

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC

&

THE HONOURABLE SMT. JUSTICE P.V.ASHA

MONDAY, THE 28TH DAY OF SEPTEMBER 2015/6TH ASWINA, 1937

WA.No. 786 of 2015 IN WP(C).7643/2013

AGAINST THE JUDGMENT IN WP(C).7643/2013-E of HIGH COURT OF KERALA
DATED 27/02/2015

APPELLANT/3RD RESPONDENT:

THE MANAGER,
RAHMANIYA HIGH SCHOOL, AYANCHERY
VATAKARA, KOZHIKODE.

BY ADV. SRI.P.C.SASIDHARAN

RESPONDENTS/PETITIONER & RESPONDENTS 1,2 AND 4:

1. KUNHABDULLA A.P, AGED 51 YEARS
UPPER PRIMARY SCHOOL ASSISTANT (UPSA)
RAHMANIYA HIGH SCHOOL, AYANCHERRY, VATAKARA
KOZHIKODE-673 544.

2. THE DEPUTY DIRECTOR OF EDUCATION,
KOZHIKODE, THE DISTRICT EDUCATIONAL OFFICER, VATAKARA
KOZHIKODE-673 101.

3. THE DISTRICT EDUCATIONAL OFFICER,
VATAKARA, KOSHIKODE 673 101

4. NAZEER ATK
PERIYAKKAMPOYIL HOUSE, THAROPOYIL P.O,
THIRUVALLUR (VIA)
KOZHIKODE DISTRICT 673 101.

R1 BY ADV. SRI.R.K.MURALEEDHARAN
R BY SENIOR GOVERNMENT PLEADER SRI M.A.FAYAZ
R BY SRI.V.RAJENDRAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 28-09-2015,
ALONG WITH WA. 790/2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ANTONY DOMINIC & P.V ASHA, JJ.

W.A Nos.786 and 790 of 2015

Dated this the 28th day of September, 2015

JUDGMENT

Asha, J.

The issue arising in both these Writ Appeals relate to the appointment made to the post of High School Assistant (Social Science) in Rahmaniya High School, Alanchery, which is an aided School. The Manager has W.A No.786 of 2015 and W.A.No.790 of 2015 is filed by a retrenched Full Time Contingent Menial ('F.T.C.M' for short), who got appointed as H.S.A (Social Science). The Writ Petition was filed by an Upper Primary School Assistant ('U.P.S.A' for short) who has been working in the School and was eligible for promotion as HSA (S.S). The parties and documents are referred to in the order in which they are described in the Writ Petition.

2. Consequent to a retirement on 31.3.2011, a vacancy of H.S.A (S.S) arose in the school with effect from 01.06.2011. The 4th respondent had worked in the school against a leave

vacancy of F.T.C.M for the period from 04.11.2009 to 29.10.2010 and that appointment was approved. The Manager appointed the 4th respondent, a retrenched F.T.C.M against the vacancy of HSA (S.S).

3. As per Ext.P4 order dated 15.05.2012, the District Educational Officer declined approval to the appointment of the 4th respondent as H.S.A (S.S), saying that the appointment was made overlooking the Rule 43 claimants in the school who was eligible for promotion against the vacancy. The Manager took up the matter in appeal before the Deputy Director of Education. While so, the writ petitioner approached this Court by filing W.P (c) No.15739 of 2012 challenging the appointment of the 4th respondent. That Writ Petition was disposed of directing the Deputy Director of Education to pass orders on the appeal filed by the Manager. Pursuant to the judgment, the Deputy Director of Education, after hearing all the parties, passed Ext.P6 order on 26.12.2012 directing approval of appointment of the 4th respondent, simultaneously directing the Manager to appoint the petitioner against the next arising vacancy. The Deputy Director of Education found that there was delay on the part of the petitioner in claiming promotion as H.S.A as he did not raise any

objection, even though the 4th respondent had been working as H.S.A w.e.f 1.6.2011. The Manager had taken up a contention that the Headmaster had called for willingness from the teachers working in the school, for promotion against the vacancy which arose on 1.6.2011 and the Headmaster had reported that the teachers informed that they were not willing for promotion and it was under those circumstance that the 4th respondent, who was a retrenched F.T.C.M, was given appointment. The Deputy Director of Education found that there were no records produced by the Manager to prove the contention as to the relinquishment made by the petitioner. However, saying that, there was no monetary loss likely to be caused to the petitioner, and as the 4th respondent had been working as H.S.A for about 1 ½ years, the Deputy Director of Education found that cancellation of his appointment at that stage will amount to violation of human rights.

4. Aggrieved by Ext.P6 order of the Deputy Director of Education, the petitioner filed Writ Petition No.7643 of 2013, which resulted in the impugned judgment. The contention of the petitioner is that even without calling for any willingness, the Manager ought to have granted promotion to a qualified teacher

in the School instead of appointing the F.T.C.M, who was already thrown out. It is also pointed out that the 4th respondent's appointment as per Ext.P7 was only for a period of less than one year, ie. for the period from 4.11.2009 to 29.10.2010, and therefore even though it was approved, he was not eligible to be considered as a 51A claimant, because at the time of his appointment, vacancies with duration of not less than one academic year alone were liable to be filled up on a scale of pay and only such appointees can be considered as 51A claimants. The petitioner had been working as U.P.S.A in the school from 08.08.1987 onwards and he was having B.A degree in History with B.Ed. even at the time of his initial appointment in 1987. A U.P.S.A senior to the petitioner had already relinquished her claim for promotion and he was the next senior most eligible hand for promotion against the vacancy which arose on 1.6.2011. According to him, he was given charge of H.S.A during vacation and he took classes for the students of standard X. Claiming that he had submitted an objection before the D.E.O, he produced Ext.P3, which is seen submitted on 29.09.2011, in which it was stated that the Manager was taking steps to fill up the vacancy of H.S.A(S.S) by appointing a fresh hand, without considering

the eligible teachers in the school.

5. The 3rd respondent therein filed a counter affidavit stating that the petitioner had expressed his unwillingness for being appointed as H.S.A. It is stated that the Manager had addressed the Headmistress of the school to call for willingness from qualified teachers for promotion to the post of H.S.A(S.S). Since the senior most teacher Smt.Kamalakshi expressed her unwillingness, the petitioner was requested to accept promotion. But the petitioner informed that he was not willing for promotion since he was drawing pay in a higher scale than that of the post of H.S.A. The Manager has produced Ext.R3(b) letter of the Headmaster addressed to the Manager intimating that the petitioner had expressed his unwillingness. It was stated that the Manager appointed the 4th respondent as H.S.A (S.S), who is a Rule 51A claimant, in the above circumstances. The Manager also stated that the petitioner had never objected to the appointment of the 4th respondent upto the filing of the Writ Petition before this Court, despite the fact that the 4th respondent has been working in the school right from 1.6.2011. It is also pointed out that the representation Ext.P3, stated to be submitted before the D.E.O, is a concocted one and there was no

reference regarding the same either in the earlier Writ petition filed by him or in the order of the D.E.O. It is further stated that the 4th respondent, who was a thrown out non teaching staff, had every right to be appointed, in recognition of his qualification and 51A claim. The Manager also raised a contention that appropriate statutory remedy is available to the petitioner against the impugned order Ext.P6 and therefore the Writ Petition is not maintainable.

6. The 4th respondent in his counter affidavit stated that his appointment as F.T.C.M for the period from 4.11.2009 to 29.10.2010 was already approved and therefore he is having a preferential right for appointment against any vacancy arising in the school thereafter, as provided, under Rule 51A of Chapter XIVA K.E.R and that he is fully qualified for appointment as H.S.A (S.S). It is also stated that the petitioner had already given up his claim for promotion. Moreover it was contended that the claim for promotion under Rule 43 of Chapter XIV A K.E.R is subject to right under Rule 51A and therefore the 4th respondent was the person eligible for appointment to the vacancy.

7. We heard Sri P.C. Sasidharan and Sri V. Rajendran, the learned counsel appearing for the respective appellants, Sri.

R.K. Muraleedharan, the learned counsel for the 1st respondent and Sri. M.A Fiaz, the learned Senior Govt Pleader for the official respondents.

8. The main contention raised by the appellants in both these appeals is that the 4th respondent, being a 51A claimant, was the eligible hand to be appointed as H.S.A, as at the relevant time when the vacancy arose, 51A claimants were to be preferred to claimants under Rule 43. Their next contention is that the petitioner had already relinquished his claim for promotion and therefore he was not entitled to be promoted.

9. In this context, it is necessary to examine the provisions contained in Rule 43 of Chapter XIV A K.E.R. The amendment to Rule 43 making Rule 43 claim subject to the claims under Rule 51A was ordered w.e.f 25.06.2005 and it was taken away w.e.f 5.7.2012. Rule 43 at the relevant time, ie. as on 1.6.2011 read as follows:

“43. Subject to rules 44, 45 and 51 A and considerations of efficiency and any general order that may be issued by the Government, vacancies in any higher grade of pay shall be filled up by promotion of qualified hands in the lower grade according to seniority, if such hands are available:

Provided that in the case of promotion to the post of High School Assistant (Subject), the minimum subject requirements alone need be satisfied, to safeguard the interests of trained graduates who are awaiting promotions as High School Assistants.

Provided further that where a Headmaster or a teacher who has been promoted under this rule faces retrenchment for want of vacancy, he shall be reverted to the category of post from which he has been promoted provided he is not eligible for protection in the retrenched post as per the orders issued by the Government from time to time.

Note (1) A teacher in a lower grade of pay in one category of post is eligible for promotion to a higher grade of pay in another category of post provided.

i) he has the prescribed qualifications; and

ii) there is no teacher with the prescribed qualifications in the lower grade of pay of the category of post to which promotions are to be made.

Note :-(2) Promotion under this rule shall be made from persons possessing the prescribed qualifications at the time of occurrence of vacancy."

Therefore the contention of the appellants is that, at the relevant time the claim of the petitioner and other teaching staff, if any, for promotion as HS..A against any vacancy, can be considered only after considering the claimants under Rule 51A. Only in the absence of a qualified 51A claimant, the claim of teachers like the petitioner can be considered against vacancy of H.S.A (S.S). According to the appellants, the 4th respondent is a qualified 51A claimant and therefore he was the most eligible hand liable to be appointed against the vacancy.

10. Now it is necessary to have a look at Rule 51A of Chapter XIV A K.E.R in order to examine whether the 4th respondent who was a retrenched F.T.C.M can be considered as

a 51A claimant eligible for appointment against a teaching post.

Rule 51A reads as follows:

“**51 A.** 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.

Note I. If there are more than one claimant under this rule the order of preference shall be according to the date of first appointment. If the date of first appointments is the same then preference shall be decided with reference to age, the older being given first preference. In making such appointments, due regard should be given to the ^requirement of subjects and to the instructions issued by the Director under sub-rule (4) of rule 1 as far as High schools are concerned

Note 1 A:- 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.

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.

Note 2. Manager should issue an order of appointment to the teacher by Registered post acknowledgment due and give a period of 14 (fourteen) clear days to the teacher to join duty. If the teacher does not join duty in time the Manager should give a further notice to the teacher stating that another person would be appointed instead and that the preferential right under this rule would be forfeited if not exercised within another 7 (seven) clear days. If nothing is heard during that time also, the preferential right under the rule will be regarded as forfeited.”

(emphasis supplied)

Thus it can be seen that preference is given to the qualified **teachers** who are relieved under Rule 49 or 52 for appointment to future vacancies that may arise in the same or higher or lower category of **teaching post** for which he is qualified. The service conditions of non teaching staff of aided schools, appointed after 1.10.1964 is governed by Chapter XXIVB K.E.R. Rule 7 thereof makes the provisions contained in Chapter XIVA K.E.R

applicable to the non teaching staff, which reads as follows:

“7. The rules regarding appointment, transfer from one educational agency to another educational agency or transfer under the same educational agency, discipline, maintenance of service records confirmation, promotion, seniority, and maintenance of seniority list contained in Chapter XIV (A) and the Conduct Rules in Chapter XIV © applicable to teachers of aided school shall mutatis mutandis apply to the non-teaching staff in aided schools.”

When Rule 51A is imported to Chapter XXIV(B), the expressions “teacher” and “teaching post” will have to be read as “non teaching staff” and “non teaching post”. Then preference will be available to the retrenched non-teaching staff to the future vacancies of non-teaching posts only, in the same or higher or lower category of non teaching post for which he is qualified. The categories of non teaching posts in a school, as provided in Rule 2 of Chapter XXIV(A) K.E.R are (1) Clerk, (2) Attender, (3) Peons and (4) other members such as Sweepers and Watchers. Therefore the 4th respondent, who was a F.T.C.M, cannot have any claim against the vacancy of a teaching post i.e H.S.A (S.S). The post of H.S.A (S.S) does not come under “same”, or “lower” or “higher” categories of the post in which he worked.

11. Moreover as per the 1st proviso to Rule 51A, only those teachers/non teaching staff with a minimum continuous

service of one academic year alone are entitled to preference under Rule 51A. The 4th respondent, who does not have one year service, even if that appointment was approved, is not therefore entitled to be treated as a rightful claimant under Rule 51A.

12. The only provision in KER which makes the non teaching staff eligible for promotion to the post of teachers is Note 1 to Rule 1 of Chapter XIVA K.E.R, which reads as follows:

“Note:-(1) A member of the non-teaching staff under the category of Clerks, Peons, Sweepers and other staff shall also be eligible for appointment as teacher provided he has the prescribed qualifications and that there is no teacher eligible for promotion or for appointment to such post under these rules.”

The 4th respondent cannot avail this benefit, firstly because there are eligible teachers for promotion/appointment; secondly because he was not a member of the non teaching staff at the time when vacancy arose. The benefit of Note 1 is available only if he is a member of the non teaching staff i.e who is currently on the rolls of the school, when the vacancy arose. Such a member of non-teaching staff becomes eligible for promotion only in the absence of teachers eligible for promotion. Therefore the 4th respondent could not have been appointed even under Rule 1 even assuming that the teachers like the petitioner had

relinquished their claims. In the absence of a Rule 51A claimant, the only method of appointment available for filling up the vacancy was by promotion under Rule 43 of Chapter XIV A K.E.R. The Manager as well as the 4th respondent claim that the petitioner had relinquished his claim for promotion. But admittedly there are no records to prove the same. The Deputy Director of Education has in Ext.P6 found that there are no records to show the unwillingness claimed to have been expressed by the petitioner for promotion. The rightful claim of teachers like the petitioner for promotion cannot be overlooked as long as the teachers have not furnished any statement of relinquishment in writing, as in the case of appointment of Headmasters provided in the Note to Rule 44 of Chapter XIVA KER. At any rate, unless there is a conscious relinquishment given in writing by the teacher, his statutory right for promotion cannot be denied. There is no case for the Manager that the petitioner has given any such relinquishment in writing. Therefore we are unable to accept Ext.R2(b) letter of the Headmaster as a relinquishment and the denial of promotion based on the same. Further, the right to be considered for promotion as H.S.A against the vacancy which arose in the High

School on 1.6.11 is the statutory right of UPSAs like the petitioner and the petitioner cannot be deprived of the same on the ground that there was delay in raising objection against the appointment of the 4th respondent.

13. Now we will come to the judgments cited by the learned counsel on either side. The learned Counsel for the Manager relied on the judgment of a learned Single Judge of this Court in **Reghu v. State of Kerala** [1993 (2) KLT 82], in support of his contention that the 4th respondent, though a retrenched hand, was eligible to be considered for appointment against the vacancy treating him as a Rule 51A claimant. In that case, the petitioner was a Peon who challenged the appointment to the post of U.P.S.A claiming that he should have been given the appointment since he had the requisite qualification. There a vacancy of U.P.S.A had arisen on 25.07.1989. Another vacancy arose on 4.6.1990. The Manager shifted a trained graduate teacher, who was working in the School, in a leave vacancy against the first vacancy and appointed a 51A claimant-a retrenched U.P.S.A against the second vacancy. Petitioner, a clerk working in the School preferred a complaint before the A.E.O. The A.E.O directed the Manager to appoint the petitioner

therein against the 2nd vacancy which arose on 4.6.1990 in the place of the 51A claimant. Manager filed an appeal before the D.E.O and the action of the Manager was upheld. The Government upheld that order in revision. Thereupon the Clerk approached this Court challenging the orders and claiming appointment against the vacancy of U.P.S.A. In paragraph 9 of the judgment, the learned Single Judge, interpreting the provisions contained in Note 1 to Rule 1 of chapter XIVA of KER, observed that the teacher referred to therein need not be one who is already in the services of the school and a teacher, who had worked in the school for some time and had to be relieved either under Rule 49 or Rule 52 i.e a 51A claimant, does not cease to be a teacher for the purpose of the Note i.e for appointment to the vacancy of a teaching staff. In that view, a retrenched teacher was also found eligible for appointment against the vacancy of U.P.S.A which arose in the school. It was held that legislature would not have intended not to include a claimant under Rule 51A in the term 'teacher' occurring under Note 1. This Court had only found that the claim of the non-teaching staff under the Note to Rule 1 of Chapter XIVA for appointment against the vacancy of teaching staff will arise only

in the absence of eligible teachers for promotion under Rule 43 and in the absence of retrenched teachers i.e 51A claimants. It is true that in paragraph 8 of the judgment, the learned Single Judge, observed that if there is no teacher with the prescribed qualification in the lower grade of pay of the category of post to which promotions are to be made, a promotion to the post with higher grade in a different category is also contemplated under Rule 43 and thus eligibility of a non teaching staff for promotion to different categories in a higher grade cannot be ruled out in the absence of qualified teachers. But in this case, the petitioner is not a member of the non-teaching staff. Therefore we are of the considered view that the judgment in **Reghu's** case (supra), which was affirmed by a Division Bench of this Court in **Reghu V State of Kerala** [2000(2) KLT 29] does not support the appellants. In this case the appointment is given to a retrenched F.T.C.M. We do not find any provision in the K.E.R which enables appointment of a retrenched non teaching staff, that too with less than one year service, against the vacancy in a teaching post, invoking his claim under Rule 51A and that too when there are eligible hands among the teaching staff.

14. The learned counsel also relied on the judgment

reported in **Jannet Varghese v. State of Kerala** [2006(3) KLT 435], wherein it was held that the 51A claimants are having a superior claim over the claimants under Rule 43, consequent to the amendment brought about to Rule 43 during the relevant period. Though we are in respectful agreement with that judgment, we find that it will not help the appellants in any manner.

15. The learned counsel for the petitioner relied on the judgment of a Division Bench of this Court in **Kalavathy v. State of Kerala** [2014(3) KLT 302], of which one of us was a party (Antony Dominic, J.), in which it was held that the words “lower” and “higher” occurring in Rule 51A of Chapter XIVA K.E.R means that the lower and the higher post should be in the same discipline in which the teacher has rendered service as a qualified teacher. Paragraph 11 of the judgment reads as follows:

“11. Further, the extended benefit to such a teacher is to claim preference for re-appointment to the same, lower or higher category of teaching posts. The words lower and higher occurring in the rule should be understood in the context of the word ‘same’. This therefore means that the lower and the higher posts should be in the same discipline in which the teacher has rendered service as a qualified

teacher. In other words, one cannot work in one discipline and claim the benefit of preference under R.51A to a post in a different discipline, be it to a lower or higher post.”

In the light of the principles underlying the aforesaid judgment also, the appointment of the 4th respondent cannot be justified, as the post of H.S.A (S.S) cannot be treated as a higher category to the post of F.T.C.M.

16. The learned counsel for the petitioner, relying on the judgment in **Sreenivasan v. State of Kerala** [2002 (3) KLT 544], contended that statutory duty casts a legal duty on the Managers of the aided Schools to promote the qualified members of the staff and that it is not necessary for them to make any application when a vacancy arises in a higher category. Therefore the Manager ought to have promoted the qualified teaching staff like the petitioner, instead of calling for applications or willingness.

We have already found that the 4th respondent, who was not a member of the non-teaching staff as on the date of occurrence of the vacancy, did not have any preferential right for appointment against the vacancy in a teaching post. In the above circumstances, we do not find any merit in the Writ Appeals.

However, we make it clear that this judgment will not prevent the Manager from considering the case of the 4th respondent for appointment against the vacancy which arose consequent to the promotion to be made in terms of the judgment of the learned Single Judge, in accordance with rules.

With the above observations, these Writ Appeals are dismissed.

Sd/-

ANTONY DOMINIC

Judge

Sd/-

P.VASHA

Judge

rtr/