
(2003) 12 KL CK 0004
In the High Court Of Kerala
Case No : O.P. No. 24342 etc. of 2002

Rani George

APPELLANT

Vs

Deputy Director of Education

RESPONDENT

Date of Decision : 18-12-2003

Acts Referred:

Kerala Education Rules, 1959 — Rule 35, 36, 37, 51A, 6B

Citation : (2004) 1 ILR (Ker) 516 : (2004) 1 KLT 460

Hon'ble Judges : Jawahar Lal Gupta, C.J.;K. Padmanabhan Nair, J

Bench : Division Bench

Advocate : Koshy George, for the Appellant; V.A. Muhammed, K.E. Hamza, T.V. Vijayarajan, A.K. Jose and Roy Chacko, Government Pleader, for the Respondent

Judgement

K. Padmanabhan Nair, J.—Are the posts of specialist teachers in the Upper Primary and High School Sections run by the same educational agency in the same district interchangeable? Is it open to a senior Physical Education Teacher working in a U.P. Section to contend that he/she shall be posted in the High School after transferring his/her junior working in the High School to the U.P. Section? These are the questions referred to this Bench for decision. The facts of all these cases are almost similar.

O.P. 24342 of 2002:

2. The petitioner is working as a Physical Education Teacher ("P.E. Teacher" for short) in the High School Section of the third respondent. She worked as a Physical Education Teacher from 13.1.1986 to 31.3.1986 and thereafter from 2.6.1986 onwards in the High School Section regularly. Her services were approved by the department. The 4th respondent was appointed as a P.E. Teacher in the U.P. School run by the third respondent in the same district on 1.1.1970. On 15.3.2002 the first respondent issued Ext. P2 order directing the third respondent to shift the 4th respondent from U.P. School to the High School and post him at High School after transferring the petitioner to the U.P. School.

3. The petitioner filed the Original Petition challenging that direction. It was contended that the order was passed without hearing her. It was averred that the post of P.E. Teacher in U.P. Section and High School Section are different categories and not interchangeable. It was also averred that there is no rule in the Kerala Education Rules which confers power on the educational agency or Manager to shift the post of specialist teacher from U.P. Section to High School Section or vice versa. It was further contended that post of P.E. Teacher in the High School Section is not a promotion post of the P.E. Teacher working in the U.P. Section as the scale of pay is the same. It was also averred that U.P. Section and High School are different units and posts of specialist teachers of U.P. Section and High School Section are treated as different grades or category. Hence, the Original Petition to quash Ext. P2 and for a declaration that the petitioner is entitled to continue in the regular post of Physical Education Teacher in the High School Section and the 4th respondent is entitled to continue only in the U.P. School.

4. The first and second respondents have not filed any counter.

5. The 4th respondent had filed a counter contending that he was appointed as a P.E. Teacher against a permanent vacancy in the U.P. School run by the third respondent on 1.1.1970 and he is working as such from that date onwards. At that point of time the third respondent had got only a U.P. School. Subsequently that school was upgraded as a High School and at that time a post P.E. Teacher was sanctioned to High School Section. The petitioner was appointed in that vacancy rejecting the claim of the 4th respondent. During the year 2001-2002, the 4th respondent was treated as a protected teacher. He filed a representation before the Deputy Director of Education to post him in the High Section as he is senior to the petitioner.

It was averred that the third respondent Manager had informed the Deputy Director of Education that he had no objection in retaining the eligible person in the regular post and the other in the protected post. It was contended that the post of a P.E. Teacher in the U.P. Section and High School Section are interchangeable and the scale of pay, qualification, nature of duties, etc. of the teachers working in both sections are one and the same.

O.P. 24343 of 2002:

6. The petitioner was appointed as a P.E. Teacher with effect from 15.7.1993 in the High School of the third respondent. The 4th respondent was appointed as a P.E. Teacher in the High School Section run by the third respondent from 11.8.1980 till 31.3.1981 and thereafter from 1.6.1981 in a regular vacancy. Subsequently she was transferred to U.P. Section on 28.12.1982. The first respondent issued Ext. P3 order directing the third respondent to shift the 4th respondent from the U.P. Section of that School to the High School Section and shift the petitioner from the High School Section to the U.P. Section. The petitioner has filed the Petition to quash Ext. P3 on grounds which are identical to

those raised by the petitioner in O.P. 24342 of 2002. The reliefs sought for are also identical.

7. The respondents 1 and 2 have not filed any counter. The third respondent has filed a counter affidavit supporting the case of the petitioner. It is contended that the first respondent has no authority to direct the third respondent to transfer a teacher working in the U.P. Section to the High School Section or vice versa. It is maintained that when the petitioner was appointed as the P.E. Teacher in the U.P. Section with effect from 22.12.1982, she had relinquished all her claims in the High School Section without reserving any right.

8. The 4th respondent has filed a counter contending that she was appointed as Physical Education Teacher in the High School Section from 11.8.1980 to 31.3.1981 and with effect from 1.6.1981 to a regular vacancy. This appointment was approved. At that point of time one Ouseph, who was working in the U.P. Section, filed a complaint before the second respondent stating that he ought to have been promoted to the newly sanctioned post in the High School Section. The Manager had posted him to the High School Section and transferred the petitioner to U.P. Section. When Sri. Ouseph retired, instead of posting the petitioner back to the High School Section, the third respondent appointed the petitioner in that vacancy. It was also contended that the posts are interchangeable.

O.P. No. 24434 of 2002:

9. The petitioner was appointed as the P.E. Teacher in the High School of the third respondent on 1.6.1988 and his appointment was approved. The 4th respondent in the Original Petition is appointed as a P.E. Teacher in the U.P. School of the third respondent with effect from 28.7.1982. The first respondent had issued Ext.P2 order directing the third respondent Manager to shift the petitioner from the High School to U.P. Section and post 4th respondent, who is now working in the U.P. Section, in the High School. Hence, the Original Petition to quash Ext. P2 order and for other reliefs.

10. The first respondent has filed a counter contending that the 4th respondent was appointed as a P.E. Teacher in the U.P. Section in the same school from 28.7.1982. It was contended that the qualification, method of appointment, scale of pay, etc. for the two posts are all identical. It was contended that these posts are interchangeable and one cannot be considered as a promotion post of another.

11. The 4th respondent had filed a counter. He has raised contentions which are identical to those raised in the connected Original Petitions which were dealt with earlier.

O.P. No. 30050 of 2002:

12. The petitioner was appointed as Sewing Teacher in K.C.P. High School of the 6th respondent on 28.7.1982. The appointment was approved. The petitioner

was transferred to the U.P. School in pursuance of the directions issued by the 4th respondent and one Smt. Vijaya Zacharia working in the U.P. Section was transferred to High School. When Smt. Vijaya Zacharia retired, the 6th respondent appointed the 5th respondent in the High School with effect from 12.10.1992. In the year 1999-2000, the post of P.E. Teacher in the U.P. Section was abolished and the petitioner became a protected teacher. According to the petitioner, the two posts are interchangeable and the petitioner being the senior person ought to have been transferred to the High School Section and the person who is junior to her and working in the High School Section ought to have been transferred to U.P. Section. The second respondent rejected her request as per Ext. P3 order. Hence, the Original Petition for quashing Ext. P3 and for a direction to respondents 4 and 6 to post the petitioner as Needle Work Teacher in the High School and shift the 5th respondent from High School to U.P. Section.

13. The 5th respondent filed a counter contending that a specialist teacher working in the High School cannot be shifted to U.P. Section or vice versa. It was contended that the petitioner and the 5th respondent are not persons of the same service and hence one person cannot be treated as senior to the other person.

14. The 6th respondent has also filed a counter contending that abolition of the post of Needle Work Teacher in the U.P. School Section was wrongly done as the School was having 500 students in the U.P. Section. It was contended that the petitioner had challenged the appointment of the 5th respondent in the High School and her objection was overruled by the D.E.O. Palakkad. Hence, she is not entitled to challenge that appointment at this distant point of time. It was contended that the Manager is free to appoint an incumbent in the High School Section as and when a vacancy arises.

15. The petitioner filed a reply affidavit to the counter affidavits filed by 5th and 6th respondents contending that the pay scales, qualifications and nature of duties of Needle Work Teacher in U.P. School Section and High School Section are one and the same and the posts are interchangeable.

16. Section 9 of the Kerala Education Act provides that the Government shall pay the salary of all teachers in aided schools. The Government is the authority to prescribe qualification for appointment of all teachers of aided Schools u/s 10. Section 11 confers power on the Managers of aided schools to appoint teachers. Section 12 deals with conditions of service of teachers in aided schools. The power is vested in the Government to prescribe conditions of service, such as pay, pension, provident fund, retirement age, etc.

17. The posts of P.E. Teachers in High Schools are sanctioned under Rule 6(4)(a) of Chapter XXIII of the Kerala Education Rules. Rule 6(4) reads as follows:-

"(4) Notwithstanding anything contained in Rule 7 in High School section of every complete High School there shall be:-

(a) One full time post of Physical Education Teacher and one full time post of Drawing Teacher irrespective of the number of periods of work per week in each of the concerned subject.

(b) One full time post of Music Teacher irrespective of the number of periods of work per week for Music.

(c) One full time post of Sewing Teacher if there is no craft Teacher provided that there are not less than 200 girls in High School Classes:

Provided that the existing part time post of Physical Education, Drawing, Music, Sewing or Needle-work shall not be converted into full time posts unless the incumbents holding the posts are fully qualified to hold the full time posts:

Provided further that no full-time post of specialist teacher under any category mentioned above shall be sanctioned, if the number of periods of work per week in the concerned subject is less than 5.

18. Rule 6(4)(a) of Chapter XXIII provides that irrespective of the number of students, there will be a post of Physical Education Teacher in the High School Section.

19. Rule 6B of Chapter XXIII deals with the appointment of specialist teacher, including Music Teacher or Physical Education Teacher or Drawing Teacher or Sewing Teacher in the Upper Primary School or Upper Primary Section or a High School having an effective strength of 500 pupils and above in the complete Upper Primary sections on the 6th working day of each academic year. It reads as follows:-

"6B.(1). Notwithstanding anything contained in any other rules in this Chapter no posts of specialist teacher or crafter teacher shall be created in any upper primary school or upper primary sections of High Schools for a period of 6 years from the school year 1969-70:

Provided that the posts sanctioned before 1969-70 against which specialist teachers and craft teachers are appointed and approved and such teachers who are qualified according to the rules then in force may however continue as such.

(2) Notwithstanding anything contained in any other rules in this Chapter, no post of Specialist Teacher or Craft Teacher shall be created in any Upper Primary School or Upper Primary Section of High School except as specified herein:

(a) One post of Specialist teacher namely Music teacher or Physical Education Teacher or Drawing Teacher or Sewing Teacher as decided by the District Educational Officer concerned during staff fixation in the case of departmental schools and as required by the Manager in the case of aided schools will be sanctioned in each Upper Primary School or Upper Primary Section of a High School having an effective strength of 500 pupils and above in the complete Upper Primary Sections on the 6th working day of each academic year.

(b) No post of Specialist teacher shall be sanctioned in any category under Clause (a) if a Specialist teacher is already working in the Upper Primary School or Upper Primary Section of the High School.

(c) A post of Sewing Teacher shall be sanctioned only subject to the following conditions also:

(i) that there are not less than 200 girl pupils in the complete Upper Primary Section and

(ii) that there is no post of Craft Teacher under Needle work in the Upper Primary School or Upper Primary Section of High Schools".

20. A reading of Rule 6B(2)(a) to (c) would show that the post of a specialist teacher in the U.P. School or U.P. Section of a High School is sanctioned only if the conditions prescribed under that Rule are satisfied. But those Rules deal only with the sanctioning of the posts of specialist teacher in the U.P. Section and for its continuance. Rules 6A and 6B of Chapter XXIII do not deal with the qualification, method of appointment, salary and seniority etc. for the posts of specialist teachers. The fact that separate Rules govern sanction of posts of specialist teachers in U.P. Schools and High Schools is riot a ground to hold that they belong to separate categories.

21. Rule 2 of Chapter II of KER provides that schools for General Education shall be of two grades, one Primary and the other Secondary. The first seven standards, that is to say Standards I to VII shall be collectively known as the Primary Grade. It is again sub-divided into two sections, Lower Primary or Junior Basic containing any or all of the Standards I to IV and Upper Primary or Senior Basic containing any or all of the Standards V to VII. Sub-rule (3) of Rule 2 of Chapter II provides that Standards VIII to X shall be collectively known as the Secondary Grade. Secondary Schools providing the three year course is known as High Schools and Secondary Schools providing the four year course is known as Higher Secondary Schools. It is further provided that Secondary Schools may contain any or all of the standards VIII to XI and may be with or without the Primary Section - Upper or Lower or both. Note (ii) to Sub-rule (4) of Rule 2 provides that the terms "Secondary School" and Training School" shall be taken to include Upper Primary and Lower Primary Standards attached to them, if any and the term "Upper Primary School" shall be taken to include Lower Primary standards attached to it, if any. It is further provided that a Lower Section shall be deemed to be attached to a Higher Section if and when it is under the same Headmaster as the Higher Section. A reading of Rules 6B, 6F and 6G of Chapter XXIII and the other Rules stated above shows that there can be an independent U.P. School or an Upper Primary Section of High School.

22. Chapter XIV-A of Kerala Education Rules deals with conditions of service of Aided School Teachers. Rule 34 of Chapter XIV-A provides that every management shall prepare a seniority list of teachers. Rule 34 reads as follows:-

"34. Every Management, shall prepare and maintain in Form 11A a staff list otherwise called the seniority list of teachers as specified below:-

(a) in the case of High Schools, a combined seniority list of teachers specified in Clauses (ii) and (iiA) of Rule 3, Chapter XXIII shall be prepared.

(b) in the case of Upper Primary School and Lower Primary School a combined seniority list of teachers if any, specified in Clauses (iii), (iv) and (v) of Rule 3, Chapter XXIII shall be prepared".

Chapter XXIII Rule 3 deals with fixing of staff strength of Upper Primary and Secondary Schools. Clause (ii) of Rule 3 of Chapter XXIII deals with High School Assistant and Clause (iiA) deals with High School Assistant (Language). Clause (iii) deals with Upper Primary School Assistant and Clause (iv) deals with Lower Primary School Assistant. Clause (v) deals with Language Teacher; Neither Sub-rule (a) nor (b) of Rule 34 contains Sub-clause (vi) (specialist teachers) and Sub-clause (vii) (craft teachers) of Rule 3 of Chapter XXIII. Rule 34 of Chapter XIV-A does not contain any provision regarding the preparation of the seniority list of the specialist teachers.

23. Rule 35 of Chapter XIV-A is also relevant. It reads as follows:-

"35. If the Educational Agencies have more than one school in a District they shall be constituted into one unit and a common seniority list shall be prepared for all the schools in the unit together and shall be submitted to the concerned District Educational Officer for approval. If the Educational Agencies have schools in more than one District within a Revenue District they shall be constituted as one unit and a common seniority list shall be prepared for all the schools in the unit together and submitted to the concerned Deputy Director (Education) for approval. If the Educational Agencies have schools in more than one Revenue District they shall be constituted as one unit and a common seniority list shall be prepared for all the schools together and shall be submitted to the Director for approval.

XXX XXX XXX".

A reading of Rule 35 makes it clear that if the same educational agency is having more than one school in a district, they shall be constituted into one unit and a common seniority list shall be prepared. The seniority of a teacher is fixed in accordance with Rule 37 of Chapter XIV-A. Rule 37 reads as follows:-

"31.(1) Seniority of a teacher in any grade in any unit shall be decided with reference to the length of continuous service in that grade in that unit provided he is duly qualified for the post.

(2) In the case of teachers in the same grade in the same unit whose date of commencement of continuous service is the same, seniority shall be decided with reference to the date of first appointment. If the date of first appoint is also the same, seniority shall be decided with reference to age, the older being the

senior".

Seniority of teachers working in any grade in any unit shall be decided with reference to their continuous service in that grade. Grade only means scales of pay. Rule 43 of Chapter XIV-A provides that vacancies of higher grade shall be filled up by promotion of qualified hands in the lower grade. Rule 1 of Chapter XXVI also deals with fixing of grade pay and allowances of Headmaster. Rule 7 of Chapter XXVI deals with grade pay of the specialist teachers. It reads as follows:-

"7. Specialist teachers and craft teachers in Aided Primary and High Schools shall be eligible for the lower and the higher scales of pay of the Specialist teachers and Craft Teachers in Government Primary Schools. Such of the specialist or other teachers in High Schools as were receiving pay scales higher than the Primary Grade on the date of coming into force of these rules shall continue on such higher scales".

24. Chapter XXXI of Kerala Education Rules deals with qualification of private school teachers. Sub-rule (3) of Rule 2 of Chapter XXXI deals with qualification of the specialist teachers in the High School Section. The qualifications essential for specialist teachers in the Upper Primary Section are stated in Rule 3(3) of Chapter XXXI. A reading of Rules 2(3) and 3(3) of Chapter XXXI shows that the qualification for appointment of specialist teachers to U.P. School and High School are the same. It is true that in view of Note to Rule 45 of Chapter XIV-A specialist teachers, according to their seniority in the combined list of teachers, are entitled to be appointed as the Headmaster of U.P. School. If the U.P. Section and High School of the same Educational Agency in a district is treated as single unit, a specialist teacher working in the High School can also be considered for being appointed as the Headmaster of U.P. School provided he is otherwise qualified.

25. The learned counsel appearing for the petitioner in O.P. 24342 of 2002 had argued that Ext. Pi appointment order produced in that case will show that the petitioner was appointed to a permanent vacancy in the High School Section. So, she cannot be transferred to an Upper Primary School or Upper Primary Section of a High School after a lapse of considerable time. It is true that the appointment order shows that the petitioner was appointed to a post of specialist teacher in the High School." Form 27 prescribed under Rule 7 of Chapter XIV(A) shows that in every appointment order the Manager is bound to specify to which particular post a person is appointed. The mere fact that in the appointment order it is stated that a particular person is appointed in a High School does not confer any right to that person to contend that he cannot be asked to work in a U.P. Section.

26. In *N. Kannammal v. Manager, K.K.M. Higher Secondary School and Ors.* (O.P. No. 19299 of 1998, decided on 27.7.2000) the petitioner, who was working as a specialist teacher in U.P. Section, wanted herself to be posted as specialist teacher in the High School Section of the same management. It was contended

that the post of a specialist teacher in a High School Section is a promotion post. That contention was negated by a learned Single Judge of this Court and the Original Petition was dismissed.

27. Reliance is placed on the decision reported in *P.G. Madhavan v. P.K. Santhakumari Amma* (1994 (2) KLJ 370). In *Madhavan's* case (*supra*) this Court considered the claim of a U.P.S.A. (Natural Science) working in the U.P. Section to get appointment in the High School Section. In that case, originally U.P. School and High School were run by the same educational agency. Subsequently the ownership and management of the U.P. School vested with one person and approved by the department. The ownership and management of the High School vested with another person. The Division Bench took the view that the U.P. School and High School in that case are to be treated as totally independent and separate institutions. That was because the two schools were owned by two different educational agencies. Still further there cannot be common seniority of U.P.S.A. (Natural Science) and H.S.A. (Natural Science). So, the principles laid down in that case can have no application to the facts of this case.

28. In *Isakah K.C. v. Dy. Director (Education) and Ors.* (O.P. No. 23855 of 2002, decided on 28.3.2003) another learned Single Judge quashed a direction issued by the Deputy Director to shift a senior specialist teacher working in U.P. Section to the High School after transferring the junior working in the High School to U.P. Section. The Original Petition was allowed on the ground of violation of principles of natural justice and delay. The Court had not considered whether the posts are interchangeable or not.

29. In *Simily Joseph v. Director of Public Instructions and Ors.* (O.P. 12102 of 1997, decided on 11.11.1997) a learned Single Judge of this Court took a view that the post of a specialist teacher working in the U.P. Section and High School Section are interchangeable. It was further held that the pay scale, qualification, nature of duties, etc. of a P.E. Teacher in both the U.P. Section and High School Section are one and the same. That decision was challenged in W.A. No. 2 of 1998. A Division Bench of this Court concurred with the judgment rendered by the learned Single Judge and dismissed the Writ Appeal. We are of the considered view that the effect of various rules in the Kerala Education Rules is to the effect that the post of specialist teacher in U.P. School and U.P. Section of the High School and a High School are interchangeable and one is not a promotion post for the other. So, in our considered opinion, the principle laid down in *Simily Joseph's* case (*supra*) is correct and we approve it. A reading of various rules leads to an irresistible conclusion that if the same Educational Agency is having an Upper Primary School or a High School with an Upper Primary Section and a High School in the same district, the specialist teachers working in the same grade in both sections are to be treated as teachers of the same unit. The seniority of those teachers is to be fixed with reference to the length of continuous service in that grade of that unit. The post of specialist teachers of both sections of a unit are interchangeable. The post of the specialist teacher in

the High School is not a promotion post of specialist teacher of U.P. Section.

30. Now we shall consider whether the direction issued by the Deputy Director to the Managers to shift the senior specialist teacher working in the U.P. Section to the High School is legal or proper. The mere fact that a specialist teacher working in U.P. Section is senior, the incumbent has no right to insist that he/she will work in the High School Section only and the junior will have to work in the Upper Primary Section of the High School or Upper Primary School. Rules 10 to 16 of Chapter XIV-A deals with transfer of teachers in an aided school. Since both the U.P. Section and High School of the Educational Agency in the district forms one unit, the power to transfer a specialist teacher from U.P. Section to High School also vests with the Educational Agency under Rule 10. Such teachers are liable to be transferred in accordance with Rules. So, if at all anybody is aggrieved by the directions given by the Deputy Director of Education, it is the Manager concerned and not the teachers. The Managers have not chosen to challenge the directions. The petitioners in these Original Petitions are not entitled to any of the reliefs sought for.

31. Though a junior may work in the High School, yet, as and when the question of termination of the service of specialist teacher for want of vacancy arises the services of the junior are liable to be terminated whether he works in U.P. Section or High School, subject to the provisions contained in Rule 51A of Chapter XIV-A of KER.

32. In view of the legal principles discussed above, it is held as follows:-

(i) If the educational agency is having an Upper Primary School and a High School or a High School with Upper Primary in the same district, both sections shall be treated as a single unit.

(ii) The seniority of the specialist teachers working in such units shall be prepared in accordance with Rule 37 treating the abovesaid U.P. Schools and High Schools as a Single unit.

(iii) The post of specialist teachers in the abovesaid schools/sections are interchangeable.

(iv) The post of the specialist teacher attached to the High School is not a promotion post of the specialist teacher working in the U.P. School or U.P. Section of High School.

(v) In case of any post of a specialist teacher in such a unit is to be abolished, the service of the junior specialist teacher in the combined seniority list is liable to be terminated even if he/she is working in the High School subject to the provisions of Rule 51A of Chapter XIV-A K.E.R.

(vi) A senior teacher working in the U.P. Section has no legal right to claim that he/she shall be transferred and posted in the High School on the ground of seniority alone.

(vii) The Educational Agency is having the right to transfer a specialist teacher working in the U.P. Section to High School of the same unit or vice versa subject to the Rules.

The Original Petitions are disposed of as above. The parties are directed to suffer their cost.