
(2011) 03 KL CK 0243
In the High Court Of Kerala
Case No : Writ Petition (C) No. 9235 of 2010

Thomas N.C.

APPELLANT

Vs

Director of Public Instructions and Others

RESPONDENT

Date of Decision : 14-03-2011

Acts Referred:

Kerala Education Rules, 1959 — Rule 51A, 52

Citation : (2011) 2 KLT 654

Hon'ble Judges : C.T. Ravi Kumar, J

Bench : Single Bench

Advocate : P.N. Mohanan, for the Appellant; Sandesh Raja (G.P.), for the Respondent

Judgement

C.T. Ravi Kumar, J.—The petitioner had different spells of approved service under the 4th respondent's school (for short "the school") as is obvious from Exts.P1 to P5. As per Ext.P1, his appointment was approved with effect from 28.9.1993 to 30.4.1994. The approved service as per Ext.P5 was from 2.6.1997 to 30.4.2002. Essentially, by virtue of the approved service in terms of Exts.P1 to P5 the petitioner became a claimant under Rule 51-A of Chapter XIV-A of the Kerala Education Rules (for short "the KER"). After the last spell of service of the petitioner the school became an uneconomic school. As per the staff fixation for the year 2009-2010 viz., Ext.P6, only seven divisions were sanctioned in the school. On 31.5.2009 the Headmaster of the school Smt. Eliamma Mathew retired from service. In the resultant vacancy occurred in the category of UPSA, the fourth respondent Manager appointed the petitioner as per Ext.P7 with effect from 1.6.2009. The said appointment of the petitioner was approved by the second respondent as per order dated 23.11.2009. Salary bill for November, 2009 was thereupon presented and encashed. Later, the arrear bill from 1.6.2009 was presented along with the bill for December, 2009. However, it was returned on the ground that since the school being an uneconomic school, the petitioner is not entitled to get salary. Ext.P8 is the objection raised in that behalf by the second respondent. Thereupon, the petitioner approached this Court

challenging Ext.P8 by filling W.P.(C) No. 1066 of 2010. As per interim order dated 15.2.2010 this Court directed to pay salary to the petitioner for the month of December, 2009 and consequently it was paid. Later, the first respondent filed Ext.P9 statement in the said writ petition. It was stated thereunder that the students strength in that school was only 59 and the school did not have the minimum effective strength of students viz., 25 per standard, as provided in Rule 22-A of Chapter V of the KER. As already noticed, there are seven divisions in the school viz., one division each in standard 1 to 7. Ext.P10 is the Government order dated 12.10.2006 ordering filling up of vacancies in uneconomic schools by protected teachers. Taking note of the aforesaid circumstances, the second respondent requested the first respondent to cancel the appointment of the petitioner. In fact, as per Ext.P11 order dated 17.2.2010 the first respondent while cancelling the appointment of the petitioner on the ground that the school is uneconomical, held that in such uneconomic schools vacancies could have been filled up only by protected teachers. Ext.P11 order was produced in W.P.(C) No. 1066 of 2010. In the said circumstances, the said writ petition was closed reserving the right of the petitioner to challenge Ext.P11 order dated 17.2.2010. It is in the said circumstances that this writ petition has been filed by the petitioner challenging Ext.P11 order. While admitting this writ petition, an interim order was issued directing the first respondent to pay salary to the petitioner from June, 2009 onwards excluding the salary of November, 2009 till the closure of the school, in accordance with law, pending disposal of the writ petition. A counter affidavit has been filed in this writ petition along with the petition to vacate the interim order. I have heard the learned for the petitioner as also the learned Government Pleader.

2. The contention of the petitioner is that being a Rule 51-A claimant he is having preferential claim over protected teachers. That apart, it is contended that the very concept of uneconomical school is unknown to the Kerala Education Rules though Rule 22-A of Chapter V of the KER empowers the Government to withdraw recognition for want of minimum effective strength of students as provided thereunder. The further contention of the petitioner is that in terms of sub-rule (4) of Rule 22-A of Chapter V of the KER the recognition of the school could not be withdrawn as the school is situated in a remote slum area in Calicut. I do not think that I should consider the said contention at this stage admittedly, Government did not withdraw the recognition of the school in terms of Rule 22-A of Chapter V of the KER, so far. Evidently, as per Ext.P11 the appointment of the petitioner was cancelled finding that the school is an uneconomic school. As noticed earlier, the contention of the petitioner is that the concept of uneconomical school is foreign to the KER. It is true that the term "uneconomic school" has not been defined anywhere in the Kerala Education Rules. However, the term is being used to describe schools which did not have the sufficient students strength in terms of the provisions under the KER for sanctioning a division. Admittedly, the school is having one division in each standard from standard 1 to 7 though the total students strength is only 59. Though the school

did not have effective minimum students strength to sanction one division in each of the said standards, so far it is not closed down. It is in the said circumstances that Government included the said school under the category described as uneconomical. The petitioner cannot contend merely because of the absence of a definition in the Act and the Rules that the school did not fall under the said category which is described as "uneconomical schools".

3. Therefore, the question is whether merely because the school is uneconomical can the authorities contend that it should run without filling up the vacancies sanctionable and sanctioned in terms of the provisions under Chapter XXIII of the KER. In other words, the question is can the authorities decline grant of permission to fill up vacancies in a school which falls under the said category. There is no provision under the KER to sanction the divisions and posts otherwise than under the provisions of Chapter XXIII of the KER. Whether falling below the required minimum effective strength per standard and thus became liable for withdrawal of recognition could be a reason for non-sanctioning of posts in terms of the specific provisions under Chapter XXIII of the KER ? The said issue has been squarely covered by a decision of this Court in Rohini Amma Vs. Asst. Educational Officer, Cannanore and others, . It was held thereunder that Rule 22-A of Chapter V of the KER is one for the purpose of deciding the question whether recognition of a school should be withdrawn or not when the strength of the classes did not reach the minimum prescribed. However, when once sanction has been granted for a particular number of class divisions, teaching staff strength has to be fixed in terms of Rule 12(1) read with Rule 1(b) of Chapter XXIII of the KER. Rule 1(b) of Chapter XXIII of the KER reads thus:-

1.(b) in schools which do not work on shift system, there shall be-

(i) One post of Headmaster; and

(ii) As many posts of Lower Primary School Assistants

as the number of class divisions reduced by one. Rule 4 of Chapter XXIII is the relevant provision in this case and the same reads thus:-

4. In every High School there may be-

(i) One post of Headmaster.

(ii) As many posts of High School Assistants as there are divisions and period of work in High School Classes:

(iii) x x x x

(iv) As many posts of Lower and Upper Primary School Assistants as there are divisions in the Lower and Upper Primary School classes:

In terms of the above provisions, there is room for any doubt regarding sanctionable number of teaching staff in the school that it should be one post of Headmaster plus seven posts of Lower and Upper Primary School Assistants. In

this case, admittedly, on 31.5.2009 the incumbent holding the post of Headmaster retired from service and resultantly a vacancy occurred in the post of UPSA, on promotion. Even as per Ext.P11 the respondents did not have a case that the same should not have been filled up. The fourth respondent Manager filled up the said vacancy by appointing the petitioner who is a claimant under Rule 51-A and the said appointment was approved by the second respondent as per his order dated 23.11.2009. Salary for the month of November, 2009 was drawn and disbursed to the petitioner. Ext.P8 objection was raised only when the arrear bill along with the salary bill for December, 2009 were presented. The objection raised as per Ext.P8 letter culminated in Ext.P11 order whereby the appointment of the petitioner was cancelled. A perusal of Ext.P11 would reveal that the respondents do not have a case that the resultant vacancy occurred on 1.6.2009 in the school could not have been or should not have been filled up whilst their case is that it should have been filled up by a protected teacher.

4. The above discussions would reveal that the real question that calls for consideration is whether the appointment of the petitioner could have been cancelled for the reason that the said vacancy against which he was appointed on 1.6.2009 should have been filled up by a protected teacher. The contention of the petitioner is that he is entitled to get preferential right over a protected teacher. The learned Government Pleader relying on the provisions under Rule 51A of Chapter XIV-A of the KER resisted the said contention of the petitioner. My attention was drawn to proviso 1 and 2 to Rule 51A of the KER. Rule 51A and the provisos read thus:-

51A. Qualified teachers who are relieved as per Rule 49 or 52 or on account of termination of vacancies shall have preference for appointment to future vacancies in the same or higher or lower category of teaching posts, for which he is qualified that may arise in schools under the same Educational Agency or an Educational Agency to which the school may be subsequently transferred provided they have not been appointed in permanent vacancies in schools under any other Educational Agency.

Provided that a teacher who was relieved under rule 49 or rule 52 shall not be entitled to preference for appointment under this rule unless such teacher has a minimum continuous service of one academic year as on the date of relief:

Provided further that the first preference under this rule shall be given to protected teachers.

(Emphasis supplied)

The first proviso to Rule 51A would reveal that a teacher who relieved under Rule 49 or Rule 52 would not be entitled to preference for appointment under this rule unless such teacher has a minimum continuous service of one academic year as on the date of relief. Rules 49 and 52 also noteworthy in this context. They read as hereunder:-

49. Qualified teachers except Headmasters appointed in vacancies which are not permanent which extend over the summer vacation and who continue in such vacancies till the closing date shall be retained in the vacancies during the vacation, if their continuous service as on the closing day is not less than eight months. The teachers so retained shall be entitled to the vacation salary. These teachers shall be relieved on the closing day if their continuous service as on that day is less than the aforesaid period. This rule shall not apply to teacher appointed in training vacancies.

Explanation:- For the purpose of this rule, "Headmaster" includes Teacher-in-charge also.

52. (1) Teachers who are relieved on account of any reduction in the number of posts under orders of the department shall on reappointment in the same school or in another school under the same management or a different management start on the same pay as they were getting at the time of relief, whether the new appointment is permanent or not.

(2) Teachers thrown out from service due to the withdrawal of recognition of schools by the Department shall also be eligible to draw the pay which they were getting at the time of withdrawal of recognition of the school on re-appointment in another school.

Ext.P5 would reveal that the entitlement of the petitioner to stake claim under Rule 51A cannot be disputed as the petitioner was admittedly, not relieved under Rule 49 or Rule 52. Whilst he was terminated on account of termination of vacancies. Admittedly, the petitioner was appointed against a leave vacancy for five years from 2.6.1997 to 30.4.2002 and it is the said appointment that was approved as per Ext.P5. That apart, going by Ext.P5 the petitioner was having continuous service of more than one academic year as on the date of relief. The second proviso to Rule 51A mandates for giving first preference under the rule to protected teachers. The explanation to Note 1A thereunder defines the term "protected teacher". The learned counsel for the petitioner submits that a combined reading of provisos 1 and 2 to Rule 51A would reveal that a protected teacher could claim preference only over those teachers who were relieved under Rule 49 or under Rule 52. I cannot countenance with the said contention for the reason that under the second proviso to Rule 51A what is provided is the first preference under this rule shall be given to protected teachers. The expression "this rule" should definitely take in all the three categories falling under Rule 51A namely, those who are relieved as per Rule 49 or Rule 52 or on account of termination of vacancies. The restriction under first proviso to Rule 51A is, of course, restricted to those teachers relieved as per Rule 49 or Rule 52 and admittedly, it is not applicable to those teachers who were relieved on account of termination of vacancies. But, on account of the said position, it cannot be contended that the application of the second proviso is restricted only to those categories falling under the first proviso namely, those teachers who were relieved as per Rule 49 or Rule 52. According to me, the second proviso is

applicable to all the categories of teachers who fall under all the three categories viz., those teachers who were relieved as per Rule 49 or Rule 52 or on account of termination of vacancies on account of the specific expression used under the second proviso i.e., "under this rule". To understand the scope and extent of the second proviso to Rule 51-A a scanning of Note 1A and the explanation thereunder is inevitable. They read thus:-

Note 1A:- Fresh appointments to vacancies arising in the same or higher or lower category of teaching posts under the Educational Agency shall be made only after providing re-appointment to such teachers thrown out from service and protected teachers available under the Educational Agency.

(Emphasis supplied)

Explanation:- For the purpose of this clause, "Protected teacher" means, a teacher who has been retrenched for want of vacancy after putting such length of regular service that may be specified by the Government or who is eligible for such Protection as per G.O.(Ms) No. 104/69/Edn. dated 6.3.1969 or G.O.(Ms) No. 231/84/G.Edn. dated 27.10.1984 or any other orders issued by Government from time to time.

It is thus obvious from Note 1A that only after providing re-appointment to such teachers thrown out from service and protected teachers available under the Educational Agency that fresh appointments to vacancies arising in the same or higher or lower category of teachers under the Educational Agency could be made. The meaning of the term "protected teacher" has been given under the Explanation. A combined reading of Note 1A and Explanation would reveal that teachers who come within the meaning of "Protected Teacher" under the Explanation that too, under the Educational Agency, shall be given the preference under the Rule by virtue of the second proviso. In other words, fresh appointments to vacancies arising in the same or higher or lower category of teaching posts under the Educational Agency shall be made only after providing re-appointment to such teachers under Rule 51-A. The expression "under this rule" can only be taken to mean under Rule 51-A. Now, in view of the above discussions, what is remaining to be considered is whether the cancellation of the appointment of the petitioner as per Ext.P11 can be sustained in the circumstances. Evidently, the appointment of the petitioner was cancelled on the ground that the vacancy occurred on 1.6.2009 should have been filled up by appointing a protected teacher. As already noticed, the definite case of the petitioner is that he was a Rule 51-A claimant and that he was appointed as per Ext.P7 recognizing the said claim. Though respondents 1 to 3 have jointly filed a counter affidavit they did not dispute the aforesaid statement of the petitioner. Virtually, they have admitted the petitioner's entitlement to 51-A claim as is obvious from the statement in paragraph 3 of the counter affidavit. When once the 51-A claim of the petitioner is admitted the question will reduce into one whether preferential right of any protected teacher under the Educational Agency was overlooked while effecting appointment of the petitioner as per Ext.P7 in

violation of second proviso to Rule 51-A of Chapter XIV-A. There is no material before this Court to decide the said aspect. As noticed herein before, the appointment of the petitioner was cancelled as per Ext.P11 on the ground that the vacancy occurred on 1.6.2009 filled up by appointing the petitioner should have been filled up by appointing protected teacher. In view of the discussions made hereinbefore, the question is whether there was any protected teacher available under the 4th respondent having right of preference in terms of second proviso to Rule 51-A and whether any such protected teacher of the Educational Agency was to be re-appointed in preference to the petitioner. In this context, it is also to be noted that in Ext.P10 Government order dated 12.10.2006 also what is provided is that vacancies in uneconomic school shall be filled up by protected teachers. True that, there is no challenge against Ext.P10 as contended by respondents 1 to 3. But, in the light of the statement in paragraph 3 of the counter affidavit filed by them and also in view of the specific provisions under Rule 51-A of Chapter XIV-A of the KER and also in the absence of any materials to show that such protected teachers are available under the Educational Agency Ext.P11 cannot be sustained. There is nothing in Ext.P11 which would reveal that an opportunity of being heard was afforded to the petitioner or to the Manager of the school before cancelling the appointment of the petitioner as per Ext.P11. In fact, the specific contention of the petitioner is that it was in blatant violation of the principles of natural justice that such an order was passed I am of the view that on that sole score Ext.P11 is liable to be set aside. Accordingly, it is set aside. It will be open to the first respondent to take a fresh decision on the issue after affording an opportunity to the petitioner and the fourth respondent for deciding the question regarding the legality of the appointment of the petitioner in taking into account the observations and findings in this judgment The appointment of the petitioner was earlier approved by the second respondent as per Ext.P7 order dated 23.11.2009 and pursuant to the same the salary bill for November, 2009 was drawn and disbursed to him and thereafter salary pertaining to the prior period was paid and from December, 2009 he has been paid monthly salary in the light of the interim order passed by this Court on 19.3.2010. In the circumstances, I am of the view that the respondents shall continue to draw and disburse salary to the petitioner till a decision in terms of this judgment is taken. The writ petition is disposed of accordingly.