
(1993) 10 KL CK 0033
In the High Court Of Kerala
Case No : W.A. No. 222 of 1993

Henry Gomez

APPELLANT

Vs

Govt. of Kerala and Others

RESPONDENT

Date of Decision : 06-10-1993

Acts Referred:

Constitution of India, 1950 — Article 30(1)
Kerala Education Rules, 1959 — Rule 43, 44, 45
Kerala State and Subordinate Services Rules, 1958 — Rule 28

Citation : (1993) 1 ILR (Ker) 808 : (1994) 2 LLJ 615

Hon'ble Judges : M. Jagannadha Rao, C.J;K. Sreedharan, J

Bench : Division Bench

Advocate : S. Sankara Subban, for the Appellant; Jose, Govt. Pleader and K. Kochu Pappu, for the Respondent

Final Decision : Dismissed

Judgement

This Judgment has been overruled by : N. Ammad Vs. The Manager, Emjay High School and Others, (1998) 7 AD 91 : AIR 1999 SC 50 : (1998) 6 JT 221 : (1998) LabIC 3560 : (1998) 5 SCALE 167 : (1998) 6 SCC 674 : (1998) 1 SCR 453 Supp : (1998) AIRSCW 3372 : (1998) 7 Supreme 241

Sreedharan, J.—Writ Appeals 222/93 and 376/93 arise out of O.P. No. 6999/88. Petitioner in the O.P. is the appellant in Writ Appeal No. 222/93. Respondents 5 and 6 therein namely the Manager of the school and the teacher who was appointed by the Manager as the Headmaster are the appellants in Writ Appeal No. 376/93. The Manager and its appointee, Headmaster, filed O.P. No. 6787/88. In that O.P., the petitioner in O.P. 6999/88 was the third respondent. This original petition was disposed of by the learned Judge along with O.P. No. 6999/88 by a common judgment. Petitioners in O.P. 6787/88 have preferred Writ Appeal No. 288/93 and the third respondent Writ Appeal 258/93. Since same issues arise in these appeals arising out of two original petitions disposed of jointly, we consider it advantageous to dispose of those appeals by a common judgment.

2. The short facts necessary for the disposal of these appeals are as follows:- The post of Headmaster in St. Joseph's High School, Tri-vandrum became vacant with effect from May 2, 1987. The management appointed Fr. Ephrem Thomas as the Headmaster. He was not qualified to be appointed as Headmaster of the school on May 2, 1987. Sri Henry Gomez, a High School Assistant working in the school, was the senior-most teacher in the school qualified to be appointed as Headmaster. Appointment of Fr. Ephrem Thomas was not approved by the District Educational Officer. Against this order, the management and Fr. Ephrem Thomas went in appeal before the Deputy Director of Education. By order dated February 2, 1988, that appeal was dismissed. The issue was taken up in second appeal before the Director of Public Instruction. While the appeal was pending, Fr. Ephrem became qualified with effect from June 4, 1987 for being appointed as Headmaster. Taking note of this fact, the Director by order dated May 23, 1988, allowed the second appeal and ordered the District Educational Officer to approve the appointment of Fr. Ephrem Thomas with effect from the date on which he became qualified for promotion to the post of Headmaster. Management thereupon issued an appointment order in favour of Fr. Ephrem Thomas posting him as Headmaster with effect from June 4, 1987. Consequently the District Educational Officer approved the appointment of Fr. Ephrem Thomas as Headmaster with effect from June 4, 1987. Aggrieved by the said developments, Sri. Henry Gomez preferred a revision petition before the Government questioning the appointment of Fr. Ephrem Thomas as Headmaster and the approval granted to him with effect from June 4, 1987. During the pendency of that revision petition, Sri. Henry Gomez retired from the service on superannuation on July 14, 1988. The revision petition was disposed of by Government by G.O. (Ms) No. 129/88/G. Edn. dated August 12, 1988 holding that Sri Henry Gomez will be deemed to have been promoted as Headmaster with effect from May 2, 1987, that he will not be entitled to Headmaster's pay and that his pension will be fixed as if he had been paid as Headmaster between May 2, 1987 and July 14, 1988. It was further ordered that Sri. Henry Gomez will not be eligible to claim that he should continue as Headmaster till the close of the academic year 1988-89 in order to avoid disruption in the middle of the year that may be caused because of his re-induction in the middle of the academic year. Henry Gomez questioned this order of the Government by filing O.P. 6999/88 on the ground that he was entitled to be paid the arrears of salary for the period for which he has been found entitled to hold the post of Headmaster. Since the appointment of Fr. Ephrem Thomas with effect from June 4, 1987 was interfered with by the Government, the management and Fr. Ephrem Thomas approached this court by filing O.P. No. 6787/88.

3. While disposing of the original petitions by a common judgment, the learned single Judge took the view that Government was wrong in appointing Sri. Henry Gomez as Headmaster of the school with effect from May 2, 1987 because it is the privilege of the management which is entitled to the protection under Article 30(1) of the Constitution of India. Management was thereupon directed to

appoint Headmaster as on May 2, 1987 from among the teachers who were then qualified to hold the post. While doing so, it was ordered that the management should consider the claims of Sri. Henry Gomez for the post. This decision is under challenge in these appeals.

4. Rule 44A of Chapter XIV(A) of K.E.R. prescribes the minimum service qualification for appointment as Headmaster of a High School as 12 years of continuous graduate service with a pass in the test in Kerala Education Act and the Kerala Education Rules and in Account Test (Lower) conducted by the Public Service Commission. Fr. Ephrem Thomas did not have 12 years of continuous graduate service as on May 2, 1987 when the vacancy of Headmaster arose in the school. But the management appointed him as the Headmaster. That appointment was not approved by the District Educational Officer. Nor was the request of the management in this regard accepted by the Deputy Director. In second appeal the Director found that Fr. Ephrem Thomas became qualified on June 4, 1987 and that his appointment as Headmaster can be approved with effect from that date. Consequently the Director ordered the District Educational Officer to approve the appointment of Fr. Ephrem Thomas with effect from June 4, 1987. This was interfered with by the Government by its order dated August 12, 1988 presumably on the ground that the vacancy that arose on May 2, 1987 could not be filled up by a teacher who became qualified only on June 4, 1987. At the same time, Government ordered the management to appoint Sri. Henry Gomez as Headmaster for the period from May 2, 1987 to July 14, 1988 on which date he completed the age of superannuation.

5. The right of the management, which is entitled to the protection of Article 30(1) of the Constitution to appoint Headmasters of its choice irrespective of seniority in educational institution established and administered by it, has been recognised by this Court and the Supreme Court. A Full Bench of this court in Aldo Maria Patroni and Another Vs. E.C. Kesavan and Others, observed:-

"The post of the headmaster is of pivotal importance in the file of a school. Around his wheels the tone and temper of the institution; on him depends the continuity of its traditions, the maintenance of discipline and the efficiency of its teaching. The right to choose the headmaster is perhaps the most important facet of the right to administer a school; and we must hold that the imposition of any trammel thereon-except to the extent of prescribing the requisite qualifications and experience--cannot but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution. To hold otherwise will be to make the right "a teasing illusion, a promise of unreality."

This view has been endorsed by another Full Bench in V. Rev. Mother Provincial, Congregation of Mother of Carmel, Carmelite Provincial House, Kovilvattam Road, Ernakulam, Cochin and Others Vs. State of Kerala and Others,) while dealing with the colleges of minority institutions. Observations made by the Supreme Court in The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another, and in The Gandhi Faiz-E-Am College, Shahjahanpur Vs.

University of Agra and Another, also supports the above conclusion. A Division Bench of this Court in *Manager Corporate E. Agency v. State of Kerala* 1990 (2) KLT 240 following the above decisions also took the view that the right to appoint the Headmaster of a school or the Principal of a College run by a minority institution vests with the management. The Bench observed:-

"The right to appoint the Headmaster of a school or the Principal of a College, is one of prime importance in the administration of the institution. The right of the minority to administer an educational institution of its choice requires the presence of a person in whom they can repose confidence, who will carry out their directions, and to whom they can look forward to maintain the traditions, discipline and the efficiency of the teaching. When once the pivotal position of the Headmaster is recognised, it has to be held that the right to appoint a person of its choice as Headmaster is of paramount importance to the minority, any interference with which (otherwise than by prescribing qualifications and experience) will denude the right of administration of its content, reducing it to mere husk, without the grain. Such an inroad cannot be saved as a regulation which the State might impose for furthering the standards of education."

In the light of this legal position, we have no hesitation in holding that Government made an inroad into the right of management when it ordered Sri. Henry Gomez to be appointed as Headmaster in the vacancy that arose on May 2, 1987. This view taken by learned single Judge is perfectly legal and it calls for no interference.

6. It is the common case of parties that vacancy of Headmaster arose on May 2, 1987. On that date Fr. Ephrem Thomas was not having the requisite qualification in the sense that he has not completed 12 years of continuous graduate service. He acquired that qualification on June 4, 1987. Now the question that arises for consideration is whether the management was justified in keeping the post of Headmaster vacant till June 4, 1987 to enable Fr. Ephrem Thomas to acquire qualification and then to appoint him with effect from June 4, 1987.

7. A Full Bench of this Court in the decision in *M. James Thomas and Others Vs. The Hon'ble the Chief Justice and Others*, expressed the view that the general rule is that claims for promotions are to be decided upon with reference to the time of occurrence of vacancies and not the time of making the appointments. The relevant date must be definite and not depend upon the volition of the authorities. Otherwise the determination on the claim for promotion would be arbitrary. If the qualification is to be decided with reference to the date of promotion, it will certainly lead to arbitrary exercise of power. Another Full Bench of this Court in *Varghese v. State of Kerala* 1981 11 LLJ 454) went into the question as to what should happen in a situation where there was none qualified on the date of occurrence of the vacancy and a junior becomes qualified subsequently. It took the view that there will be no difference whether the vacancy existed already or the vacancy occurred after the junior became qualified. If there was a vacancy as and when a person becomes qualified for

being promoted to such vacancy, he would be entitled to be considered for promotion to that vacancy. If there was no vacancy when a person becomes qualified for promotion and vacancy arose while he would remain qualified, his case of promotion is to be considered as and when vacancy arose. The Bench observed (at p. 457):

"The relevant date must be definite and not depending upon the volition of the authorities as otherwise the determination would be arbitrary. If it were to be the date of promotion that is to be relevant for determining the title to such promotion the rule is capable of arbitrary exercise. Even if it is honest exercise that would be arbitrary because the fate of the service career will depend in each instance upon the time taken by the concerned authority in passing the order of promotion. On the other hand, there is definiteness in treating the date of occurrence of the vacancy as that which would determine the title of person to be considered for promotion."

A still later Full Bench of this Court in *P. Padmanabhan Nair and Another Vs. The Deputy Director of Education, Malappuram and Others*, went into the question as to how the vacancy of Headmaster is to be filled up. Regard being had to the provisions contained in Rule 44A of Chapter XIV (A) of KER, the Full Bench took the view that when qualifications are prescribed for a promotion post, eligibility for appointment to that post has to be reckoned with reference to the date on which the vacancy arose. If there was a qualified hand on that date, he is entitled to be considered for appointment to the post in preference to his unqualified colleagues. The Bench also took the view that the date on which promotion is actually made is immaterial as the title to the appointment arises on the date of occurrence of the vacancy. In the light of the above mentioned three Full Bench decisions which are binding on us, we have no hesitation in holding that the management should have filled up the vacancy of Headmaster which arose on May 2, 1987 on the basis of the qualification of claimants as on that date. It is established beyond any doubt that Fr. Ephrem Thomas was not qualified to be considered for the post of Headmaster on the date of occurrence of the vacancy namely, May 2, 1987. By delaying the appointment to June 4, 1987, the management cannot favour Fr. Ephrem Thomas by giving him the post of Headmaster.

8. Learned counsel representing the management tried to bring out a case that promotion to the post of Headmaster need not be with reference to the qualification as on the date of the occurrence of the vacancy. In support of this contention, he sought to rely on the so-called difference between Rules 43 and 44 of Chapter XIV(A) of K.E.R. According to counsel, while Note (2) of Rule 43 states that promotion under that rule shall be made from persons possessing the prescribed qualifications at the time of occurrence of vacancy, Rule 44 dealing with the appointment of Headmasters does not contain any such Note or provision. On this basis, it was contended that the management need consider the qualification of the teacher as on the date of appointment and not with

reference to the date of occurrence of vacancy. Learned counsel in support of this argument placed before us the following observations made by a learned single Judge in *Radhakrishna Kamath v. Cochin T.D. Corporation* 1976 KLT. SN 14 Case No. 31:

"The Headmaster's retirement could take effect as per the rules only from the closing of the school for the academic year. There is no statutory rules or orders which prescribe that on the date of retirement itself the new Headmaster should be appointed. The third respondent was appointed within a reasonable period as Headmaster. There is no rule like Rule 28(bb) of the Kerala State and Subordinate Service Rules in this connection which states that the qualifications should be as on the date of occurrence of the vacancy and not on the date of the appointment."

According to learned counsel, in the instant case, even though vacancy arose on May 2, 1987, Fr. Ephrem Thomas became qualified within a reasonable time i.e. on June 4, 1987 and his appointment is not to be faulted. We find no legal basis for this argument. Rule 43 of Chapter XIV (A) of K.E.R. states that 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. When this provision itself says that it is subject to Rules 44 and 45, according to us, Rules 44 and 45 must also be understood in the light of the provisions contained in Rule 43. As per Rule 44, the appointment of Headmasters shall ordinarily be according to seniority from the seniority list of teachers. Rule 43 says that promotion must be by qualified hands in the lower grade according to seniority. Rule 44 gives emphasis only to seniority and as to how the seniority is to be decided. The Note (2) to Rule 43 makes it abundantly clear that the promotion shall be with reference to the qualification at the time of the occurrence of the vacancy. A combined reading of Rules 43 and 44 can only have the effect of stating that promotion to the higher cadre should be based on the qualification and seniority at the time of occurrence of vacancy. This can only be the interpretation in view of the three Full Bench decisions referred to earlier. Consequently we are of the view that the observations made by the learned single Judge in *Radhakrishna Kamath v. Cochin T.D. Corporation* (*supra*) cannot be considered as laying down the correct proposition.

9. The result of the above discussion is that the management is bound to find out a qualified teacher from among the members of its staff to be posted as Headmaster of the school in the vacancy that arose on May 2, 1987. Fr. Ephrem Thomas cannot be considered for that vacancy as he was not having the requisite qualification. Fr. Ephrem Thomas can be considered for the post of Headmaster only against any vacancy that arises subsequent to the date of his acquisition of the qualification. The view that is taken in this regard by the learned single Judge is perfectly legal and we endorse the same.

10. In view of what has been stated above, we find no merit in these appeals.

They are accordingly dismissed.