
(2012) 03 KL CK 0070

In the High Court Of Kerala

Case No : Writ Petition (C) .No. 26877 of 2009

Manager, L.M.S. Special Schools, Trivandrum

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 05-03-2012

Acts Referred:

Constitution of India, 1950 — Article 30(1)
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 32, 33, 47, 47(2)

Citation : (2012) 2 KarLJ 44 : (2012) 2 KLJ 44

Hon'ble Judges : A.M. Shaffique, J

Bench : Single Bench

Advocate : Aysha Youseff, Molly Jacob, U.M. Fousia, Rabia Beegam T.K. and Bobby M. Sekhar, for the Appellant; Babu Varghese (Sr.), V. Vijulal (GP) and Johnson T. John, for the Respondent

Judgement

A.M. Shaffique, J.—The petitioner is an Assistant teacher in a blind school. She has 26 years of service and is the senior most fully qualified teacher for promotion as Headmaster. By Ext.P1 applications were invited for appointment to the post of Headmaster. The petitioner did not get appointment and the 6th respondent was appointed to the said post. Though the petitioner challenged the matter before the competent authorities, her claim had been rejected finally by Ext.P11 which is under challenge and she also seeks for a direction to promote and appoint her as the Headmistress.

2. The respondent however contended that the petitioner was not eligible to be appointed as the Headmaster as per the qualification criteria prescribed under Note (3) of Clause 1 (A) of Ext.P1, wherein it is indicated that handicapped persons shall not be recruited or promoted as Headmaster of special schools. It is further contended that the respondent institution is a minority institution coming under Article 30(1) of the Constitution and thereby entitled to make appointments overlooking seniority.

3. It is the contention of the petitioner that as per Section 47(2) of "The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995" (hereinafter referred to as the Act), no person shall be denied promotion on the ground of disability. According to the petitioner, the statutory provision aforementioned would override Note (3) of Clause 1 of Ext.P1 and therefore her promotion as Headmistress has to be considered ignoring Note No. 3.

4. The respondents 1 to 4, on the other hand, supported the stand taken by the Management and according to them, in view of Note (3) of Clause 1 of Ext.P1, the petitioner, being a blind person, suffers a handicap and therefore as a Headmaster of the School, it is for the Government/Management to decide regarding the qualification which cannot be dictated by the petitioner. It is further contended that the Act has no application for appointments to be made in pursuance to Ext.P1.

5. Therefore the point to be decided in the case is whether Note (3) of Clause 1 of Ext.P1 can be ignored for the purpose of prescribing qualification criteria of a Headmaster in the light of Section 47(2) of the Act, and or whether Ext.P1 is liable to be interfered for any other reasons.

Section 47 of the Act reads as follows:

47. Non-discrimination in Government employments-

(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability.

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

6. On the basis of the above provisions, learned senior counsel Sri. Babu Varghese appearing on behalf of the petitioner contends that since a criteria for promotion as envisaged under Ext.P1 contemplates that incapable persons shall not be recruited or promoted as Headmaster of special schools, the said criteria is totally against Section 47(2) of the Act and it amounts to denial of promotion to the petitioner.

7. On the other hand, it is argued by the learned counsel for the 5th respondent Smt. Molly Jacob that for the Act to be made applicable, certain criteria is to be followed and the Government has not chosen to prescribe the provisions of the Act as applicable to Headmaster of a School. It is well within the jurisdiction of the Management to decide the qualification criteria of a Headmaster and especially being a blind school it is all the more necessary that a Headmaster should be a person who is not having such a handicap. The learned counsel for the respondent also submitted that in Annexure II of Ext.P9 scheme which indicated the posts suitable for appointment in different categories of the physically handicapped among the blind, Headmasters have not been included. The scheme is prepared on the basis of G.O.(P) No. 18/2000/P & ARD dated 25/7/2000.

8. Going by Section 32 of the Act, it indicates that the appropriate Government shall identify posts in the establishments which can be reserved for the persons with disability and it is therefore contended that once a scheme is prepared by the Government with reference to the posts identified for disabled persons, the provisions of the Act can be made applicable only to such categories of establishments. The provisions of the Act, no doubt, applies to an establishment aided by the Government, which includes the 5th respondent institution as well. But, it is argued by the learned counsel for the 5th respondent that it has the absolute authority to prescribe qualification criteria for Headmasters. She relies upon the judgment of the Supreme Court in N. Ammad v. The Manager, Emjay High School & Ors. [Civil Appeal Nos. 4597-4598 of 1998] in order to contend for the position that selection and appointment of Headmaster in a school are of prime importance in the administration of an educational institution. Headmaster, being a key post in the running of the school, functional efficacy of the school will depend upon the efficiency and education of the Headmaster and as such the management of a minority school is free to find out a qualified person either from the staff of the same school or from outside to fill up the vacancy. In the said case, the Supreme Court observed as follows:

Thus the management's right to choose a qualified person as the Headmaster of the school is well insulated by the protective cover of Article 30(1) of the Constitution and it cannot be chiselled out through any legislative act or executive rule except for....."

9. The learned counsel for the 5th respondent also relied upon the judgment in Manager Corporate E.agency v. State of Kerala, 1990 (2) KLT 240 in which it is held that

We are bound by the decisions of the respective Full Benches in the cases of Patroni and Mother Provincial as also the decisions of the Supreme Court in St.Xaviers College and Gandhi Faiz-e-am College upholding the pivotal importance of the head of an institution. It is therefore well established by decisions of this court as well as the Supreme Court that 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.

10. From the above judgments, it is clear that as far a minority institution is concerned, it is open for them to prescribe qualifications for appointment of Headmasters. The 5th respondent School being an aided school, necessarily the qualifications ought to be approved by the Government and it is by virtue of Ext.P1, qualification has been prescribed. The judgments referred above has not taken into consideration the purport of the provisions of the above Act. The judgments are clearly on the law that applied as far as regular recruitments/promotions are concerned. When it comes to the question of promotion of a blind person, the question is whether the provisions of the Act applies or not. The preamble to the Act reads as follows:

An Act to give effect to the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region.

11. As per Section 32 of the Act, appropriate Government which in the case is State Government is to identify posts in the establishments which can be reserved for the persons with disability. Section 33 indicates that every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from blindness or low vision. However proviso further provides that having regard to the type of work carried on in any department or establishment, it is possible for Government to exempt any such establishment from the provisions of the Act. The scheme now produced by the learned counsel for the 5th respondent apparently does not include the Headmaster. But, at the same time, it should be noticed that Chapter VIII of the Act deals with non-discrimination of persons with disabilities and Section 47 clearly applies to non- discrimination of Government employments. Sub Section (1) of Section 47 indicates that no establishment shall dispense with or reduce in rank an employee who acquires a disability during his service. Proviso indicates that if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits and if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is

earlier. Section 47(2) really mandates that no promotion shall be denied to a person merely on the ground of his disability. The proviso further indicates that appropriate Government may having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this Section.

12. The mandatory provision contained u/s 47 (2) can be avoided-only if the appropriate Government exempts such establishments from the provisions of the Section. In this case, by virtue of Ext.P1 even though the petitioner is otherwise qualified as per other promotion criteria, by incorporating Note (3), the person of disability becomes disqualified for the said promotion post. The very purpose of the Act is to avoid discrimination of persons with disabilities including a blind person, blindness cannot be a reason for not providing the promotion which he or she was otherwise entitled to get as per the other qualification criteria. In that view of the matter, Note (3) of Ext.P1 is discriminatory and is liable to be struck off. Though the 5th respondent is a minority institution, it being an aided institution, it is an "establishment" as defined under the Act which inter alia includes "an authority or a body owned or controlled or aided by the Government." When it is an admitted fact that this minority institution is aided by the Government and the appointment criteria are fixed by the Government, though the management has a say in the qualification criteria prescribed for appointment of a headmaster as laid down by the Supreme Court, when a qualification criteria is prescribed for promotion, the provisions of the Act has to be strictly complied with and in that view of the matter, "disability" cannot be a reason for not giving a promotion.

13. The learned counsel for the 5th respondent further contended that the role of a headmaster is very crucial in a blind school and the Government/Management had to prescribe such a qualification, excluding persons with disability in view of the fact that an able person should take charge of the headmaster of the school. It is to avoid such contingencies that a proviso is added to Section 47(2), which clearly enables the Government to exempt any establishment from the operation of the section. Note (3) in Ext.P1 is not such an exemption.

14. Under these circumstances, W.R.C.No. 16227 of 2010 is only to be allowed and Ext.P1 order is liable to be set aside. Petitioner is entitled to be appointed as Head Mistress in the light of Ext.P9 order. W.P.C.No. 26877/09 is filed by the Manager of the school challenging the order passed by the Lok Ayukta as Ext.P8 directing the Manager to appoint the petitioner in W.P.C.No. 16227/2010 as Headmistress. It is contended that Ext.P8 order is passed without jurisdiction. Ext.P8 order is later reviewed by the Government as Ext.P11 in W.P.C.No. 16227/2010. It is contended by the learned counsel for the petitioner that Lok Ayukta has no jurisdiction in the matter relating to appointment, removal etc. which is clearly excluded by virtue of Section 8(1) of the Lok Ayukta Act 1999. The learned counsel also placed reliance on the judgment of a Division Bench of

this Court in Kamalu v. State of Kerala, 2000 (3) KLT 227 in which it is held that the Lok Ayukta or Upa Lokayukta has no jurisdiction in respect of matters referred to in item (d) of the second schedule, as contemplated u/s 8(1) of the Act. This is also a matter relating to appointment or conditions of service of public servant and therefore orders passed as per Ext.P8 in W.P.C.No. 26877/2009 is without jurisdiction and hence the same is quashed.

In the result,

i) W.P.C.No. 16227/10 is allowed. Ext.P11 is quashed. Respondents 1 to 5 shall implement Ext.P9, immediately.

ii) W.P.C.No. 26877/2009 is allowed and Ext.P8 is quashed.