
(2007) 12 KL CK 0034

In the High Court Of Kerala

Case No : W.A. No"s. 797, 837, 1729 and 2799 of 2007

Gigimol, N.M.

APPELLANT

Vs

Director of Higher Secondary Education and Others

RESPONDENT

Date of Decision : 04-12-2007

Acts Referred:

Kerala Education Rules, 1959 — Rule 7

Citation : (2007) 12 KL CK 0034

Hon'ble Judges : T.R. Ramachandran Nair, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : I. Sheela Devi, for the Appellant; Benny Gervasis, Govt. Pleader, K.T. Shyamkumar and Benoy Thomas, for the Respondent

Judgement

K.S. Radhakrishnan, J.—We are in these cases primarily concerned with the question as to how the 25% vacancies of the HSST as provided in G.O.(Ms.) No. 162/98/G.Edn., dated 13-5-1998 have to be filled up, whether it is by way of promotion or through a process of selection among High School Assistants. The operative portion of the G.O. is extracted hereunder:

(i) 25% vacancies will be reserved for appointment from qualified High School Assistants and Primary School Teachers.

(ii) The remaining 75% of posts in Government Schools will be filled up by direct recruitment through the Public Service Commission. In the absence of select list with the Public Service Commission the vacancies will be filled up by candidates from Employment Exchange. Should there be shortage of suitable candidates from the Employment Exchange, Guest Lecturers may be appointed as is done in Colleges. The selection of Employment Exchange candidates will be done by Director of Higher Secondary Education and that of the Gues(sic) Lecturers will be done by the concerned Deputy Director, Education by constituting a selection committee consisting of the Principal, Deputy Director/and President of the concerned PTA.

(iii) Appointments to the 75% vacancies earmarked for direct recruitment in the Aided Higher Secondary Schools will be done by the management. If qualified teachers are not available for appointment as mentioned in item (i) above, the management will fill up such vacancies also by direct recruitment. Selection of candidates for direct recruitment in Aided Higher Secondary Schools will be done by a staff selection committee consisting of the Manager or his representative, the Principal of the School and a Government nominee from the Panel of Officers consisting of Deputy Director, Education, D.E.O., of the area and EIET Principal of the district. The management can select a nominee from among the above officers. The above officers are permitted to attend the staff selection committee meeting without further sanction.

3. While making appointments the Manager will see that only part-time teachers are appointed when the periods to be taught are less than 15 in a week. This procedure will be followed in Government schools also when direct recruitment is resorted to through Employment Exchange. But the teachers appointed from General Education Subordinate Service will be treated as appointment by promotion and they will be full-time teachers irrespective of the periods to be taught.

Scope of the above-mentioned G.O. earlier came up for consideration before a Division Bench of this Court in *K. Krishnankutty and Others Vs. State of Kerala and Others*, . Question posed before the Division Bench was whether the private aided school teachers had any right to be appointed as higher secondary schools teachers in aided private higher secondary school and whether the prescription of quota and constitution of selection committee for appointment of higher secondary school teachers from among existing aided school teachers were valid. Court held that private aided school teachers did not have any right whatsoever, to get appointed as higher secondary teachers in private aided higher secondary schools and that constitution of the selection committee did not fetter any right of the educational agencies.

2. Above-mentioned judgment was appealed against before the Apex Court in *M.M. Dolichan v. State of Kerala* (2001) 1 S.C.C. 151. Apex Court did not examine the correctness or otherwise of the legal question whether the 25% vacancies of HSST has to be filled up by way of promotion on the basis of seniority or by way of selection from the High School Assistants. The Apex Court felt it was not necessary to examine those issues since Special Rules for Kerala Higher Secondary School Education Services was framed. However it was noticed by virtue of the interim order dt. 7-12-1999, the private aided schools were permitted to appoint from the then existing teachers, if they were qualified and found suitable by the selection committee. Under such circumstance while disposing of the case the Supreme Court gave the following directions:

In the aforesaid premises, and keeping in view the fact that the statutory rules are in the process of being notified we would dispose of these batch of cases with the following directions:

(1) All the teachers in the private schools who have been appointed during the pendency of these cases pursuant to the interim order dated 7-12-1999 would be held to be duly appointed to the post and their services will not be annulled.

(2) All the teachers who have been appointed also in the Government schools pursuant to the order dated 1-2-1999 shall also be held to be appointed and those appointments will not be annulled.

(3) If there has been any appointment made pursuant to the Government Order of 13-5-1998 as on today those appointments also would continue and will not be annulled.

(4) There will be no further appointment from any source either in the private school or in the Government schools from today for a period of 3 months.

(5) The State Government is directed to bring into force the Statutory Recruitment Rules within the aforesaid period of 3 months whereafter recruitment to the vacancies in the higher secondary grade could be dealt with in accordance with the said statutory rules.

(6) If for any unforeseen circumstances the statutory rules cannot be notified and brought in force within the aforesaid period of 3 months and on such event there exists any necessity for immediate recruitment of teachers then it would be open for the parties to move this Court for appropriate direction.

We may indicate, for the first time, the scope of the above-mentioned G.O. came up for consideration before the Apex Court in Valsalakumari Devi v. Director, Higher Secondary Education 2007 (4) KLT 494 (S.C.). Appellant therein one Valsalakumari Devi was originally working as High School Assistant (Social Studies) in the B.A.R. Higher Secondary School, Bovikanan. She was appointed as HSA (Social Studies) with effect from 13-7-1990 which was duly approved by the Manager, B.A.R. High School, Bovikanan. Respondent No. 5 therein, one M.K. Aravindakshan Nambiar entered service as HSA [Social Studies (Kannada Medium)] with effect from 20-6-1991. He was junior to Valsalakumari Devi in the category of HSA. Government had issued notification prescribing the method of appointment for the post of Higher Secondary School Teachers. The minimum qualification prescribed in the Government Order for HSSTs. was Second Class Master's Degree in the concerned subject with B.Ed., till Rules were framed for regular appointment. It was ordered that selection would be subject to seniority and suitability. Appellant in that case had secured second class Master's degree in History and B.Ed. degree in English and History and was fully qualified for appointment as HSST as per the G.O. dated 27-6-1990. Vacancy of HSST (History) arose in the school during the academic year 2000-01. Appellant and the 5th Respondent applied for appointment by promotion to the above said post. Selection was made by the Manager through a selection committee and seniority was not taken as a criterion. Action of the Manager overlooking seniority was sustained by the learned Single Judge which was confirmed by the Division Bench in W.A. 1265 of 2004. In fact, Division Bench had stated that

Government Order would indicate that the appointment to the post was not by way of promotion. Judgment of the Division Bench was reversed by the Apex Court in Valsalakumari Devi's case and held as follows:

Government Order dated 27-6-1990 makes it clear that the selection of teachers will be subject to seniority and suitability and G.O. dated 13-5-1998 specifically prescribes that the teachers appointed from General Education Subordinate Service will be treated as appointment by promotion. As stated earlier, the selection will be subject to seniority and suitability and there is no dispute that the Appellant is senior to 5th Respondent. She is eligible and qualified for appointment by promotion to HSST. It is not the case of the Management that she is unsuitable for promotion.

The expression "subject to seniority and suitability" occurring in G.O. dated 27-6-1990 does not mean the comparative assessment of suitability and it only means the suitability for the particular post and the suitability is related to the prescribed qualification and requisite experience. In view of the distinction between the appointment by promotion from General Education Subordinate Service and an appointment to the 75% vacancies earmarked for direct recruitment, we are of the view that the finding arrived at by the Director, Higher Secondary School, Thiruvananthapuram, Kerala that seniority is not the criterion for "appointment by promotion to HSST" is erroneous and is not in terms of the Government Orders referred to above. Though in the order, it is stated that the 5th Respondent is more suitable than the Appellant, as rightly pointed out by learned Counsel appearing for the Appellant, it has not been shown or indicated the reasons or grounds for arriving at such decision that the 5th Respondent was found more suitable than the Appellant for the post. We are also in agreement with the contention that the Director has mechanically accepted the decision of the Selection Committee that the 5th Respondent is more suitable than the Appellant without reference to selection for appointment by promotion to HSST against 25% quota earmarked for qualified High School Assistants. We are of the view that the Director has committed an illegality in upholding the selection of the 5th Respondent for appointment to the post of HSST. Further the 5th Respondent has been preferred to the Appellant for the reason that his main subject in B.A. is History which is totally irrelevant for promotion to HSST from among HSAs. In G.O. dated 27-6-1990 the qualification prescribed is a second class Master's Degree in the concerned subject with B.Ed. It is relevant to point out that the Appellant and the 5th Respondent have obtained M.A. Degree from Mysore University and the 5th Respondent took B.Ed. with Social Studies. The other reason given by the Selection Committee for preferring 5th Respondent is that he has proficiency in English, Kannada and Malayalam whereas the Appellant has proficiency in English and Malayalam. As rightly pointed out by the learned Counsel appearing for the Appellant, once the requirement of the prescribed qualification is satisfied, the selection must be made on the basis of the seniority and suitability and there is no scope for making comparison of qualifications or comparative assessment of suitability. The expression "suitability" means that a

person to be appointed shall be legally eligible and "eligible" should be taken to mean "fit to be chosen".

Apex Court therefore interpreted Government Order dt. 13-5-1998 read with G.O. dated 27-6-1990 and laid down the law that 25% of the posts were reserved for appointment from qualified High School Assistants and Primary School Assistants by way of promotion and there was no element of selection. Only thing is that the candidates should satisfy the qualification laid down in the Government Order dated 27-6-1990. Once a candidate has satisfied that qualification, then promotion should have been effected by way of seniority and there is no question of a selection or evaluation of comparative merit.

3. We have to examine the facts of this case in the light of the above-mentioned principle laid down by the Apex Court in Valsalakumari Devi's case. Petitioner Gigimol joined the second Respondent school as HSA (Mathematics) on 14-10-1992. That appointment was up to 31-3-1993 which was duly approved by the DEO. Again she was appointed as HSA (Mathematics) on 7-6-1993 and that appointment was also duly approved. She continued in that post without interruption. She had also passed M.Sc. Mathematics with 59.4% marks and B.Ed. with 60% marks. Third Respondent was appointed as HSA (Mathematics) in the High School on 14-9-1998 and she was appointed as HSST in Mathematics on 26-10-1998. When she was appointed as HSST she had put in only 41 days of service as HSA in the school. But ignoring the Petitioner's claim for promotion to the post of HSST, Manager through a selection process promoted the third Respondent and appointed her as HSST. Action of the Manager was questioned by the Petitioner by filing a representation to the Manager on 29-6-1998 claiming that she should have been appointed as HSST by way of promotion on the strength of the Government Order. Since there was delay in disposing of the representation she approached this Court and filed O.P. No. 23610 of 1998 which was disposed of by this Court directing to consider her representation by the Director of Higher Secondary Education the first Respondent. First Respondent vide order dated 14-6-1999 examined rival claims and held that the right of the HSA for upward mobility should be recognised and the experience of the HSA would be a positive factor that elevates the academic standards of the High Secondary Course. While infusing fresh blood by setting apart 75% vacancies for new hands, it was stated that the Government had also taken care to ensure that the wisdom and experience of the senior teachers in the campus should enrich the academic environment of the school. Further it was also pointed out that by appointing a fresh teacher of 41 days experience, the Manager had, in effect, defeated the purpose of the G.O. reserving 25% of seats for HSAs. and attempt of the Manager was only to see that Petitioner was denied the post of HSST. Director therefore cancelled the appointment of the 3rd Respondent noticing that proper appointment was not made under 25% quota reserved for HSAs. Manager was directed to consider the representation submitted by the Petitioner claiming the post of HSST (Mathematics) and issue appropriate orders. Aggrieved by the said order Manager preferred a review petition before the Government and

Government passed Ext. P-7 order dated 11-11-1999 stating that as per G.O. dated 13-5-1998 seniority was not the only criterion for selection of HSSTs from 25% quota from qualified HSA. Holding so, order passed by the Director was set aside and the review petition filed by the Manager was allowed. Petitioner challenged that order in O.P. No. 29517 of 1999 which was allowed and the Government was directed to consider the matter afresh. Government heard all the affected parties and ordered as follows:

After hearing all the concerned parties, Government have examined the matter thoroughly. It is found that Smt. Anithakumari had only 41 days service as High School Assistant in the school, service below 80 days should not be taken as a claim for appoints in the same school under the same management. Since she is not a 51A claimant, she has no right to claim the post of Higher Secondary School Teacher in the school. Moreover, Smt. Anithakumari's appointment as High School Assistant was not approved at the time of selection. Hence she cannot claim preferential treatment on the basis of interview.

However, considering all the facts Government are pleased to order that the post of Higher Secondary School Teacher (Maths) in question will be notified forthwith and the selection process will be made afresh after observing all formalities and salary will be paid to Smt. Anithakumari for the period she worked. The manager is hereby directed to comply with the norms and the orders of the Hon''ble Supreme Court in their judgment dated 14-11-2000 in the matter of fresh appointment.

Government vide Ext. P-11 order has categorically found that Anithakumari did not have approved service as HSA and therefore she had no right to claim the post of HSST in the School. Government therefore ordered a fresh selection by the Manager after complying with all formalities.

4. We are of the view, it is not legal to go for a fresh selection, especially in the light of the principle laid down by the Apex Court in Valsalakumari Devi's case. Apex Court has declared the law that so far as 25% quota of appointment for the post of HSST is concerned criterion is seniority and suitability. The Apex Court interpreted the word seniority and suitability to mean seniority and qualification and requisite experience and not the comparative assessment of suitability. Indisputedly, Petitioner is senior to the third Respondent since she had put in more than 6 years of service while third Respondent had put in only 41 days. Admittedly, Petitioner was fully qualified for the post of HSST on the date of occurrence of vacancy. If that be so, there is no question of a fresh selection since Petitioner was the senior most qualified HSA available in the school when the vacancy of HSST arose on 24-8-1998. The 3rd Respondent was not in service on the date of occurrence of vacancy. Further, she did not have approved service of HSA. Ext.P-9 Government Order specifically says that 25% seats would be reserved for appointment from qualified High School Assistants and Primary Schools Teachers on the date of the occurrence of the vacancy. Rule 7 of Chapter XIVA of K.E.R. says 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. Since third Respondent was not an approved teacher on the date of occurrence of vacancy as HSST Government had rightly held that she had no right to claim the post HSST since she was not an approved teacher.

5. Counsel appearing for the 3rd Respondent Anithakumari placed considerable reliance on the judgment of the Division Bench in Krishnankutty's case. Judgment in Krishnankutty's case in our view is no more good law in view of the judgment of the Apex Court in Valsalakumari Devi's case (supra). Further it may be noted the dispute between Gigimol and Anithakumari was a live issue from 1998 onwards, when Anithakumari was illegally appointed by the Manager. Anithakumari is also not entitled to get the benefit of the judgment in Dolichan, since she was not appointed on the strength of the interim order passed by the Apex Court on 7-12-1999. Further she was also not entitled to get the benefit of sub-para (3) of para 4 of Dolichan's judgment, since both Gigimol and Anithakumari were fighting each other from 1998 onwards.

6. Under such circumstance we are inclined to allow W.A. Nos. 797, 837 and 1729 of 2007 and set aside Ext. P-11 order in O.P. No. 3515 of 2001 and declare that the Petitioner was the legitimate claimant for the post of HSST, the vacancy of which arose on 24-8-1998. Since the Petitioner had not worked in the post of HSST she is not entitled to get salary, however, she would be deemed to have been appointed in the post of HSST with effect from 24-8-1998 and that period would be counted for all service benefits except salary. Since third Respondent had worked as HSST from 26-10-1998 the salary paid would not be recovered. Management would implement the judgment within a period of one month from today.

7. We are of the view, the reasoning of the learned Judge in W.P.(C) No. 12345 of 2004, against which W.A. No. 2799 of 2007 has been preferred is also in accordance with the view expressed by us in this judgment. We have already found, there is no element of selection in 25% quota, then the 4th Respondent was the senior most qualified teacher, was entitled to get appointment in the vacancy of HSST which arose in the year 1998-99, not the Petitioner therein, since she was not in service at that time. Petitioner can aspire for the post of HSST (Junior) only for the year 2001-02. Learned Judge has rightly held so and hence we dismiss W.A. No. 2799 of 2007. W.A. Nos. 797, 837 and 1729 of 2007 would stand allowed as above.