

(2005) 02 KL CK 0073
In the High Court Of Kerala
Case No : Writ Petition No. 17862 of 2004

Baburaj

APPELLANT

Vs

Government of Kerala

RESPONDENT

Date of Decision : 09-02-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309, 341, 342
Kerala State and Subordinate Services Rules, 1958 — Rule 9

Citation : (2005) 2 KLT 451

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : T.A. Unnikrishnan and Reshmi Poullose, for the Appellant; M.J. Rajasree, Government Pleader and M.K. Chandra Mohandas, for the Respondent

Judgement

Thottathil B. Radhakrishnan, J.—The petitioner and the third respondent were appointed as P.D. teachers (Tamil) in Government service. As per Ext.P6 order dated 29.10.1993, the service of the petitioner was regularised with effect from 7.6.1993 and that of the third respondent with effect from 8.6.1993, the respective dates on which they joined duty.

2. The third respondent was working in the Govt. U.P.School, Elappara when a vacancy of Headmaster arose in the Govt.U.P.School, Vandiperiyar during the academic year 2004-2005. The petitioner was then and is even now working in the Government U.P.School, Pampanar.

3. Vandiperiyar in Peerumedu Taluk in Idukki District is identified as a local area with more than 15% of the population speaking Tamil.

4. In terms of Rule 9(d) of Part II of the Kerala State and Subordinate Services Rules (hereinafter called "the general Rules"), notwithstanding anything contained in the General Rules or the Special Rules, if and when a vacancy arises in a post borne on the cadre of a service, class or category for appointment to which knowledge of a particular regional language is necessary in the opinion of

the State Government and the person who is entitled to appointment to the post under the General Rules and the Special Rules does not possess such knowledge, any other person junior to him who possesses such qualification and other qualifications, if any, prescribed under the Rules may be appointed to that post; but the person so appointed shall not, by reason only of such appointment, be regarded as a probationer in such service, class or category, nor shall he acquire thereby any preferential right to future appointment to such service, class or category.

5. Though the petitioner holds rank No. 69 and the third respondent holds rank No. 70 in the seniority list of P.D. teachers eligible for promotion as Headmaster, Ext.P7 Government Order dated 12.3.2004 was issued ordering out of turn promotion of the third respondent under the aforesaid Rule and Ext.PI circular. It is this decision of the Government, that is under challenge in this Writ Petition. Ext.P8 is an order of the 2nd respondent consequent on Ext.P7. Hence the same also stands impugned.

6. The impugned Ext.P7 order has been passed by the Government without hearing the petitioner and without even entering any finding that the persons who are indisputably seniors to the third respondent, do not have the knowledge of the regional language for the Government to invoke Rule 9(d) of the General Rules.

7. According to the Writ Petitioner, he is senior to the third respondent and had passed Account Test and the language test in Malayalam and Tamil as is evidenced by Ext.P2 and is entitled to be appointed as Headmaster in preference to the third respondent. The petitioner, however, concedes that if there is a person still senior to him and has the required knowledge in terms of Rule 9(d) of the General Rules, such person has to be preferred. The third respondent having been appointed, petitioner claims that he ought to have been preferred.

8. Inter se seniority as between the petitioner and the third respondent is not a matter in dispute. It is also not in dispute that both of them are teachers in Tamil and that the petitioner has passed the language test conducted by the Public Service Commission, which fact is evidenced by Ext.P2. His knowledge of Tamil for the purpose of Rule 9(d) of the General Rules is also not disputed.

9. However, the third respondent contends that his out of turn promotion has been made on the basis of Ext.PI circular dated 14.1.1986. The learned counsel appearing for the third respondent argued that Ext.PI circular as also Ext.R3(a) and R3(b) Government Orders, that preceded Ext.P1, when read in the backdrop of Ext.R3(h), which is stated to be a brochure issued by the Government of Kerala enumerating the various safeguards for linguistic minorities in Kerala (published in 2003), would show that the impugned appointment of the third respondent in preference to the petitioner is not one confined to Rule 9(d) of the General Rules. Dilating on this, the learned counsel urged that Articles 347, 350-A and 350-B of the Constitution of India provide the constitutional backing for

such a decision by the Government.

10. Article 347 relates to the power of the President to direct that a particular language shall also be officially recognised throughout a State, if he is satisfied that a substantial proportion of the population of that State desire the use of any language spoken by them to be recognised by such State. The said provision is, therefore, not relevant for this case. Articles 350-A and 350-B are provisions contained in Chapter IV (Special Directives) under Part XVII, relating to official language. Article 350-A provides that it shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups, and the President may issue such directions to any State as he considers necessary or proper for securing the provisions of such facilities. Article 350-B provides for the appointment of a Special Officer for linguistic minorities, such appointment to be made by the President. The duties of the said Special Officer are as directed in Article 350-B(2). I read the aforesaid articles to ascertain whether they provided any constitutional backing in making a rule in the nature of Rule 9(d) of the General Rules. They do not. As already noticed, the said Rule is one authorising the making of an appointment under the special circumstances conceived in the said Rule. Promotion, being a method of appointment, can be resorted to and that is how the said Rule is often referred to a provision for "out of turn promotion". Though the gaze of different provisions in the Constitution relating to the care and advancement that is required to be provided to the linguistic minorities falls on the legislative process of the State, it cannot be conceded that any such constitutional goal would eclipse the mandate of Articles 14 and 16, while resorting to Article 309 to make a primary legislation or when resort is made to primary legislations made under that Article, including Kerala Public Services Act, to make statutory Rules in the nature of the General Rules. In this view of the matter, it has to be immediately noticed that what is made under Rule 9(d) of the General Rules is not a rule of reservation, but a rule authorising the State to make an appointment. The paramount consideration for making such a rule is the interest of the beneficiaries of the public offices and the institutions with which they have to transact or mingle. In areas, where the linguistic minorities are identification as a group by themselves in a proportion to the satisfaction of the State, which has been reasonably fixed at a particular ratio of the population, as already noticed, their requirements will have to be satisfied. This is the reasonableness of a classification made by Rule 9(d) of the General Rules. But for such an identification and intelligible differentia, I am afraid that Rule 9(d) would itself have been vulnerable on count of being violative of Articles 14 and 16. Rule 9(d) of the General Rules is the only statutory Rule that has been brought to my notice, which can support a decision for "out of turn promotion" on the ground of knowledge, as prescribed by the said Rule. Ext.P1 circular merely extracts the said statutory rule after tracing its genesis. The other matters are irrelevant in the context and, therefore, the impugned decision can

be sought to be sustained only on the basis of Rule 9(d) of the General Rules, which alone is statutory and one governing the field in question. I, therefore, repel the contention on behalf of the third respondent that the order in his favour has been made in exercise of power, even otherwise than under Rule 9(d) of the General Rules.

11. The third respondent has yet another contention. This is that the petitioner had not staked a claim to be promoted invoking Rule 9(d) of the General Rules and therefore, he is not entitled to be preferred. Needless to say, this contention does not stand. Firstly Rule 9(d) of the General Rules does not require a Government servant to stake a claim. That apart, as laid down by this Court in *Ramakrishnan v. State of Kerala* ILR 1992 Ker 737, the Government cannot pick and choose, but has to be guided by due yardsticks. Therefore, the seniority between the personnel cannot be disturbed by recourse to Rule 9(d) of the General Rules unless the senior does not possess the knowledge of language as required by the said Rule. Secondly, if one were to make the order of promotion and posting under Rule 9(d) dependent on a Government servant staking a claim, that would be a practice to be deprecated, not appreciated, in public service. Hence this contention of the third respondent fails.

12. By an additional counter affidavit dated 11.1.2005, the third respondent contended that he is the District President of the Service Organisation of G.S.T.U. Idukki and that the petitioner belongs to the rival association and the petitioner's initial appointment itself is bad, since, according to the third respondent, the petitioner does not belong to Kerala and that therefore, being a Hindu Nadar domiciled in Tamil Nadu, the petitioner was not entitled to have been appointed under the O.B.C. quota, since he is not a Hindu Nadar domiciled in Kerala and that this is the effect of Articles 341 and 342 of the Constitution. It is consequently urged that the petitioner had obtained his initial appointment by fraud and therefore, he does not deserve any sympathy from this Court. As already noticed, the petitioner and the third respondent were appointed in June 1993 and were regularised with effect from 7.6.1993 and 8.6.1993 respectively. Ext.P6 was issued on 29.10.1993 which contains name of both of them disclosing the respective date on which each of them joined duty. This means that the third respondent, at least more than a decade ago, had known from Ext.P6, that the petitioner would be placed above him in the matter of seniority. If the petitioner had any grievance about selection of the third respondent, he ought to have agitated the same. It is too late in the day for the third respondent to contend that the petitioner's initial appointment was tainted. That apart, there is no material on record to hold that the initial appointment is illegal. He was duly selected by the Public Service Commission and the Government were advised by the Public Service Commission in that regard. The challenge made by the third respondent in his additional counter affidavit is only to be rejected. I do so.

13. As already noticed, the petitioner is admittedly senior to the third respondent and the fact that he has the requisite knowledge of language for the purpose of

Rule 9(d) of the General Rules is not in dispute. So much so, he was entitled to be promoted as Headmaster in the vacancy that arose in the Government U.P.School, Vandiperiyar against which the third respondent now stands posted as per Exts.P7 and P8. I declare so. This declaration shall not stand in the way of the entitlement of any other person in preference to the petitioner, if there is one in the service who is entitled to such preference following Rule 9(d) as interpreted above, in view of any such person being senior to the petitioner. I further hold that the Government ought not to have passed Ext.P7 without considering the question as to whether the seniors to the third respondent are unqualified in terms of Rule 9(d) of the General Rules. In the context, the petitioner is a person, who ought to have been heard before any decision in the nature of the one contained in Ext.P7, was taken.

In the result, Exts.P7 and P8 are quashed. The Government will now issue orders following the declaration and directions contained in the penultimate paragraph of this judgment. I direct so. No costs.