
(2005) 01 KL CK 0044
In the High Court Of Kerala
Case No : O.P. No. 38807 of 2002

Remya R. Chandran

APPELLANT

Vs

D.E.O.

RESPONDENT

Date of Decision : 18-01-2005

Acts Referred:

Kerala Education Rules, 1959 — Rule 2, 2(1), 2(2), 5, 51B

Citation : (2005) 1 KLT 702

Hon'ble Judges : K.M. Joseph, J

Bench : Single Bench

Advocate : S.P. Aravindakshan Pillay and Resmi G. Nair, for the Appellant; T.K.M. Unnithan and Rajasree, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Joseph, J.—The petitioner's mother died in harness on 29.1.1989 while working as H.S.A. Petitioner says that she is a major. Her mother was survived by her husband and another daughter. The petitioner has passed Plus Two Examination. She contends that she is qualified to be appointed as Clerk/Peon/Attender or full time Menial in Aided Schools. According to her, on the basis of her being a dependent of her late mother, who died in harness on 29.1.1989, she submitted an application on 19.8.2002. Since the first respondent informed her that she has to send the application to the second respondent, application was submitted on 19.8.2002 before the second respondent, who is the Manager of the Aided School. By order dated 13.11.2002, her application for compassionate appointment was rejected. She preferred an appeal before the D.E.O., Mavelikkara. She contends that she had produced the prescribed proforma duly filled in and Income Certificate issued by the Village Officer. It was also accompanied by an Affidavit duly attested by a Notary Public to the effect that the other legal heirs of her deceased mother have no objection to the petitioner being appointed. It is stated that while appeals were pending, the second respondent appointed the third respondent in his School as full time Menial with

effect from 2.9.2002. It is her case that despite her above efforts, she could not get a copy of the appointment order. She also sent a representation requesting that the appointment of the third respondent may not be approved. She has approached this Court challenging Ext.P2, the order rejecting her claim. She further prays that this Court may command the first respondent to ensure that the petitioner is appointed and further that there will be a declaration that the petitioner is entitled to be appointed under Rule 51B of Chapter XIVA K.E.R. to any suitable post existing or in an arising vacancy with effect from the date of application, and for a further declaration that the appointment of the third respondent is illegal and ab initio void. She also seeks a declaration that no appointment was liable to be made in the School from the date of Ext.P1 against any suitable post for which the petitioner is qualified. There is a further relief sought in the form of a mandamus directing respondents 1 and 2 to appoint the petitioner to any suitable post commensurate with her qualifications.

2. A counter affidavit was filed by respondents 2 and 3. In the said counter affidavit, it is stated that under C1.20 of the Government Order dated 24.5.1999 that application shall be only in the prescribed form. It is stated that the application Ext.P4 is submitted only very late. It is further contended that the letter evidenced by Ext.P1 is not a proper application. A letter issued by the D.E.O. to the Manager wherein the petitioner was informed that the petitioner should send a proper application. Therefore, it is contended that the contention of the petitioner that she had submitted application vide Ext.P1 dated 19.8.2002 is incorrect. It is further stated that, however, an application in the prescribed form was given on 27.11.2002. The application was accompanied by Ext.R2(b) covering letter. It is stated that on receipt of letter dated 19.8.2002, the second respondent had informed the petitioner by Ext.P2 that she was not eligible. It is stated that by the time Ext.P4 was submitted, the third respondent was already appointed in a temporary vacancy as the service of a full time Menial was absolutely necessary for the School on 2.9.2002. It is stated that the appointment of the third respondent was only till 30.12.2002 and Shri K.K. Vasu rejoined duty on 31.12.2002. It is stated that the later decision of this Court in Deepak Vs. Secretary, General Education Department, is what is applicable. It is stated that the conditions mentioned in the said Ruling are not available here. It is further stated that the petitioner's mother died in 1989, but her father had been in Government service in the Excise Department and is even now in service in the Excise Department. It is further stated that the financial condition of the petitioner's family was not at all weak at the time of death of her mother and even now, after twelve years. It is further stated that the appointment of the petitioner is not absolutely essential to get over any financial crisis at any time at all. It is specifically stated that the third respondent has no independent income and his family income is very little. The only income of the family being the pension amount of his father who retired on superannuation as a Lower Division Clerk. The third respondent, it is stated, has two brothers who are also unemployed. It is stated that the third respondent and his brothers had passed

S.S.L.C. and that in the family five members are depending on the above said pension amount. An additional counter Affidavit has been filed by respondents 2 and 3 wherein it is stated that even according to the petitioner, she completed 18 years of age on 17.8.2002. It is stated that as on 19.8.2002, the petitioner was not eligible to submit the application as per Chapter XXIVA Rule 1 of the K.E.R. It is also stated that thirteen years have already gone by from the date of death of the mother and reference is made to the decision in Sunilkumar v. Union of India (2003 (1) KLT SN 23) It was also stated that the Manager is obliged to entertain only proper application submitted in the prescribed form as per the Government Order. It is reiterated that the third respondent is financially very poor and he seeks sympathetic consideration at the hands of this Court also.

3. A reply affidavit has been filed wherein it is stated that the petitioner attained majority on 17.8.2002, and that the time limit for preferring an application under the Scheme will be two years from the date of death. It is stated that in the case Of a minor, the period is 3 years from the date of attaining majority. It is stated that the application accompanied by Ext.R2(b) is a valid application and the clerical error therein is to be ignored. It is stated that the income of her family does not disqualify her from getting an employment under the dying-in-harness scheme, and that her father is employed and he remarried after the death of her mother. He has got two daughters in the second marriage also. Petitioner and her sister were depending on the mother. Dependence even now continues and it is stated that she is yet to tide over the financial difficulty. It is stated that the provisions of Rule 1(2) of Chapter XIVA K.E.R. will not operate against her submitting an application on 19.8.2002.

4. The Government has filed a Statement supporting the petitioner. It is stated that the application submitted by the petitioner is within the stipulated time and hence it can be considered.

5. Heard the learned counsel appearing on both sides.

6. The undisputed facts in this case are that the petitioner's mother was working as H.S.A. in the school of which the second respondent is the Manager, which is an Aided School. The application was submitted originally by Ext.P1 by the petitioner on 19.8.2002. The application has been rejected by order dated 13.11.2002. It is stated in the order as follows:

"It is stated in your letter that your mother died on 29.1.1989 ie. more than 13 years back.

It is understood that your family's financial position is not weak. There is absolutely no evidence to show that the appointment for you in Dying in Harness Scheme is necessary in the present circumstances to tide over any financial difficulties.

You are not qualified for any appointment under Rule 51B of Chapter XIVA K.E.R.

Hence your application is summarily rejected."

It cannot be doubted that the petitioner being a minor, as per the Government Order, the period within which the petitioner should have applied was three years from the date on which she became a major.

7. Two principal contentions are raised by the learned counsel for respondents 2 and 3, who are the Manager and the person appointed by the Manager: Firstly, it is contended that the application itself is not maintainable for the reason that the Rules contemplate that the person must have attained majority as on the first day of the year in which the application is made. The second contention raised on behalf of the Manager is that having regard to the passage of nearly 13 years from the date of death of the petitioner's mother and having regard to the fact that the petitioner's father is an employee in the Excise Department, this is not a case where this Court should extend the benefit of compassionate appointment scheme as embedded in Rule 51B Chapter XIVA K.E.R. Shri T.K.M. Unnithan would expatiate and contend that Rule 2 Chapter XXIV A specifies that the lower age limit for appointment as a member of non-teaching staff shall be 18 and the upper age limit 45. It is further stated that under Chapter XXIVB Rule 5 proclaims that the date for determination of the age for eligibility for appointment shall be the first of January of the year in which the appointment is to be made. He would also refer me to the Public Services Date of Determination of Age for Eligibility for Appointment Rules, 1977. It is stated in Rule 2 of the said Rules that the dates specified in any Special Rules for determination of the age for eligibility for appointment proposed are modified as the 1st of January of the year in which applications for appointment to such posts are invited. Per contra, learned counsel for the petitioner Shri S.P. Aravindakshan Pillai would refer me to the decision in K.K. Bhaskaran v. State of Kerala and Anr. (1983 KLT 894) That was a case where a question arose as to whether a lawyer who was above 62 years of age could be appointed as the Advocate General under Article 165 of the Constitution of India. Article 165 mandates that a person to be appointed as Advocate General should be a person who is qualified to be a Judge of the High Court and, therefore, a person who is above 62 years of age was not qualified. This Court held that in the context in which the word "qualifications" occurs in Article 17, non-entertainment of a particular age is not regarded there as a qualification. It is only in the nature of a condition governing appointment to the office and not a qualification with reference to a person who has to be appointed. This Court in the decision in Sundaresa Kamath v. Kitty Lopez (1991 (1) KLT 741) has held that Rule 10 of the Kerala State & Subordinate Services Rules, 1959 which is titled as qualifications states that educational or other qualifications required for a post shall be as specified in the Special Rules applicable to service in which that post is included. It was further held that the Rules make it clear that qualifications mentioned in the Special Rules and General Rules take within its ambit the educational qualifications as also other qualifications. The other qualifications should necessarily mean qualifications regarding age. It was further held that whenever the rule making authority wanted to refer to educational qualification alone, specific mention of that has

been made in the Rules. In the absence of specific mention when it is simply stated that the candidate must possess the qualifications, then it is to be taken that the candidate must satisfy the educational qualifications and also other qualifications like age as prescribed by the Special Rules.

8. The learned counsel for the petitioner would draw my attention to the terms of the Government Order dated 24.5.1999 which is the order relating to appointment under the compassionate appointment scheme governing the case at hand and referable to Rule 51B of Chapter XXIV K.E.R. He would point out two clauses in this regard. They are Clauses 17 and 18 which read as follows:

"17. The qualification prescribed for direct recruitment to the post will apply. No relaxation in the qualifications will be allowed under the scheme.

18. In the case of appointment to widow/widower and in the case of appointment to part-time contingent posts, there shall be no upper age restriction i.e., applicants shall be given appointment up to the age of retirement. In all other cases the upper age limit prescribed for direct recruitment to the post shall apply."

He would say that a perusal of Clause 18 would show that under the order in the case of appointment to widow or widower and in the case of appointment to part time contingent post, there shall be no upper age restriction, i.e. the applicants shall be given appointment up to the age of retirement. He would lay emphasis on the next sentence which is that in all other cases, it is the upper age limit prescribed for direct recruitment shall apply. In other words, his contention is that under the Government Order which alone should govern the situation, there is only a limitation as regards the upper age limit for direct recruitment. To make it more clear, he would argue that there is no reference to the lower age limit. If that be so, he would say that the only requirement necessary to be complied with in terms of the general law is that a person competent to contract, can be given appointment under the dying-in-harness scheme. He would point out that, that be the position, all that is necessary is that the person should complete 18 years of age at the time when the application is made, for consideration for appointment under the Scheme. Consequently, he would say that in so far as the petitioner had admittedly completed 18 years of age at the time the application was considered, or a vacancy arose, her application was well within law and there was no reason to reject the application on that ground. He would also point out that there is no specific mention of this ground in the order rejecting the claim of the petitioner. It is to be noted that Rule 2 of Chapter XXIV comes under the heading "qualifications" and it refers to educational qualifications. Rule 2(2) deals with age limits. If this is read in conjunction with Clause 17 of the Government Order dated 24.5.1999 which provides that the qualifications prescribed for direct recruitment to the post will apply and no relaxation in the qualifications will be allowed under the Scheme, it cannot admit of any doubt that age has to be determined as on the first day of the year.

9. Clause 18 will act as a proviso to both Clause 17 and Rule 2(1) and 2 read with Chapter XXIVA and Rule 5 of Chapter XXIVB. In other words, apart from carving out an exception in favour of widow and widower, the limits which are mentioned as to age are reiterated. It is also important to bear in mind that statutory rules governing appointment to a post except to the extent to which they are supplanted on the strength of Government Order which is referred to in Rule 51B, must hold the field. It is difficult to concede to the position that Rule 5 of Chapter XXIVB requiring that the person shall be 18 years of age as on the first day of January in which the appointment is to be made, is liable to be ignored. If that be so, I am constrained to take the view that as regards the appointment of the third respondent to the post in the year 2002 cannot be held to be illegal for the reason that it was overlooking the case of the petitioner. This is for the reason that the petitioner was not eligible for appointment to the said post. The further contention taken by the respondents is that 13 years have gone by since the death of the mother of the petitioner and there is no urgent need. The rights of the petitioner under Rr.51B and 9A are statutory rights. Petitioner is entitled when she became a major, to apply within three years, if the other conditions are satisfied. It is to be noted that though it is true that the petitioner's father is an employee in the Excise Department, he has remarried and has two children. The financial limits as to income not having been breached, it cannot be said that the petitioner cannot be given the benefit of the statutory right. However, the Writ Petition has to fail. Having regard to these circumstances, the petition has to fail for the only reason that in terms of the Rules and Order, as more elaborately stated hereinbefore, the petitioner was not a major as on the first January of the year in question. Accordingly, the Writ Petition fails and it is dismissed.