
(2011) 03 KL CK 0338

In the High Court Of Kerala

Case No : Writ Petition (C) No. 18408 of 2008

Sebastian Joseph

APPELLANT

Vs

Director of Higher Secondary Edu. and Others

RESPONDENT

Date of Decision : 16-03-2011

Acts Referred:

Citation : (2011) 2 ILR (Ker) 416 : (2011) 2 KLJ 283 : (2011) 2 KLT 355

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : Viju Abraham, Joy C. Paul and Dominic Johnson, for the Appellant;
M.P. Ashok Kumar, V.A. Muhammed and K.E. Hamza, for the Respondent

Final Decision : Allowed

Judgement

K.T. Sankaran, J.—The petitioner is working as High School Assistant (Physics) at St. Mary's High School, Marykulam, a school under the Corporate Educational Agency of the second respondent. The petitioner acquired the qualification of B.Sc. (Physics), M.A. (English) and B.Ed. (English). It is stated that the petitioner was teaching Physics as well as English in the schools under the management of the second respondent. The petitioner was appointed as High School Assistant on 16.6.1981. His grievance is that overlooking his seniority, the third respondent was appointed as Higher Secondary School Teacher (Junior) (English).

2. A vacancy of HSST (Junior) (English) arose at St. George Higher Secondary School, Kattappana, a school under the Educational Agency of the second respondent. The second respondent called for a list of qualified persons to be considered for appointment as HSST (Junior) (English). An interview was conducted on 10.3.2008. Six persons participated in the interview. It is stated that, as per the rank list published in the notice board on 2.6.2008, the name of the petitioner was shown as rank No. 4. Rank Nos. 1 to 3 in the rank list are respectively respondents 3 to 5.

3. Though the petitioner applied for a copy of the rank list, the second

respondent did not furnish the same. However, a copy of the minutes of the interview conducted on 10.3.2008 has been produced by the third respondent as Ext. R3(h). Going by Ext. R3(h), the third respondent secured 252 marks, the fourth respondent secured 229 marks, the fifth respondent secured 227 marks and the petitioner secured 226 marks. Ext. R3(i) is the criteria for preparing the rank list. The criteria are the following:

Sl. No.

Distribution of Marks

Max Marks

Merit Marks

1.

Academic Qualifications

a

SSLC (half the percentage of marks)

50

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b

Basic Degree (BA/B.Sc/B.Com. etc) (Half the percentage of marks for the same subject as in Sl. No. 2.)

50

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c

Qualifying Examination (MA/M.Sc/M.Com etc) (percentage of the marks obtained)

100

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d

Professional qualifications (Bed) (Half the percentage of the marks).

50

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e

Additional Qualifications (Any other qualification higher than and other than the essential qualifications-qualifications to be specified)

40

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2.

Teaching experience in the same subject in which the master degree is taken (Aided/recognized School or College) 5 marks for one year up to a maximum of 30 marks.

30

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3.

Co-Curricular Activities:

a. Achievements in the field of sports and games

15

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b. Achievements in the field of arts and culture

15

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4.

N.C.C., Scout and Guide, N.S.S., Red Cross etc.

10

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5.

Awards and Recognitions on Research papers and Publications on the subject as in Sl. No. 2.

15

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6.

Marks for interview

125

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Total

500

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5:15 PM 3/6/2013

4. Chapter XXXII of the Kerala Education Rules provides for the method of appointment and qualifications of teachers and non-teaching staff in aided Higher Secondary Schools. Sl. No. 3 in the table in Rule 4 of Chapter XXXII deals with method of appointment of HSST (Junior), which reads as follows:

Sl. No.

Category

Method of Appointment

3.

Higher School (Junior)

Secondary Teacher

1. (i) By transfer from qualified High School Assistants in the subject concerned under the Educational Agency.

(ii) In the absence of qualified hands under item (i) above, by transfer from qualified Upper Primary School Assistants/Lower Primary School Assistants in the subject concerned under the Educational Agency.

2. By direct appointment

Note:-

(i) 25% of the total posts shall be filled up by the method specified in item (1) above on seniority - cum suitability basis and 75% of such post shall be filled up by direct appointment.

(ii) When qualified persons are not available to fill up the vacancies set apart for appointment by transfer under item 1 above, such vacancies also shall be allotted for direct appointment.

The selection and appointment in the case on hand was "by transfer" from qualified High School Assistants. The contention of the petitioner is that he is the senior-most among the six candidates who participated in the interview. It was not found that he was not suitable. The counsel for the petitioner submitted that suitability cannot be assessed and marks awarded for the same. The only method that can be adopted is to find out whether a person is suitable or not. Once it is found that he is suitable, then the selection can only be on the basis of seniority.

5. The Note to Rule 5 of Chapter XXXII of the Kerala Education Rules provides that appointments to teaching post shall be made on the recommendation of a selection committee consisting of the Manger or his nominee (Chairman),

Principal of the school and a representative of the Government selected by the Manager from a panel of officers not below the rank of a Deputy Collector or officers not below the rank of Deputy Secretary to Government prepared by the Director, Higher Secondary Education for every academic year.

6. The learned counsel for the petitioner submitted that though the petitioner applied for the relevant documents, they were not supplied by the Manager and therefore, the petitioner was constrained to file the Writ Petition. At the time when the Writ Petition was filed, the appointment of the third respondent was not approved.

7. Learned counsel for the petitioner relied on the decision of the Supreme Court in Valsala Kumari Devi M. Vs. Director, Higher Secondary Education and Others, and contended that the method of selection was quite illegal and contrary to the provisions of Chapter XXXII of the Kerala Education Rules. It is submitted that before Chapter XXXII was inserted in the Kerala Education Rules on 9.11.2001, the method of appointment and qualifications of Higher Secondary School Teachers were provided in an executive order issued by the Government. The appointment was "subject to seniority and suitability". The Supreme Court held that the expression "subject to seniority and suitability" does not mean the comparative assessment of suitability and it only means the suitability for the particular post and the suitability is related to the prescribed qualification and requisite experience. The Supreme Court also held thus:

As rightly pointed out by the learned counsel appearing for the appellant, once the requirement of the prescribed qualification is satisfied, the selection must be made on the basis of the seniority and suitability and there is no scope for making comparison of qualifications or comparative assessment of suitability. The expression "suitability" means that a person to be appointed shall be legally eligible and "eligible" should be taken to mean "fit to be chosen".

In such circumstances, we are of the view that it was improper on the part of the selection committee to make selection taking into account the qualifications which are not prescribed in the Government Orders and by giving weightage to such qualifications.

8. A Division Bench of this Court in N.M. Gigimol V. Director of Higher Secondary Education (W.A. Nos. 797 of 2007 and connected cases) held thus:

Apex Court therefore interpreted Government Order dt. 13.5.1998 read with G.O. dated 27.6.1990 and laid down the law that 25% of the posts were reserved for appointment from qualified High School Assistants and Primary School Assistants by way of promotion and there was no element of selection. Only thing is that the candidates should satisfy the qualification laid down in the Government Order dated 27.6.1990. Once a candidate has satisfied that qualification, then promotion should have been effected by way of seniority and there is no question of a selection or evaluation of comparative merit.

The Division Bench referred to the decision of the Supreme Court in Valsalakumari Devi's case.

9. Sri. Viju Abraham, learned counsel appearing for the petitioner, referred to Ext. P5 Government Order, G.O. (MS) No. 141/2008/G.Edn. dated 18.8.2008. For the sake of convenience, the Government Order is extracted below:

As per the Government Order read as 1st paper above, Government have prescribed the qualifications and method of appointment in the post of HSST (Jr.)/ HSST in Aided Higher Secondary Schools in the State. According to the above Government Order "by transfer" appointment to the 25% of total posts shall be filled up by qualified High School Assistants in the subject concerned on "seniority-cum-suitability" basis. It has come to the notice of Government that the term "suitability" is wrongly interpreted by some managements in certain cases of "by transfer" appointments. Moreover, the Hon'ble Supreme Court as per the Judgment read as 2nd paper above has clarified the meaning and applications of the term "suitability" as "the expression "suitability" means that a person to be appointed shall be "legally eligible" and "eligible" should be taken to mean "fit to be chosen".

2. Considering the facts stated above and in the light of the above Judgment, it is hereby clarified that the term "suitability" means "the prescribed qualification and requisite experience". Hence suitable senior candidates cannot be overlooked when "by transfer" appointment is made in Higher Secondary School Teacher posts of Higher Secondary Schools.

10. Sri. M.P. Ashok Kumar and Sri. V.A. Muhammed, learned counsel appearing for respondents 2 and 3 respectively, submitted that the petitioner was working as HSA (Physics), while the third respondent was working as HSA (English). The selection and appointment was for HSST (Junior) (English). The counsel submitted that Sl. No. 3 in the table appended to Rule 4 of Chapter XXXII of the Kerala Education Rules provides for "by transfer" appointment from qualified High School Assistants in the subject concerned under the Educational Agency. The counsel submitted that to be qualified for appointment as HSST (Junior), the HSA concerned should be qualified in the subject concerned. The petitioner being HSA (Physics), it cannot be said that he was qualified in the subject concerned. In reply, the learned counsel for the petitioner submitted that the petitioner has qualification of MA (English) and B.Ed.(English). He was teaching English as well. There is no bar for the appointment of the petitioner as HSST (Junior)(English).

11. The selection committee did not find that the petitioner is not qualified. Or else, it should have been stated so in Ext. R3(h). Ext. R3(h) shows that the petitioner was awarded 226 marks. This itself would prove positively that the petitioner was found qualified by the selection committee.

12. Learned counsel for the second respondent submitted that the Supreme Court in Valsala Kumari Devi's case considered the scope and ambit of the expression "seniority and suitability" occurring in the Government Order,

whereas, Rule 4 of Chapter XXXII, KER, speaks of "seniority-cum-suitability basis". The counsel submits that both are not the same. He also submitted that seniority is to be reckoned with reference to the number of years of teaching in the subject concerned. The learned counsel for the third respondent also submitted that the third respondent has two post graduate degrees and SET qualification. The counsel also relied on Exts. R2(a), R2(b), R2(c) and R2(d) letters of appreciation and certificates in support of the contention that the third respondent is the most suitable candidate.

13. Learned counsel for the second respondent also relied on the decisions in *Sarat Kumar Dash and Others Vs. Biswajit Patnaik and Others*, and *Sankar Deb Acharya and Others Vs. Biswanath Chakraborty and Others*, . In *Sarat Kumar Dash and Others Vs. Biswajit Patnaik and Others*, , the Supreme Court held that in the case of merit-cum-suitability, seniority should have no role to play when the candidates were found to be meritorious and suitable for higher posts. Even a junior most man may steal a march over his seniors and jump the queue for accelerated promotion. Seniority would have its due place only where the merit and ability are approximately equal or where it is not possible to assess inter se merit and suitability of two equally eligible competing candidates who come very close in the order of merit and ability. In case where the relative merit and suitability or ability have been considered and evaluated and found to be superior, then the seniority has no role to play.

14. In *Sankar Deb Acharya and Others Vs. Biswanath Chakraborty and Others*, , the Supreme Court held thus:

39. When the principle of merit-cum-seniority is applied, it is now a well-settled principle that great emphasis is on merit and ability and seniority plays a less significant role. Seniority has to be given weightage only when merit and ability are approximately equal. (See *B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc.*, ; *Central Council for Research in The Central Council for Research in Ayurveda and Siddha and Another Vs. Dr. K. Santhakumari*,).

15. In the aforesaid decisions of the Supreme Court, the Court was considering "merit-cum-seniority" but in *Valsala Kumari Devi's* case, the Supreme Court was considering "seniority and suitability". Therefore, I am of the view that the Supreme Court decisions in which "merit-cum-seniority" was considered, are not applicable to the present case.

16. Sri. V.A. Muhammed, the learned counsel appearing for the third respondent, submitted that the petitioner has not challenged the appointment of the third respondent, going by the reliefs prayed for in the Writ Petition. He also submitted, relying on the decisions in *Dalpat Abasaheb Solunke and Others Vs. Dr. B.S. Mahajan and Others*, , *Dr. Krushna Chandra Sahu and others Vs. State of Orissa and others*, and *Tresa V. Fernandez v. University of Kerala* (1997(1) KLT SN 36 Case No. 47), that the Court cannot interfere with the decision of the selection committee except on limited grounds and that the Court cannot

scrutinize the relative merits of the candidates. The counsel submitted that the committee is an expert body whereas the Court is not an expert body. It is also pointed out that there is no plea of mala fides or that the committee is not a properly constituted committee.

17. The reliefs prayed for in the Writ Petition are the following:

(i) A writ of mandamus or other appropriate writ or order, directing the 2nd respondent to appoint the petitioner as HSST (English) in the schools under the 2nd respondent, to the vacancy which arose due to retirement at St. George H.S.S., Kattappana;

(ii) A writ of mandamus or other appropriate writ or order, directing the 1st respondent to approve the appointment of the petitioner as HSST English and pay salary and all other consequential benefits; and

(iii) To grant such other reliefs as this Hon'ble Court deems fit and proper to grant in the facts and circumstances of the case.

18. Respondents 3 to 5 in the Writ Petition are the persons who were awarded more marks than that of the petitioner, by the selection committee. I am not inclined to accept the contention of Sri. V.A. Muhammed that the petitioner has not challenged the selection of the third respondent. The various grounds taken in the Writ Petition would clearly indicate that the petitioner has challenged the selection and appointment of the third respondent. It is specifically pleaded that respondents 3, 4 and 5 are juniors in service to the petitioner. The method of selection was also attacked for the various grounds taken in the Writ Petition. The petitioner has prayed for a direction to the second respondent to appoint the petitioner. The cumulative effect of the grounds taken in the Writ Petition and the reliefs prayed for is that the petitioner wanted him to be appointed instead of the third respondent.

19. Going by the decision of the Supreme Court in Valsala Kumari Devi's case and the decision of the Division Bench in Gigimol's case (W.A. No. 797 of 2007 and connected cases), there cannot be any doubt that the selection committee committed a grave error in assessing the comparative merit of the candidates who appeared for the interview. Rule 4 of Chapter XXXII, K.E.R., does not provide for assessing such comparative merit. The Rule only provides for selection on the basis of seniority-cum-suitability. There is no doubt that the petitioner is the senior most among the persons who participated in the selection process. There is no case for any of the respondents that the petitioner is not suitable. Of course, the contesting respondent submitted that the petitioner is not qualified in the subject concerned. That contention has no force in view of the following: Chapter XXXII Rule 6 of the Kerala Education Rules deals with the qualifications. Serial number 2 therein is the category of Higher Secondary School Teacher and Higher Secondary School Teacher (Junior). The qualifications prescribed are: (1) Masters Degree in the concerned subject with not less than 50% marks from any of the Universities in Kerala or a qualification recognised as

equivalent thereto in the respective subject by any University in Kerala. (2) B.Ed. in the concerned subject acquired after a regular course of study from any of the Universities in Kerala or a qualification recognised as equivalent thereto by a University in Kerala. There is no case for the respondents that the petitioner does not have these qualifications. If the petitioner is not qualified as per Rule 6 of Chapter XXXII, K.E.R., he would not have been considered for the interview by the selection committee.

20. In the facts and circumstances mentioned above and in view of the decision of the Supreme Court in Valsala Kumari Devi's case and the Division Bench decision in Gigimol's case, I am of the view that the petitioner is entitled to succeed.

21. The next question to be considered is what relief should be granted to the petitioner. It is submitted that the petitioner is to retire from service on 31.3.2011. In these circumstances, I do not think it would be just to set aside the selection and appointment of the third respondent and to direct that the petitioner should be appointed as HSST (Junior). At the same time, the petitioner was legitimately entitled to be selected and appointed as HSST (Junior). Therefore, he is entitled to all the service benefits of HSST (Junior) (English) except the salary of HSST (Junior) (English). The Director of Higher Secondary Education shall pass appropriate consequential orders so that the petitioner gets all the service benefits except the salary of HSST (Junior) taking that the petitioner was notionally appointed as HSST (Junior) from the date on which the third respondent was appointed.

The Original Petition is allowed to the extent indicated above.