

(2011) 03 KL CK 0137

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 23519 of 2010-L, 25061 of 2010-G, 27603 of 2010-A and 28516 of 2010-L

Sreedevi V. Shenoi

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 29-03-2011

Acts Referred:

Kerala Education Rules, 1959 — Rule 34(b)

Citation : (2011) 03 KL CK 0137

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : Elvin Peter P.J, for the Appellant; V.A. Muhammed, for the Respondent

Judgement

T.R. Ramachandran Nair, J.—The Petitioners in W.P.(C) Nos. 25061/2010 and 28516/2010 are Upper Primary School Assistants (UPSAs) and the Petitioners in W.P.(C) Nos. 23519/2010 and 27603/2010 are Lower Primary School Assistants (LPSAs). The dispute raised herein is with respect to the steps taken by the management to retrench the UPSAs in preference to LPSAs on reduction of posts of LPSAs by transferring them as UPSAs. The same was done in terms of the seniority of the appointees. The contentions raised by the Petitioners in W.P.(C) No. 25061/2010 and 28516/2010 are that the posts of UPSEA and LPSA are not inter-changeable. It is therefore pointed out that when LPSA posts are reduced consequent on staff fixation, the juniormost in that category will have to be retrenched.

2. In W.P.(C) No. 28516/2010 the Petitioner was appointed as a UPSEA in T.D. High School, Mattancherry as per Ext.P1 order dated 22.6.2005. She is a B. Ed. holder. The appointment has been approved by the District Educational Officer, as per Ext.P2 order. In the High School the primary section consists of an L.P. section as well as a U.P. section. According to the Petitioner, since she is appointed in the U.P. section, she is entitled to continue in the U.P. section. There

cannot be a shifting of LPSA to U.P. Section to avoid retrenchment of LPSA and resulting in the retrenchment of the Petitioner. Reliance is placed on Ext.P3 Govt. Order whereby the qualification for UPSA and LPSA were introduced by amendment of Chapter XXXI of the K.E.R.

3. In the year 2010-2011, it is pointed out that the Manager wanted to shift certain LPSAs. to U.P. section. This was complained by the Petitioner by way of a representation as per Ext.P4, before the Manager and later another representation was filed as per Ext.P5 before the District Educational Officer. The Petitioner relies upon Ext.P6 order passed by the Deputy Director of Education, by which for the year 2009-2010, a similar shifting done by the Manger was interfered with. The order passed by the District Educational Officer pursuant to the direction issued in Ext.P7 judgment of this Court, produced as Ext.P8, is also relied upon. It is pointed out that the District Educational Officer found that LPSAs and UPSAs are different categories of posts and whenever a retrenchment is necessary due to the reduction in the number of posts, the juniormost in the respective category should be retrenched. The prayer is to implement Ext.P8 order.

4. The Petitioner in W.P.(C) No. 25061/2010 was appointed on 5.6.2006 as UPSA. This was approved as per Ext.P1 order. In the year 2009-2010 one division in Standard VI was abolished. Ext.P2 is the staff fixation order. Even though the Petitioner claimed the benefit of 1: 40 teacher student ratio, the Manager transferred the sixth Respondent, an LPSA from another L.P. School and retained her as UPSA by applying 1: 40 ratio as per Ext.P3 order. Against the modified staff fixation order the Petitioner approached the Deputy Director of Education. By Ext.P6 order the Deputy Director of Education cancelled the order of the District Educational Officer and directed the Petitioner to be retained as UPSA. The Petitioner relies upon various judgments and Government Orders to contend for the position that LPSAs and UPSAs are different categories of posts. Ext.P6 is the order which the Petitioner seeks implementation. The Petitioner also challenges Ext.P11 order passed by the Manager, whereby two LPSAs have been transferred as UPSAs on 14.7.2010 to the High School as UPSAs which affected the continuance of Petitioner herein and the Petitioner in W.P.(C) No. 28516/2010.

5. In W.P.(C) No. 23519/2010 Ext.P6 order produced in W.P.(C) No. 25061/2010 is under challenge. The facts of the case show that the Petitioner is having the qualification B.A. and T.T.C. She was appointed as LPSA as per Ext.P1 order, in T.D.G.L.P. School, which was approved with effect from 27.6.2005. The Petitioners in W.P.(C) Nos. 25061/2010 and 28516/2010 are arrayed as Respondents 5 and 6. It is her case that during the academic year 2009-2010 two posts of LPSAs were abolished in the T.D.G.L.P.S., Mattancherry and one post of UPSA was abolished in T.D.H.S., Mattancherry. The Petitioner was transferred as UPSA to T.D.H.S., Mattancherry by Ext.P2 order. The fifth Respondent challenged the same in appeal before the Deputy Director of Education. The appeal was allowed as per Ext.P4.

6. During the academic year 2010-2011 two posts of LPSAs have been abolished in the T.D.G.L.P.S., Mattancherry and therefore two seniormost LPSAs. have been transferred to T.D.H.S., Mattancherry. The Petitioner has filed this writ petition at this stage seeking to challenge Ext.P4 order. During the pendency of the writ petition, the third Respondent issued Ext.P7 order against her and the writ petition has been amended.

7. In W.P.(C) No. 27603/2010 the Petitioner who is having the qualification Pre-degree and T.T.C., was initially appointed on 28.3.2003 against the leave vacancy of a UPSEA. She was appointed as LPSA on 2.6.2004 in the T.D.G.L.P.S., Mattancherry as per Ext.P2 order. This was in a transfer vacancy of LPSA to T.D. High School. The Petitioner claims that he is senior in Ext.P3 seniority list and in accordance with the seniority, the Manager transferred him and another senior teacher to the U.P. section in T.D. High School and accordingly the Petitioner joined duty on 15.7.2010. The District Educational Officer thereafter passed Ext.P7 order on the appeal filed by the contesting Respondents herein. The view taken is that the posts of LPSA and UPSEA are distinct and different and therefore the Petitioner cannot be transferred to U.P. Section. Ext.P7 order is under challenge in the said writ petition.

8. The crucial question therefore is whether the transfer and shifting of LPSAs on reduction of the posts of LPSAs as UPSAs, to retain them resulting in termination of vacancies for continuance of UPSAs, is valid.

9. I had occasion to consider the very same issue in the judgment in W.P.(C) No. 25667/2010 and 27987/2010 (Manager, M.M.U.P. School v. Deputy Director of Education and Ors. - ILR 2011 Ker. 895). Therein, after considering the relevant rules and earlier judgments of this Court, it was held that the shifting of UPSEA and LPSA and vice versa cannot be recognised. This was upheld by a Division Bench in W.A. Nos. 25/2011 and 26/2011.

10. The learned Counsel appearing for the Petitioners in W.P.(C) No. 23519/2010 and 27603/2010 raised various arguments to distinguish the said judgment and therefore I propose to consider the same.

11. First I will consider the arguments raised by the learned Counsel for the Petitioners Shri Elvin Peter and Shri V. Rajendran, in W.P.(C) Nos. 23519/2010 and 27603/2010 who are appearing for the LPSAs. Learned Counsel submitted that in the light of Rule 34(b) of Chapter XIV A K.E.R. the Management will have to prepare a combined seniority list in respect of UPSAs. and LPSAs. It is therefore submitted that the said seniority list can be considered in a situation like this also. Therefore, in terms of the seniority list alone any retrenchment can be effected. Learned Counsel relied upon the principles stated by the Full Bench of this Court in S.N.D.P. L.P. School Vs. Roy, . Shri S.B. Premachandra Prabhu, the learned Counsel for the Management supported these arguments and the orders passed by the Manager.

12. Per contra, learned Counsel appearing for the Petitioners in W.P. (C) Nos.

25061/2010 and 28516/2010 Shri K.E. Hamsa and Shri Kaleeswaram Raj submitted that LPSA and UPSA are different categories and going by Chapter XXXI of K.E.R., the qualifications have been separately prescribed. Sanction of posts is also separately made. Therefore, they are distinct categories and in the light of Rules 51 and 55 of Chapter XIV-A K.E.R. when retrenchment is effected, the same has to be effected in terms of the category concerned. They have relied upon the following decisions, viz. Mary George v. State of Kerala 1999 (3) KLT 912 and Rejimol Vs. Asst. Educational Officer, and also the judgments in W.P.(C) No. 3427/2006 (produced as Ext.P9 in W.P.(C) No. 25061/2010) and W.P.(C) Nos. 25667/2010 and 27985/2010 which is affirmed by a Division Bench in W.A. Nos. 25/2011 and 26/2011. It is submitted that after the amendment of Rules in Chapter XXXI, in the year 2000, a person with TTC alone can be appointed as LPSA. Thus, both UPSAs and LPSAs have become distinct categories.

13. Chapter XXXI deals with qualification of primary school teachers. The qualification for UPSA is provided in Rule 3. Going by the same, apart from the academic qualification like SSLC or its equivalent or a pass in Pre-degree examination conducted by any of the Universities in Kerala or any examination recognised by any such Universities as equivalent to Pre-degree examination or a pass in a Higher Secondary Examination conducted by the Board of Higher Secondary Examination, Kerala or any other examination recognised by Government as equivalent thereto, a pass in T.T.C. Examination conducted by the Commissioner for Government Examinations, Kerala; or a degree in any subject and B. Ed./B.T./L.T. conferred by or recognised by the Universities in Kerala, are the qualifications. The rule was amended as such as per G.O.(P) No. 188/2000/Edn. dated 8.6.2000 whereby Degree and B. Ed. was introduced. The qualifications for LPSA are provided in Rule 4. Therein, apart from the academic qualifications similarly provided in Rule 3, except Degree with B. Ed., it can be seen that a person for appointment as LPSA, should have TTC. Thus, B. Ed. holders cannot be appointed as LPSAs after this amendment. Chapter XXIII relates to fixation of strength of teachers in aided schools. Therein, Rule 1 relates to fixing of strength of Lower Primary Schools. Rule 3 relates to fixing of strength of teaching staff in Upper Primary and Secondary Schools. Rule 6 relates to fixing of strength of Language teachers in Upper Primary Schools. This will also show that the staff strength relating to L.P. Schools and U.P. Schools will have to be fixed separately. The contention raised by Shri Elvin Peter and Shri Rajendran is that L.P. Section and U.P. Section are commonly known as primary and the appointees will come within the term "teacher" going by the definition in Rule 2(7a) of the Rules. It is in these circumstances, according to them, in the light of the provision for finalising the seniority list under Rule 34(b) also, a combined seniority list being in operation, these two categories can be treated as interchangeable and based on common seniority alone the question of retention of teachers will have to be considered in the event of reduction of post. True that in Rule 34(b) what is mentioned is that a combined seniority list of teachers shall be prepared. The question is whether the same alone is the criteria to decide a

dispute that has emerged in these writ petitions.

14. The Full Bench in S.N.D.P. L.P. School's case (2006 (4) KLT 497, was considering the effect of Rule 45A of Chapter XIV-A K.E.R. with respect to the right to be promoted to the post of Headmaster. Rules 45 and 45A deals with the promotion to the post of Headmaster in complete U.P. and L.P. Schools. Therein, the words "Primary Teacher" are mentioned in Rule 45. The above rules were interpreted by the Full Bench in the above case. The question considered was whether an LPSA possessing B. Ed. but not TTC, is qualified for the post of Headmaster of an L.P. School. The interpretation was primarily based on the words "Primary Teacher" available under Rule 45. It was held that in a primary school having Lower Primary and Upper Primary sections, the seniormost qualified Primary School Teacher among LPSAs. and UPSAs. and Language Teachers will have the right to be considered for promotion to the post of Headmaster based on the seniority in the combined staff list. Significantly, in para 22, their Lordships held that the non mentioning of the words "LPSA" and "UPSA" before the words "Primary School Assistants" gives an indication in the matter. Wherever necessary the statute has used the nomenclature of the teaching posts distinctively as LPSAs, UPSAs, HSAs, etc.. If that be so, when we come to Chapter XXIII as well as Chapter XXXI it can be seen that separately the words "UPSA" and "LPSA" are used.

15. In fact, while considering the very same question raised herein, I had occasion to consider the import of the decisions of this Court in Mary George's case (1999 (3) KLT 912) and Rejimol Vs. Asst. Educational Officer, , in the judgment in Manager, M.M. U.P. School's case (supra). In these decisions, the issue examined was as to whether the post of LPSA and UPSA are of different or of similar in nature and whether there can be a shifting. After considering various aspects, it was laid down in paragraphs 15 and 16 of the said judgment as follows:

15. The posts of UPSA and LPSA are different in category and the nature of duties are different. This question was examined in Mary George's case (1999 (3) KLT 912). The issue was examined while considering the right of a UPSA for appointment as LPSA under Rule 51A of Chapter XIV-A K.E.R. This Court held that both these categories of teachers are not one and the same. They are different in nature and duties. The findings contained in paragraphs 10 and 11 in that regard are reproduced below:

Applying these principles it has to be examined as to whether a post of L.P.S. Assistant and U.P.S. Assistant are two different posts or posts of similar nature. According to the Petitioners, posts of L.P.S. Assistant and U.P.S. Assistant are two different and distinct categories as per Chapter XXIII and XXXI of K.E.R. Qualifications prescribed for these posts are SSLC and TTC. The senior claimants about whom reference had been made by the Educational Authorities are persons appointed as U.P.S. Assistants with B. Ed. qualification. They did not have TTC qualification. Chapter XXIII of the K.E.R. deals with fixation of strength of

teachers in Departmental and Aided Schools. R. 5 of the above Chapters deals with staff of the Upper Primary Schools and Lower Primary Schools. The above Rule mentions separately the posts of U.P.S. Assistants and L.P.S. Assistants. Chapter XXXI of the K.E.R. deals with the qualifications of Private School Teachers. R.3 of the above Chapter mentions qualifications prescribed for U.P.S. Assistants. R. 4 specifies the qualifications of L.P.S. Assistants. In both these posts, pass in SSLC and pass in TTC examination are the qualifications prescribed. No B. Ed. qualification has been prescribed for appointment as either U.P.S. Assistant or L.P.S. Assistant. L.P.S. Assistants are teaching students in L.P. School and U.P.S. Assistants are teaching students in the U.P. Schools. From these circumstances, it can be safely inferred that both these categories of teachers are not one and the same. They are different in nature and duties. The defence set up in the counter affidavit is that the Government have clarified in various orders that trained graduates could also be appointed in the vacancy of L.P.S. Assistants. It was further stated in the counter affidavit that the Petitioners are SSLC and TTC holders and at the time of their appointment there were several claimants under R.51A of Chapter XIV-A K.E.R. who were awaiting appointments under the Management. But all these claimants were formerly appointed as U.P.S. Assistants and not as L.P.S. Assistants. Thus it cannot be said that there were valid claimants of L.P.S. Assistants under R.51A of the K.E.R. at the time of the appointment of the Petitioners. As already indicated, U.P.S. Assistants have no preferential claim for appointment as L.P.S. Assistants under R.51-A of the K.E.R. over persons who were appointed as L.P.S. Assistants.

The amendment by Ext.P3 also did not vary the legal position that the posts of UPSA and LPSA are different in nature.

16. In the latter decision in *Rejimol Vs. Asst. Educational Officer*, also a similar question was examined. Therein, the seniormost L.P. S.A. was promoted as Headmistress and the Petitioner in the writ petition, a UPSA staked claim for appointment. In para 6, while discussing the legal aspects concerning the matter, it was held thus, relying upon *Mary George's* case (1999 (3) KLT 912):

The question is what will be the situation in a school having both Lower Primary and Upper Primary sections and where the Headmaster is to be from the Lower Primary Section? Before tackling the question yet another issue also has to be analysed. Whether a Lower Primary School Assistant can teach in an Upper Primary class and vice versa? That question is no more *res integra*. In *Mary George v. State of Kerala* 1999 (3) KLT 912, it has been held that both the categories of teachers are not one and the same and that they are different in nature and duties. In the judgment dated 8.1.1996 in W.A. No. 1499/1995 also a Division Bench of this Court has held that under R.51-A of Chapter XIV-A KER a retrenched H.S.A. cannot claim the vacancy of an UPSA and a retrenched UPSA cannot claim the vacancy of a LPSA. Therefore, there cannot be a dispute on the position that a Lower Primary School Assistant cannot teach in an Upper Primary class.

The above judgment was affirmed by a Division Bench in W.A. Nos.25/2011 and 26/2011.

17. The very same question which arose herein, was considered by a learned Single Judge of this Court in W.P.(C) Nos. 3427 & 25115 of 2006, a copy of the judgment has been produced as Ext.P9 in W.P.(C) No. 25061/2010. Therein also, the very same contentions relying upon Rule 37 of Chapter XIV-A and Rule 2 of Chapter II K.E.R. arose, that for the purpose of retrenchment, what has to be looked into is the common seniority among both UPSAs. and LPSAs. and not separate seniority among UPSAs. on the one hand and LPSAs. on the other hand. This Court, after elaborately considering various aspects, held as follows:

For all purposes U.P. Section and L.P. Section are treated separately. While fixing all staff strength, the staff strength is fixed separately for U.P. Section and L.P. Section. Therefore, when reduction of staff strength occurs in U.P. School, the juniormost U.P. School Assistant alone can be retrenched. Otherwise, an anomalous situation would occur. For example, if there is reduction of staff strength in the L.P. Section and if there is a U.P. School Assistant who is appointed after the appointment of the junior-most L.P. School Assistant then the U.P. School Assistant would have to be retrenched which does not stand to reason. Further a common seniority list among U.P. School Assistant and L.P. School Assistant is beyond comprehension. Therefore, I am of opinion that when reduction of staff strength occurs in U.P. Section, the junior-most U.P. School Assistant has to be retrenched and not the junior-most among U.P. School Assistant and L.P. School Assistants put together. In that view, it is clear that the Petitioner who is the junior-most U.P. School Assistant herein should be retrenched and not the 4th Respondent who is the junior most L.P. School Assistant.

I respectfully agree with the same. Therefore, the contention raised by the learned Counsel Shri Elvin Peter and Shri V. Rajendran that the common seniority list alone is the criteria, cannot be accepted.

18. The other relevant rules to be considered in this context are Rules 51 and 55 of Chapter XIV-A K.E.R. which are extracted below:

51. When a vacancy in any category of post terminates necessitating the relief of a teacher, senior hands shall ordinarily be retained in preference to junior hands with due regard to the requirement of subjects determined by the Director under Sub-rule (1) of Rule 1 and to the instructions issued by him under Sub-rule (4) of the Rule.

55. Supernumerary and Excess Teachers.- The number of permanent teachers under each category in the staff list of any school or in all the schools under one Educational Agency shall not, exceed the aggregate number of sanctioned posts under that category in that school or in that unit as the case may be: and excess hands, if any based on the strength of the classes fixed in accordance with Sub-rule (1) of Rule 12 of chapter XXIII will be retrenched by throwing out the

juniormost hands with due regard however to the requirement of subjects determined by the Director under Sub-rule (1) of Rule 1 and to the instructions issued by him under sub rule (4) of Rule 1 as far as High Schools are concerned.

Provided that a person who was confirmed before the date of commencement of Section 12 of the Act under orders of the competent authority shall not be retrenched under this Rule but will be treated as supernumerary and absorbed in the next earliest vacancy in that school or in any other aided or government school as laid down in Section 13.

Rule 51 provides the method for retrenchment. It is specified therein that when a vacancy in "any category" of post terminates necessitating the relief of a teacher, senior hands shall ordinarily be retained in preference to junior hands with due regard to the requirement of subjects. In Rule 55 also importance is given to the words "each category". It also provides that excess hands will be retrenched by throwing out the juniormost hands with due regard however to the requirement of subjects. Therefore, the word "category" is important. Going by the scheme and method of appointment of UPSA and LPSA are concerned, it can be seen that they are separate categories. This was the view taken by a learned Single Judge of this Court in Mary George's case (1999 (3) KLT 912). It was emphasised that since the qualification for the post of LPSA and UPSA are separately mentioned in Rules 3 and 4 respectively of Chapter XIV-A K.E.R. and as L.P. School Assistants teach students in L.P. Section and U.P. School Assistants teach students in U.P. Section, both these categories of teachers are not one and the same. They are different in nature and duties. Of course, the said judgment was rendered before the present amendment regarding the fixation of qualification in respect of U.P. School Assistants. After the amendment, the situation will be that a person having degree with B. Ed. cannot be appointed as LPSA. Therefore, this will re-emphasise the fact that there cannot be a transfer of UPSA as LPSA and LPSA as UPSA. Their title to hold the respective post depends upon the nature of appointment. Therefore, the persons appointed as UPSA belong to one category and persons appointed as LPSA belong to another category. Both these are distinct. Therefore, for the purpose of Rules 51 and 55, it can be seen that these two can only be treated as separate categories. If that be so, retrenchment can be effected only in terms of the separate seniority. The combined seniority list will not render any help in such a situation. Rule 34(b) of Chapter XIV-A K.E.R. will not therefore help the Petitioners in W.P.(C) Nos. 23519/2010 and 27603/2010.

19. In fact, in Rejimol Vs. Asst. Educational Officer, also all these questions were considered. In para 6, after following the dictum laid down in Mary George's case (1999 (3) KLT 912), it was held that an LPSA cannot teach in Upper Primary classes. Therein, reliance was also placed on the decision of a Division Bench of this Court in W.A. No. 1499/1995.

20. One more aspect that has to be considered is the fixation of staff strength under Chapter XXIII K.E.R. Posts will be sanctioned in terms of the divisions of

L.P. classes and U.P. classes. This is also a pointer to support the conclusions as above.

21. In W.P.(C) Nos. 23519/2010 and 27603/2010 the Petitioners are relying upon additional documents produced along with I.A. No. 4582/2011 in W.P.(C) No. 23519/2010 and I.A. No. 4587/2010 in W.P.(C) No. 27603/2010. They are relying upon an order passed by the Government dated 16.2.2011, produced as Ext.P8 in W.P.(C) No. 23519/2010. Therein, the Government has stated that in the event of retrenchment, seniority of teachers prescribed in Rule 34(b) of Chapter XIV-A K.E.R. shall invariably be observed. Much argument was raised on the validity of this Govt. Order. Shri Hamsa and Shri Kaleeswaram Raj, learned Counsel appearing for the Petitioners in W.P.(C) Nos. 25061/2010 and 28516/2010 submitted that this Govt. Order cannot stand scrutiny for more reasons than one. It is pointed out that a circular or executive order cannot go against the express provisions of K.E.R. It also pointed out by them that this order was issued without reference to any of the principles stated in the various judgments of this Court and therefore really go against them. It is pointed out that the same is issued during the hearing of these writ petitions in a hasty manner. Shri Elvin Peter submitted that unless it is challenged, it should be treated as valid.

22. Evidently, the Government has not considered any of the principles stated by this Court in the various decisions while issuing Ext.P8. This Court had considered the various questions after interpreting the relevant rules in the matter. In that view of the matter, the Government cannot issue an executive order like this by interpreting the rule in that manner. The background under which the order Ext.P8 is issued, is also absent therein. It is well settled that an executive order or circular cannot go against the statutory prescriptions and they cannot whittle down the interpretation of the relevant rules rendered by this Court. Therefore, Ext.P9 produced in W.P.(C) No. 27603/2010 (which is Ext.P8 in W.P.(C) No. 23519/2010) and Ext.P10 produced therein, relying upon the same, cannot survive at all. Ext.P9 produced in W.P.(C) No. 23519/2010 which is the circular issued by the Director of Public Instruction, also cannot be understood as laying down the correct position. In Ext.P7 Government letter produced in W.P.(C) No. 25061/2010, the Government had already observed that the post of LPSA and UPSA are different in nature and duties and hence different category, which is in accordance with the dictum laid down in Mary George's case (supra). None of these are even referred to in Ext.P8.

23. The Deputy Director of Education, in Ext.P6 order produced in W.P.(C) No. 28516/2010 and the District Educational Officer in Ext.P12 order produced in W.P.(C) No. 25061/2010, produced along with I.A. No. 14427/2010 have therefore correctly understood the legal position and the orders are therefore valid.

24. The challenge against the above orders raised in W.P.(C) Nos. 23519/2010 and 27603/2010 fails. Therefore, W.P.(C) Nos. 23519/2010 and 27603/2010 are dismissed.

W.P.(C) No. 25061/2010 and 28516/2010 are allowed. There will be a direction to the Management to implement the orders passed by the Deputy Director of Education and District Educational Officer, expeditiously, at any rate, within one month from the date of receipt of a copy of this judgment.

No costs.