
(1991) 12 KL CK 0002
In the High Court Of Kerala
Case No : O.P. No. 79 of 1991

P.V. Vijayalakshmikutty

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 11-12-1991

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1992) 1 KLJ 56

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

Bench : Single Bench

Advocate : M. Vijayakumar, for the Appellant; K.A. Abdul Gafoor and N. Sankara Menon Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

Mrs. K.K. Usha, J.—The challenge in this original petition is against the order passed by the 1st respondent invoking its jurisdiction under Rule 92 of Chapter XIV A of the K. E. R. declining petitioner's claim for appointment to the post of Lower Grade Hindi Teacher in the vacancy which arose on 30-3-91 in the school of the 4th respondent on the ground of preferential claim under Rule 51A of Chapter XIV A K.E. R. The petitioner was originally appointed as a Lower Grade Hindi Teacher in the school of the 4th respondent in a temporary vacancy for the period from 10-6-1980 to 11-8 1980. The appointment was duly approved by the 3rd respondent. She was again appointed in a leave vacancy from 5-9-1980 to 28-11-1980, which was also approved. Thereafter, when a vacancy arose in the same post between 10-1-1989 to 22-3-1989, nobody was appointed by the Manager. But in a subsequent temporary vacancy for the period from 3-7-1989 to 1-9-1989 the complaint of the petitioner is that overlooking her claim under Rule 51 A of Ch. XIVA of K. E. R., the 5th respondent was appointed. She contends that no notice was given to her by the Manager as contemplated by "Note" 2 to Rule 51 A. When she came to know about the appointment, she made representation on 7-7-1989 both to the Manager as well as to the A. E. O.

with a request not to approve the appointment of the 5th respondent. When there was delay in passing order on her representations, she filed O. P. 6454/89, which was disposed of by Ext. P1 judgment dt. 14-8-1989 directing the A. E. O. to consider petitioner's claim under Rule 51A and pass orders thereon. Ext. P2 is the order passed by the A. E. O. on 19-8-1989, rejecting petitioner's claim. Two reasons were given therein to deny the petitioner's request. Firstly, it was found that the petitioner had given two letters relinquishing her claim under Rule 51A for further appointment in the school and secondly, she was overaged.

2. Aggrieved by the stand taken by the A. E. O., the petitioner filed a revision before the Director of Public Instruction. Ext. P4 is the order passed thereon. The Director of Public Instruction took the view that the letters of relinquishment, alleged to have been given by the petitioner have no legal effect so long as the procedure directed by law under "Note" 2 to Rule 51A had not been followed by the Manager. He therefore set aside the approval of appointment of the 5th respondent and directed the Manager to appoint Rule 51A claimant observing the procedure laid down under "Note" 2 of Rule 51A.

3. A permanent vacancy arose in the school on 31-3-1990. Coming to know about this, the petitioner made a representation to the Manager to appoint her in the above vacancy. She was given a reply that the matter was pending before the Government. She therefore submitted Ext. P5 representation dt. 10-8-1990 before the Government for a direction to the Manager to appoint her in the permanent vacancy. The Government thereupon issued a notice, Ext. P6, directing the petitioner to show cause why her request for reappointment should not be rejected on the ground that she had relinquished her claim referable to Rule 51 A of Ch. XIV A of K. E. R. She submitted a detailed reply, Ext. P7, wherein she stated that the Manager had not followed the procedure laid down by law in making the appointment in the vacancy which arose on 3-7-1989. She also pointed out the background in which "Note" 2 was added to Rule 51A to protect the interest of the teachers from the illegal methods used by the Management. She said that the so called relinquishment were created on blank papers got signed by the Management. Ultimately, the Government passed Ext. P8 order pinning down the petitioner to the letters of relinquishment. Government took the view that she had not proved that the second relinquishment letter was fabricated and that a teacher, who had voluntarily relinquished her right for future appointment cannot put forward any claim under Rule 51 A.

4. The view taken in Ext. P8 regarding the binding nature of the relinquishment letter is reiterated in the counter-affidavit filed on behalf of the first respondent. The 4th respondent, the teacher who was appointed in the vacancy which arose on 3-7-1989 and in the permanent vacancy which arose on 31-3-1990, has filed a separate counter - affidavit in which she has taken an addl. ground to sustain Ext. P8 namely that the petitioner was over-aged and therefore not entitled to be considered at all for appointment to the vacancy which arose on 3-7-1989.

5. Rule 1 (2) of Ch. XIV A K. E. R. provides that the age limit and relaxation thereof for appointment applicable to teachers of Govt. Schools shall apply mutatis mutandis to teachers of aided schools. Learned counsel appearing on behalf of the 4th respondent submits that the minimum age in the case of P.D. teachers in the Govt. service during the relevant period was 39 years and since the petitioner has completed 42 years on 1-1-1989, she cannot be considered for appointment to a vacancy which arose on 3-7-1989. The 4th respondent further submits that in view of the clear relinquishment made by the petitioner, she cannot put forward a claim for appointment under Rule 51A in the vacancy which arose on 3-8-1989 or 31-3-1990.

6. The fact that the petitioner has completed 42 years as on 1-1-1989 and the fact that during the relevant period, the age limit prescribed for appointment to the post of P. D. teachers was 39 are not disputed by learned counsel appearing on behalf of the petitioner. But, he would contend that the question of age limit is not relevant at all in the case of an appointment based on claim under Rule 51 A.

According to him, the age limit is applicable only at the stage of the first appointment, which was over as far as the petitioner is concerned, as early as on 10-6-1980 which date, admittedly, the petitioner was within the permissible age limit. By virtue of the earlier appointments in leave vacancies a right under Rule 51A for further appointment in vacancies arising at a later point of time, had accrued to the petitioner and there is no reference in Rule 51A restricting the period of such claim for appointment. Under these circumstances, learned counsel would contend that there is no merit in the contention raised by the 4th respondent that the petitioner is overaged.

7. The petitioner is supported by a decision of this Court in O. P. No. 3949/88. Under similar situations, a learned Single Judge of this Court held that in view of the purpose of Rule 51A it has to be held that the age limit prescribed in Rule 1 (2) will not apply in the case of teachers claiming preference for appointment under Rule 51 A. I am in respectful agreement with the above view taken by the learned Single Judge. It is seen that even though the A. E. O. has referred to a disqualification of the petitioner being over-aged, no reference is made to this aspect either in the show cause notice Ext. P5 or in the final order Ext. P8 issued by the first respondent.

8. Then, the next question to be considered is whether the petitioner should be treated to have waived her right under Rule 51 A for appointment in future vacancies. The first letter of relinquishment is dt. 11-6-80, which is the same date which the petitioner was appointed in the leave vacancy available during the period between 11-6-1980 to 11-8-1980. The first respondent has correctly declined to rely on the above letter of relinquishment in the light of the very frequent complaint that along with the appointment order on many occasions, a letter of relinquishment is also obtained by some of the Managers. Reliance is made by the first respondent on the second letter of, relinquishment signed on 28-11-1980, namely the date on which the petitioner's second spell of

temporary appointment came to an end. The first respondent has rejected the case of the petitioner that this was a fabricated document and sitting in the jurisdiction under Art. 226 of the Constitution, it may not be possible for this Court to examine whether the above document which is produced as Ext. R1 (a) by the first respondent along with its counter - affidavit, is a fabricated document or not. The claim put forward by the petitioner has therefore to be considered without deciding the question whether Ext. R1 (a) letter of relinquishment is a fabricated document or not.

9. "Note" 2 to Rule 51A of Chapter XIV A of K. E. R. provides as follows:

Note 2. Manager should issue an order of appointment to the teacher by Registered Post acknowledgement due and give a period of 14 (fourteen) clear days to the teacher to join duty. If the teacher does not join duty in time the Manager should give a further notice to the teacher stating that another person would be appointed instead and that the preferential right under this rule would be forfeited if not exercised within another 7 (seven) clear days. If nothing is heard during that time also, the preferential right under the rule will be regarded as forfeited.

This "Note" was added to the Rule by way of an amendment in 1977 pursuant to a decision of this Court in *Nirmala v. D. E. O.* ILR (1976) 1 Ker. 149 wherein this Court held that it is imperative on the part of the Manager to issue an appointment order to claimant under Rule 51A in the address available when a vacancy arises. Admittedly, when the relevant vacancies arose in this case, the "Note" was in the statute book and it issues a mandate on the Manager to send appointment order to the claimant under Rule 51A in the manner prescribed therein. If a statute provides that an act has to be done in a particular manner, that act can be done only in that manner alone. (*Vide University of Kashmir and Others Vs. Dr. Mohd. Yasin and Others*,). Even though, in the above case what was considered was the power of a body created by the statute vesting in it certain powers by specifying limitations, the principle is applicable in the case of a Manager of a private aided school who is bound to act in accordance with the provisions of Kerala Education Rules. In *Pathumma v. State of Kerala*, 1986 KLT 166, this Court held that no teacher can be treated as having forfeited his or her right under Rule 51A, without the Manager completing the procedure laid down in "Note" 2 to Rule 51A of Ch. XIV A. In that case also, the Management relied on relinquishing letters but the only difference is that the fact finding authorities found that those letters cannot be relied on. But the principle decided therein is applicable in the present case also.

10. In the nature of the vulnerable position of a teacher who is being appointed in a temporary vacancy in a private aided school and in the background in which the "Note" was added to Rule 51 A, it has to be held that the relinquishment letter alleged to have been given by the petitioner has no legal effect at all so long as the Manager has not complied with the procedure contemplated in "Note" 2. There is no provision available in the K. E. R. under which a teacher is

enabled to give a letter of relinquishment which can be relied upon by the Manager for making appointments in the school in disregard of the claim of the teacher under Rule 51A. The provisions contained under "Note" 2 is therefore mandatory and before appointing a teacher other than one who has a claim under Rule 51A, the Manager has necessarily to follow the procedure contemplated under "Note" 2. Admittedly, in the present case, it has not been done. Therefore, the appointment of the 5th respondent in preference to the petitioner in the subsequent vacancies is to be held as illegal and against the Rules. Since the 5th respondent had worked during the entire period of the temporary vacancy which existed between 3-7-1989 to 1-9-1989 and in view of the passage of time, I am not setting aside the order by which her appointment during the above period was approved by the authorities. But Exts. P2 and P8 to the extent it directed approval of appointment of 5th respondent in the permanent vacancy which arose on 31-3-1990 are set aside. It is declared that the petitioner has a preferential claim over the 5th respondent under Rule 51A of Ch. XIV A of K. E. R. for being appointed to the vacancy which arose on 31-3-1990. Respondents are therefore directed to take necessary steps to appoint the petitioner as Lower Grade Hindi teacher in the school of the 4th respondent in the vacancy which arose on 31-3-1990 within a period of one month from today.

The original petition is allowed to the above extent, but in the circumstances of the case, without any order as to costs.