

(1997) 07 KL CK 0002

In the High Court Of Kerala

Case No : O.P. No's. 6248/95 R and 12307/96 M

The Manager, P.S. High School

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 30-07-1997

Acts Referred:

Constitution of India, 1950 — Article 30(1)
Kerala Education Rules, 1959 — Rule 11, 13, 43(2), 44, 7

Citation : (1997) 07 KL CK 0002

Hon'ble Judges : K.A. Abdul Gafoor, J

Bench : Single Bench

Advocate : Mathai M. Paikedy, for the Appellant; Jose J. Matheikel and Julian Xavier, for the Respondent

Judgement

K.A. Abdul Gafoor, J.—O.P. No. 6248/95 is filed by the Manager, P.S. High School, Thirumudikkunnu, an aided school. O.P. 12307/96 is filed by the 4th Respondent in O.P. 6248/95 and another, both working as teachers in the same school. I will first deal with O.P. No. 6248/95.

2. The Manager has approached this Court challenging Ext. P-1. It is an order passed by the Government on a revision petition submitted by the 4th Respondent, the senior most H.S.A. in the school. He filed a petition before the Government against the order of the District Educational Officer whereby the inter-management transfer of the 3rd Respondent from a different school to the P.S. High School as Headmistress had been approved by the 2nd Respondent. The facts are as follows:

3. The existing Headmaster of the P.S. High School opted for voluntary retirement with effect from 7th March 1994. His request for voluntary retirement was approved by the Deputy Director (Education), Thrissur as per proceedings dated 16th May 1994, of course with effect from 7th March 1994. Consequently, a vacancy of Headmaster arose with effect from 8th March 1994. The Petitioner consented for inter-management transfer of the 3rd Respondent to the

Petitioner's school as Headmaster. Admittedly by the Petitioner in paragraph 1 of the Original Petition, it was "approved by the 2nd Respondent, D.E.O., Irinjalakuda on 4th June 1994". Against this order dated 4th June 1994, the 4th Respondent represented before Government and Government had after hearing the parties issued Ext. P-1 setting aside order dated 4th June 1994 of the District Educational Officer, Irinjalakuda, the 2nd Respondent. That is under challenge by the Petitioner.

4. The main grounds urged by the Petitioner are that "the school is conducted by the religious minority of Roman Catholics entitled to protection granted under Article 30(1) of the Constitution of India" (paragraph 2 of the Original Petition) and therefore the 1st Respondent in issuing Ext. P-1 order "thrown to the winds the well established principles which he knew, with regard to the protection guaranteed to the minority communities in establishing and administering institutions of their choice", "the vacancy of Headmaster arose much before the 4th Respondent got qualified to be appointed to that post" and therefore right of the 4th Respondent to get promoted has to be decided on the basis of the qualification on the date of occurrence of vacancy, that "the 1st Respondent went wrong in taking into account the date on which the D.E.O. approved the transfer of the 3rd Respondent" as the relevant date to determine the rights of the parties and when approval is granted it shall relate back to the date of actual appointment by the Manager, the competent appointing authority, that the teacher who obtains inter-management transfer "will not lose his/her seniority as per the provisions of the K.E.R.", and that Ext. P-1 order of the Government "has resulted in a grave miscarriage of justice".

5. It is an admitted fact that the 3rd Respondent was not a member of staff of the school managed by the Petitioner and that she is brought to the Petitioner's school for being appointed as Headmistress on inter-management transfer. Inter-management transfer is governed by Rule 11, Chapter XIV-A, K.E.R. As per the said rule, a teacher serving in any school under one educational agency may be transferred to a school under another educational agency with previous approval of the District Educational Officer and the number and date of the order of the District Educational Officer containing the approval shall be quoted in the last pay certificate of the teacher. Therefore, a transfer will be effective only when transfer is approved by the District Educational Officer, "previous approval" is a pre-condition to effect it. In other words, the rule does not permit a transfer and a post factum approval thereto. So, the management can effect the transfer only after the order has been passed by the D.E.O. according to the previous approval of the transfer. Admittedly in this case, the order granting previous approval to the transfer of the 3rd Respondent was passed only on 4th June 1994. Therefore, the transfer takes effect on the said date or any other subsequent date and not earlier than that. The transfer is from the post of H.S.A. which the 3rd Respondent was holding in her parent school to the post of Headmistress in the Petitioner's school. Such a transfer to a higher post is permissible under Rule 11. But, the Note to the said rule makes it clear that "no transfer to a higher post

shall be made...if there are persons with prescribed qualification in the school eligible for promotion to that post to which the transfer is proposed". This is a restriction on the power of the D.E.O. in granting prior approval for inter-management transfer. While approving inter-management transfer to higher post, it is incumbent on the D.E.O. to ascertain whether as on the date of approval whether there are any persons with prescribed qualifications eligible for promotion to that higher post. Even according to averments of the Petitioner in paragraph 6 of the Original Petition "the 4th Respondent namely, Sri K.P. Joseph, admittedly got qualified to be appointed as a Headmaster of the school on 31st May 1994." Thus, as on the date of the order of the D.E.O. under Rule 11 transferring the 3rd Respondent to a higher post in the Petitioner's school, the 4th Respondent was available in the Petitioner's school with the prescribed qualifications for being promoted to the post to which the 3rd Respondent was transferred. In such case, the 2nd Respondent District Educational Officer ought not to have given approval for the transfer of the 3rd Respondent.

6. It is submitted by the Petitioner that the vacancy occurred on 8th March 1994 and that as on that date the 4th Respondent was not qualified and that claim for promotion of the 4th Respondent shall be determined with reference to his eligibility on that date. Rule 43, Chapter XIV A, K.E.R. deals generally with promotion and Rule 44 deals with promotion to the post of Headmaster. Note (2) to Rule 43 makes it clear that promotion "shall be made from persons possessing the prescribed qualifications at the time of occurrence of vacancy". Rule 44 dealing with promotion to the post of Headmaster makes it clear that "the appointment of Headmasters shall ordinarily be according to seniority from the seniority list prepared and maintained" under the rules. Therefore, ordinarily the competent claimants for the post of Headmaster shall be the members of staff in the school whose names are included in the seniority list. Their claim shall be considered by the appointing authority based on Note (2) to Rule 43, Chapter XIV A, K.E.R., and promotion shall be made from among the persons possessing the prescribed qualification at the time of occurrence of vacancy. This makes it clear that the relevance of qualification as on the date of occurrence of vacancy for promotion to the post of Headmaster is only among the competent claimants on the staff of the particular school in which the vacancy of Headmaster occurs. When a vacancy of Headmaster occurs in one school, a teacher working in a different school under another management cannot lay a claim for that post stating that he or she is qualified as on the date of occurrence of vacancy, because that teacher is working in a difference unit. Therefore, the qualification as on the date of occurrence of vacancy is not a relevant factor while deciding the eligibility of the 3rd Respondent to get transferred to a higher post in the Petitioner's school. As the 3rd Respondent was appointed as headmistress on inter-management transfer from the post of a H.S.A., the District Educational Officer should not have passed an order on 4th June 1994 without ascertaining whether there were any qualified hands for promotion to that post as on that date. The relevance is thus not to the date of occurrence of vacancy, but the date

on which previous approval is granted for inter-management transfer to a higher post of the 3rd Respondent.

7. On the basis of Rule 11 of Chapter XIVA, K.E.R. which governs inter-management transfer, previous approval by the District Educational Officer concerned is a pre-condition. It is only from that date the transfer could have been given effect to. When transfer is applied for by a teacher on a particular date, and when the management of both the schools accord consent for such requests, the District Educational Officer has to consider all relevant aspects and to grant previous approval to effect the transfer. So, on the basis of the scheme of Rule 11 it is only after granting approval by the District Educational Officer, the transfer takes effect. Therefore, that is the relevant date of transfer and not the date of application for transfer. In the service jurisprudence the transfer takes effect only after the date of transfer or approval of transfer and not from the date of application. The rule does not provide for to effectuate the transfer retrospectively from the date of application. This is more clear from Rule 7, Chapter XIVA K.E.R. dealing with approval of appointment of teachers. An appointment made by the management shall take effect only when it is approved. Thus, approval will be subsequent to appointment. Rule 7 provides that "the appointment shall be effective from the date on which the teacher is admitted to duty, provided the appointment is duly approved". Thus, the statute enables appointment to take effect from the date the teacher is admitted to duty, though approval is granted subsequently. Such a provision is absent in Rule 11. Therefore, an inter-management transfer will take effect at the earliest from the date of approval by the D.E.O. So, the contention of the Petitioner that the 1st Respondent went wrong in taking into account the date when D.E.O. approved transfer of the 3rd Respondent and that once approval is granted it relates back to the date of occurrence of vacancy cannot be accepted. Appointment of the 3rd Respondent by the Petitioner can take effect only after previous sanction is given by the District Educational Officer. That was on 7th June 1994. Only thereafter the 3rd Respondent could be relieved from the transferee school. By that time, admittedly by the Petitioner, as already mentioned above, the 4th Respondent had become qualified and therefore transfer of the 3rd Respondent became violative of Note to Rule 11 of Chapter XIVA, K.E.R.

8. Another contention is that "a teacher who gets inter-management transfer will not lose his/her seniority as per the provisions of the K.E.R." This contention cannot be accepted in the light of Rule 13, Chapter XIV A, K.E.R. The rank of the teachers transferred to a new school "will be fixed next below the juniormost teacher in that particular grade in that particular school". So, even if the 3rd Respondent can be transferred on 4th June 1994, that can only be to a post of H.S.A. which she was holding in her parent school as the 4th Respondent was qualified on that date for promotion to the post of Headmaster. On her transfer she will be the juniormost among the H.S.As.

9. Another contention raised is that Ext. P-1 Government order resulted in grave

miscarriage of justice. I have already discussed the issue with reference to the relevant rules and found that the transfer of the 3rd Respondent to the post of Headmistress on 7th June 1994 when the 4th Respondent was qualified, was violative of Note to Rule 11 Chapter XIV A K.E.R. Moreover, the method of appointment to the post of High School Assistant as per Rule 44 is from among the qualified hands in the staff of the school. Rule 44 does not provide for appointment of headmaster from among outside. Thus, by setting aside the order of the District Educational Officer in Ext. P-1, the Government had corrected the illegalities. Therefore, it cannot be said that Ext. P-1 results in miscarriage of justice.

10. Another contention raised by the Petitioner is that his school is entitled to the protection under Article 30(1) of the Constitution of India being a minority institution and therefore the Petitioner can choose the headmaster of his choice. In order to get the protection under Article 30(1) of the Constitution, the educational institution should have been established and administered "by a minority community". On the other hand, the averment of the Petitioner in paragraph 2 of the original petition is that "the school is conducted by the religious minority of Roman Catholics entitled to the protection granted under Article 30(1) of the Constitution of India". Even if it is accepted, it is not averred that the school was established by a minority community and it was being administered by a minority community. This twine test shall be applied to examine whether an institution is entitled for the protection under the said Article. The 4th Respondent had averred in his original petition that the school was established by his grand-father. Establishment of a school by an individual will not make the institution eligible for protection under Article 30(1) of the Constitution of India. Though, the Petitioner submits that the school has been "recognised by the District Educational Officer as a school established and administered by a minority community", no orders are produced in support of that averments. Even if it is taken that the school is one entitled to such protection, that will not enable the management to get out of the fold of the restrictions and regulations contained in the statutory rules. True, a management entitled to the protection under the minority can choose a headmaster even without regard to the seniority. But, that shall be a qualified candidate among the staff of the school. The field of choice does not extend beyond the staff of the school. Even if the minority protection is granted to the Petitioner, that will not enable the Petitioner to choose a person in another management to be appointed as headmaster overlooking an existing claimant, the 4th Respondent, in the Petitioner's own management.

11. Thus, the Government have considered the entire aspects in detail in Ext. P-1 with reference to the relevant rules and found that the District Educational Officer had went wrong in granting approval to the transfer of the 3rd Respondent as headmaster to the Petitioner's school when the 4th Respondent was fully qualified for that post. Accordingly, I see no reason to interfere with Ext. P-1. Therefore, O.P. 6248/95 is dismissed.

12. O.P. 12307/96 is filed by the 4th Respondent in O.P. 6248/95 and his sister, another teacher in the same school. They have approached this Court challenging Ext. P-6 order. Exhibit P-6 shows that it is an interim order passed by the Government in a revision petition filed by the Manager, the Petitioner in O.P. 6248/95. The Manager placed the Petitioners under suspension. The District Educational Officer, on preliminary investigation found that there was no valid ground to ratify the action of the Manager in having suspended the Petitioners and thus in Ext. P-4 directed the Manager to reinstate the Petitioners. This direction is again repeated in Ext. P-5. The Manager went in revision before the Government against Ext. P-4. Pending consideration of the revision petition, Government issued an interim order, Ext. P-6, staying the direction contained in Ext. P-4 to reinstate the Petitioners. Thus, they are continuing under suspension. A counter affidavit has been filed by the Respondent. The counter affidavit of the Government, the 4th Respondent, shows that Ext. P-6 is only an interim order on a revision petition filed by the Manager. It is stated in that counter affidavit that "fourth Respondent is not in a position to dispose of the statutory revision petition" because of the pendency of the original petition and an interim order. In the aforesaid circumstances, the only order that is required in O.P. 12307/96 is to direct the 4th Respondent in that original petition to consider the revision petition filed by the 1st Respondent Manager, P.S. High School, on which Ext. P-6 interim order has been issued and to pass final orders at any rate within two months from the date of receipt of a copy of this judgment, after hearing the Petitioners as well as the Manager. O.P. 12307/96 is disposed of with that direction.