concerning the impact of the newly introduced first proviso to Rule 51A of Chapter XIV A of the Kerala Education Rules (for short "K.E.R."). The learned Judge noticed the decisions in W.P.C. 19155 of 2005 and W.P.C. 31790 of 2007, which took conflicting views on the point. Therefore, the matter was referred for decision by a Division Bench of this Court, so that the conflicting decision could be considered and a pronouncement may be made on the effect of the first proviso to Rule 51A.

8. Heard the learned counsel on both sides. The learned counsel for the petitioner submitted that the relinquishment letter has no validity and the claim of the petitioner will be lost if only the Manager followed the procedure prescribed under Note 2 to Rule 51A. In support of that submission, the learned counsel relied on the decisions of the Division Bench of this Court in Lakshmikutty Amma and Others Vs. Vijayalakshmikutty and Another and Nalini Vs. State of Kerala . Regarding the impact of the first proviso to Rule 51A, it was submitted that the said proviso will apply to Rule 51A claimants who got appointment after the introduction of the above amendment and not those who got appointment earlier.

9. The learned counsel for the 4th respondent Manager submitted that in view of Ext. R4(a) relinquishment letter, the petitioner has no right to claim appointment as Scavenger or Cook. The learned counsel for respondents 5 and 6 supported the stand of the Manager. It is pointed out that Ext. R4(a) is a genuine document, because it was executed in the presence of the D.E.O. and counter signed by him. Therefore, the petitioner cannot claim re-appointment in the school after executing Ext. R4(a).

10. We heard the learned Government Pleader for the official respondents. We also had the benefit of hearing the learned counsel appearing in the connected writ petitions, concerning the interpretation of the first proviso to Rule 51A.

11. We will first consider the point referred for decision by the Division Bench. Rule 51A, as it stood before the amendment dated 25-6-2005, reads as follows:

Qualified teachers who are relieved as per Rule 49 or 52 or on account of termination of vacancies shall have preference for appointment to future vacancies in schools under the same Educational agency or an Educational agency to which the school may be subsequently transferred provided that they have not been appointed in permanent vacancies in schools under any other Educational Agency.

Rule 51A, after the amendment, reads as follows:

R. 51A: Qualified teachers are relieved as per Rule 49 or 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 in schools under the same Educational Agency or an Educational Agency to which the school may be subsequently transferred provided they have not been appointed in permanent vacancies in schools under any other Educational Agency.

Provided that a teacher who was relieved under Rule 49 or Rule 52 shall not be entitled to preference for appointment under this rule unless such teacher has a minimum continuous service of one academic year as on the date of relief;

Provided further that the first preference under this rule shall be given to protected teachers.

Rules 49 and 52 are relevant. Therefore, they are also quoted below for convenient reference:

R. 49: Qualified teachers except Headmasters appointed in vacancies which are not permanent which extend over the summer vacation and who continue in such vacancies till the close date shall be retained in the vacancies during the vacation, if their continuous service as on the closing day is not less than eight months. The teachers so retained shall be entitled to the vacation salary. These teachers shall be relieved on the closing day if their continuous service as on that day is less than the aforesaid period. This rule shall not apply to teacher appointed in training vacancies.

R. 52(1): Teachers who are relieved on account of any reduction in the number of posts under orders of the department shall on reappointment in the same school or in another school under the same management or a different management start on the same pay as they were getting at the time of relief, whether the new appointment is permanent or not.

(2) Teachers thrown out from service due to the withdrawal of recognition of schools by the Department shall also be eligible to draw the pay which they were getting at the time of withdrawal of recognition of the schools on re-appointment in another school.

The above rules govern appointment and re-appointment of teachers in Aided Schools. But, by virtue of Rule 7 of Chapter XXIV B, the aforementioned rules are mutatis mutandis applicable to non-teaching staff working in the Aided Schools. Rule 49 deals with appointees in temporary vacancies, which extend over summer vacation, but who have not completed 8 months' service on the closing day. Such teachers will be relieved on the closing day and will be re-appointed on the re-opening day. Retention during vacation is permissible only if the teacher has completed more than 8 months' service.

12. Rule 52 deals with teachers, who are relieved on account of reduction in number of posts under the orders of the department. Rule 51A deals with not

only teachers covered by Rules 49 and 52, but also those relieved on account of termination of vacancies, like the petitioner herein. But, the first proviso introduced deals with only teachers relieved under Rules 49 and 52 and not the teachers coming under the third category, relieved on account of termination of vacancies. While introducing the above proviso, simultaneously Rule 7A of Chapter XIVA was also amended and sub-rule (3) was introduced, which says that vacancies, the duration of which is less than one academic year, shall not be filled up. Earlier, prior to that amendment, sub-rule (3) of Rule 7A stated that vacancies, the duration of which is two months or less, shall not be filled up by any appointment. The said amendment was also introduced w.e.f. 25-6-2005. Rule 7A, before the said amendment, was as follows:

7A. (1) xxxxxxxx

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

(3) Vacancies, the duration of which is two months or less shall not be filled up by any appointment.

The above Rule after the amendment, reads as follows:

7A (1) xxxxx

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

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

13. The point to be decided is whether the persons who were appointed before 25-6-2005 to short-term vacancies extending beyond two months and whose appointments were approved and on termination who became 51A claimants, will be affected by this amendment introduced on 25-6-2005. We feel that an interpretation which will affect them is not possible, going by the plain meaning of the words of the Rule. Up to 25-6-2005, it was possible to appoint persons to vacancies having a duration not less than two months. Such appointees, on being relieved, were treated as 51A claimants also. Even in the absence of any such rule, it is a well recognised principle in Industrial Jurisprudence that a person retrenched from service should be preferred, when vacancy arises in future. Earlier, it was thought that the said benefit flowing from Chapter VA of the Industrial Disputes Act in favour of the workmen was available only if retrenchment is made after working for 240 days. The said concept has been knocked down by the judgment of the Division Bench of this Court in *Prabhakaran v. General Manager, K.S.R.T.C.* (1981 KLT 164). So, in industries, persons appointed for one or two months, if retrenched, were entitled to get re-appointments when vacancies arise in future. In the case of Educational institutions, the minimum incumbency period was fixed as two months. That is because valid appointment can be made only if the vacancy extends beyond that

period. Now, it is provided that appointments can be made, if only the duration of the vacancy is one academic year and only such incumbents are to be given preference in future appointments. But, the said amendment can in no way affect the rights accrued to persons, on the strength of their appointment to short duration vacancies exceeding two months, made earlier to the amendment. The right of them to get reappointment was always recognised by Rule 51A. But, after 25-6-2005, one can be appointed if only the vacancy has a duration of one academic year. Therefore, naturally, such persons alone can get the right to re-appointment also. So, the interpretation sought to be advanced by the respondents that the writ petitioner has no right for reappointment under Rule 51A, in view of the introduction of the first proviso to the said rule, cannot be accepted. Therefore, we overrule the view taken by learned Judge in W.P. (C) No. 15291 of 2007 and uphold the view taken by the learned Judges in W.P (C) Nos. 31924 of 2005 and 19155 of 2005, as legally correct. The reference is answered accordingly.

14. Now, coming to the facts of the case, we are of the view that the reliance placed by the Management on the relinquishment letter, to deny the claim u/s 51A, is untenable. There is no relinquishment letter, contemplated under Rule 51A, whether it is executed before the D.E.O. or the D.P.I. The right under Rule 51A will be lost only in the manner provided therein. Note 2 to the said rule says that the Manager should issue an order of appointment to the teacher by Registered post acknowledgment due and give a period of 14 (fourteen) clear days to the teacher to join duty. If the teacher does not join duty in time, the Manager should give a further notice to the teacher, stating that another person would be appointed instead and that the preferential right under this rule would be forfeited if not exercised within another 7 (seven) clear days. If nothing is heard during that period also, the preferential right under the rule will be regarded as forfeited. The right under Rule 51A will be lost only as provided under Note 2 to Rule 51A. The said position is well settled by several decisions of this Court, including the reported decisions in Lakshmikutty Amma (supra) and Nalini (supra). It is not necessary to embark on an enquiry to find whether Ext.R4(a) is genuine or not. Even assuming Ext.R4(a) is genuine, it is not valid and cannot affect the rights of the petitioner.

15. But in this case we notice that having regard to the nature of duties attached to the post of Scavenger a male candidate could not have been appointed. So, we feel that it is not proper to interfere with the appointment of the 5th respondent, invoking our discretionary jurisdiction under Article 226 of the Constitution of India. But, the appointment of the 6th respondent as Cook, ignoring the claim of the petitioner is untenable. Even Ext.R4(a) was concerning only the post of Scavenger.

16. At the time of hearing this case, the learned counsel for the Manager handed over a relinquishment letter, purported to have been executed by the petitioner in relation to the post of Cook also. Since, we have already held that such a

relinquishment letter will not affect the rights of the petitioner, we are not referring to that in detail. The Manager has wrongly denied appointment to the post of Cook, which was available for the period from 5-6-2006 to 8-3-2008. It is declared that the appointment of the 6th respondent and its approval are ab initio void and having no legal effect. Since the 6th respondent has worked and drew his salary, the same cannot be recovered from him now. But, the approval of his appointment or drawal of salary will not give him any preferential claim for appointment in the future vacancies, in preferential claim for appointment in the future vacancies, in preference to the writ petitioner. The 4th respondent Manager is directed to issue an appointment order to the petitioner, as contemplated under Rule 7 of Chapter XIVA K.E.R appointing him as Cook for the period from 5-6-2006 to 8-3-2008 within one month from today. He shall also forward that appointment order to the D.E.O. for approval under Rule 8 of that Chapter, within two weeks from the date of appointment. Thereupon, the D.E.O. shall approve the appointment. The D.E.O. shall release the salary for the above period to the petitioner and respondents 1 to 3 can recover the same from the 4th respondent/Manager. The Writ Petition is allowed as above with costs, which is quantified as Rs.5.000/-. The Manager shall pay the costs to the petitioner.