

(1993) 08 KL CK 0049
In the High Court Of Kerala
Case No : O.P. No. 2480 of 1991

Nirmala

APPELLANT

Vs

Deputy Director of Education and Others

RESPONDENT

Date of Decision : 13-08-1993

Acts Referred:

Kerala Education Act, 1958 — Section 3, 7(2)

Kerala Education Rules, 1959 — Rule 51A, 6, 7, 7(4), 9(1)

Citation : (1993) 08 KL CK 0049

Hon'ble Judges : K.K. Usha, J

Bench : Single Bench

Advocate : M.S. Madhusoodanan, for the Appellant; Mary Benjamin, for Respondent 1 to 3, V.P. Mohankumar, for 5th Respondent and P.K. Ravikrishnan, for 6th Respondent., for the Respondent

Judgement

K.K. Usha, J.—At the time of final hearing of the Original Petition, learned Counsel for the Petitioner submitted that only relief No. 6 in this Original Petition remains to be considered by this Court. To consider the remaining relief, it is necessary to refer to certain facts relating to the complaint of the Petitioner.

2. The Petitioner had an approved period of service in the school under the management of the 5th Respondent as Lower Grade Hindi Teacher in U.P. section from 1st February 1973 to 23rd April 1973 and from 29th January 1985 to 9th March 1985. She had also Anr. term as H.S.A. (Hindi) during the period from 17th February 1983 to 19th April 1983. On the retirement of a Lower Grade Hindi Teacher in the U.P. section on 31st March 1990, a vacancy arose in the U.P. section with effect from 1st June 1990 in the post of Lower Grade Hindi Teacher. Anticipating the above vacancy, Petitioner had made a representation dated 22nd September 1989 which was followed by Ext. P-3 dated 5th May 1990 and Ext. P-4 dated 21st May 1990 to the 5th Respondent. Petitioner had also made a representation Ext. P-5 dated 19th May 1990 to the first Respondent Deputy Director of Education and Ext. P-6 representation dated 26th February 1990 to the 2nd Respondent-D.E.O. Ext. P-6 representation was returned to the

Petitioner directing her to file the same before the A.E.O. The Petitioner therefore filed Ext. P-7 representation dated 3rd June 1990 to the third Respondent A.E.O. This was followed by representations Ext. P-8 dated 27th December 1990 and Ext P-9 dated 14th January 1991 to Respondents 1 and 3. The Petitioner was then favoured with a reply, Ext. P-10 dated 4th February 1991 from the third Respondent informing her that necessary action was being taken in this regard even before receipt of her representation Ext. P-9. In spite of the above reply, when no action was taken by the authorities, the Petitioner filed this Original Petition on 6th March 1991.

3. The Original Petition was disposed of by a learned Single Judge of this Court by judgment dated 5th July 1991 recording a statement made by learned Counsel appearing on behalf of the 5th Respondent that recognising the claim of the Petitioner, she will be appointed in the vacancy within three weeks from that date. Later, the 5th Respondent filed a petition for review of the above judgment. this Court allowed the application for review, set aside the judgment and the Original Petition was posted for further hearing.

4. Thereafter, the case was again heard and this Court, by Order dated 1st August 1991, directed the Manager to appoint the Petitioner in the vacancy which arose on 31st March 1990 in the post of Lower Grade Hindi Teacher within a period of ten days. Instead of complying with the above order, the Manager filed a counter-affidavit stating that he does not propose to make any appointment to the above vacancy. This Court by order dated 30th August 1991, gave one more opportunity to the Manager to implement the order within one week. He was directed to report to this Court on 9th September 1991 the fact of having implemented the order. It was further directed that if no such order was passed by the Manager appointing the Petitioner the Manager was to be present personally in the Court and show cause why contempt proceedings should not be taken against him for not implementing the orders of this Court.

5. On 9th September 1991, counsel appearing for the Manager submitted that a letter had been issued to the Petitioner on 4th September 1991 directing her to join the post of Hindi Teacher in the U.P. section within seven days from the date of receipt of the letter. It was also submitted that the Petitioner had received the letter on 5th September 1991. Ext. P-11 is a copy of the letter dated 4th September 1991. On receipt of the above letter, the Petitioner presented herself before the Headmaster to join duty but she was informed by the Headmaster that no instruction had been given by the Manager to admit the Petitioner to duty. Ext. P-11 appointment order was not in the proper form prescribed by the Kerala Education Rules. Ultimately, the Petitioner was admitted on duty on 12th September 1991. A proper appointment order in the prescribed form dated 7th September 1991 was issued by the Manager and the appointment was approved by the D.E.O. on 9th November 1991 with effect from 12th September 1991. A copy of the appointment order along with the endorsement is produced as Annexure I by the Petitioner along with C.M.P. 8369/93 dated 30th March 1993.

6. Since the probation of the Petitioner was not being declared, the Petitioner sought a direction in the above mentioned C.M.P. for declaration of probation and for a direction to pay the increment due with effect from 12th September 1992. This Court, by order dated 15th June 1993 directed the A.E.O. third Respondent in the Original Petition, to declare the probation of the Petitioner with effect from 12th September 1992. It was also ordered that the Petitioner will be entitled to claim increment on the above basis in accordance with law. The Manager was directed to file a counter-affidavit, if any, in the Original Petition and the Original Petition was posted for disposal on 6th July 1993. This Court had to direct the A.E.O. to declare the probation of the Petitioner in exercise of his power under Clause (e) of Rule 6 of Chapter XIV A, since there was no response from the Manager when C.M.P. 8369/93 was taken up for hearing.

7. A counter-affidavit has been now filed by the 5th Respondent-Manager in the Original Petition. It is stated therein that the school is run by a registered Society, namely M.M. Educational Society (Regd.), New Mahe. The deponent of the counter-affidavit was elected as the Manager on 2nd February 1993 since the previous Manager Sri K.K. Basheer resigned. The appointment of the present Manager was approved by the D.E.O. by order dated 4th May 1993. It is further stated that the former Manager had not informed the Society about the developments in the case. He has been now removed from the membership of the Society also. It is further contended in the counter-affidavit that the Petitioner has no right to seek any mandatory relief against the Management from 1st June 1990 onwards for the reason that the school was properly functioning without filling up the vacancy of the lower grade Hindi Teacher in the U.P. Section. The 6th Respondent was never appointed in the vacancy in the U.P. section, denying Petitioner's claim. It is contended on behalf of the Manager that no employer can be compelled to appoint an employee. It is open to the Manager, who is an employed, to leave the vacancy of a teacher unfilled.

8. The facts stated above would show that the Petitioner has been now granted appointment and that the person who was acting as the Manager during the period when the Petitioner was refused appointment, is no longer the Manager of the school. It is under the above circumstances the learned Counsel for the Petitioner submitted that the prayer for issue of a writ of mandamus directing Respondents 1 and 3 to take necessary action for appointment of the Petitioner and also for a declaration that the 5th Respondent is unfit to hold the office of a Manager, do not survive at present. But the learned Counsel contended that in the facts and circumstances of the case, the Petitioner is fully justified in pressing her claim for monetary benefit from 1st June 1990 onwards and it has to be realised from the Manager. He relies on the following provisions under Sub-rule (4) of Rule 7 of Chapter III K.E.R. which read as follows:

(4) In the case of a Manager who commits serious irregularities causing monetary loss to teachers/Government, the loss sustained by the teachers/Government shall be recoverable from the Manager under the provisions of the

Revenue Recovery Act for the time being in force as if it is an arrear of public revenue due on land, in the following cases, namely:

(a) Denial of appointment to a qualified thrown out teacher who has a rightful claim for re-appointment by virtue of his/her Holding the post earlier, under Rule 51A, Chapter XIV A.

9. It is contended that the Petitioner's case would come squarely under the above provision. She has suffered monetary loss due to the serious irregularity committed by the Manager, namely denial of appointment in the vacancy which arose on 1st June 1990. The only answer by the Manager to the above contention is that denial of appointment by itself cannot be considered as a serious irregularity when no other teacher was appointed in preference to Petitioner. As mentioned earlier the stand taken by the Manager is that it is open to him not to make any appointment if he is satisfied that the existing staff is sufficient to engage classes for the students in the school. In such circumstances, he cannot be compelled to make an appointment or be made liable for not making such appointment.

10. I find no merit in the above contention of the Manager. Sub-rule (4) of Rule 7 of Chapter III, K.E.R. specifically provides that denial of appointment to a qualified thrown out teacher is a serious irregularity and if monetary loss is sustained by the teacher, it shall be recovered from the Manager under the Revenue Recovery Act. The claim of the teacher is not restricted to cases where the manager had appointed Anr. person in the vacancy due to the teacher. There is no challenge by the Manager against the provisions contained in Rule 7 of Chapter III K.E.R. Therefore he cannot escape from his liability to the Petitioner. The contention that the Manager shall not be compelled by the department to make appointment to an existing vacancy cannot also be accepted. The position of the Manager of an aided school is not akin to an ordinary employer.

11. Section 3 of the Kerala Education Act empowers the Government to regulate the primary and other stages of education and courses of instruction in Government and private Schools. For the purpose of providing facilities for general education, special education and for training of teachers", Government may establish and maintain schools or permit any person or body of persons to establish and maintain aided schools or recognise any school established and maintained by any person or body of persons. It is further provided that after the commencement of the Act, the establishment of a new school or the opening of a higher class in any private school shall be subject to the provisions of the Act and the rules made thereunder. All existing schools at the time of coming into force of the Act shall be deemed to have been established in accordance with the Act. Sub-section (2) of Section 7 provides that the Manager shall be responsible for the conduct of the school in accordance with the provisions of the Act and the rules thereunder. Chapter III of the Kerala Education Rules contains provisions regarding management of private schools. Sub-rule (1) of Rule 9 directs that 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 thereunder. 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 rules issued thereunder. There is a mandatory provision under Sub-rule (3) that the Manager shall provide site, building, staff, equipment, furniture etc, as per the rules issued under the Education Act and as per the orders that maybe issued from time to time by the Government and the department in conformity with the provisions of the Act and the Rules issued thereunder. The strength of the teaching staff in aided schools are fixed as per the provisions under Chapter XXIII of K.E.R. taking into consideration the requirement of the students. Under the above provisions the authorities had come to the conclusion that the service of a lower grade Hindi teacher is essential in the U.P. Section of the school for the academic year 1990-91. Therefore when a vacancy arose on 1st June 1990 on the retirement of the teacher who was holding the post in the year 1989-90, the Manager is bound to make appointment to fill up the vacancy. It is mandatory under Rule 9(3) of Chapter III that he shall provide "staff" as per rules issued under the Act.

12. The provisions under the Kerala Education Act, referred above Would show that permission is granted to establish and maintain private schools and recognition is given to them in furtherance of the duty of the State to provide facilities for education. Under the Rules and Orders when the authorities have come to the conclusion that a particular number of teachers are required to impart proper education to the pupils, the Manager cannot be allowed to take a stand that appointment is the prerogative of the employer and therefore he cannot be compelled to make appointment to the required full strength. I find no justification or bona fides in the stand of the Manager especially when salary is being paid by the Government.

In the facts and circumstances of the case, I am satisfied that the Petitioner is entitled to claim from the Manager the monetary loss which he suffered by his being not appointed in the vacancy of lower grade Hindi teacher with effect from 1st June 1990. I therefore direct the 1st Respondent to compute the monetary loss sustained by the Petitioner and realise it from the Manager under the provisions of Revenue Recovery Act and pay the same to the Petitioner. The entire proceedings shall be completed within a period of three months from the date of receipt of copy of this judgment.