

(1980) 11 KL CK 0014
In the High Court Of Kerala
Case No : O.P. 479 of 1980F

Meenakshy

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 13-11-1980

Acts Referred:

Kerala Education Rules, 1959 — Rule 43, 43B, 43B(1), 43E(1), 51A
Kerala State and Subordinate Services Rules, 1958 — Rule 28

Citation : (1980) 11 KL CK 0014

Hon'ble Judges : Narendran, J

Bench : Single Bench

Advocate : K.J. Joseph, for the Appellant; Government Pleader for Respondent Nos. 1 and 2, V. Sivaraman Nair and V.M. Nayanar for Respondent No. 3 and George Varghese Kannanthanam, for the Respondent

Final Decision : Allowed

Judgement

Narendran, J.—In the C.N.N. Girl's High School, Cherpu, a High School Assistant (Hindi) retired from service on 31st March 1977. The Petitioner and the 4th Respondent were then working as lower grade language teachers (Hindi). The Petitioner was fully qualified for the post of High School Assistant (Hindi) while the 4th Respondent though senior to the Petitioner, was not qualified. On 18th June 1977 the 4th Respondent also became qualified for appointment as High School Assistant (Hindi). On 23rd June 1977 the 3rd Respondent--Manager appointed the Petitioner as High School Assistant (Hindi). The 2nd Respondent--District Educational Officer, Trichur by Ext. P-3 dated 8th September 1977 declined approval to the Petitioner's appointment on the ground that the 4th Respondent "who is the qualified senior hand has the claim for the post of High School Assistant (Hindi)". Against Ext. P-3 the Petitioner appealed to the Regional Deputy Director of Public Instruction, Ernakulam, who by order dated 13th June 1978 rejected that appeal. Thereupon, the Petitioner filed a revision before the 1st Respondent-State. The 1st Respondent-State by Ext. P-4 order dated 9th February 1979 rejected the Petitioner's revision holding that the 4th

Respondent the senior most lower grade (Hindi) teacher should have been promoted as High School Assistant on 23rd June 1977. The Petitioner challenged Ext. P-4 order before this Court in O.P. No. 555 of 1979. The original petition was disposed of by this Court by Ext. P-5 judgment. This Court quashed the orders challenged by the Petitioner including Ext. P-4 and directed the 2nd Respondent District Educational Officer to pass fresh orders. The 2nd Respondent thereupon passed Ext. P-6 on 1st September 1979 holding that the rule applicable in the case is Rule 43 of Chapter XIV A of the Kerala Education Rules and not Rule 43(E) (1)(f), and directed the 3rd Respondent--Manager to promote the 4th Respondent in the vacancy as, according to the 2nd Respondent, the appointment of the Petitioner was irregular. Ext. P-6 was challenged by the Petitioner before this Court in O.P. No. 3166 of 1979. This Court by Ext. P-9 Judgment set aside Ext. P-6 order and again directed the 2nd Respondent to consider the claims of the Petitioner and the 4th Respondent for promotion as High School Assistants under Rule 43(B) of Chapter XIV A of the Kerala Education Rules. Thereupon, the 2nd Respondent passed Ext. P-8 order on 11th January 1980 holding that the promotion of the Petitioner was irregular and that the 4th Respondent ought to have been promoted. The Petitioner who continued as High School Assistant (Hindi) from 23rd June 1977 has again challenged the order of the 2nd Respondent by this original petition.

2. A counter-affidavit has been filed on behalf of the 2nd Respondent. It is stated in para 5 of the counter-affidavit that at the time of effecting the promotion of the Petitioner the 4th Respondent who was senior to the Petitioner was duly and fully qualified to be promoted. In para 7 it is stated as follows:

At the time of the reopening also as, a staff fixation is statutorily imminent for that academic year, the posts if filled up before 15th of July that has to be done at the risk of the manager. Apart from that the manager being the appointing authority can decide as to when the post has to be filled up. In this case the manager has filled up the post on 23rd June 1977. Hence the claim of the senior hand at the time of the filling up of the post on promotion has to be considered and the senior most hand eligible for promotion has to be so posted.

It is asserted in the counter-affidavit that the 4th Respondent is the legitimate claimant to the post according to law.

3. The 3rd Respondent--Manager in his counter-affidavit has stated that when the retirement vacancy arose on 31st March 1977 the Petitioner was the only qualified person working in the lower grade at that time. It is further stated that only on 23rd June 1977 the 3rd Respondent received a circular of the Director of Public Instruction dated 23rd April 1977 giving permission to Managers to fill up retirement vacancies that arose on the closing date of schools from 1st June of the year. The above circular is produced as Ext. R-1 along with the counter-affidavit. In para 4 it is also stated:

If I had received the copy of Ext. R-1 circular earlier, I would have promoted the

Petitioner to the higher grade immediately after the vacancy arose, namely on 1st June 1977 itself since she is the only qualified teacher working in the lower grade at the time when the vacancy occurred and she had previous approved service as the Higher Grade Language Teacher which gives her preference in the matter of future appointments to the Hither Grade.

In para 7 it is stated that as Manager of the school the 3rd Respondent exercised his discretion and promoted the Petitioner. A contention that Rule 43(B) of Chapter XIV A of the Kerala Education Rules does not restrict or limit the power of the Manager for making a selection from the qualified persons in service and make the promotion is also taken in the counter-affidavit. It is stated in para 9 that the 4th Respondent did not inform the 3rd Respondent that she acquired the necessary qualifications and hence she has no legitimate claim for the post in which the Petitioner was promoted. A copy of the G.O. Ms. 612/Edn., dated 10th November 1964 has been produced as Ext. R-2 along with the counter-affidavit. The 4th Respondent in her counter-affidavit has asserted that she became qualified on 2nd May 1977. It is further stated in para 4 that evidently as on the date of appointment the 4th Respondent was qualified. The stand taken in para 5 of the counter-affidavit is that the case of the Petitioner and the 4th Respondent will come exclusively under Rule 43, Chapter XIV A of the Kerala Education Rules.

4. The questions that arise for consideration are: (1) A vacancy of High School Assistant Language arose in an aided school. The seniormost lower grade language teacher was not qualified for the post of High School Assistant Language when the vacancy arose but became qualified before the vacancy was filled up by promoting a lower grade language teacher who was only a junior but was qualified for promotion when the vacancy arose. Who is the rightful claimant for the post under Rule 43 B of Chapter XIV A of the Kerala Education Rules? Can the delay in effecting the promotion deprive the teacher qualified for the post at the time when the vacancy arose of the promotion? (2) Simply because it is not said in Rule 43B(1)(iii) that the promotion under the clause must be according to seniority can the Manager promote a junior overlooking a qualified senior hand? and (3) Whether the giving of an option in writing by a Lower Grade Language Teacher qualified for promotion as High School Assistant Language when there was no vacancy of a part-time High School Assistant Language in the school can create a claim for preference for promotion as High School Assistant Language under Rule 43B(1)(i)?

5. Rule 7A(2) of Chapter XIV(A) of the Kerala Education Rules reads:

(2) 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 Headmasters).

Rule 43B of Chapter XIV A of the Kerala Education Rules reads:

43B(1) Notwithstanding any thing contained in Rule 43, post of fulltime High School Assistants in a particular language shall be filled up by promotion in the following order of preference:

(i) Lower Grade Language Teachers who have the prescribed qualifications in that Language for promotion to the post of High School Assistants in that language at the time of occurrence of the vacancy and who had given option in writing as per G.O.Ms. 612/Edn. dated 10th November 1964 to continue as Lower Grade Language Teachers.

(ii) Part-time High School Assistants in that Language.

(iii) Other Lower Grade Language Teachers in that Language.

(iv) Regular Primary Teachers having the prescribed qualifications.

(v) Craft and Specialist Teachers having the prescribed qualifications.

(vi) If no teacher with the prescribed qualification is available in the categories mentioned above Lower Grade Language Teachers in any other Language having the prescribed qualifications.

(2) If qualified teachers as mentioned in sub-rule (1) are not available in schools under the same Educational agency for promotion to the post of High School Assistants in that language qualified candidates from outside may be appointed to that post.

In *Mary v. The Regional Deputy Director of Public Instruction, Eanakulam* ILR 1974 (2) Ker 274, Eradi, J. (as he then was) dealing with the contention that when a qualified hand working in a lower grade in the institution is available for promotion on the date of occurrence of the vacancy, the vacancy can be filled up only by promoting such qualified hand, said:

If Rule 51A is to be understood as conferring a right on an outsider to be appointed to a vacancy in a higher grade merely on the ground of his having acted in the school on a previous occasion when there was no qualified hand in the lower grade, the provisions of Rule 43 will be rendered nugatory. Such an interpretation will also leave the door open for misuse of the provisions of Rule 51A by the manager since it will be possible for him to circumvent the mandatory terms of Rule 43 by merely appointing an outsider in a short term vacancy which may even be deliberately created by inducing a higher grade teacher to take leave at a time when the person working in a lower grade is not yet fully qualified. By the said device the teacher in the lower grade can be effectively deprived of the benefit conferred by Rule 43 and divested of all prospects of promotion, even though such person may have acquired the requisite qualifications by the time a permanent vacancy arises in the school.

In *S.G. Jaisinghani Vs. Union of India (UOI) and Others*, , the Supreme Court has said:

In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of

law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (See Dicey--"Law of the Constitution"--Tenth Edn., Introduction ex.) "Law has reached its finest moments", stated Bouglas, J. In *United States v. Wanderlich* (1951) 342 U.S. 98, "when it has freed man from the unlimited discretion of some ruler...there discretion is absolute, man has always suffered". It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of *John Wilkes*, (1770) 4 Furr 2528 2539 "means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful.

In *Radhakrishna Kammath v. Cochin T.D. Corporation* 1976 KLT 14, it is said:

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 the retirement itself the new Headmaster should be appointed. The 3rd Respondent was appointed within a reasonable period as Headmaster. There is no rule like Rule 28(bb) of the Kerala State and Subordinate Services 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.

In *Thankamma v. Kunjamma* 1976 KLT 212, it is said:

Under Rule 51A of Chapter XIVA a prior appointee as a temporary teacher in a school has no prior title. The Act and the Rules merely imposed restrictions and subject to such restrictions the Manager has full freedom of choice. If there was no clear provision in Rule 51A giving a prior title to a prior temporary appointee, the Manager was free to appoint any one of the two or more that fell under Rule 51A. When such an appointment was made, two consequences follow; firstly, the Manager who appointed exercised his right to choose and the person appointed gets a right to the post. If that post rightly given to that person is taken away it will be injustice and it will be certainly open to that person to come forward and challenge the impediments that have been placed in the way of that person in continuing in service. By the impugned orders passed by the educational authorities, there has been interference, a wrongful interference, an illegal interference with a right of choice of the Manager. The Government Pleader is partly right in his submission that it is for the Manager to complain and that the Manager not having complained, this Court should not interfere. But the choice made by the Manager had resulted in the appointment of the 1st Respondent. When that appointment was wrongly interfered with this Court removed the interference.

Rule 43B(1) deals with promotions to the post of High School Assistant

Language. The different categories of teachers on the staff of the school who are qualified for the post of High School Assistant Language which falls vacant have a right to be promoted in the order of preference insisted by the rule. This is a right which accrues to them the moment the vacancy arises. So, a qualified teacher (qualified for the post of High School Assistant) on the staff has a right for promotion, of course subject to the rules in the Kerala Education Rules. The teacher's right to get promotion cannot depend upon anything the Manager does or omits to do. It is a right conferred by the rules and it can only be subject to the rules and cannot depend on the whims and fancies of the Manager. Even if the Manager makes an honest mistake or does not take prompt action at the appropriate time that cannot be a reason to deny the teacher his claim for promotion. That cannot also create any right in a teacher, who because of the fact that he was not qualified for promotion at the time when the promotion ought to have been made, to claim promotion, even if he becomes qualified by the time the Manager actually makes the delayed promotion. It is true that the powers of the Manager are restricted only to the extent that there are restrictions imposed by the Kerala Education Act and the Kerala Education Rules. It is also a fact that there is no statutory compulsion that the Manager should fill up the vacancies within a time limit. But that does not mean that a Manager need only make the promotion whenever he wants. If a post is kept vacant for long, it will adversely affect the instruction in the school. Giving an absolute discretion to the Manager in the matter is likely to result in the misuse of the powers of appointment. Legitimate rights of teachers in service will also be lost. In any service, the powers of the appointing authority cannot be interpreted ignoring the rights of the service. Discretion that a Manager has must be sound discretion and not absolute discretion which will be arbitrary and which will deprive teachers in service of their valid rights for promotion. The indication in Rule 7A(2) of Chapter XIVA of the Kerala Education Rule is also that the Manager must fill up vacancies without delay. The only restriction is that except in the case of posts of Headmasters, posts that fall vacant on the closing date should not be filled up till the reopening. So, at any rate, in this case, the vacancy in question which arose on 31st March 1977 ought to have been filled up in the first week of June 1977. The Petitioner was qualified at the time of the occurrence of the vacancy. The Kerala Education Act and the Rules do not give any discretion to the Manager to delay the promotion to deprive the Petitioner of her rights for promotion. As per Rule 43B(1)(i) the right to preference for promotion is to the teacher qualified for promotion at the time when the vacancy arose. Simply because such an indication is not there in Rule 43B(1)(iii) it cannot be said that qualification on the date of occurrence of the vacancy is not to be taken into account for promotion under Rule 43B(1)(iii). There is no reason to believe that the Government wanted to lay down different principles for promotions under sub-clauses (i) and (iii). Hence I hold that for promotions under Rule 43B(1)(iii) also only a lower grade teacher qualified for promotion when the vacancy arose has got preference.

6. The next question is whether promotion under Rule 43B(1)(iii) is to be according to seniority. Being a promotion, it goes without saying that the right goes to those in service in the lower category. In that case, it goes without saying that promotion can be only according to seniority of qualified hands in the lower grade. Simply because it is not mentioned in Sub-clause (iii) that seniority has to be taken into account, one cannot jump to the conclusion that the Manager has the discretion to make promotions under Sub-clause (iii) overlooking seniority. A manager is also an appointing authority and the Kerala Education Act and the Kerala Education Rules do not give any indication that the Manager has the freedom to make promotions in disregard of the fundamental principles to be observed in the matter of promotion in all services.

7. The next question is whether in view of the option the Petitioner gave, is the Petitioner entitled to promotion under Rule 43B(1)(i). The occasion for option under G.O. Ms. 612/Edn., dated 10th November 1964 arises only when the vacancy of a Part-time High School Assistant is sanctioned for the school. It is not disputed that no such post was sanctioned for the school at any time before the vacancy in question arose. So, even if the Petitioner has given in writing something to the Manager that will not make the Petitioner entitled to preference for promotion under Rule 43B(1)(i).

8. It is clear from the affidavit filed by the 3rd Respondent-Manager (hat he wanted to promote the Petitioner earlier, but he was waiting for a circular issued by the Director of Public Instruction on 23rd April 1977. It is really the ignorance of the 3rd Respondent-Manager which delayed the Petitioner's promotion which could have been made on the reopening of the schools in the year 1977--78. The 4th Respondent became qualified only on 18th June 1977. As I have already held, the Petitioner, who was the only qualified hand when the vacancy arose, is the rightful claimant for promotion under Rule 43B(1)(iii) of the Kerala Education Rules. The 4th Respondent cannot claim the post even though she was senior to the Petitioner and got qualified before the promotion was actually effected by the Manager. This is a case where the Manager wanted to promote the teacher who was qualified on the date of the occurrence of the vacancy. If the vacancy goes to one qualified on the date of the vacancy it was wrong on the part of the department to have declined approval to the appointment in question.

9. In the result, Ext. P-8 order of the 2nd Respondent-District Educational Officer, Trichur is quashed. The Petitioner is declared as the rightful claimant for the vacancy of High School Assistant Hindi which arose in the G.N.N. Girls' High School, Cherpu on 31st March 1977. The 2nd Respondent should approve the Petitioner's appointment as High School Assistant Hindi with effect from 23rd June 1977 and disburse the salary to the Petitioner.

10. Before parting with the case I would like to add a word or two more. The Manager of an aided school should have discretion in many matters. The State has the power to impose reasonable restrictions on the Manager without depriving him of the right to administer the school. As has been said, right to

administer is not right to mal-administer. There are ever so many matters where the provisions in the Kerala Education Rules are to be made more clear and specific. There are rules which suffer from drafting anomalies. One such rule is Rule 43B Chapter XIVA of the Kerala Educational Rules. It is high time that something is done to remove the anomalies in the Kerala Education Rules. This will enable effective implementation of the reasonable restrictions imposed by the Act and the Kerala Education Rules. Then only the valuable rights of the aided school service can be better safeguarded. The result will be a better organisation and development of the educational institutions in the State.

11. The Original Petition is allowed. There will be no order as to costs.