
(2016) 02 KL CK 0081

In the High Court Of Kerala

Case No : W.P.(C) Nos. 1786 (W) and 15025 of 2013-C

Zeena Elma Varghese

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 12-02-2016

Acts Referred:

Citation : (2016) 1 KerLJ 770

Hon'ble Judges : K. Vinod Chandran, J.

Bench : Single Bench

Advocate : Kaleeswaram Raj, Advocate, for the Appellant; S. Subhash Chand, S. Prasanth, Varsha Bhaskar, Advocates and M.J. Rajasree, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K. Vinod Chandran, J.—1. The petitioner had three spells of temporary appointment in leave vacancies in the 5th respondent's School between 01.09.1998 to 31.10.1998, 12.06.2000 to 08.08.2000 and 02.11.2000 to 15.03.2001, as evidenced by Exts.P1 to P3; for which approval was granted by the DEO. Such appointment was as a High School Assistant (H.S.A) (Social Science). On the basis of the Rule 51A claim, the petitioner was appointed on 26.07.2002 in an additional division vacancy as HSA (Social Studies), as evidenced by Ext. P4.

2. While the petitioner was so continued, in the academic year 2008-2009, the petitioner was retrenched for reason of fall in vacancies. The petitioner hence was accommodated as an Upper Primary School Assistant (U.P.S.A) in a leave vacancy between 01.09.2008 to 01.06.2009. The same was approved. When a regular vacancy arose in the post of UPSA, on 01.06.2009, she was shifted there and approved. Subsequently, a leave vacancy arose on maternity leave taken by an HSA (Social Studies), to which the petitioner was promoted as HSA on 30.09.2009 till 28.03.2010. The petitioner's promotion was not approved by the DEO and the petitioner failed in the statutory remedies also, as evidenced by

Exts.P6 & P7. The petitioner challenges the orders at Exts.P5 to P7 on the ground that the petitioner could have been accommodated as HSA (Social Studies) on 30.09.2009 and she is entitled to protection and could be retained as an HSA (English), even if there is a division fall. The petitioner relies on Exts.P9 & P10. This is the claim in W.P.(C) No. 1786 of 2013.

3. Ext. P9, GO(MS) No. 11/02/G.Edn. dated 07.01.2002, also specifies the subject requirement on introduction of a separate core subject in English in the aided Schools under the Kerala Educational Rules, 1959 (KER). When introducing such an additional core subject, the Government took note of the fact that the English divisions were manned by the Teachers in the other core subjects till then. In such circumstance, to avoid a continuing Teacher from being thrown out, the implementation was made in a phased manner. A Teacher continuing in another core subject, if threatened with retrenchment merely for reason of the new core subject introduced and the divisions and posts set apart for such subject of English, then that Teacher could be continued in the post of HSA (English). The KER also stood amended by adding Rule 6-I of Chapter XXIII, giving further statutory sanction for such phased implementation. A promotion under Rule 43 would also be permissible; but no Teacher could be promoted to the post of HSA (English), unless the said Teacher has the required qualification as has been held in *Minimole v. State of Kerala* [, 2012 (4) KLT SN 90]. The facts in the instant case has to be examined on the above stated interpretation of the G.O. and the Rules.

4. Admittedly, in the academic year 2008-2009, there were available 14 divisions in the 5th respondent School. The 14 divisions have been apportioned to each subject, as is seen from Ext. P2 and there were available only three vacancies in Social Studies. In the subject year, there were four HSA (Social Studies) continuing in the School, one of whom was protected, in one of the two English vacancies available in that year. One of the four, availed maternity leave and then the other three could be accommodated in the three sanctioned Social Science vacancies. Hence, the petitioner could not have been promoted to the maternity leave vacancy, though the same was occupied by a HSA (Social Studies). This is because, the excess HSA (Social Studies) was protected in the vacancy of HSA (English).The protection so granted was available to the Teacher and not to the post.

5. When the protected Teacher had taken leave or is adjusted in the available vacancy, there is no question of promotion from the subject of Social Studies, since there is no available vacancy for Social Studies. If at all the maternity leave vacancy is filled up, that could be only by an HSA (English) having the required qualification. The petitioners claim essentially is that she be promoted and then be protected; which neither Ext. P9 G.O. nor Rule 6-I permits.

6. The further contention is based on Ext. P10. Ext. P10 is a Circular of the Government dated 26.02.2003, which took note of the ensuing circumstances brought about by the challenge against G.O.(MS) No. 11/2002. The G.O. inter-

alia directed that, for implementation of the new core subject created in English, there would be a temporary ban of promotion of claimants as per Rule 43 of Chapter XXIV A KER, exempting those who had the prescribed qualification to be posted as HSA (English). The G.O. was held to be unenforceable by a learned Single Judge, which decision was later overturned by a Division Bench of this Court by judgment dated 16.11.2002. In the meanwhile, promotions were made as per the directions of the learned Single Judge. The provisions of the above Circular was to protect those promotions under Rule 43 and appointments under Rule 51A, prior to 16.11.2002. This does not in any way help the petitioner since the petitioner's appointment under Rule 51A was on 26.07.2002, in an additional vacancy, as an HSA (Social Studies). Neither G.O. No. 11/2002 nor the later Circular in any way touched upon the appointment of the petitioner under Rule 51A, which was to an additional divisional vacancy in Social Studies itself. The reliance placed on Ext. P10 is of no consequence in the instant case.

7. Yet another contention was taken by the learned counsel for the petitioner relying on GO(MS) No. 132/09/G.Edn. dated 17.06.2009. The aforesaid G.O. related to persons, who had a 51A claim prior to 07.01.2002. The G.O. protected such claimants to the extent of permitting appointments of such claimants, resorting to the subject requirement as existing prior to 07.01.2002. What the petitioner hence claims is that, the temporary spells of appointments, by which the petitioner acquired a Rule 51A claim, was prior to 07.01.2002 and hence the petitioner's claim has to be adjusted either in the maternity leave vacancy, which arose on 30.09.2009 or in the promotion vacancy occurred on 01.06.2010, on the basis of the Circular, reckoning the divisions as per subject requirement, excluding English, as it existed prior to 07.01.2002.

8. The primary fallacy in the said argument is that, the petitioner did not at that point have the Rule 51 A claim, since it already crystallized into an appointment in her case. In the case of the petitioner, she was first appointed as an HSA and when thrown out again appointed as UPSA, both under Rule 51A. The petitioner's claim under Rule 51A on the strength of the approved temporary spells of appointments prior to 07.01.2002, resulted in a regular appointment in an additional divisional vacancy on 26.07.2002 as an HSA (Social Studies). When there was a division fall in the academic year 2008-2009, the petitioner was thrown out. The Manager again appointed her as an UPSA in a leave vacancy and then in a regular vacancy on 01.06.2009, this was on the basis of her Rule 51A claim arising for reason of her retrenchment in 2009. The G.O. of 2009 only permitted Rule 51A claimants prior to 07.01.2002, to be appointed to vacancies arising without the subject requirement of English being determined.

9. Rule 51A specifically speaks of the right being available in a higher or lower post, without reference to the appointment by which the Rule 51A claim arose. Having been appointed as a UPSA and continuing in the post, the claim of the petitioner could only be for promotion under Rule 43, which is not possible in the present circumstances as explained above. If the petitioner is allowed to exercise

her Rule 51A claim successively, then she would have a claim to any vacancy arising in the School and she could jump from one regular vacancy to another. That is not contemplated by the G.O, the Circulars and the Rules referred to herein above. The Rule 51A claim on being relieved under Rule 49, crystallizes with a regular appointment and would then arise only if there is a retrenchment under Rule 52.

10. The appointment in leave vacancies first gave the petitioner a Rule 51A claim, having been relieved under Rule 49, against which claim she was appointed as an HSA. When she was retrenched from the post of HSA, she had a fresh claim under Rule 51A having been relieved under Rule 52, against which she was appointed as UPSA. The petitioner, at the time when the subsequent HSA vacancy arose, for reason of maternity leave, had been continuing as UPSA in a regular vacancy and hence she has no Rule 51A claim. She cannot exercise any further claim under Rule 51A by reason of her leave vacancy appointments prior to 07.01.2002. The Government Order of 2009 has no application in the case of the petitioner.

11. In such circumstance, the rejection order at Exts.P5 to P7 of WP(C) No. 1786 of 2013 has to be upheld.

12. WP(C) No. 15025 of 2013 relates to another appointment made of the petitioner again to the post of HSA (Social Studies). That vacancy arose when the senior most HSA (Social Studies), was promoted as Headmistress. Hence, again on 01.06.2010, the petitioner was promoted as HSA (Social Studies). However, even in the said academic year, the position remained as such and there was no post available for HSA (Social Studies). The three Teachers, who had been continuing as HSA (Social Studies), had to be accommodated in the three available vacancies and the protection, available was only to the junior-most Teacher, continuing as HSA (Social Studies). On promotion of the senior most HSA (Social Studies), there was no necessity to extend protection as there were only three teachers against three sanctioned posts. Again, the situation is as before, since the available vacancy would be only of an HSA (English) and the petitioner does not have the required qualification to be promoted to the post of HSA (English). There being no available vacancy in the post of HSA (Social Studies), the petitioner could not claim promotion under Rule 43.

13. The DEO had by Ext. P4 in WP(C) No. 15025 of 2013, directed that the petitioner has to be accommodated against the vacancy in which the 6th respondent was appointed as an HSA (English) as per Ext. P14. The same was overturned by Ext. P15. A reading of Ext. P15 would indicate that in the said academic year, there were four HSA (Social Studies) Teachers, of which one could have been accommodated in HSA (English). When the senior most HSA (Social Studies) was promoted as Headmistress, the junior most HSA (Social Studies), who was protected in the post of HSA (English), was accommodated in the resultant vacancy; one out of the three available vacancies, of HSA (Social Studies).

14. In such circumstance, the HSA (English) post could be filled up only by a person, who had the required qualification for being appointed to that post. If the petitioner had the qualification, definitely the petitioner would have a claim under Rule 43. However, the petitioner cannot have a claim for promotion as HSA (Social Studies) and then protection in the post of HSA (English). As noticed above the petitioner no longer has a claim under R51A, which has already crystallized into an appointment. Ext. P15 also has to be upheld.

The writ petitions are found to be devoid of merit and the same are dismissed. No costs.