

**(2010) 01 KL CK 0125**

**In the High Court Of Kerala**

**Case No :** Writ Petition (C) No's. 35543 of 2007 and 21147 of 2009

Saji

APPELLANT

Vs

State of Kerala

RESPONDENT

**Date of Decision :** 29-01-2010

**Acts Referred:**

Kerala State and Subordinate Services Rules, 1958 — Rule 3

**Citation :** (2010) 1 KLT 753

**Hon'ble Judges :** P.N. Ravindran, J;K. Balakrishnan Nair, J

**Bench :** Division Bench

**Advocate :** V.A. Mohammed and Kaleswaram Raj, for the Appellant; Alexander Thomas and Benny Gervacis, Government Pleader, for the Respondent

## Judgement

K. Balakrishnan Nair, J.—One of the main points that arises for decision in these Writ Petitions is whether the persons included in the rank-list published by the Public Service Commission (for short "P.S.C.") for appointment to the post of Lower Primary School Assistant (for short "LPSA") (Malayalam) can claim the vacancies occupied by protected teachers. The petitioners in these Writ Petitions are persons included in the rank-list published by the P.S.C. for appointment to the post of LPSA (Malayalam) in Kollam district. The rank-list was published on 1.11.2006. It should have expired on 30.10.2009. But, because of the unification of the age of retirement of Government servants, the P.S.C. has extended its life and now the list expires only on 30.04.2010. These Writ Petitions are filed, mainly, praying to report all available vacancies, including those occupied by protected teachers, to the P.S.C.. They also claim that the vacancies set apart for inter-district transferees, when such transferees are not available, shall also be reported to the P.S.C.

W.P.(C) No. 35543/2007:

2. This Writ Petition is treated as the main case for the purpose of referring to the exhibits. Ext.PI is the aforementioned rank-list published by the P.S.C. on 1.11.2006. Exts.P5 and P6 are the lists of protected teachers presently working

in Kollam district. Their total strength will come to 74. The petitioners pray, those vacancies may be reported to the P.S.C. forthwith. Though the petitioners would say that they may be given the vacancies set apart for inter-district transferees, when there are no such incumbents available for transfer, we find that in the Writ Petition their case is that inter-district transferees have been posted in excess of their quota.

3. The qualifications and method of appointment to the post of LPSA are governed by executive orders issued by the Government. As per the Government order G.O.(MS) No. 120/99/G.Edn. dated 25.5.1999, 65% of the vacancies available in a district, which is the unit for appointment of LPSA's, has to be filled up by direct recruitment through the P.S.C. and the remaining 35% is set apart for inter-district transferees. In the said Government order, the Government have specifically stated which are the vacancies that should be reckoned for fixing the percentage for direct recruitment. The relevant portion of the said Government order reads as follows:

5. Government have examined the case in detail and are pleased to order that the following vacancies will be reckoned for computing the net vacancies under different categories for recruitment as Primary Teacher and High School Assistant.

1. Primary Teachers:

1. Retirement vacancies.

2. Vacancies consequent on promotion of Primary Teachers as Heads of Departmental Primary Schools and on promotion as HSA's or other categories.

3. Vacancies due to death of teachers in this category.

4. Vacancies due to inter-district transfer of teachers to other Districts.

5. Posts additionally created during staff fixation.

Recently, the Government have issued G.O.(MS)No. 95/2008/G.Edn., dated 26.5.2008, providing that if there are no eligible hands for inter-district transfer, the vacancies available in their quota shall also be reported to the P.S.C.. It is submitted on behalf of the petitioners that the retention of protected teachers is impermissible, when a ranked list published by the P.S.C. is available. At any rate, there should not have been any deployment of protected teachers after 1.11.2006, the date on which the P.S.C. list came into force. In support of that submission, the petitioners relied on para 2(vii) of G.O. (P) No. 403/2002/G.Edn., dated 4.12.2002, governing deployment of protected teachers. The said clause specifically bars deployment after coming into force of a P.S.C. list and during its life. They also relied on the decisions of this Court in *Girija Kumari v. State of Kerala* 1998 (1) KIT 501 and *Amina v. State of Kerala* 2001(3) KIT 75 (Case No. 98).

4. The 3rd respondent Deputy Director of Education, Kollam has filed more than one counter affidavit in this Writ Petition. The main contentions raised therein are

that the P.S.C. recruits are in excess of their quota. The protected teachers, whose total strength comes to 71, are accommodated in the inter-district transferees' quota. The 3rd respondent has also pointed out that because of the abolition of Sarva Siksha Abhiyan, which is going to take place by the end of this academic year and also the abolition of the shift system, there will be further excess hands, reducing the number of vacancies. Further, the Government have abolished certain supernumerary posts created to accommodate one teacher each in a school, where there are ten teachers. With the abolition of such supernumerary posts, there will be further reduction of vacancies. If that be so, going by the materials on record, the vacancies available will come to only four. It was also submitted that those four vacancies were already reported and advices are yet to be made.

5. We heard Sri. Kaleeswaram Raj and Sri. V.A. Mohammed, learned Counsel for the petitioners and Sri. Benny Gervasis, learned senior Government Pleader for the respondents 1 and 3. They reiterated and amplified the aforementioned respective contentions.

6. It is a well-settled position in law that a person included in the rank-list does not have any indefeasible right for appointment. The said general principle in the law relating to Master and Servant finds statutory expression in Rule 3(b) of Part II of the Kerala State and Subordinate Services Rules. The said sub-rule reads as follows:

3. Approved candidates:

(a)....

(b) The inclusion of a candidate's name in any list of approved candidates for any service (State or Subordinate) or any class or category in a service, shall not confer on him any claim to appointment to the service, class or category.

Judicial precedents also support this position. The Apex Court in *The State of Haryana Vs. Subash Chander Marwaha and Others*, *Mani Subrat Jain and Others Vs. State of Haryana and Others*, and *State of Kerala v. A. Lakshmikutty* (1986) 4 SCC 632 had repeatedly held that mere inclusion in the select list will not confer upon the candidates included therein an indefeasible right to appointment.

7. Protected teachers are teachers retrenched from aided schools after they have put in a specified period of service. Such teachers can continue to draw salary from the Government. The orders regarding protection of Aided School teachers have been issued by the Government as a social security measure to protect those engaged in teaching from starvation on their retrenchment. The teachers thrown out from aided schools are deployed to suitable vacancies in Government schools. The Government have also issued orders providing for appointment of retrenched teachers in other aided schools, especially, in newly opened schools. In relation to such aided schools, the Government have issued mandatory directions to accommodate the protected teachers available before going in for

fresh appointment. The said orders have, now, been incorporated in the form of relevant Rules in Chapter V of the Kerala Education Rules. So, to extract work from the protected teachers, who are paid from public funds, is a concern of the Government. It is every Master's right to decide how the vacancies under him should be filled up. The Government can also exercise the usual general power of a Master and decide that the vacancies under its establishments will not be filled up for some time for valid reasons. The Government can also abolish posts. The existence of a rank-list published by the P.S.C. for filling up vacancies in a particular category of posts will not stand in the way of the Government deciding not to fill up those vacancies or even to abolish some of those posts. The Apex Court in *Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and others*, upheld the decision of the Andhra Pradesh Government not to fill up the existing vacancies in accordance with the Recruitment Rules then prevailing, for the reason that the Government were contemplating amendment of the Rules. The normal Rule is that till amendments are carried out, the vacancies arising shall be filled up according to the existing Rules. The Apex Court, in the above decision, held that if the Government decided consciously not to fill up any vacancy till the existing Rules were amended, it was well within the powers of the Government. So, even if certain vacancies are available for recruitment through the P.S.C., we are of the view that the Government can decide not to fill up those vacancies. The Government can also issue an order, directing filling up of those vacancies by a different method, say, for example, by deploying protected teachers. Since the method of appointment to the post of LPSA (Malayalam) is prescribed by executive orders, the same can be modified or annulled by another executive order. The earlier order will survive till another order is issued, which is at variance with the earlier order. In this case, one of the claims of the petitioners is to throw out the existing protected teachers and to engage P.S.C. hands in their place. We notice that the protected teachers are being paid from public funds. So, if they are thrown out, the Government will have to pay them salary and if, in their place, new hands are inducted, the Government will have to pay them also. We think, the persons included in the rank-list cannot press any such claim. The Government are well within their power to retain the existing protected hands. We notice that *Girija Kumari* (supra) and *Amina* (supra) were rendered without taking note of the above mentioned principles concerning filling up of vacancies under the Government.

8. But, we find considerable force in the submission of the petitioners that once a rank-list comes into force, there shall not be any further deployment of protected teachers. This right is flowing from the Government order dated 4.12.2002. In para 2(vii) of the said Government order, it is stated as follows:

Protected teachers shall be deployed in Government Schools in the Districts where no live list of P.S.C. is available till lists become available.

The intention of the above order is clear. The vacancies in a district shall not be filled up by deploying aided schools teachers after a P.S.C. list is brought into

force. But, this is also an executive order. If there is a subsequent order at variance with this order, the subsequent order will prevail. But, the official respondents do not have a case that they have passed any subsequent order, enabling them to deploy protected teachers even after the publication of P.S.C. lists.

9. Having regard to the facts of the case, we think, the following directions should be issued: The 3rd respondent Deputy Director of Education shall consider whether any protected teacher has been deployed after 1.11.2006. If the answer is in the affirmative, that deployment order shall be cancelled. The Deputy Director shall also assess whether any vacancy in the inter-district transferees" quota is remaining vacant without any claimants for the same. The vacancies, if any, available under the above two heads shall be reported to the P.S.C. The Deputy Director shall also assess the vacancies that may arise as a result of retirement of teachers on 31.3.2010 and if there are any vacancies available for P.S.C. recruits, going by 65% - 35% quota, those vacancies shall also be reported to the P.S.C. In the result, all the substantive vacancies available for P.S.C. hands from ,1.11.2006 and also the substantive vacancies that are available in the inter-district transferees" quota without claimants shall, if so far not reported, be positively reported by the Deputy Director (Education) before 15.4.2010.

The Writ Petition is disposed of as above.

W.P.(C) No. 21147/2009:

10. In the light of the judgment in W.P. (C) No. 35543/2007, this Writ Petition is also disposed of. The directions issued in that judgment will govern this case also.