
(2009) 03 KL CK 0085

In the High Court Of Kerala

Case No : Writ Petition (C) No. 9382 of 2007

Manager, Chentrapinni Secondary School and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 19-03-2009

Acts Referred:

Kerala Education Rules, 1959 — Rule 43, 44, 44A, 44B, 49

Citation : (2009) 03 KL CK 0085

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : V.P. Seemandini, M.S. Unnikrishnan, K.P. Geethamani, M.R. Anison and T.R. Rajesh, for the Appellant; Antony Mukkath, Government Pleader. for Respondents 1 to 3, N.N. Sugunapalan and G. Sreekumar (Chelur) and S. Sujin for 4th Respondent, for the Respondent

Final Decision : Allowed

Judgement

T.R. Ramachandran Nair, J.—An interpretation of Rule 51A of Chapter XIV A of the Kerala Education Rules, 1959 and the amendment to the same introduced as per G.O.(P) No. 187/2005 arises for consideration in this case.

2. The first Petitioner is the Manager of a school and the second Petitioner is the newly appointed High School Assistant (English) with effect from 18-7-2005. The 4th Respondent is the claimant under Rule 51 A. The school is having Upper Primary and High School Sections and she had approved service in the U.P. Section during different spells, viz., from 31-7-1998 to 16-10-1998 and 14-10-1998 to 16-2-2000. She has got qualifications for holding the post of HSA (English).

3. Smt. P. Indira Devi, HSA retired from service on 31-3-2005 and thus a vacancy of HSA arose. The second Petitioner was appointed as per Ext. P-1 appointment order dated 18-7-2005 which was duly approved by the third Respondent as per order dated 31-3-2006.

4. Subsequently, the 4th Respondent raised her claim for appointment to the above HSA vacancy under Rule 51A of Chapter XIV A K.E.R. She approached the Director of Public Instruction by a representation, who by Ext. P-2 informed her that she is having eligibility for appointment as HSA (English) as per G.O.(P) No. 187/2005. Subsequently, the 4th Respondent forwarded the same along with a representation, to the first Petitioner Manager and then only the Manager knew about the existence of Ext. P-2. Later, the third Respondent District Educational Officer directed the first Petitioner to reconsider the appointment of second Petitioner and to grant appointment to the 4th Respondent in the light of G.O.(P) No. 187/2005.

5. The first Petitioner took the stand that since G.O.(P) No. 187/2005 is not having any retrospective effect, the second Petitioner's appointment is not affected. Accordingly, Exts. P-5 and P-6 replies were given to Respondents 3 and 4. Again, by Ext. P-7 the third Respondent District Educational Officer directed the first Respondent to terminate the appointment of the second Petitioner and to appoint the 4th Respondent. Against this, a revision petition was filed before the Government which was directed to be disposed of by this Court as per the judgment in Writ Petition No. 30226/2006. By Ext. P-8, the revision petition stands dismissed which is under challenge in this writ petition.

6. The Government took the view that eventhough the 4th Respondent is not qualified on the date of occurrence of vacancy, she became qualified from 17-6-2005 in the light of the amendment made to KER. Since the second Petitioner was appointed only on 18-7-2005, subsequent to the amendment and as Rule 51A being a special provision to protect the interest of a thrown out teacher, the appointment cannot be denied to the 4th Respondent on the ground that on the date of occurrence of vacancy, she was not qualified.

7. Heard learned Counsel for the Petitioner Shri M.R. Anison, learned Senior Counsel Shri N.N. Sugunapalan, for the 4th Respondent and learned Government Pleader Shri Antony Mukkath, for Respondents 1 to 3.

8. Learned Counsel for the Petitioner mainly contended that herein, the vacancy arose on 1-4-2005 consequent on the retirement of the Teacher and the amendment introduced as per G.O.(P) No. 187/2005 was brought into force only on 17-6-2005. As the said provision is not retrospective, the qualification for appointment has to be considered as on the date of occurrence of vacancy. Prior to the amendment, the provision envisaged a preference in the matter of appointment to an identical post, viz. the post of UPSA here and thus the 4th Respondent was not entitled to claim any preference for appointment of HSA (English). Such claim would therefore arise only in a vacancy that arose on or after 17-6-2005. Learned Counsel relied upon various decisions of this Court, viz. Varghese and Ors. v. State of Kerala and Ors. K.L.T.458 (F.B.), Padmanabhan Nair v. Deputy Director 1991 (1) KLT 337 (F.B.), Neema Rajan v. Jyothi Chandran (2001 (3) KLT SN page 25, Case No. 35 and Mohanan v. Director of Homeopathy 2006 (3) KLT 641 (F.B.) to contend for the position that qualification for

appointment should be considered as on the date of occurrence of vacancy. It is pointed out that the date of filling up the vacancy cannot be relevant to decide the title for getting the appointment.

9. Learned Senior Counsel appearing for the 4th Respondent relied upon the decisions of this Court in Radhakrishna Kamath v. Cochin T.D. Corporation 1976 KLT S.N. 14 Manager, H.M. High School v. State of Kerala 1987 (2) KLT 555, Henry Gomez v. Government of Kerala 1993 (2) KLT 883 and Sandhya v. Jalaja Kumartf 2008 (3) KLT 655 to contend for the position that as vacancy has been filled up after the date of the amendment, the 4th Respondent has got every right to seek the appointment and therefore the Government Order cannot be said to be faulty.

10. Rule 51A of Chapter XIV A K.E.R. prior to the amendment stood as follows:

51 A. Qualified teachers who are relieved as per Rule 49 or 52 or on account of termination of vacancies shall have preference for appointment to future vacancies in schools under the same Educational Agency or an Educational Agency to which the school may be subsequently transferred provided they have not been appointed in permanent vacancies in schools under any other Educational Agency.

As per the amendment, the following words have been inserted after the words "to future vacancies", namely: "in the same or higher or lower category of teaching posts, for which he is qualified that may arise." The amendment was introduced as per G.O.(P) No. 187/2005 dated 17-6-2005 which was published in the Gazette dated 25-6-2005.

11. The settled legal position as per the unamended provision was that preference for appointment is to an identical post only and this position has been reiterated by various decisions of this Court, viz. Gopalakrishnan Nair v. D.E.O. 1988(1) KLT 644 D.B. and other decisions. Going by the present amendment, as far as a teaching post is concerned, a qualified teacher will have the preference for appointment in future vacancies in the same or higher or lower category of teaching posts for which he is qualified, that may arise. Therefore, herein the 4th Respondent who had approved service as UPSA and who is having qualification as HSA, will be entitled to preference under Rule 51A if all the conditions to attract the same are present.

12. While considering the argument that the vacancy has arisen on 1-4-2005, on the retirement of the teacher concerned, we may have to go to the scheme of the provisions under Chapter XIV A K.E.R. to understand whether the title to hold the office by a claimant under Rule 51A arises as on the date of occurrence of vacancy or as on the date when appointment is made.

13. Rule 7A(2) of K.E.R. states that "posts that may fall vacant on the closing date shall not be filled up till the reopening date except in the case of posts of non vacation staff ". The question posed herein could therefore be analysed in

the light of Rule 7A(2) also. This Court in *Manju v. State of Kerala* 2005 (1) KLT S.N. page 98, Case No. 122, held that Sub-rule (2) of Rule 7A of Chapter XIV A K.E.R. does not envisage postponement of date of occurrence of vacancy. It was held thus:

All that Sub-rule (2) of Rule 7A provides is that the posts that may fall vacant on the closing date shall be left unfilled till the reopening date. A proper understanding of the said sub-Rule will show that it concedes the situation that the vacancy occurs immediately on the vacation of office of an incumbent who superannuates on the closing date but a statutory interdiction is imposing against filling up of that vacancy till the reopening date.

Therefore, actually the vacancy has arisen here on 1-4-2005. Then the question is whether in the absence of a retrospective operation of the amended provision, the 4th Respondent could claim appointment in a vacancy which arose on 1-4-2005.

14. The question as regards the right of a person to get promotion as on the date of occurrence of vacancy, was laid down in various Full Bench decisions of this Court, viz. *James Thomas v. Chief Justice* 1977 KLT 622 (F.B.), *Varghese and Ors.* case 1981 KLT 458 (F.B.) and a later Full Bench decision under Chapter XIV A K.E.R. itself viz. *Padmanabhan Nair's case* [1991 (1) KLT 337 (F.B.)]. In *Varghese and others* case, their Lordships relied upon the earlier Full Bench decision in *James Thomas's case* 1977 KLT 622 (F.B.) and held that "it is the time of occurrence of vacancy that should be relevant for determining the question of promotion and not the time the order of promotion is passed. 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 the person to be considered for promotion."

In the later decision in *Padmanabhan Nair's case* 1991 (I) KLT 337 (F.B.), Rule 44A of Chapter XIV A K.E.R. came up for interpretation. Rule 44A prescribes the minimum service qualification for appointment as Headmaster as 12 year of continuous graduate service with a pass in the test in Kerala Education Act and the Kerala Education Rules. While considering the competing claims of the parties concerned, Their Lordships, after following the Full Bench decisions in *James Thomas's case* 1977 KLT 622 (F.B.) and *Varghese and Ors.* case 1981 KLT 458 (F.B.) held in para 11 thus:

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, in the feeder category, he is entitled to be considered for appointment to the post in preference to his unqualified seniors. The date on which the appointment is actually made is immaterial as the title to the appointment arises on the date of occurrence of the vacancy and is not defeated by the acquisition of qualifications by a senior thereafter. If however, none was qualified on that date, the person who first becomes qualified thereafter is entitled to be considered for appointment, if the vacancy continues to remain.

In *Manager, II.M. High School's case* 1987 (2) KLT 555, Rules 43, 44, 44A and 44B of Chapter XIV A K.E.R. came up for interpretation. The very same question was considered and it was held thus:

There shall be some definite, ascertainable and unalterable standard which shall govern the entitlement of eligible High School Assistants for appointment as Headmasters. The only unalterable and absolutely certain date for ascertaining the entitlement of teachers on the basis of possession of qualifications or exemption from possession of such qualifications is the date of occurrence of the vacancy. The statutory functionary shall be bound to adopt such ascertainable standards and cannot claim a discretion to determine the entitlement for appointment covered by statutory provisions as its whim and fancy. Therefore, the relevant date to ascertain whether the seniormost teacher was qualified for appointment as Headmaster is the date of occurrence of the vacancy.

Later, a Division Bench of this Court in *Henry Gomez's case* 1993 (2) KLT 883 considered the very same position while interpreting Rules 43 and 44 of Chapter XIV A K.E.R. After reiterating the position, it was held that "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." The decision of a learned Single Judge of this Court in *Radhakrishna Kamath's case* 1976 KLT S.N. 14, Case No. 31 was overruled. In *Neema Rajan's case* 2001 (3) KLT 25, Case No. 35, it was held that "the Manager cannot postpone filling up the vacancy until a teacher of his choice gets qualified for promotion when a claimant is waiting appointment as on the date of occurrence of vacancy.

17. In *Mohanan's case* 2006 (3) KLT 641 (F.B.) the effect of an amendment of the Special Rules while a rank list was in force, was considered. The Full Bench was of the view that "once an amendment regarding qualifications and method of appointment etc. in respect of a particular post comes into force any vacancy which arises subsequent to the commencement of the amended rules can be filled up only in accordance with the amended rules notwithstanding the currency of any rank list published by the PSC, selection of which was initiated prior to the amendment of the rules." Therein also, the amendment was not retrospective in nature. Therefore, in understanding the question posed herein, the said dictum could also be profitably applied.

18. Learned Senior Counsel appearing for the 4th Respondent, Shri N.N. Sugunapalan submitted that the Full Benches in Varghese and Ors." casc 1981 KLT 458 (F.B.) and Padmanabhan Nair's case 1991 (1) KLT 337 (F.B.) and other Benches in later decisions referred to above were considering the questions wherein the right to get promotion was involved and it was not one concerning any right to get appointment. It is therefore submitted that the said principles cannot be adopted in a fact situation which has arisen here. Even though the said decisions were concerning the eligibility for promotion, still the said principles can be profitably applied herein also. In view of the amendment alone the 4th Respondent gets right to claim appointment to the post of HSA. In that view of the matter, the principles stated in the decisions above will squarely apply to the situation herein.

19. In fact, going by Rule 51A of Chapter XIV A K.E.R., when a teacher has approved service and was thrown out for want of vacancy or for similar reasons, such a teacher is entitled to claim preference for appointment in a future vacancy. Now, as per the amendment alone the restriction regarding identity of teaching post was removed. It is in those circumstances the question, as posed herein, arises whether as on the date of occurrence of vacancy, the 4th Respondent who had only approved service as UPSA, could stake a claim for appointment in the vacancy of HSA. Admittedly, the amendment is not having any retrospective operation.

20. In fact, this Court had to consider the relevancy of the date of occurrence of vacancy under Rules 43, 44 and 51A as noted already. Another situation wherein the applicability of the said principle considered by this Court, is regarding the entitlement of a dependent to claim appointment under Rule 51B of Chapter XIV A K.E.R. The said rule was introduced from 30-3-1990. As a result, a liability is cast on the management to give employment to a dependent of an aided school teacher or a member of a non teaching staff dying-in-hamess. In Manager, Parli High School v. Narayanan 2002 (3) KLT 912 a Division Bench of this Court considered the issue whether the said rule operates prospectively or not. In fact, an argument was raised that the rule will not apply to cases of death occurred prior to the introduction of the said rule. This Court held that what is relevant is the date of occurrence of vacancy. Their Lordships laid down the legal position in para 10 thus:

Rule 51B operates only prospective and the fact that the death of the employee occurred before the introduction of Rule 51B, does not disentitle the dependent from claiming appointment under that Rule. What is relevant is the date of occurrence of the vacancy. If the occurrence of vacancy is on or after the coming into force of Rule 51B, the fact that the employee died before such commencement is immaterial. For the mere reason that facts necessary for giving effect to the Rule are drawn from the past, the Rule cannot be held retrospective. One of the facts that go to confer a right on the dependent of a deceased employee to claim appointment under Rule 51B is the death of that

employee while in service. The fact that the death of the employee is prior to the commencement of Rule 51B does not mean that Rule 51B is given effect to retrospectively. Appointments can be claimed only against the vacancies that would arise after the introduction of Rule 51B. It is therefore clear that the said Rule is enforced only prospectively.

21. Similar is the position here also. Prior to the amendment, admittedly the 4th Respondent had no right to claim preference in the matter of appointment as HSA (English) for lack of identity of the post. The right, if any, of the 4th Respondent arises only after the amendment, with effect from 25-6-2005. Admittedly the amendment is not retrospective. Government in Ext. P-6 took the view that since the vacancy was filled up only on 18-7-2005, the amended rule applies. In fact, that is the view taken by the Director of Public Instruction in Ext. P-2, by the District Educational Officer in Exts. P-4 and P-7 which was confirmed by the Government in Ext. P-8. The question is whether the amendment not being retrospective, is it safe to reckon the effect of the amendment as on the date on which the vacancy was filled up. There should be some definiteness while the right to get preference in the matter of appointment in a "future vacancy" is sought to be enforced by the claimant. As noted already, going by Rule 7A of Chapter XIV A K.E.R. the Manager could not have filled up the vacancy which arose on 31-3-2005, from 1-4-2005. In fact, Note 2 to Rule 51A also will have to be complied with by the Manager. Thus, even though the filling up of the vacancy is postponed, importance is there only to the date of occurrence of vacancy while considering the qualification and the eligibility. Otherwise, it will be an uncertain and indefinite criteria which may crop up while determining the respective rights of the claimants. The law should be definite and such definiteness, if applied, then the date of occurrence of the vacancy is the safe and relevant criteria to determine the title to get appointment. If it depends upon the date on which it is filled up, that will be an indefinite and an arbitrary criteria. There can be a situation wherein different claimants may be trying to enforce their right to the very same vacancy. In that view of the matter, going by the amendment dated 25-6-2005, the 4th Respondent gets a right to get appointment in a vacancy to a teaching post which arises only from that date. Admittedly, the vacancy herein arose with effect from 1-4-2005. In that view of the matter, she will be entitled for appointment only for an appointment as HSA in a vacancy which arose subsequent to 25-6-2005.

22. I am fortified in this view by a recent decision of this Court in *Abdurahiman, N.K. v. Government of Kerala and Ors.* 2009 (1) K.H.C. 950 (D.B.). Their Lordships were considering an amendment by adding the proviso to Rule 51A of Chapter XIV A K.E.R. to the effect that "provided that a teacher who was relieved under Rule 49 or Rule 52 shall not be entitled to preference for appointment under this rule unless such teacher has a minimum continuous service of one academic year as on the date of relief". This was also introduced by the very same notification with effect from 25-6-2005. The question arose whether persons who were appointed before 25-6-2005 (the date of coming into force of

the amendment) to short term vacancies extending beyond two months and whose appointments were approved and on termination who became Rule 51A claimants, will be affected by this amendment introduced on 25-6-2005. It was held in para 14 thus:

In the case of Educational Institutions, the minimum incumbency period was fixed as two months. That is because a valid appointment can be made only if the vacancy extends beyond that period. Now, it is provided that appointments can be made, if only the duration of the vacancy is one academic year and only such incumbents are to be given preference in future appointments. But, the said amendment can in no way affect the rights accrued to persons, on the strength of their appointment to short duration vacancies exceeding two months, made earlier to the amendment. The right of them to get reappointment was always recognised by Rule 51A. But after 25-6-2005, one can be appointed if only the vacancy has a duration of one academic year. Therefore, naturally such persons alone can get the right to reappointment also. So, the interpretation sought to be advanced by the Respondents that the writ Petitioner has no right for reappointment under Rule 51A, in view of the introduction of the first proviso to the said rule, cannot be accepted.

The above dictum can be profitably applied to the facts of this case to hold that the amendment is not retrospective and if that be so, it will apply to vacancies which may arise on or after 25-6-2005.

23. In fact, in the counter-affidavit filed on behalf of the third Respondent, it is stated that the regular vacancy of HSA arose in the school with effect from 31-3-2005 due to the retirement of Smt. P. Indira Devi on 31-3-2005. It is also stated that according to G.O.(P) No. 187/2005 dated 17-6-2005 Smt. K. Sreedevi is eligible for appointment in the school to the post of HSA (English) also in terms of Rule 51A of Chapter XIV A K.E.R. in vacancies arising from 17-6-2005. But thereafter, it is averred that since the second Petitioner was appointed on 18-7-2005, the claim of the 4th Respondent was overlooked. Once it is admitted that the vacancy arose on 1-4-2005 and that the amendment makes the 4th Respondent eligible to get appointment only in vacancies arising from 25-6-2005, merely because the appointment was made on 18-7-2005, the 4th Respondent will not get any right to be appointed as such instead of the second Petitioner.

24. Therefore, the legal position is clear. The amendment as on 25-6-2005 will not confer any right on the 4th Respondent to claim appointment in the vacancy which arose on 1-4-2005.

25. In the result, Exts. P-2, P-4 and P-8 are quashed. It is declared that the appointment of the second Petitioner as H.S.A., as approved by Ext. P-1 is legal and valid. It is also declared that the 4th Respondent will have claim in the school for appointment as HSA under Rule 51A of Chapter XIV A K.E.R. in a vacancy which arose after 25-6-2005.

The writ petition is allowed as above. No costs.