

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

WEDNESDAY, THE 4TH DAY OF NOVEMBER 2015/13TH KARTHIKA, 1937

W.P.(C).No.26796 of 2014 (Y)

PETITIONER(S)/PETITIONER:

JOLY GEORGE.K., AGED 46 YEARS, S/O.K.V GEORGE,
L.P.S.A., S.K.G.M.A.U.P. SCHOOL, KUMBALAPPALLI,
OERUTABGANAM P.O., 671314,
RESIDING AT KALAMBUKATT HOUSE, KOTTAMALA P.O., 671314,
NILESHWARAM, KASARAGOD DISTRICT.

BY ADVS.SRI.M.SASINDRAN
SRI.PRADEESH MATHEW.

RESPONDENT(S):-

1. THE MANAGER, S.K.G.M.A.U.P. SCHOOL, KUMBALAPALLY,
PERIYANGANAM P O-671314, KASARAGOD DISTRICT.
2. THE ASSISTANT EDUCATION OFFICER,
CHITTARIKKAL, KASARAGOD DISTRICT, PIN-671326.
3. STATE OF KERALA - REPRESENTED BY SECRETARY TO GOVERNMENT,
DEPARTMENT OF GENERAL EDUCATION, SECRETARIAT,
THIRUVANANTHAPURAM-695001
4. SOBHANA.C.K.,
HEADMISTRESS, S.K.G.M.A.U.P. SCHOOL, KUMBALAPALLY,
PERIYANGANAM P.O., - 671314, KASARAGOD DISTRICT.

R1 BY ADV.SRI.JAWAHAR JOSE.
R2 & R3 BY GOVERNMENT PLEADER SMT.M.J.RAJASREE
R4 BY ADV. SRI.V.VINAY MENON

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
04-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS:-

- EXT.P1:- TRUE COPY OF THE CERTIFICATE OF TEST IN KERALA EDUCATION ACT AND RULES.
- EXT.P1(a):- TRUE COPY OF THE ACCOUNT TEST LOWER CONDUCTED BY THE KERALA PUBLIC SERVICE COMMISSION.
- EXT.P2:- A TRUE COPY OF THE APPOINTMENT ORDER OF THE 4TH RESPONDENT AS HEADMISTRESS
- EXT.P3:- A TRUE COPY OF THE EMPLOYEE DATASHEET OF THE 4TH RESPONDENT.
- EXT.P4:- TRUE COPY OF REPRESENTATION FILED BY THE PETITIONER BEFORE THE FIRST RESPONDENT MANAGER DTD 14/5/2014.
- EXT.P4(a):- TRUE ENGLISH TRANSLATION OF EXT. P4.
- EXT.P5:- TRUE COPY OF REPRESENTATION FILED BY THE PETITIONER BEFORE THE FIRST RESPONDENT MANAGER DTD 25.6.2014.
- EXT.P5(a):- TRUE ENGLISH TRANSLATION OF EXT. P5.
- EXT.P6:- A TRUE COPY OF THE ORDER GO(RT).NO.3354/2013/G.EDN DTD. 17/8/2013 SETTING ASIDE APPOINTMENT OF T.I. THANKAMANI IN IDENTICAL SITUATION.
- EXT.P7:-A A TRUE COPY OF THE ORDER NO 92/2014/G.EDN DTD 2/6/2014.
- EXT.P7(a):- A TRUE COPY OF THE ORDER NO 92/2014/G.EDN DTD 2/6/2014.

RESPONDENT(S)' EXHIBITS:-

- EXT.R1(a) TRUE COPY OF THE JUDGMENT OF THIS HON'BLE COURT IN W.P.(C).NOS.14971/2014 AND 15011/2014.

VKU/-

[TRUE COPY]

“C.R.”

K. Vinod Chandran, J

W.P.(C).No.26796 of 2014-Y

Dated this the 04th day of November, 2015

JUDGMENT

The petitioner was appointed as a Lower Primary School Assistant [for brevity “LPSA”] with effect from 19.10.1990. The petitioner has passed Account Test [Lower] and Test in Kerala Education Act and Rules, conducted by the Public Service Commission, which enables him to aspire for the post of Headmaster as provided under Rule 45B of Chapter XIV-A KER. The allegation in the writ petition is that, overlooking his claim the 4th respondent, who is not test qualified, was promoted on the basis of seniority only on the ground that the 4th respondent has crossed 50 years of age.

2. The contention raised by the petitioner's counsel is that the exemption granted under sub-rule (4) of Rule 45B is only for teachers who crossed 50 years of age as on the date of introduction of that provision. This is especially so, since the word used is “have” and there is introduced another provision at Rule

45BB, which makes sub-rule (4) of Rule 45B redundant. Even going by sub-rules (3) and (4) of Rule 45B, the Government grants temporary exemption to those who have crossed 50 years of age and a particular period of service as to enable them to qualify the test. The contention is also raised on the basis of Rule 18(1) of the Kerala Right of Children to Free and Compulsory Education Rules, 2011 [for brevity “Rules of 2011”].

3. The respondent has a specific contention that the writ petition is grossly delayed, since the appointment of the 4th respondent was on 01.05.2012 and the challenge is made in the year 2014; on the verge of the retirement of the 4th respondent. The learned counsel for the petitioner, however, would contend that the delay was occasioned only by reason of Rule 18 of the Rules of 2011, providing for three years, in which period an unqualified Headmaster could acquire the qualification provided thereunder. In the nature of the orders to be passed in the writ petition, this Court is of the opinion that the issue of delay can be left open.

4. With respect to Rule 18(1) of the Rules of 2011, the issue is covered by a judgment of this Court in W.P.(C).No.14971 of 2014 and connected case, dated 24.06.2014, produced as Exhibit

R1(a) in the above writ petition. Hence, the same has to be rejected, respectfully following the aforesaid decision.

5. With respect to the effect of Rule 45BB, this Court itself, found so in the judgment in W.P(C).No.22029 of 2015 dated 19.10.2015:

“4. The learned Counsel for the respondent however submits that the provision in sub-rule (4) of Rule 45B of Chapter XIVA K.E.R, which is extracted hereunder, only applies to teachers, who attained 50 years as on 24.02.1982; the date of introduction of such rule. Sub-rule (4) of Rule 45B of Chapter XIVA K.E.R is extracted hereunder:-

Teachers who have attained the age of 50 years shall stand exempted permanently for acquiring the qualification specified in sub-rule (1).

To buttress the above contention, the learned Counsel would in fact refer to Rule 45BB to contend that otherwise there was no reason for the introduction of that Rule.

5. When sub-rule (1) of Rule 45B provided for an obligatory test qualification for promotion as Headmaster/Headmistress sub-rule(2) exempted all Headmaster/Headmistress as on that date from acquiring such qualification. This was effective from 19.12.1978. Subsequently on 04.07.1985, w.e.f.

19.12.1978 sub-rule (3) was introduced granting temporary exemption to teachers awaiting promotion from the test qualification till 31.03.1986 and then till 31.03.1988; the later amendment on 02.09.1986 w.e.f 01.04.1986. Rule 45BB was brought in to permit such temporarily exempted persons to occupy the Headmaster/Headmistress post even without test qualification; provided they attained 50 years and also completed 25 years of service, as on 10.05.1988. Rule 45BB did not deal with teachers who attained 50 years after incorporation of sub-rule(4) of Rule 45B. Rule 45BB only saved those, who were temporarily promoted under sub-rule (3) of Rule 45B from acquiring test qualification, if they satisfied the condition of 50 years and 25 years of service.

6. Hence, going by sub-rule (4) of Rule 45B of K.E.R, there is a permanent exemption granted to teachers, who have attained the age of 50 years and there is nothing in the provision to show that the same is confined to the date on which such provision was brought in. In such circumstance, going by Ext.P5 and the above interpretation placed on sub-rule (4) of Rule 45B of Chapter XIVA K.E.R, the petitioner is entitled to be posted as Headmistress in the aided school managed by the 5th respondent. Exts.P4 and P11 shall stand set aside. The petitioner shall be immediately posted as the Headmistress of the 5th

respondent school at any rate, within a period of two weeks from the date of receipt of a certified copy of this judgment and the Government shall pay the salary from 01.05.2014 to the petitioner herein and recovery proceedings shall be initiated under Rule 7 of Chapter III of K.E.R against the 5th respondent, since it is a specific instance of denial of right for promotion to the post of Headmistress”.

6. The additional ground raised is with respect to the use of the word “have”. It is to be noticed that the provision exists in the statute and the same having not been omitted, whoever attains the age of 50 years would be entitled to such exemption from test qualification, after 50 years of age. On a vacancy arising if the senior-most teacher, having no test qualification has crossed (teachers/have) 50 years, then he/she would be entitled to exemption. The exemption is not on the attainment of the age of 50 but for those teachers who **have** crossed it, when a vacancy arises.

7. Further, Rule 45BB was brought into the statute book since the exemption continued indefinitely on the basis of successive amendments to sub-rule (3) of Rule 45B; varying the date provided therein, having been struck down by a Division

Bench in ***Pankajakshy And Others v. George Mathew And Others*** [1987 (2) KLT 723]. The Division Bench held that the exemption, continued indefinitely, is *ultra-vires* the Act and violative of Article 14. The Division bench also found that the exemption under Rule 45B(3) is applicable to the teachers awaiting promotion even after 1978, when Rule 45B was originally introduced. But when the amendment of 1986, extending the period of exemption to 31.03.1988 was struck down, all teachers who were appointed as Headmasters after 1978 but failed to acquire the qualification before 01.04.1986 was held to be liable to be reverted. It was to enable them to continue that Rule 45BB was enacted. But even the Division Bench held that “Teachers who have attained the age of 50 years before 1-4-1986 are deemed to be qualified because of the permanent exemption” (*sic*). This was by virtue of sub-rule (4) of Rule 45B.

8. Again it is significant that originally sub-rule (4) of Rule 45B exempted teachers who have attained 50 years of age and completed 25 years of service. The requirement of 25 years service was given up subsequently in 1982. If the legislative intent was only to exclude the teachers who have completed 50 years of

age as on 1978, the date on which Rule 45B was introduced, then the conscious act of removing the 25 years requirement in 1986 was redundant. The legislative intent thus is crystal clear.

For all the above reasons, the writ petition would stand dismissed. No costs.

Sd/-

K.Vinod Chandran
Judge.

vku/-

[true copy]