
(1996) 02 KL CK 0005
In the High Court Of Kerala
Case No : W.A. No. 1111 of 1991

Padminikutty, K.

APPELLANT

Vs

District Educational Officer and Others

RESPONDENT

Date of Decision : 15-02-1996

Acts Referred:

Kerala Education Rules, 1959 — Rule 1, 43, 44, 45, 48

Citation : (1996) 02 KL CK 0005

Hon'ble Judges : K. Sreedharan, J;J.B. Koshy, J

Bench : Division Bench

Advocate : K. Ramakumar, for the Appellant; P.K. Behanan, Government Pleader, for the Respondent

Judgement

K. Sreedharan, J.—O.P. 99/1994 has been referred to Bench for being disposed of along with W.A. 1111/1991 on the ground that the view expressed by a learned Single Judge of this Court in Babu Varghese v. Manager 1994 (1) KLT 557, runs contrary to the decision of a Division Bench in W.A. 517/1992 and the decision in O.P. 6282/1987, pending consideration in W.A. 1111/1991. In the decision reported in 1994 (1) KLT 557, learned Single Judge held that proviso to Rule 43 of Chapter XIV-A K.E.R. has to be read down and should be understood as providing that promotion to the post of High School Assistant in core subjects should be in the ratio of 1:1:1. That decision goes on to state that the minimum subject requirement, referred in the proviso to Rule 43, is the subject requirement laid down by the Director of Public Instruction in the Circular dated 13th May 1985 as 1:1:1 between core subjects, namely Mathematics, Science and Social Studies.

2. For a proper understanding of the issues raised in the Original Petition and the Writ Appeal, we consider it necessary to narrate the facts in detail. The facts in O.P. 99/1994 are as follows.—Petitioner in the original petition—Smt. Aleyamma—was appointed as an Upper Primary School Assistant with effect from 29th July 1986 during the academic year 1986-87. She is fully qualified to hold the post of

H.S.A. (Social Studies). A permanent vacancy of H.S.A. (Social Studies) arose in the school on 1st September 1989 on account of the death of a H.S.A. (Social Studies). Petitioner was promoted as H.S.A. (Social Studies). That appointment was not approved by the departmental authorities on the ground that one Smt. Letty Philipose, who was senior to her in the U.P. School Section, should have been promoted as per Rule 43 of Chapter XIV-A. Aggrieved by the denial of approval, Petitioner approached this Court by filing O.P. 13423/1991. On dismissal of that Original Petition, she took up the matter in W.A. 517/1992. Division Bench dismissed the Appeal on the ground that Smt. Letty Philipose, a trained Science graduate, should have been promoted as H.S.A., since she was the senior-most U.P.S.A. entitled to promotion under Rule 43 of Chapter XIV-A. During the academic year 1991-92, senior-most H.S.A. (Social Studies), namely Smt. V.P. Ponnamma, was promoted as Headmistress. Instead of promoting the Petitioner to that vacancy, Manager appointed a fresh hand-Smt. Sissy Koshy, the 5th Respondent-as H.S.A. (Maths.). The appointment of the 5th Respondent made with effect from 8th October 1991 is questioned by Aleyamma, the Petitioner.

3. During the academic year 1991-92, there were 11 posts of High School Assistants, as per the staff fixation order passed by the educational authorities. At that time according to the Petitioner, there were only two High School Assistants in Social Studies after Smt. V.P. Ponnamma's promotion as Headmistress with effect from 1st June 1991. The minimum subject requirement for Social Studies as on 1st June 1991, by applying the ratio of 1:1:1, should be three. Petitioner, who was fully qualified to hold the post of H.S.A. (Social Studies) and senior enough among the U.P.S. As., should have been promoted to that vacancy. Instead of doing that, 5th Respondent was appointed against a post of H.S.A. (Maths.) from open quota. As there were six Science teachers, as against the minimum subject requirement of four, the District Educational Officer refused to grant approval to the appointment of the 5th Respondent. 5th Respondent took up the matter in appeal before the Deputy Director of Education, who agreed with the decision rendered by the District Educational Officer. 5th Respondent then took up the matter before the Government. Government called for a report from the Deputy Director of Education. Deputy Director opined that the appointment of the 5th Respondent was against the Rules, since the Petitioner who is a Rule 43 claimant should have been accommodated as the eleventh H.S.A. to meet the minimum subject requirement in Social Studies. Ignoring the report of the Deputy Director of Education, the Government ordered regularisation of the 5th Respondent's appointment as H.S.A. (Maths.) with retrospective effect from 8th October 1991 and to pay her the salary. This decision of the Government is under challenge.

4. The contention raised by Aleyamma is that appointment of H.S.A. in core subjects should have been on the basis of the ratio 1:1:1; but if there is an eligible U.P.S.A. awaiting promotion to the cadre of H.S.A., minimum subject requirement need alone be satisfied. During the academic year 1991-92, the

school was to have eleven posts of H.S.As. Applying 1:1:1 ratio, there should be 3 H.S.As. (Social Studies), 3 H.S.As. (Maths.) and 3 H.S.As. (Science). Among the two excess posts, first should go to Science subjects and the second to Mathematics. If so adjusted, the total number of teachers in the school should be 3 for Social Studies, 4 for Mathematics and 4 for Science. The Headmaster of the school during that academic year was the senior most H.S.A. in Social Studies. On account of her appointment, the strength of H.S.A. (Social Studies) became two. During that academic year, the school had two H.S.As. (Maths.) alone. Instead of promoting the Petitioner, who was the senior most U.P.S.A. qualified to hold the post of H.S.A. (Social Studies) to fill up the vacancy in Social Studies, the Manager appointed the 5th Respondent, a Mathematics hand, in an attempt to meet the subject requirement of Mathematics. This was so done by the Manager only because the school had at that time two Mathematics teachers alone when the school should have four. As per the rules, Headmaster is also to engage ten periods during one week. The Headmaster, who was fully qualified to engage the classes in Social Studies, was available to supplement the two Social Studies hands who were already in service. Can this action of the Manager in appointing the 5th Respondent as H.S.A. (Maths.) be taken as against the Rules?

5. It is common case that during the academic year 1991-92, as per the Circular fixing the ratio 1:1:1, the school was to have four H.S.As. (Maths.). At that time, the school had only two teachers in Maths. It is also the admitted case that students were to be taught Mathematics for 58 periods a week. As per the circulars issued by the Director of Public Instruction, a teacher is to work for a minimum of 25 periods during one week. Though minimum work load of a teacher is fixed as 25 periods a week, according to the Petitioner, Aleyamma, teachers can work upto 30 periods a week. So, the two H.S.As. (Maths.) already in the school could very well engage all the 58 periods set apart for Mathematics. Thus it is contended that minimum subject requirement, as far as Mathematics was concerned, was satisfied. Therefore, a fresh hand should not have been appointed as H.S.A. (Maths.). Applying the 1:1:1 ratio, the school should have 3 Social Studies teachers. When there were only 2 teachers in that subject, Aleyamma, the senior most U.P.S.A. who was qualified to be appointed as H.S.A. (Social Studies), should have been preferred. Consequently it was contended that denial of promotion to the Petitioner as H.S.A. (Social Studies) is against Rule 43 of Chapter XIV-A.

6. During the academic year 1991-92, there were two H.S.As. (Social Studies) in the school. If the teachers are to be allotted minimum work load of 25 periods a week, the said two teachers could engage students for 50 periods. Headmistress, who was a H.S.A. (Social Studies), can engage students for ten periods. Thus, teachers qualified to take classes in Social Studies could engage the students for 60 periods during a week. Even according to the Petitioner, the total number of periods available for Social Studies was only 51. Thus, the need of the students was fully satisfied with the two H.S.As. (Social Studies) and the Headmistress. In the case of Mathematics, it is not in dispute, there were only two H.S.As.

(Maths.). The periods set apart for Mathematics per week was 58. The sanctioned strength of H.S.A. (Maths.), applying the ratio 1:1:1, was four. So, the Manager, taking into consideration the interest of the students, appointed the 5th Respondent as H.S.A. (Maths.). Certainly the said action was in the best interest of the students. If the 5th Respondent was not so appointed as H.S.A. (Maths.), the two H.S.As. (Maths.) should have engaged the students for 58 periods. At that time, there was a dearth of two H.S.As. (Maths.) for maintaining 1:1:1 ratio. In such a situation, can Aleyamma claim promotion as H.S.A. (Social Studies) invoking the proviso to Rule 43 of Chapter XIV-A, which will certainly go against the interest of the students of the School?

7. Facts in W.A. 1111/1991 are as follows.-In the school belonging to the 4th Respondent, a vacancy of Headmaster/Headmistress arose during the academic year 1986-87. Smt. K.R. Sulochana, the senior most H.S.A. (Social Studies), was promoted as Headmistress. During that academic year, as per the staff fixation order, the school was to have twelve posts of H.S.As. Applying the ratio of 1:1:1, for Social Studies, General Mathematics and General Science the School should have four teachers each in the above subjects. Consequent on the appointment of Smt. Sulochana as Headmistress, a vacancy in Social Studies arose. On the date of occurrence of vacancy, the senior most U.P.S.A. namely the third Respondent, Smt. P.K. Vasundhara Devi, was not qualified to be appointed as H.S.A. (Social Studies), she being qualified to be H.S.A. (Natural Science). Therefore, Petitioner-K. Padminikutty-was appointed by the Manager as H.S.A. (Social Studies). Her appointment was not approved by the District Educational Officer on the ground that Vasundhara Devi, a Natural Science graduate working as U.P.S.A., should have been promoted. District Educational Officer placed reliance on G.O.(Ms.) No. 43/86/G. Edn., dated 4th March 1986. The Manager of the school challenged the order passed by the District Educational Officer in appeal before the Deputy Director of Education, Palakkad. Deputy Director rejected the appeal placing emphasis on the minimum subject requirement. Appellant questioned the orders passed by the District Educational Officer and Deputy Director by filing O.P. 6282/1987. Learned Single Judge dismissed the Original Petition, taking the view that Rule 43 of Chapter XIV-A together with its proviso should have precedence over the ratio 1:1:1 of H.S.As. in core subjects fixed by the Director of Public Instruction. The learned Judge observed:

Proviso to Rule 43 of Chapter XIV-A of the K.E.R. specifically says that in the case of promotions to the post of High School Assistants the minimum subject requirement alone need be satisfied to safeguard the interests of trained graduates who are awaiting promotions as High School Assistants. In the instant case, the Counsel for the Respondents submitted that already there are 3 teachers and they are enough and more to satisfy the subject requirement as one teacher would be able to take 25 periods in a week. This is not denied by the Petitioner. If proviso to Rule 43 of Chapter XIV A is applied, the Petitioner is not entitled to get any relief prayed for in the Original Petition.

8. The short question that arises for consideration is whether in filling up a vacancy in the cadre of H.S.A. should the ratio of 1:1:1 in core subjects be strictly followed or whether for giving promotion to U.P.S.As. minimum subject requirement alone need be looked into.

9. A Division Bench of this Court in *Cherian v. State of Kerala* 1990 (2) KLT 481 took the view that the Education Act and the Rules give power to the Director of Public Instruction to issue instructions determining the requirement of subjects, teachers who are in service should continue in service and who should stand relieved as per rules 48 or 52 or on account of termination of vacancies and who would be eligible for re-appointment under Rule 51A. No other authority has got power to issue any instruction on these aspects. The Bench went on to state that under the scheme of the rules, the Director alone is the competent authority that has to issue instructions and that even Government has no power to issue any instruction on the above matters. The Director of Public Instruction issued Circular No. H2-42115/84, dated 13th May 1985. As per that circular, from the academic year 1985-86, the distribution of posts of High School Assistants in core subjects, namely Social Studies, Mathematics and Science, was directed to be in proportion, of 1:1:1. In the case of Physical and Natural Science, an internal ratio was fixed as 3:2. If there were posts unclassified after distribution between the three core subjects, the remaining posts were directed to be filled up by giving first preference for Science and second preference for Mathematics. This direction regarding the distribution of posts was in super session of all the earlier circulars in the subject. The said Circular further provided, in unmistakable terms, that new appointments of High School Assistants for core subjects and re-appointment of retrenched hands under Rule 51A of Chapter XIV A should be made in strict compliance with the subject ratio. The said Circular, which has been upheld by a Bench of this Court, made it crystal clear that any vacancy of High School Assistant in core subjects should strictly be made by observing the subject ratio. In other words, if a vacancy in Mathematics arose during an academic year, that vacancy should be filled up by a person qualified to hold the post of H.S.A. (Maths.) and by no one else.

10. In implementation of the decision reported in 1990 (2) KLT 481, Government issued G.O. (Ms) 37/94/G. Edn., dated 16th March 1994 clarifying the implementation of subject ratio of 1:1:1. Government classified the situation into two categories- (i) Where Manager has strictly followed the subject ratio; and (ii) Where Manager has only followed the proviso to Rule 43 of Chapter XIV A. In the first category of cases, according to Government, vacancies might have been filled up by promotion of eligible hands or in their absence, by direct recruitment strictly observing the subject ratio. In such cases, the educational officers were directed to approve the appointments. In the cases falling under the second category, namely promotion is given relying on proviso to Rule 43, the educational officers were directed to approve the appointment if such appointments had not been challenged by any qualified junior claimant under Rule 43 or by a Rule 51A claimant. Clarification further states that if appointment

made with reference to the proviso to Rule 43 is challenged by a qualified hand under Rule 43 or 51A, the wrongly promoted teacher should be directed to be reverted to the lower post and the rightful claimant assigned that place. In the case of future promotions/appointments to the posts of H.S.A. (core subjects), Government provided that it should be strictly in conformity with the subject ratio of 1:1:1 for each category of H.S. As. and that appointment should be made with due regard to the qualifications prescribed for the post, i.e. the candidate should be duly qualified for that particular post under Chapter XXXI of K.E.R. Government further stated that on fixation of the staff strength if retrenchment or reversion is to take place, it must be done on the principle "last come first go" in each category of H.S.As. In other words, subject ratio of 1:1:1 in the core subjects must, in the above circumstances, also should be followed.

11. Taking into consideration the guidelines issued by Government in the order, dated 16th March 1994 referred to above, Director of Public Instruction issued Circular No. H2/54419/94, dated 10th February 1995. The said Circular was one incorporating the provisions contained in the said Government Order. Clause 4 of that Circular mandates that all vacancies in the cadre of H.S.A. should strictly be filled up by implementing the ratio 1:1:1 in core subjects. But in the case of effecting retrenchment or reversion on account of the fall in strength of students and consequent staff fixation order, each core subject should be treated as a separate unit and "last come first go" principle should be adopted. While ordering such reversion or retrenchment, the appointing authority must make sure that for every 25 periods or part thereof, there should be a H.S.A. in that subject. In the light of the above provisions, we are clear in our mind that while effecting appointment to the post of H.S.A. in core subjects, the distribution of posts in core subjects, namely Social Studies, Mathematics and Science, should strictly be in the ratio of 1:1:1.

12. One has to search in vain the entire Kerala Education Rules and the Act to find out what minimum subject requirement means. From the Circulars issued by the Director, it would appear that one teacher must engage the students for 25 periods a week. If there are teachers who are sufficient to engage all the periods in any of the core subjects, it appears that the minimum subject requirement in respect of that subject is satisfied. Even if the number of H.S.As. in that subject are capable of engaging the students during the period set apart for that subject, if any vacancy arises in that subject, it should be filled up by qualified hands to comply with the ratio of 1:1:1. A U.P.S.A. who is not qualified to hold the post of H.S.A. in the subject in which vacancy arose, cannot be promoted to that vacancy because such a promotion will violate the ratio 1:1:1.

13. Number of divisions to be sanctioned in a school depends on the strength of the students (vide Rule 23 of Chapter VI). Number of High School Assistants to engage the students so fixed should be decided on the basis of the number of divisions (Rule 4 of Chapter XXIII). As per Rule 1 of Chapter XIV A, the Director has power to determine subject requirement formula in making appointments of

teachers in High Schools, with reference to the curricula of studies. In exercise of that power, Director issued Circular prescribing 1:1:1 ratio between the core subjects, namely Social Studies, Mathematics and Science, with an internal ratio of 3:2 between Physical Science and Natural Science. The appointment of H.S.As. in the above ratio should be on the basis of the qualifications prescribed in Chapter XXXI of the Rules.

14. Rule 1 of Chapter XIV A mandates that Managers of private schools shall appoint only candidates who possess the prescribed qualification. Further, it proceeds to state that as far as High School classes are concerned, the appointment should be made with due regard to the requirement of the subjects as determined by Director of Public Instructions with reference to the curricula of studies. The qualifications prescribed for High School Assistants are contained in Chapter XXXI. Rule 1 of Chapter XXXI states that the teachers in private schools should have the educational and professional qualification prescribed in the Chapter. A High School Assistant in core subjects must have Degree in the concerned subject and B.Ed., B.T. or L.T. conferred or recognised by the Universities of Kerala. Thus, a High School Assistant (Social Studies) must have the Degree in Social Studies and H.S.A. (Maths) must be a holder of a Degree in Maths, and H.S.A. (Science) should have a Degree in Science, which will take in Physical Science or Natural Science as the situation requires. Thus, only a candidate possessing the above qualification can be appointed as H.S.A. in the concerned subject.

15. Rule 43 of Chapter XIV A of the Kerala Education Rules deals with the manner in which vacancies in any higher grade of pay is to be filled up. Subject to rules 44 and 45, it is provided that vacancies in any higher grade of pay shall be filled up by promotion of qualified hands in the lower grade according to seniority, if such hands are available. Thus, as per this rule, promotion should be of qualified hands, taking into consideration efficiency as well. The said rule contained Note (2), inserted by G.O. dated 16th December 1982. That Note, in unmistakable terms, state that promotion under Rule 43 should be made from persons possessing the prescribed qualifications at the time of occurrence of vacancy. What can be the prescribed qualification for promotion to a post of H.S.A. (core subject)? The qualification can only be that prescribed in Chapter XXXI of the Rules. While the provision of Rule 43 remained like that, proviso was added by G.O. (P) 185/86/G. Edn., dated 22nd November 1986, published in Gazette dated 6th January 1987. The proviso states that in the case of promotions to the post of High School Assistant (subject), the minimum subject requirement alone need be satisfied to safeguard the interest of trained graduates who were awaiting promotions as High School Assistants. This proviso has been taken to mean that if minimum subject requirement on a subject is satisfied, then a U.P.S.A. who is a trained graduate, should be given promotion ignoring the ratio 1:1:1. For giving full effect to this proviso, one has to examine whether in the subject in which vacancy has arisen there are High School Assistants who can engage the total number of periods by assigning 25 periods

to each of them and see whether the entire periods are thus exhausted. If such an allotment is possible, then ignoring the subject ratio qualified U.P.S.A. is to be promoted. Such an interpretation runs counter to the Rule itself. It is settled law that the proviso cannot nullify or run counter to the main rule. The proviso cannot be given an effect which would negative the scope and ambit of the rule. So, the proviso has to be read down to make it in conformity with Rule 43 and the Circulars issued by the Director of Public Instruction in exercise of his statutory powers.

16. Learned Judge who referred O.P. 99/1994 to the Division Bench took the view that the decision rendered by a Bench of this Court in W.A. 517/1992 runs counter to the view taken by the learned Single Judge in 1994 (1) KLT 557. W.A. 517/1992 was one filed by the Petitioner in O.P. 99/1994 when her promotion as H.S.A. (Social Studies) in the vacancy that arose on 1st September 1989 was not approved by the educational authorities and the learned Single Judge. The dispute was between herself and one Letty Philipose. In that case she conceded the position that if the principle of promotion according to seniority when minimum requirement of subjects are satisfied, is followed, Smt. Letty Philipose, who is senior to her as U.P.S.A. ought to have been promoted. She also conceded the position in that writ appeal that none has got a case that the existing number of High School Assistants (Social Science) falls short of minimum subject requirement. On the basis of these concessions made by Petitioner in O.P. 99/1994, the Division Bench observed:

In other words, if the minimum subject requirement is satisfied, that is to say, if enough number of High School Assistants dealing with the same subject are available, promotions should go according to seniority irrespective of the subject requirement. Therefore, on the admitted facts and the facts admitted in the Petitioner's grounds of revision before the Government, there is absolutely no merits in the appeal and the same is accordingly dismissed.

From the above observations made by the Bench, it cannot be said that Their Lordships were concerned with the questions which were canvassed before us in these matters. So, the said decision cannot be considered as a precedent in relation to the issues referred to us by the learned Single Judge. The law stated by the learned Single Judge in 1994 (1) KLT 557 is, according to us, correct and we respectfully approve the same.

17. In the light of the law stated above, when a vacancy of H.S.A. arose in St. Thomas High School, Kadampanad, for complying with the ratio of 1:1:1 in core subjects one H.S.A. (Maths.) was to be appointed, since there were only 2 Maths, hands as against the minimum requirement of four. Periods set apart for Maths, during a week was 58. Existing 2 H.S.As. (Maths.) could not engage the students during those periods. As per circulars issued by the Director of Public Instruction, for every 25 periods and parts thereof one teacher each must be in service. Thus, at least three H.S.A. (Maths.) were required even for satisfying minimum subject requirement. So, a H.S.A. (Maths.) should alone have been

appointed. Manager in fact appointed the 5th Respondent, a qualified teacher in Mathematics. That appointment has been directed to be approved by the Government. We do not find any ground to interfere with the said decision. Consequently, we dismiss O.P. 99/1994.

18. In W.A. 1111/1991, during the academic year 1986-87, a vacancy of H.S.A. (Social Studies) arose on 2nd June 1986. At that time, there were 12 posts of H.S.As. 4 for Social Studies, 4 for Mathematics and 4 for General Science. Since there were only 3 H.S.As. (Social Studies) Petitioner was appointed as the 4th teacher in Social Studies. Her appointment was not approved for giving promotion to a U.P.S.A., who was qualified to hold the post of Natural Science. In the vacancy of a H.S.A. (Social Studies), a U.P.S.A. in Natural Science cannot be appointed. Consequently, we allow the Writ Appeal and direct the educational authorities to approve the Appellants appointment as H.S.A.(Social Studies) with effect from the date of her appointment, namely 2nd June 1986.

Original Petition and Writ Appeal are disposed of in the above terms. We make no order as to costs.