
(2010) 12 KL CK 0129

In the High Court Of Kerala

Case No : Writ Petition (C) . No"s. 25667 and 27985 of 2010

Manager, M.M.U.P. School

APPELLANT

Vs

Deputy Director of Education

RESPONDENT

Date of Decision : 22-12-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Education Act, 1958 — Section 7
Kerala Education Rules, 1959 — Rule 9

Citation : (2011) 1 ILR (Ker) 895 : (2011) 1 KLJ 724 : (2011) 1 KLT 663

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

Bench : Single Bench

Advocate : George Poonthottam and Sujith Mathew Jose, for the Appellant; V.T. Madhavanunni, V.A. Satheesh and K. Sandesh Raja, Government Pleader, for the Respondent

Judgement

T.R. Ramachandran Nair, J.—The Writ Petitions concern a common issue arising between the parties and therefore they are disposed of by a common judgment. In W.P. (C) No. 25667/2010 the Petitioner is the Manager of the school and in W.P. (C) No. 27985/2010 the Petitioner is working as a UPSA in the school, who is the fourth Respondent in W.P. (C) No. 25667/2010.

2. The main question raised in the Writ Petition filed by the Manager is the right of the Manager to shift a teacher working in the U.P. section as U.P.S.A. to the L.P. section. It is argued that in the absence of a prohibition in the Kerala Education Act and Rules, the Manager can do so in exercise of the right of management of a school. The circumstances leading to the dispute, as pleaded in W.P. (C) No. 25667/2010, are the following:

3. The main challenge in the Writ Petition is against Ext.P1 order passed by the Deputy Director of Education, Kannur whereby the appeal filed by the fourth Respondent teacher was allowed and she is further allowed to continue in the post of U.P.S.A. A vacancy in the post of L.P.S.A. arose in the L.P. Section with

effect from 1.6.2009 consequent on the retirement of Smt. K. V. Devi. She was a TCH holder. According to the Manager, till the amendment of the rules as per Ext.P3 in the year 2000, teachers who possessed higher qualification were also allowed to take classes in the L.P. section, which cannot be done after the amendment of the rules. The said position has been reiterated by a recent amendment produced as Ext.P4. It is stated that the Manager decided to shift the fourth Respondent who is also a TCH holder, to the L.P. section consequent on the retirement of Smt. K.V. Devi. Ext.P5 is the copy of the staff fixation order for the year 2009-2010 which according to the Manager, approved the shifting. Ext.P6 is the copy of the seniority list of the teachers of the school. Based on the representation made by the fourth Respondent, the Asst. Educational Officer by Ext.P7 held that the shifting is not permissible and therefore she being a UPSA, should be allowed to continue in that post. This was challenged by the Manager before the District Educational Officer, who passed Ext.P8 order which was in turn challenged by the fourth Respondent before the Deputy Director of Education, who passed Ext.P1 order.

4. One of the contentions raised by the Petitioner Manager is that the appeal before the Deputy Director of Education was not competent. What is mainly argued is that going by the qualification of the fourth Respondent, she can be only accommodated as an LPS A. Four posts are allowable in the L.P. section and there are only three teachers and the Manager will have to make arrangements to conduct the classes.

5. In W.P. (C) No. 27985/2010 the teacher challenges Ext.P10 communication issued by the Manager dated 27.8.2010 directing the Headmistress to implement the orders of the Manager. This order is issued relying upon the interim order in W.P. (C) No. 25667/2010. It is the contention of the Petitioner therein that she was appointed as a UPS A as per Ext.P1 order and she is about to retire on 31.3.2012. The posts of LPS A and UPS A are different in nature and duties. Ext.P2 is the copy of the document showing the class charges of the teachers working in the school from 1998 to 2009 to show that she is working in the U.P. section throughout. Ext.P3 therein is the direction issued by the Manager on 29.9.2009 to the Headmistress to instruct the Petitioner to do the teaching work in the L.P. section. It is pointed out that there is no power for the Manager to shift her to the L.P. Section.

6. The counter affidavit filed on behalf of the Deputy Director of Education in W.P. (C) No. 25667/2010 reveals the following facts. From 1.4.2009 onwards due to retirement of Smt. K.V. Devi, one LPSA post and due to the retirement of Shri P.V. Balakrishnan, one post of UPSA became vacant in the school. Against the retirement vacancy of LPSA, the Manager appointed one Shri T.V. Muhammed Ameen, a B. Ed. holder which cannot be approved, as the vacancy arose in L.P. section. The fourth Respondent was appointed in the school as UPSA on 2.6.1982 which was approved by the Asst. Educational Officer. Going by the Govt. Order dated 11.10.2004 the post of LPSA and UPSA are different and the nature of

duties are also different and they are different categories. The Manager has no power to shift the fourth Respondent to LP Section from U.P. Section with effect from 1.6.2009. On enquiry, it is seen that she was not actually shifted with effect from 1.6.2009 and was continuing in the U.P. section during the last so many years including 2009-2010. The Manager has not given any application before the Educational authorities for shifting the fourth Respondent from U.P. section to L.P. section. The matter of shifting is not shown in the Staff Fixation Order 2009-2010. The post of LPSA and UPSA are different in nature, in duties and are different categories as held by this Court. Ext.P6 seniority list was not approved by the Asst. Educational Officer, nor submitted to that office for approval.

7. Heard learned Counsel for the Manager Shri George Poonthottam, Shri V.T. Madhavanunni, learned Counsel for the Teacher and Shri Sandesh Raja, learned Govt. Pleader.

8. Learned Counsel for the Manager submitted that actually four posts of LPSA are available in the school. The fourth Respondent is not a B. Ed. holder. Therefore, she was liable to be shifted to the L.P. section in terms of the staff fixation order. The retirement vacancy arose in the L.P. section. It is argued that there is no prohibition under the Act and Rules for the Manager to exercise such a power. Learned Counsel further submitted that even going by the approved seniority list, etc. the seniority of the fourth Respondent is not affected. The new appointee being a B. Ed. holder, can be appointed only as a UPSA. It is pointed out that the amendment of the rules in the year 2000 to Chap. XXXI providing for qualifications of the LPS As and UPS As require a shifting of persons not having the B. Ed. qualification and the action of the Manager cannot be said to be illegal.

9. Shri Madhavanunni, learned Counsel appearing for the Teacher pointed out that the fourth Respondent was working as UPSA. The Manager has only issued a direction to the Headmistress as per Ext.P3 produced in W.P. (C) No. 27985/2010 which has no statutory backing. The fourth Respondent being a UPSA, cannot thus be shifted and there is no provision in the KER which allows such a shifting. Even the amended rules do not provide for any such shifting.

10. Shri Sandesh Raja, learned Govt. Pleader submitted that in the light of the decision of this Court in Mary George v. State of Kerala (1999 (3) KLT 912), which was followed in Rejimol Vs. Asst. Educational Officer, , it can be seen that the post of LPSA and UPSA are different in nature and duties. Therefore, there cannot be any arrangement by which a UPSA can be shifted to the post of LPSA. It is therefore pointed out that the step taken by the Manager cannot be justified, as the Manager is bound to comply with the provisions of the Act and Rules and there is no absolute power for the Manager to provide for such a shifting.

11. Certain factual aspects will have to be gone into to examine the question raised herein. Admittedly, the vacancy in the L.P. section arose on 1.6.2009

consequent on the retirement of Smt. K. V. Devi, LPSA. The Manager claims that the shifting was done consequent on the retirement of Smt. Devi which was effected and approved by the Staff Fixation Order for the year 2009-2010. Ext.P5 is the copy of the Staff Fixation Order. It only shows in the Appendix the number of teaching staff including Headmaster, UPS Assistants and LPS Assistants as well as language and specialist teachers. In the category of LPSA four posts have been sanctioned. Ext.P5 does not show any approval for the shifting of the fourth Respondent as LPSA as contended by the Manager. The controversy herein arose when the Manager issued a direction as per Ext.P3 produced in W.P. (C) No. 27985/2010. The same is dated 29.9.2010, much after the staff fixation order. The said proceedings directs the Headmistress to have the academic work in U.P. section exclusively by trained graduates and academic work of TTC/TCH should be utilized in L.P. section. Accordingly, the Headmistress is directed to instruct the fourth Respondent to do the teaching work in L.P. section. The said letter alone generated the subsequent proceedings. Therefore, the reliance placed by the Manager on Ext.P5 Staff Fixation Order as a justification for shifting, is not correct. Evidently, even in Ext.P3 produced in W.P. (C) No. 27985/2010 the Manager has not taken the stand that shifting is approved by the department.

12. The other document relied upon by the Manager is Ext.P6, stated to be a seniority list. Evidently, going by the counter affidavit filed by the first Respondent, the same has not been approved by the Asst. Educational Officer and not submitted to the office for approval till date. Therefore, the same cannot have any legs to stand in deciding the controversy herein.

13. In Ext.P7, the Asst. Educational Officer took the view that the post of LPSA and UPSA are different categories and therefore in the retirement vacancy which arose in L.P. Section, a UPSA cannot be shifted and there is no provision for that also. While considering the appeal filed by the Manager, in Ext.P8 the District Educational Officer also held that the arguments raised by the Manager is not sustainable. But, the District Educational Officer recognized the right of the Manager on the plea that shifting was made prior to 9.9.2009, the date of amendment of the rules by Ext.P4 produced in W.P. (C) No. 25667/2010. Actually the said amendment is not one concerning the shifting of UPS A to L.P. Section and vice versa. The amendment was made to Rule 4A of Chap. XXXI of K.E.R. Rule 4A only provided that notwithstanding anything contained in Sub-rule (1) of Rule 4, the Educational Officer shall be competent to approve appointments of candidates possessing higher qualifications, provided they have any of the training qualifications approved by the Government of Kerala. The latter limb of the rule is replaced by the words "provided they have the training qualification stipulated in the said sub-rule", by the present amendment. In the Explanatory Note, it is mentioned that the amendment is required, since certain Managers shifted B. Ed. holders working as UPSA, as LPSA to accommodate another B. Ed. holder in the U.P. Section. The amendment is only to remedy the said mischief. What is noted in the Explanatory Note is the shifting of a B. Ed. holder working as UPSA, as LPSA. Therefore, the basis for the findings of the District Educational

Officer is evidently unsustainable, as the amendment had nothing to do with the questions raised herein. The said order was therefore set aside in Ext.P1.

14. The scope of the amendment introduced as per Ext.P3 of Rule 3 and 4 of Chap. XXXI is only that Rule 3 permits appointments of graduates with B. Ed. as UPSA and Rule 4 shows that as far as LPS As are concerned, persons with SSLC or its equivalent or a pass in Pre-degree and a pass in TTC could be appointed as LPSA. Going by Rule 3, persons having SSLC or its equivalent or a pass in Pre-degree examination conducted by any of the Universities in Kerala, etc. and having TTC/TCH qualification, can also be appointed as UPSA. Therefore, it is not a case where after the coming into force of the amendment, persons working as UPSA and not having B. Ed. lose their right to continue as UPSA which warrants a shifting to the LP cadre. Such is not the intention of the rules. Therefore, it is not legally permissible for the Manager to contend that the fourth Respondent is liable to be shifted as LPSA when a retirement vacancy arose on 1.6.2009.

15. The posts of UPSA and LPSA are different in category and the nature of duties are different. This question was examined in Mary George's case (1999 (3) KLT 912). The issue was examined while considering the right of a UPSA for appointment as LPSA under Rule 51A of Chap. XIV-A K.E.R. This Court held that both these categories of teachers are not one and the same. They are different in nature and duties. The findings contained in paragraphs 10 and 11 in that regard are reproduced below:

Applying these principles it has to be examined as to whether a post of L.P.S. Assistant and U.P.S. Assistant are two different posts or posts of similar nature. According to the Petitioners, posts of L.P.S. Assistant and U.P.S. Assistant are two different and distinct categories as per Chap. XXIII and XXXI of K.E.R. Qualifications prescribed for these posts are SSLC and TTC. The senior claimants about whom reference had been made by the Educational Authorities are persons appointed as U.P.S. Assistants with B. Ed. qualification. They did not have TTC qualification. Chap. XXIII of the K.E.R. deals with fixation of strength of teachers in Departmental and Aided Schools. Rule 5 of the above Chapters deals with staff of the Upper Primary Schools and Lower Primary Schools. The above Rule mentions separately the posts of U.P.S. Assistants and L.P.S. Assistants. Chap. XXXI of the K.E.R. deals with the qualifications of Private School Teachers. Rule 3 of the above Chapter mentions qualifications prescribed for U.P.S. Assistants. Rule 4 specifies the qualifications of L.P.S. Assistants. In both these posts, pass in SSLC and pass in TTC examination are the qualifications prescribed. No B. Ed. qualification has been prescribed for appointment as either U.P.S. Assistant or L.P.S. Assistant. L.P.S. Assistants are teaching students in L.P. School and U.P.S. Assistants are teaching students in the U.P. Schools. From these circumstances, it can be safely inferred that both these categories of teachers are not one and the same. They are different in nature and duties. The defence set up in the counter affidavit is that the Government have clarified in various orders that trained graduates could also be appointed in the vacancy of L.P.S. Assistants. It

was further stated in the counter affidavit that the Petitioners are SSLC and TTC holders and at the time of their appointment there were several claimants under Rule 51A of Chap. XIV-A K.E.R. who were awaiting appointments under the Management. But all these claimants were formerly appointed as U.P.S. Assistants and not as L.P.S. Assistants. Thus it cannot be said that there were valid claimants of L.P.S. Assistants under Rule 51 A of the K.E.R. at the time of the appointment of the Petitioners. As already indicated, U.P.S. Assistants have no preferential claim for appointment as L.P.S. Assistants under Rule 51-A of the K. E.R. over persons who were appointed as L.P.S. Assistants.

The amendment by Ext.P3 also did not vary the legal position that the posts of UPSEA and LPSA are different in nature.

16. In the latter decision in Rejimol's case (2004 (2) KLT 899) also a similar question was examined. Therein, the senior most L.P.S.A. was promoted as Headmistress and the Petitioner in the Writ Petition, a UPSEA staked claim for appointment. In para 6, while discussing the legal aspects concerning the matter, it was held thus, relying upon Mary George's case (1999 (3) KLT 912):

The question is what will be the situation in a school having both Lower Primary and Upper Primary sections and where the Headmaster is to be from the Lower Primary Section? Before tackling the question yet another issue also has to be analysed. Whether a Lower Primary School Assistant can teach in an Upper Primary class and vice versa? That question is no more *res Integra*. In *Mary George v. State of Kerala* (1999 (3) KLT 912 it has been held that both the categories of teachers are not one and the same and that they are different in nature and duties. In the judgment dated 8.1.1996 in W.A. No. 1499/1995 also a Division Bench of this Court has held that under Rule 51-A of Chap. XIV-A KER a retrenched H.S.A. cannot claim the vacancy of an UPSEA and a retrenched UPSEA cannot claim the vacancy of a LPSA. Therefore, there cannot be a dispute on the position that a Lower Primary School Assistant cannot teach in an Upper Primary class.

17. Ext.P13 produced in W.P. (C) No. 27985/2010 also lays down that the posts of LPSA and UPSEA are different in nature and duties. Therefore, it is clear from the said judgment also that a LPSA cannot teach in Upper Primary class and vice versa. Therefore, the nature of duties of LPSA and UPSEA are quite different. Hence, the teachers in these posts cannot be shifted at the whims and fancies of the Manager.

18. The next question is whether in the absence of a prohibition in the rule the Manager can shift a teacher working as UPSEA to the L.P. section. Herein, evidently the vacancy arose in the cadre of LPSA on 1.6.2009. Section 7 of the Act and Rule 9 of Chap. III are relevant in this context. Section 7(2) provides that the Manager shall be responsible for the conduct of the school in accordance with the provisions of the Act and the Rules there under. The position is evident from Rule 9 of Chap. III of the Rules which deals with the duties and powers of

the Managers of Aided schools. Sub-rule (1) provides as follows:

The Manager shall be responsible for the conduct of the school strictly in accordance with the provisions of the Kerala Education Act and the Rules issued there under, He shall also abide by the orders that may be issued from time to time by the Government and the Department in conformity with the provisions of the Act and the rules issued there under.

Therefore, the Manager will have to conduct the school strictly in accordance with the provisions of the Act and orders issued from time to time by the Government and the department. He cannot assume certain powers by himself other than that is conferred by the Act and Rules as Manager of the school. Recognition of such a wide power de hors the express power conferred on the Manager will go clearly against the provisions of the Act, Rules and the object underlining the provisions of the Act and Rules. Such unbridled power if recognized, the Manager can play havoc in the management of the school. Therefore, the contention raised by the counsel for the Petitioner Manager that in the absence of a prohibition, the Manager can order shifting of a UPSA as LPSA, cannot be accepted.

19. There cannot be any dispute also that the fourth Respondent is working as UPSA in the school, going by the pleadings of the parties. She was appointed as UPSA which is evident from Ext.P1 order of appointment produced in W.P. (C) No. 27985/2010. The approval was granted as Assistant Teacher. Ext.P2 produced therein will show that she had been in the U.P. section from 1998 to 2009, even though the Manager by producing copies of certain attendance registers, contends that in the earlier period she was taking certain classes in L.P. Section. Even the documents produced by the Manager leading to the shifting will show that she was working as UPSA. Along with I. A. No. 16960/2010 in W.P. (C) No. 25667/2010, the Manager has produced Ext.P 11 which expressly states that "Smt. K.V. Sakunthala (T.C.H.) working in the school as U.P.S.A. is shifted as L.P.S.A. w.e.f. 1.6.09 in the vacancy of Smt. K.V. Devi, retired from service on 31.3.2009." Ext.P 12 is stated to be a statement of change of staff, wherein against column 2 showing the designation of the 4th Respondent, it is clearly noted as "U.P.S.A.". Therefore, it cannot be the case that she was not in the U.P. Section as U.P.S.A., especially since the Manager has actually shifted her to the L.P. Section. Therefore, no amount of argument can be accepted to show that she was not appointed as U.P.S.A. As evident from the counter affidavit of the first Respondent also, during the year 2009-2010 also she was taking classes in the U.P. section. Therefore, the Manager could not have taken the advantage of a vacancy in L.P. section to shift a U.P.S.A. as L.P.S.A. Ext.P14 produced by the Manager cannot also help the contentions of the Manager, since that is not a general order passed by the Government laying down any principle, but on the facts of the said case the Government by way of work arrangement permitted a UPSA to work as LPSA to avoid her retrenchment. That cannot be treated as a relevant document at all.

20. The Manager has also raised a contention that the Deputy Director of Education was not competent to consider the appeal. The appeal was disposed of by the Deputy Director of Education in the light of the direction issued by this Court in the judgment in W.P. (C) No. 16085/2010 produced as Ext.P7 in W.P. (C) No. 27985/2010. Evidently, no contention was raised by the Manager before the Deputy Director of Education challenging his jurisdiction. Therefore, the same cannot be raised for the first time in the Writ Petition. The Deputy Director of Education is also an appellate authority from the orders of the District Educational Officer under Chap. XIV-A K.E.R. Apart from that, the contention regarding jurisdiction need not deter this Court from accepting its validity for another reason also. If the order of the Deputy Director of Education is set aside, that will result in revival of the order passed by the District Educational Officer, which is illegal and unsustainable. Therefore, under Article 226 of the Constitution of India, this Court can refuse to interfere with the order under challenge if it results in resurrection of an illegal order passed by another authority. On that principle also the challenge against Ext.P1 order in W.P. (C) No. 25667/2010 fails. Since the issue raised is one regarding the powers of the Manager to shift a UPSA as LPSA, the said aspect was gone into by the Deputy Director of Education, which is in tune with the principles stated by this Court in the decisions considered above.

For all these reasons, W.P. (C) No. 25667/2010 is dismissed. W.P. (C) No. 27985/2010 is allowed by quashing Ext.P10 order of the Manager which was issued on the basis of the interim order passed in W.P. (C) No. 25667/2010. No costs.