

(2003) 07 KL CK 0048

In the High Court Of Kerala

Case No : O.P. No's. 36563 and 36789 of 2002

Helen Thilakom

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 25-07-2003

Acts Referred:

Kerala Education Rules, 1959 — Rule 43

Citation : (2003) 3 KLT 233

Hon'ble Judges : K. Balakrishnan Nair, J

Bench : Single Bench

Advocate : N. James Koshy, for the Appellant; G. Sudheer and K.R.B. Kaimal and P. Nandakumar, Government Pleader, for the Respondent

Judgement

K. Balakrishnan Nair, J.—OP.No. 36563 of 2002 is filed for implementing the order, G.O.(Rt)No. 4119/2002/G. Edn. dated 22.11.2002. O.P. No. 36789 of 2002 is filed challenging that order. Therefore, they are heard and disposed of by a common judgment.

O.P. No. 36789/2002

2. The petitioner in this Original Petition is a part-time Music Teacher working in the Light to the Blind School at Varkala. She was appointed by Ext.P2 order dated 2.1.1992. The said appointment was approved by Ext.P3 order of the D.E.O. dated 2.1.1997 with retrospective effect from 2.1.1992 to 31.3.1992 and thereafter with effect from 1.6.1992 without any time limit. The petitioner's school is run by a Corporate Educational Agency. It is having a few other schools also. One of them is Samuel LMS HS Parassala. A vacancy arose in the said school in the post of Music Teacher during the academic year 1999-2000. The Manager invited applications for appointment to that vacancy. The petitioner also submitted an application for that post. But, the 5th respondent Manager selected the 6th respondent and appointed her by Ext.P4 order dated 12.7.1999. Against Ext.P4 appointment order, the petitioner submitted a representation before the D.E.O, The D.E.O. by Ext.P6 order dated 17.2.2000 upheld the petitioner's claim

and directed the Manager to appoint the petitioner to the vacancy in which the 6th respondent was appointed. The Manager filed an appeal against Ext.P6 before the Deputy Director. That appeal was dismissed by Ext.P7 order dated 16.3.2001. Against Ext.P7, the Manager filed a revision before the D.P.I. That revision was allowed by the D.P.I. by Ext.P8 order dated 27.11.2001. The D.P.I. rejected the claim of the petitioner and directed the approval of appointment of the 6th respondent. The D.P.I., held that the petitioner's school is a separate unit for the purpose of appointment governed by G.O.(P) No. 412/69/Edn. dated 3.11.1969. Therefore, according to the D.P.I., the provisions Contained in Rule 43 of Chap. XIV-A KER will not apply to the petitioner's school. The petitioner filed Ext.P9 revision before the Government against Ext.P8. That was dismissed by Ext.P11 order, G.O.(Rt) No. 4119/02/G.Edn. dated 22.11.2002. The Government affirmed the view taken by the D.P.I.

This Original Petition is filed challenging Exts.P8 and P11, and also seeking consequential reliefs. The 5th respondent Manager has filed a counter affidavit resisting the prayers of the petitioner.

O.P. No. 36563/2002

3. This Original Petition is filed seeking implementation of Ext.P11 Government Order in O.P. No. 36789/2002, and also payment of salary due to the petitioner herein, who is the 6th respondent in that Original Petition.

4. Heard both sides. O.P. No. 36789/2002 is treated as the main Original Petition. The parties and the Exhibits mentioned hereafter are those in O.P. No. 36789/2002.

5. The learned counsel for the petitioner submitted that the petitioner's school is also a school covered by the provisions of the Kerala Education Act and the Rules. In support of that contention, he referred to Section 3(5) of the Kerala Education Act and also Rule 1 (iii) and 4(i) of Chap.II of the Kerala Education Rules. It is also submitted relying on Rule 35 of Chap. XIV-A of KER that all the teachers working in various schools under the same Management should be treated as one unit for the purpose of seniority. Therefore, the Staff of the petitioner's school should be treated as part of the unit and so the petitioner has a claim for appointment to the vacancies arising in higher grades in other schools by virtue of Rule 43 of Chap.XIV-A KER In support of this contention, the learned counsel relied on Exts. P12 to P15 transfer orders transferring teachers from the petitioner's school to other schools.

6. Learned counsel for the Manager and the learned counsel for the 6th respondent submitted that the petitioner's school is always treated as a separate unit for the purpose of seniority, appointment and retrenchment. Further, the vacancy of Music Teacher in Samuel LMS High School was filled up after inviting applications. The petitioner had also applied. When she was not selected, she could not turn round and say it should have been filled up by promotion. It is also submitted that the special schools like the Blind Schools are not covered by

the provisions of the Kerala Education Rules. Therefore, the Government have issued G.O.(P) No. 412/69/Edn. dated 3.11.1969 providing for recognition of special schools for the deaf, dumb and blind etc. Various posts are sanctioned by the Government in those schools. Separate qualifications are also prescribed for those posts. So, the provisions of Chap. XXIII KER governing staff fixation and those of Chap. XXXI dealing with the qualifications of teachers will not apply to them. It is also submitted that the provisions of Chap.XIV-A KER are also not applicable to these special schools. It is also contended that the transfers made as per Exts.P12 to P15 were made as special cases and they were not strictly authorised by the rules contained in the Kerala Education Rules.

7. The learned Government Pleader also supported the contentions of the contesting respondents. It is common case of both sides that the petitioner's school is an aided school. Section 2(1) of the Kerala Education Act, defines Aided School as follows:

"aided school" means a private school which is recognised by and is receiving aid from the Government, but shall not include educational institutions entitled to receive grants under Article 337 of the Constitution of India, except in so far as they are receiving aid in excess of the grants to which they are so entitled;"

Rule 1 of Chap.II of the K.E.R. contains the general classification of the schools. They are: (1) for general education (2) schools for special education, (3) schools for the education of particular categories of students and (4) other institutions connected with educational system of the State. So, schools for particular categories of students like the one where the petitioner works are covered by the Kerala Education Rules. Rule 4 of the said Chapter of the Kerala Education Rules states that schools for the education of particular categories of students will include, inter alia, the schools for defective children such as the deaf, the dumb, the blind and the mentally handicapped. The heading of Chap.XIV-A of the K.E.R. reads as follows: CONDITIONS OF SERVICE OF AIDED SCHOOL TEACHERS. The petitioner's school is admittedly an Aided School contemplated under Rule 1(iii) read with Rule 4(i) of Chap.II of K.E.R. Rule 35 of Chap.XIV-A says that,

"If the Educational Agencies have more than -one school in a District they shall be constituted into one unit and a common seniority list shall be prepared for all the schools in the unit together and shall be submitted to the concerned District Educational Officer for approval....."

So, all schools under the Educational Agency have to be constituted into one unit irrespective of whether they are schools meant for general education or schools established for special categories of students. Regarding appointment, its approval, retrenchment, re-appointment and disciplinary action, the provisions contained in Chap.XIV-A will apply to all Aided schools irrespective of whether they are established for general students or special categories of students. It is true, there are no provisions in the Rules prescribing the special qualifications for the teachers of the said school. It is also equally true that the special posts

required for teaching in those schools are also not provided in Chap.XXIII of the Kerala Education Rules. Therefore, to fill the lacuna, the Government issued G.O. (P) No. 412/69/Edn. dated 3.11.1969 creating special posts for those schools and also providing special qualifications for those posts. This does not mean that other provisions of the Rules which have general application to all aided schools do not apply to the schools for special categories of students. The rules having general application are those relating to appointment and approval (Rule 8), transfer (Rules 10 and 11), seniority (Rules 35 to 40), Promotion (Rule 43), Retrenchment (Rules 49 & 52), Re-appointment (Rule 51-A), appointment on compassionate ground (Rule 51-B) and disciplinary action (Rules 65 to 91). The issuance of an order by the Government on 3.11.1969 will not have the effect of amending the Kerala Education Rules and taking out from its purview the schools imparting education to special categories of students. The said order only fills in the gap in the Rules in its application to schools for special categories of students. The Manager appointed the 6th respondent under Rule 8. On rejection of approval, the appeal was filed before the Deputy Director under Rule 8(5), the revision before the D.P.I, was filed under Rule 8A and the further revision was filed before the Government under Rule 92 of Chap.XIV-A. So, it illcomes from the mouth of the Manager to say that the said Chapter will not apply to the blind school. Any interpretation which takes out the teachers of schools for special categories of students from the purview of the beneficial provisions of Chap.XIV-A cannot be upheld. Those teachers whose functions are more arduous, when compared to the teachers of schools rendering general education will be left in the lurch, if the contention of the Manager is accepted. Therefore, the contentions of the contesting respondents in this regard are rejected. The stand of the management that the petitioner's school should be treated as a separate unit is plainly untenable. The fact that the petitioner has applied for the post when it was notified, cannot defeat the rights of the petitioner. There can be no estoppel against a Statute. The right under Rule 43 Chap.XIV-A KER cannot be defeated by the plea of waiver or acquiescence. The petitioner has moved the competent authority immediately for reliefs against the denial of her rights. A Division Bench of this Court in Lakshmikutty Amma v. Vijayalakshmi Kutty (1992 (2) KLT 341) has held that the provisions contained in Rule 51-A are mandatory and even if the teacher gives a letter relinquishing the rights under the said rule, her rights will not be lost. The principle based on which this Court arrived at that conclusion will apply in the case of the rights under Rule 43 also.

8. In view of the above position, Ext.P8 order of the D.P.I, and Ext.P11 order of the Government are quashed. To give a quietus to the dispute at the earliest, the matter is remitted to the Government for fresh determination of the claim of the petitioner for the post of Music Teacher in Samuel LMS High School in accordance with law in the light of the observations contained herein above, after affording an opportunity of being heard to the petitioner and respondents 5 and 6. If the petitioner is having the prescribed qualification for the post of Full-time Music Teacher and she is the senior most among the qualified persons working in the

lower grade, she is entitled to get promotion to that post by virtue of Rule 43 Chap.XIV-A KER, which reads as follows:

"43. Subject to Rules 44 and 45 and considerations of efficiency and any general order that may be issued by the Government, vacancies in any higher grade of pay shall be filled up by promotion of qualified hands in the lower grade according to seniority, if such hands are available".

The Government shall take a decision as directed above within three months from the date of receipt of a copy of this judgment. The 6th respondent shall be entitled to get salary for the period upto the date of this judgment, if she has actually worked and the post continued to be in existence during the academic years 2001-02 to 2003-04. O.P. No. 36789/2002 is allowed as above. In view of this judgment, O.P. No. 36563/2002 is dismissed. No costs.