
(2012) 06 KL CK 0141
In the High Court Of Kerala
Case No : W.A. No"s. 257 and 258 of 2012

Thyagarajan

APPELLANT

Vs

Santhosh T. Alexander

RESPONDENT

Date of Decision : 04-06-2012

Acts Referred:

Kerala Education Rules, 1959 — Rule 37(1)

Citation : (2012) 3 KLJ 97 : (2012) 3 KLJ 101

Hon'ble Judges : C.N. Ramachandran Nair, J;C.K. Abdul Rehim, J

Bench : Division Bench

Advocate : Kaleeswaram Raj, for the Appellant; V.A. Muhammed, K.E. Hamza, V. Philip Mathew and Government Pleader George Mecheril, for the Respondent

Final Decision : Allowed

Judgement

C.N. Ramachandran Nair, J.—The question raised in the connected Writ Appeals filed by one and the same person is whether the appellant who joined four years earlier than the contesting respondent as a High School Teacher will lose his seniority for promotion as Headmaster by virtue of his redeployment in a Government High School on account of loss of division for a period of less than two years. The parties, facts and documents referred to in this judgment are those contained in W.A. No. 257/2012. We have heard learned counsel appearing for the appellant, learned counsel for the first respondent, learned Government Pleader for respondents 2 to 5 and learned Standing Counsel for the Management.

2. The facts leading to the controversy are the following:-

The appellant was appointed as a High School Teacher in Malayalam in the sixth respondent School on 14.7.1987. The 1st respondent joined the School as a Teacher in Hindi on 8.7.1991 i.e., almost four years after the appellant joined the School as a Teacher. However, on account of loss of periods of work in Malayalam the appellant was deployed in a Government High School from 23.10.1997 to

16.7.1999. The appellant was restored to the same School on 17.7.1999, and while continuing so, vacancy of Headmaster arose on 1.4.2010. Question arose as to whether the appellant by virtue of deployment will lose his seniority entitling the 1st respondent for appointment as Headmaster. Until the Educational Authorities settle the matter, the Manager appointed a third teacher to hold charge as Headmaster from 1.4.2010 to 6.12.2010. Later, based on R. 37(1) of Chap.XIV A of Kerala Education Rules, the Government vide order dated 1.12.2010 approved the appointment of the 1st respondent as Headmaster of the School with effect from 1.4.2010. On representation filed by the appellant, the Government vide Ext.P6 proposed to review the approval of appointment and decided to appoint the appellant as Headmaster. This proposal for review was challenged by the first respondent. The appellant also filed separate W.P. (C) challenging Ext.P4 Government Order approving the appointment of the 1st respondent as Headmaster.

3. Admittedly, the appointment of Headmaster is based on seniority and going by the date of appointment as Teacher in the School the appellant is 4 years senior to the 1st respondent. Therefore, the short question is whether short term deployment of the appellant from 23.10.1997 to 16.7.1999 in a Government High School on account of fall in number of teaching hours in Malayalam affects the seniority of the appellant. A Full Bench of this Court in the decision in A.G. Abraham, High School Assistant, R. Shyamalakumari and N. Sreenath, High School Assistant Vs. The State of Kerala, The District Educational Officer, The Manager, Mar Thoma High School and Aleyamma Varghese, , on which heavy reliance is placed by the learned counsel for the 1st respondent, held that the deployment on protection basis of a teacher from one School to another and his redeployment in the same School will result in break in service and going by this Full Bench decision the appellant loses his seniority and hence the first respondent is eligible for appointment as Headmaster in preference to the appellant. However, learned counsel for the appellant has relied on the proviso introduced to R. 37(1) of the K.E.R. to get over the Full Bench decision. For easy reference, we extract hereunder R. 37(1) with the proviso thereunder introduced vide the amendment published on 23.7.2010.

37(1) - Seniority of a teacher in any grade in any unit shall be decided with reference to the length of continuous service in that grade in that unit provided he is duly qualified for the post.

Provided that the period of service rendered in the parent school or in another school by a teacher, who is relieved under rule 52, shall be reckoned for seniority on his re-appointment to the parent school.

Learned counsel appearing for the appellant has relied on an unreported judgment of this Court in O.P. No. 631/1985 confirmed by the judgment in W.A. No. 66/1985, wherein this Court held that seniority is not lost by virtue of redeployment on protection basis to another School for a short term. However, first respondent's counsel relied on the decision of this Court in W.A. No.

763/2012 dated 31.5.2012, wherein this Court held that the law applicable for considering eligibility is that prevalent on the date of arising of vacancy. Learned counsel for the first respondent has also relied on another Division Bench decision of this Court in *Henry Gomez v. Government of Kerala*, reported in 1993 (2) KLT 883, wherein this Court held that promotion to higher grade should be based on qualification and seniority at the time of occurrence of vacancy. The question that arises for consideration is whether nearly two years deployment of the appellant in a Government School on account of reduction in the work load in the sixth respondent's school amounts to break in service whereby he will lose first ten years of his service to be treated as a fresh teacher appointed on repatriation on 17.7.1999. What is seen from R. 52 of Chap.XIV A of K.E.R. is that a teacher relieved on account of reduction in number of posts or work in a School gets employment on protection bases in other Schools both under aided and Government on same pay, and on repatriation to the original School his pay is protected. The whole purpose of protection and deployment in other Schools on same pay is to prevent break in service of teachers. In fact, in some cases protected teachers remained in the same school without break in service and deployment to other schools arises only when there are vacancies in other Schools. The whole issue cropped up in this case only because of the Full Bench decision which is literally interpreting the scope of R.37 without referring to the situation of protection, deployment to other schools and restoration after work increases in the original School. In our view, R. 37 only prohibits adding of service of school teachers in different schools for the purpose of seniority. Operation of R. 37 does not affect the seniority merely because a teacher is deployed for short term in other School and brought back with protection of pay. In fact continuity of seniority is protected by providing pay protection to teachers deployed in other Schools and on their restoration to the parent School. In this case, even if the two years' service on protection basis given to the appellant in a Government School is reduced from his total service, still he is senior to the first respondent by another two years. On the other hand, the 1st respondent wants to interpret R. 37 in such a way that the appellant will lose ten years of his service as a permanent teacher in the 6th respondent School, which in our view is not backed by any Rule in the K.E.R. So long as the appellant's protection and deployment in another school and his restoration in the parent school itself are based on the principle that he is a permanent teacher in the sixth respondent School, where he is entitled to continue until his retirement, there cannot be any break in service during the period of deployment in a Government School for short time.

In our view, the amendment to R. 37 was occasioned only by virtue of the Full Bench judgment and the problem created by it. Explanatory note makes it clear that the original Rule was not intended to cover a situation like this. All what is prohibited is a teacher from claiming service in different Schools for the purpose of his seniority. In our view, the amendment itself is clarifying the legal position stated by us above. The position canvassed by the 1st respondent's counsel, in

our view, does not apply here because as on the date of arising the vacancy i.e., on 1.4.2010 the first respondent was not appointed and his appointment was also not approved. On the other hand, during the pendency of the controversy, the manager chose to appoint a third teacher as a teacher in-charge of Headmaster. This pre-supposes that the Manager is not willing to supersede appellant's seniority and appoint the first respondent, who is junior to him by four years as Headmaster. The position is recognized by the Government when they sought to correct the mistake vide Ext.P6 notice. In fact by the time wrong appointment was made, i.e., on 7.12.2010, the amendment had already taken effect on 23.7.2010. So much so the appellant is entitled to get protection of the proviso to R. 37(1) with reference to the date on which the Government decided the matter. So much so, even without declaring that the amendment is clarificatory in nature, what we feel is that the appellant is entitled to be appointed as Headmaster of the School in preference to the 1st respondent, who is four years junior to him in service. It is worthwhile to note that the appellant never suffered a break in service because as soon as the work load was reduced in sixth respondent's School, he was sent to a Government School to work there until restored to the parent School. So much so, the appellant was given continuity in service by the respondents and his short term deployment on working arrangement should not lead to lose of seniority and the same is not visualised or authorised by any provision of the K.E.R. We, therefore, uphold the entitlement of the appellant for appointment as Headmaster.

This Writ Appeal is accordingly allowed vacating the judgments of the learned Single Judge in both the WP (C)s and directing the D.E.O. to approve the appointment of the appellant as Headmaster w.e.f. 1.4.2010. However, since the controversy arose on account of the Full Bench decision, we feel the pay given to the first respondent should not be collected from him and the appellant also will be entitled to pay as Headmaster only w.e.f. 1.6.2012. For the purpose of pension and other benefits, the appellant will be treated as Headmaster w.e.f. 1.4.2010. The duties discharged by the first respondent as Headmaster until the actual charge is taken over by the appellant will stand validated.

This Writ Appeal is allowed as above.