
(2012) 09 KL CK 0041

In the High Court Of Kerala

Case No : Writ Petition (C) No. 12824 of 2012

Beena

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 06-09-2012

Acts Referred:

Citation : (2012) 4 KLT 703

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : S. Subash Chand and Shindo Varghese, for the Appellant; M.A. Fayaz Sr. Government Pleader, G. Biju, K.P. Sudheer, K.L. Narasimhan and N. Krishna Prasad For Respondents, for the Respondent

Judgement

P.R. Ramachandra Menon

1. The dispute pertains to transfer of the incumbent to the particular post in a school belonging to the Corporate Manager/7th respondent, allegedly in violation of the transfer norms. The petitioner is working as H.S.A. (Malayalam) in the Devaswom Board High School at Vamanapuram under the 7th respondent and is continuing there right from 5.2.2006 by virtue of Ext. P1 appointment order. In connection with the general transfer for the year 2011-2012, the petitioner was transferred to the Devaswom Board Higher Secondary School at Parumala vide Ext. P2, which is situated nearly 150 km. away, which has been effected to accommodate another person by name Remadevi in the petitioner's place.

2. Being aggrieved of the above transfer, the petitioner had approached this Court by filing W.P.(C) No. 15335/2011 alleging that the petitioner was having longer approved service in the post and as such, the petitioner ought not to have been shifted to accommodate a junior hand, having lesser approved service. After considering the case projected by the petitioner, she was relegated to approach the Departmental Authorities, as per Ext. P4 judgment. Pursuant to the said course and proceedings, the matter was considered by the second respondent, who decided the issue in favour of the petitioner as per Ext. P8 and

cancelled Ext. P2 order, intercepting the transfer from Vamanapuram to Parumala. The said order was challenged by the aggrieved party by filing a revision under R. 92 of Chapter XIV A of KER before the Government and approached this Court by filing W.P.(C) 24984/2011. As per Ext. P9 judgment, the Government was directed to finalise the Revision Petition and accordingly, the same was considered and final orders were passed by the Government vide Ext. P10, upholding the order passed by the DPI. On finalisation of the proceedings as above, the 7th respondent/Manager implemented the same, by passing Ext. P12 order on 5.12.2011, whereby the petitioner who was made to shift to the school at Parumala from 1.6.2011 was brought back to the school at Vamanapuram.

3. The grievance raised now is in respect of the general transfer proceedings for the next year i.e. 2012-13, whereby the petitioner has been shifted from the school at Vamanapuram to another school situated at a place about 200 Km. away at Kangazha, filling up the post occupied by transferring the 8th respondent, allegedly on the ground of compassionate circumstances as provided under R. 10(3) of Chapter 14 A of K.E.R. According to the petitioner, the 8th respondent is also far junior to the petitioner as borne by the factual particulars described in paragraph 4 of the Writ Petition and this being the position, Ext. P13 order passed by the 7th respondent is a colourable exercise of power, in a vindictive manner for having lost their battle in the earlier rounds of litigation. It is in the said circumstances that the petitioner has sought to challenge the said order by filing the present Writ Petition both on the ground that the petitioner has got a better claim than that of the 8th respondent to continue at Vamanapuram and further on the ground of mala fides (pleaded in Ground C of the Writ Petition) against the 9th respondent, who is the concerned authority who passed Ext P13 order and hence impleaded in the personal capacity.

4. The 7th respondent has filed a counter-affidavit disputing the averments in the Writ Petition and seeking to sustain the impugned order. So also, the 8th respondent has also filed a counter-affidavit and such other proceedings. The petitioner has filed a reply affidavit as well. In the course of the proceedings, the concerned parties have filed various I.As and additional documents forming part of the materials on record.

5. The learned counsel for the petitioner submits that the husband of the petitioner is actually bedridden because of various ailments as reflected from Exts. P11, P11(a), P14 certificates and Ext. P19 medical certificate dated 19.07.2012 issued by the Medical Board. The learned counsel submits that the earlier transfer intercepted by the DPI was sought to be sustained by the department and the person byname Ramadevi was brought in place of petitioner, on compassionate ground as provided under R. 10(3) of Chapter XIV A of KER. But it was specifically observed by the concerned authority and so also by the Government in the concerned orders including Ext. P10 that no such case was discernible from the impugned order i.e. Ext P12 which in turn was rightly intercepted by the DPI and upheld by the Government as per Ext. P10. It is

because of the ill will and hatred nurtured by the 9th respondent, that Ext. P13 order came to be passed with respect to the subsequent academic year and hence the mala fides. It is also stated that, inspite of impleading the concerned authority in the personal capacity as the 9th respondent, the plea of mala fides has not been denied by the said respondent. The learned counsel further submits that the ailment of the husband of the petitioner to be considered with compassion has not been considered by the concerned authority while passing Ext. P13, inspite of having all the relevant records made available in the earlier round of litigation, while such a consideration is made only in respect of the 8th respondent. It is also the contention of the petitioner that, if rival claims are made with reference to the benefit of R. 10(3), then the seniority will come into play, upon which, it is the petitioner who is entitled to have the benefit of the said Rule and to have a posting at Vamanapuram, rather than the 8th respondent.

6. The learned Standing Counsel for the Board submits that the plea of "mala fides" is very much vague and unfounded. It is stated that there was no such case of mala fides at any time before, as discernible from Ext. P3 appeal preferred at the first instance. It was only thereafter, that such a contention was incorporated while submitting the "hearing notes" vide Ext P6, which by itself is not correct. Merely for the reason that an order passed by the 7th respondent happened to be intercepted by the Departmental Authorities and also by the Government, it cannot be said that the authority concerned is having personal ill will or hatred against the party concerned, which is raised just as a ground for moulding the case and nothing more, submits the learned Standing Counsel.

7. The learned counsel for the 8th respondent submits that the husband of the 8th respondent is suffering from serious cardiac ailments, certified by an Institution not less than Sree Chitra Thirunal Institute of Medical Science and Technology, Thiruvananthapuram, which is an autonomous institution and it is with reference to the said certificate, that transfer has been given to the 8th respondent, granting the benefit of R. 10(3), vide Ext. P13. The learned counsel further submits that the factual position in this regard is clearly given in paragraph 7 of the counter-affidavit filed by the respondent stating that the said person is completely bed ridden, particularly by virtue of the paralysis on the right hand side. Serious consequence is also revealed from Ext, R8(g) Medical Certificate pursuant to the examination of the patient by the Medical Board on 7.7.2012. The learned counsel also submits that the petitioner's husband is not bed ridden and he has been going to the office of the Devaswom Board as stated in the last paragraph of the counter-affidavit filed by the 7th respondent.

8. After hearing both the sides, this Court finds that the normal rule of seniority with regard to the guidelines for transfer is sought to be deviated, so as to accommodate the party concerned extending the benefit under R. 10(3) as to the compassionate circumstances. The factual position with regard to the case of the 8th respondent is sought to be established before the 7th respondent, who

accordingly has given the benefit as per Ext. P13 order. But the position with regard to the petitioner and the alleged claim in this regard is not referred to in Ext. P13; presumably for the reason that no such request referring to the compassionate ground was ever made by the petitioner. But then the learned counsel for the petitioner submits that there is no need, necessity or occasion for having made any such request while passing Ext. P13 as the correct factual position in this regard was well known to the 7th respondent as well, in view of the earlier rounds of litigation and the various medical certificates already produced by the petitioner with reference to such crucial facts.

9. With regard to the contention put forth by the petitioner that, if there are two or more claims for the benefit of R. 10(3), the senior most person has to be considered, which in the instant case happens to be none other than the petitioner (between the petitioner and the 8th respondent), this Court finds it difficult to accept the said proposition. This is for the primary reason that seniority has to be reckoned as a guideline for providing transfer in respect of 75% and the remaining 25% is by virtue of R. 10(3) as an "exemption" to the general norms. This is to meet the specific contingency as contemplated thereunder, which reads as follows:

Rule 10(3): Exceptions to the seniority criterion shall be the bare minimum. Exception shall include close relatives of Jawans, Intercaste marriage, Physically handicapped, other grounds for special consideration, compassionate grounds, persons who have only one year of service left for retirement etc.

The very purpose of incorporation of such provision is to extend a helping hand in deserving cases, deviating from the normal rule by virtue of seniority. Once it is prescribed and provided to deviate from the seniority in respect of a circumstance involving R-10(3), there is no further going back to the question of seniority. That apart, the persons who are having the disability and the extent of compassion to be considered, may differ, depending upon the infirmity/handicap which has to be meticulously analysed with proper application of mind, as to who is the deserving hand to be given the benefit invoking the power under R. 10(3). This can be done by way of analysing the extent of disability sought to be substantiated by the party concerned.

10. Going by the contents of Ext. P13, reference made is only with reference to the claim of the 8th respondent and in view of the pleadings and records produced before this Court, it is necessary to have analysed the facts and figures as to the rival claim of the petitioner as well. This is a matter which requires to be considered by a competent authority i.e. 7th respondent, on the basis of the relevant materials/certificates. By virtue of the interim order already passed by this Court, though the 8th respondent had joined duty in the school at Vamanapuram (pursuant to Ext. P13), she has been sent back on 7.6.2012 and the petitioner has been accommodated in that place as earlier. In the said circumstances, the 7th respondent is directed to reconsider the matter, in the light of the above observations and to pass a reasoned order after giving an

opportunity to the petitioner and also to the 8th respondent, enabling them to produce all the relevant materials they want to rely upon. It is for the petitioner as well the 8th respondent to produce the relevant documents before the 7th respondent, so as to facilitate such an exercise. Ext. P13 order is set aside in the above circumstance. As agreed by the learned counsel for the petitioner as well as the learned counsel for the 8th respondent, the husbands of both the said parties shall be caused to be examined by the Medical Board, both of whom shall be present before the Superintendent, Thiruvananthapuram Medical College. It is for the petitioner or the 8th respondent to produce a copy of this judgment before the Superintendent, Thiruvananthapuram Medical College, upon which a Medical Board shall be constituted within "one month" from the date of production of a copy of this judgment and both the husbands of the petitioner and the 8th respondent shall be caused to be examined certifying the alleged incapacity with reference to the relevant ailments and also certifying the percentage of disability, if any, without delay. The certificate issued by the Medical Board as above shall be produced before the 7th respondent and a final order shall be passed as aforesaid within one month thereafter, after hearing both the parties. "Status quo" will continue till that time.

The "file", if any, produced by the Devaswom Board shall be returned by the Registry to the Standing Counsel for the Board.