

(1993) 07 KL CK 0083
In the High Court Of Kerala
Case No : O.P. No. 7098 of 1993

C.P. Viswanathan and Another

APPELLANT

Vs

D.P.I. and Others

RESPONDENT

Date of Decision : 22-07-1993

Acts Referred:

Citation : (1993) 2 KLJ 345

Hon'ble Judges : K.K. Usha, J

Bench : Single Bench

Advocate : M. Vijayakumar and M. Rameshchandran, for the Appellant; Mary Benjamin and V.K. Raveendran, Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

Mrs. K.K. Usha, J.—Shri. Narayanan Nair, Headmaster of Nadavannur High School under the management of the 1st petitioner retired from service on 1-7-92 on superannuation. He was granted special leave on full pay from 1-6-92 in the light of the provisions contained under Rule 63 of Chapter XIV A Kerala Education Rule.-.. The question arising for consideration in this original petition is whether vacancy in the post of Headmaster arose in the school on 1-6-92 or on 1-7-92. The claim put forward by the 2nd petitioner and the 4th respondent for promotion to the post of Headmaster will have to be considered in the light of the answer to the above question. Both of them have not acquired the test qualification necessary for promotion to the post of Headmaster. But the 4th respondent would acquire the eligibility for exemption on 14-4-90 on completion of 50 years of age whereas the 2nd petitioner would get such exemption only on 1-7-92. Therefore if the vacancy in the post of Headmaster is taken to have arisen on 1-6-92, the 2nd petitioner will not be entitled to claim the same as he was not qualified with the help of an exemption on that day even though he is senior to the 4th respondent. On the other hand, the 4th respondent who has already acquired exemption from test qualification as on 1-6-92 could claim promotion. The 1st petitioner, manager took the view that the vacancy had

arisen only on 1-7-92 and on that basis the 2nd petitioner was promoted. The above view was not accepted by the authorities and the appointment of the 2nd petitioner was not approved. The orders passed by the District Educational officer Exts. P1 and P2, and the orders passed by the Dy. Director Ext. P5 and the Director of Public Instruction Ext. P7 are under challenge in this original petition. Reliance is placed by the District Educational officer on a Circular dated. 1-7-79 issued by the Director of Public Instruction while coming to the conclusion that the vacancy had arisen on 1-6-92. He has also taken the view that since the Headmaster ceased to be on active duty with effect from 1-6-92 as per the provisions contained under Rule 63 Ch. XIV A of K.E.R., it should be taken that vacancy of the Headmaster had arisen in the school on 1-6-92. The same reasoning has been followed by the Deputy Director of Education But unfortunately no reason has been given by the Director of Public Instruction in Ext. P7 for affirming the views taken by the D.E.O. and the Dy. Director.

2. In the statement filed on behalf of the 1st respondent in this original petition, reference is made to the provisions contained under Rule 63 of Ch. XIV-A K.E.R. and also to the Circular dated 1-7-79. Copy of the Circular is produced as Annexure A. In the counter affidavit filed on behalf of the 4th respondent reliance is placed on a decision of this court in Ponnammamma v. Government of Kerala 1991 2 KLT 344) in support of the contention that the vacancy had arisen on 1-6-92.

3. A reading of the Circular dated 1-7-79 would show that the contents of the Circular have no application whatsoever in the present case. The doubt answered in the Circular was whether the additional leave vacancy under Rule 60(c) of K.S.R. Part I from 1st June to 30th June followed by a regular vacancy due to the retirement from 1st July can be taken as leave vacancy. It is clarified in the Circular that it can be so taken and the substitute appointed will be eligible for pay and allowances from 1-6-79. It does not answer the question whether a regular vacancy would arise on 1st of June.

4. The relevant provision which has to be interpreted in this original petition is the one contained in Rule 63 Ch. XIV - A.K.E.R. The Rule 63 reads as follows :-

63. If the date of superannuation falls within one month from the date of re-opening of the institution, he will cease to be on active duty on the date of re-opening. In such cases, he will be allowed special leave on full pay from the re-opening date till he gets superannuated.

5. Does the teacher who has been granted special leave on full pay and has ceased to be on active duty on the date of reopening ceases to be a member of the service ? I am inclined to take a view that he does not. It is true that by virtue of the provisions contained under Rule 63, he may be disabled from coming to the school and function as a Headmaster. But suppose a vacancy in the post of Asst. Educational Officer arises between 1st of June and 1st of July, can the teacher be denied promotion to the above post on the ground that he has ceased to be on active duty. Both the petitioners and respondents submitted

before me that he cannot. If that be so, the teacher should be treated XX as still in service and a permanent vacancy can arise only when he retires on superannuation on 1-7-92.

6. Strong reliance was placed by the learned counsel appearing on behalf of the 4th respondent on the above mentioned decision reported in 1991 (2) KLT 344 in support of his contention that the vacancy in the post of Headmaster had arisen on 1-6-92. In the reported decision, a learned single Judge of this court had occasion to consider the effect of the provisions contained in Rule 62 of Chapter XIV-A of K.E.R. on the provisions contained in Rule 7A (3) of Chapter XIV-A which provides that vacancies, the duration of which is two months or less shall not be filled up by any appointment. Rule 62 reads as follows:

62. Retirement:- A teacher who completes the age of retirement during the course of an academic year but not within one month from the date of reopening, shall continue in service till the close of the school for the mid-summer vacation. But if he is on leave on such date with no prospect of returning to duty or on leave from the commencement of the academic year to the date of superannuation he may be retired on the due date. If the teacher applies for any leave other than casual leave during the period of his continuance under this rule beyond the age of retirement he shall be retired forthwith."

The learned Judge held as follows :- In the instant case, Sri. K.K. Varghese did not rejoin duty prior to his retirement. A remote possibility of an incumbent withdrawing the request for leave preparatory to retirement and rejoining duty with consent of authority competent to appoint cannot be considered as a circumstance to hold that R. 7A (3) of Chapter XIV - A is attracted in such cases. In the circumstances, it is open to the authorities to treat the vacancy as commencing from 25-3-1988 and continuing beyond 30-4-1988, the date of superannuation of the former Headmaster.

I do not understand the above judgment as an authority to find that a regular vacancy would arise on the date on which the teacher proceeds on leave prior to his retirement, In any view of the matter the issue raised in the present case has to be adjudicated in the light of the provisions contained under Rule 63. For the reasons mentioned earlier. I find that the permanent vacancy of a Headmaster arose in the school of the 1st petitioner only on 1-7-92 and not on 1-6-92. The 2nd petitioner admitted senior to the 4th respondent was at that time available for promotion on obtaining exemption from test qualification. Therefore the 2nd petitioner should have been preferred for appointment to the post of Headmaster instead of the 4th respondent. I therefore set aside. Exts. P1. P2. P5 and P7 and direct respondents 1 to 3 to approve the appointment of the 2nd petitioner as Headmaster with effect from 1-7-92.

The Original Petition stands allowed as above.