

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

WEDNESDAY, THE 4TH DAY OF FEBRUARY 2015/15TH MAGHA, 1936

WP(C).No. 32223 of 2011 (C)

PETITIONER(S):

**P.M. RESI,
HIGH SCHOOL ASSISTANT, SOCIAL SCIENCES (MALAYALAM),
BAR HIGHER SECONDARY SCHOOL, BOVIKANA, MULIYAR P.O.,
KASARAGOD DISTRICT.**

**BY ADVS.SRI.KRB.KAIMAL (SR.)
SRI.ANIL K.NAIR
SRI.B.UNNIKRISHNA KAIMAL
SRI.T.ISSAC**

RESPONDENT(S):

- 1. STATE OF KERALA,
SECRETARY TO GOVERNMENT OF KERALA,
GENERAL EDUCATION (A) DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM-695 001.**
- 2. THE DISTRICT EDUCATIONAL OFFICER,
KASARAGOD-671 121.**
- 3. MANAGER,
BAR HIGHER SECONDARY SCHOOL, BOVIKANA, MULIYAR P.O.,
KASARAGOD DISTRICT-671 542.**
- 4. B.HARSHARAJA BHANDARI,
BELINJE HOSAMANE, YOTHADKA P.O., KUMBADAJE VILLAGE,
KASARAGOD TALUK, KASARAGOD DISTRICT - 671 551.**

**R1 & R2 BY SENIOR GOVERNMENT PLEADER SRI.SOJAN JAMES
R3 BY ADV. SRI.V.VENUGOPAL
R4 BY ADVS. SRI.K.SHRIHARI RAO
SMT.N.SHOBHA
SRI.K.S.BALAKRISHNAN**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
04-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

msv/

APPENDIX

PETITIONER(S) EXHIBITS:

- EXT.P1 : TRUE COPY OF THE STAFF FIXATION ORDER NO.D.DIS.B1-3121/06
DTD.15.7.06 ISSUED BY THE 2ND RESPONDENT.
- EXT.P2 : TRUE COPY OF THE STAFF FIXATION ORDER NO.D.DIS./B1-3410/07
DTD.14.7.07 ISSUED BY THE 2ND RESPONDENT.
- EXT.P3 : TRUE COPY OF THE STAFF FIXATION ORDER NO.D.DIS./B1-4099/2008
DTD.30.7.08 ISSUED BY THE 2ND RESPONDENT.
- EXT.P4 : TRUE COPY OF THE STAFF FIXATION ORDER NO.D.DIS./B1-3294/2009
DTD.15.7.09 ISSUED BY THE 2ND RESPONDENT.
- EXT.P5 : TRUE COPY OF THE STAFF FIXATION ORDER NO.D.DIS./B1-3749/2010
DTD.14.12.2010 ISSUED BY THE 2ND RESPONDENT.
- EXT.P6 : TRUE COPY OF THE ORDER DTD.21.8.2000 ISSUED BY THE 3RD
RESPONDENT.
- EXT.P7 : TRUE COPY OF THE LETTER NO.B1/3658/09/L.DIS. DTD.16.10.09 OF
THE 2ND RESPONDENT TO THE 4TH RESPONDENT.
- EXT.P8 : TRUE COPY OF THE APPOINTMENT ORDER DTD.1.6.2010 ISSUED BY THE
3RD RESPONDENT WITH ENDORSEMENT OF APPROVAL THEREON BY THE
2ND RESPONDENT.
- EXT.P9 : TRUE COPY OF THE LETTER NO.70124/A2/2008/G.EDN. DTD.11.3.2011
OF THE 1ST RESPONDENT TO THE 2ND RESPONDENT.
- EXT.P10: TRUE COPY OF THE REVISION PETITION DTD.21.6.2010 SUBMITTED BY
THE 4TH RESPONDENT BEFORE THE 1ST RESPONDENT.
- EXT.P11: TRUE COPY OF THE COMMON JUDGMENT DTD.8.6.2011 OF THIS HON'BLE
COURT IN WPC NO.11391/2011.
- EXT.P12: TRUE COPY OF THE ARGUMENT NOTE DTD.22.7.2011 SUBMITTED BY THE
PETITIONER'S COUNSEL.
- EXT.P13: TRUE COPY OF THE JUDGMENT DTD.23.6.2011 OF THIS HON'BLE COURT
IN WA NO.421/2011.
- EXT.P14: TRUE COPY OF THE ORDER G.O.(RT)NO.5238/2011/G.EDN. DTD.24.11.2011
ISSUED BY THE 1ST RESPONDENT.

Msv/

WP(C).No. 32223 of 2011 (C)

**EXT.P15: TRUE COPY OF THE ARGUMENT NOTE SUBMITTED BY THE
4TH RESPONDENT ON 3.8.2011.**

**EXT.P15(a): TRUE COPY OF THE CERTIFICATE DTD.3.10.09 ISSUED BY THE
KERALA PUBLIC SERVICE COMMISSION TO THE 4TH RESPONDENT.**

**EXT.P16: TRUE COPY OF THE ORDER G.O.(RT)NO.4788/2011/G.EDN. DTD.31.10.11
ISSUED BY THE 1ST RESPONDENT.**

RESPONDENT(S)' EXHIBITS:

**EXT.R4(a): TRUE COPY OF THE CERTIFICATE NO.12196/2009 DTD.3.10.2009 ISSUED
BY THE KERALA PUBLIC SERVICE COMMISSION FOR DEPARTMENTAL
TESTS WITH REGISTRATION NO.29379.**

**EXT.R4(b): TRUE COPY OF THE ADMISSION TICKET NO.29379 ISSUED BY THE
KERALA PUBLIC SERVICE COMMISSION.**

**EXT.R4(c): TRUE COPY OF THE LETTER DTD.22.8.2009 ISSUED BY THE HEAD
MASTER, GOVERNMENT HIGH SCHOOL ADOOR, KASARAGOD DISTRICT.**

**EXT.R4(d): TRUE COPY OF THE LETTER DTD.9.9.2009 ISSUED BY THE PRINCIPAL,
DIET, IDUKKI AT THODUPUZHA.**

//TRUE COPY//

P.S.TO JUDGE

Msv/

C.K. ABDUL REHIM, J.

W.P.(C)No.32223 of 2011

Dated this the 4th day of February, 2015

JUDGMENT

The petitioner was appointed as High School Assistant (Social Sciences) in the High School section of the 3rd respondent's school, which is having parallel Class Divisions both in Malayalam and Kannada medium. The appointment was made with effect from 01/06/2010 against a vacancy of H.S.A (Social Science) in the Malayalam division which arose due to retirement of one Sri.Gangadharan Nair with effect from 31/03/2010. The appointment of the petitioner was approved by the 2nd respondent as H.S.A (Social Studies) in the Malayalam medium with effect from 01/06/2010, as evidenced from the endorsement contained in Ext.P8. The 4th respondent was appointed in the 3rd respondent's School as H.S.A (Social Science) in Kannada medium with effect from 21/08/2000 in a promotion vacancy of Sri.Aravindakshan Nambiar H.S.A (Social Studies)(Kannada) promoted as Higher Secondary

School Teacher (for short 'H.S.S.T'). The appointment of the 4th respondent was also approved by the 2nd respondent with effect from 16/07/2001, as evidenced from Ext.P6. But another H.S.A (Social Science) (Malayalam) Smt.Valsala Kumari Devi, had challenged promotion of Sri.Aravindakshan Nambiar as H.S.S.T, on the ground that her seniority was overlooked in the matter of promotion as H.S.S.T. The dispute went upto the Hon'ble Supreme Court and in the judgment in Civil Appeal No.4480/2007 it was held by the apex court that the promotion of Sri. Aravindakshan Nambiar as H.S.S.T was illegal because the claim of Smt.Valsala Kumari Devi has to be upheld. Consequently, Sri.Aravindakshan Nambiar was reverted and Smt.Valsala Kumari Devi was promoted as H.S.S.T. When Sri. Aravindakshan Nambiar was reverted to the post of H.S.A (Social Science) (Kannada), the 4th respondent was retrenched as there was no post of H.S.A (Social Science) (Kannada) available to retain him. After retrenchment of the 4th respondent on 14/2/2008 there arose another vacancy of

H.S.A (Social Science)(Malayalam) on 25/02/2008 in which the 3rd respondent had appointed one Smt. K.Sumadevi, which was approved by the Educational Officer. Even though the 4th respondent raised a claim for appointment against the said vacancy, the 3rd respondent rejected the claim finding that 4th respondent is not eligible and qualified to be appointed as H.S.A (Social Science) (Malayalam). An appeal preferred by the 4th respondent before the 2nd respondent was also rejected as per Ext.P7. Thereafter another vacancy of H.S.A (Social Science) (Malayalam) arose on 01/06/2009 in which the 3rd respondent appointed another teacher, Smt.Hima Paul, which was also approved.

2. While so, after a long lapse of the approval of appointment of the petitioner as H.S.A. (Social Science) (Malayalam), the 1st respondent issued Ext.P9 letter to the 2nd respondent directing to take urgent steps to post the 4th respondent as H.S.A. (Social Science) in one of the vacancies which arose in the Malayalam medium of the 3rd respondent's school. It is mentioned in Ext.P9 that, as per

Rule 2(2) (a) of Chapter XXXI of Kerala Educational Rules (for short 'K.E.R'), there is no separate qualification stipulated for appointment as H.S.A. in the different medium and that the qualification is only a Degree in the concerned subject and B.Ed/BT/LT conferred by any of the recognized Universities in Kerala. It is mentioned in Ext.P9 that, with respect to Departmental Schools the proficiency in the language is tested at the time of interview by the Public Service Commission. But as per K.E.R there is no provision for language tests and hence the 4th respondent, being a Rule 51 A claimant was eligible to be appointed as H.S.A Social Science in the Malayalam medium. Evidently, Ext.P9 order was passed by the 1st respondent on a revision petition filed by the 4th respondent, against Ext.P7 order passed by the 2nd respondent. Apprehending retrenchment of the petitioner based on directions contained in Ext.P9, she had approached this court in a writ petition, challenging Ext.P9. Meanwhile the 4th respondent filed another writ petition seeking implementation of Ext.P9. Both these writ

petitions were disposed of through Ext.P11 common judgment. This court directed the Government to pass fresh orders on the revision petition filed by the 4th respondent, after quashing Ext.P9. Ext.P16 is the consequential Order passed by the 1st respondent. In Ext.P16, the Government found that the 3rd respondent School is a bilingual School having medium of instructions in Malayalam and Kannada. It is found that the Educational Officer issues staff fixation orders in every year sanctioning class divisions and posts separately under both Malayalam and Kannada Medium. It is further found that, such regulatory measures for ensuring educational characters and standards and for maintaining academic excellence can be taken by the Educational Officers. It was categorically found that the main concern must be that of the children's welfare and that in the process of teaching oral communication is a major factor. It should be through a language known to the teacher and the students. A teacher is expected to teach the subject to the students to the medium in which he is

admitted and any distraction in the communication between the students and teacher will curtail the instructional objectives in teaching. However the 1st respondent found that the 4th respondent had passed a language proficiency test conducted in January 2009 by the Public Service Commission and it should be taken as additional qualification of the 4th respondent facilitating his eligibility for handling classes in the Malayalam medium. Hence it is held that the 4th respondent is eligible in the post of H.S.A (Social Studies) (Malayalam). Hence the revision petition filed by the petitioner against Ext.P9 was dismissed. It is challenging Ext.P16 order passed by the Government , this writ petition is filed.

3. Contention of the petitioner is many folded. It is argued that the 4th respondent has no surviving claim for re-appointment under Rule 51 A, in view of the fact that his appointment as H.S.A (Social Science) (Kannada) was subsequently nullified by virtue of the decision of the Hon'ble Supreme Court. It was pointed out that subsequent

to the judgment of the Hon'ble Supreme Court in Civil Appeal No.4480/2007 Smt. Valsala Kumari Devi had filed a Writ Petition before this court claiming notional seniority with effect from the date on which Sri. Aravindakshan Nambiar was promoted as H.S.S.T. The challenge in this regard was ultimately settled through Ext.P13 common judgment by a Division Bench in Writ Appeal Nos. 421/2011 and connected cases. This court found that Smt.Valsala Kumari Devi is eligible to be appointed notionally with effect from the date on which Sri.Aravindakshan Nambiar was promoted. Therefore it is contended that there was no post existed at the time when 4th respondent was posted as H.S.A (Social Science) (Kannada) with effect from 16/07/2001. Therefore the 4th respondent cannot make any successful claim under Rule 51 A. It is complained that despite raising specific objections in this regard, the 1st respondent in Ext.P16 had failed to consider the above aspect.

4. It is pertinent to note that the preference for appointment provided under Rule 51 A is available to qualified teachers who were relieved as per Rule 49 or 52 of Chapter XIV A K.E.R. The retrenchment or relief of the teacher either under Rule 49 or 52 can be on account of having service not less than 8 months in a temporary vacancy or on the basis of occurring any reduction in the number of posts by virtue of orders issued by the department. Such teachers are provided with preference for appointment in future vacancies in the same or in higher or lower category of teaching posts for which he is qualified, provided he has a minimum continuous service of one academic year as on the date of relief/retrenchment. In the case at hand, the 4th respondent was appointed against a vacancy which arose consequent to promotion of Sri. Arvindakshan Nambiar as H.S.S.T. His appointment was approved and he had continued in the post for more than one academic year. He was relieved by virtue of a finding that another teacher was eligible to be promoted to

the post of H.S.S.T. Even though it is found that the teacher who succeeded in the claim was directed to be considered as notionally working in the post from the original date of appointment of the 4th respondent, it will not affect the approved service rendered by the 4th respondent, for the purpose of a claim under Rule 51 A. Hence this court is not inclined to accept the contention that the 4th respondent is not entitled to raise a claim under Rule 51 A.

5. Another contention raised on behalf of the petitioner is that, the 4th respondent had failed in making any claim for appointment with respect to vacancies which arose during the interregnum, in which Smt. Suma Devi and Hima Paul were appointed. Going by the legal principles remaining settled through various decisions, it cannot be found that the 4th respondent will be estopped from raising a claim with respect to a subsequent vacancy, as it is the duty of the Manager to offer him appointment as and when any subsequent vacancy arise, after acquisition

of the claim under Rule 51A by the incumbent.

6. The most important challenge raised is on the basis that the 4th respondent is not entitled to raise a claim under Rule 51 A against a post of H.S.A (Social Science) which arose in the Malayalam medium of the school concerned. It is evident from Ext.P1 to P5 orders of staff fixation that, with respect to the 3rd respondent's school posts in various subjects are sanctioned separately for Malayalam medium and Kannada medium. From Ext.P6 order of appointment issued with respect to the 4th respondent it is evident that the appointment was made as H.S.A (Social Science) in Kannada medium. It is admitted in Ext.P16 order of the Government that the 3rd respondent school is a bilingual school having medium of instructions in Malayalam and Kannada. On the basis of the above aspect contention of the petitioner is that the 4th respondent is not an eligible claimant under Rule 51A with respect to a post of H.S.A (Social Science in Malayalam medium, in which the petitioner was appointed. Attention in this regard was

drawn to Ext.P8 order of appointment of the petitioner wherein it is specifically stated that she was posted as H.S.A (Social Science) (Malayalam) and her appointment was approved as H.S.A (Social Science) (Malayalam). In Ext.P9 letter Government directed the 2nd respondent to post the 4th respondent in one of the posts of H.S.A Social Science (Malayalam) based on the finding that the qualification stipulated under Rule 2 (2) (a) for an H.S.A in any subject is only a Degree in the concerned subject and B.Ed conferred or recognized by the Universities in Kerala. It is mentioned that no separate qualification is stipulated for H.S.A in Kannada or Tamil medium. At the same time it is mentioned that, with respect to Government schools proficiency in the language is decided at the time of interview by the Public Service Commission. Learned counsel appearing for the 4th respondent contended that as long as Rules does not insist upon any language qualification with respect to proficiency in language, it cannot be held that a person satisfying the qualifications

stipulated under Rule 2 (2) (a) is entitled for raising a claim under Rule 51A with respect to any post in the subject concerned, without there being any separation based on the medium of instruction. In Ext.P16 order passed by the Government after remand of the matter, it was categorically found that there can be regulatory measures for ensuring educational characters and standards and for maintaining academic excellence. It was found that a teacher is expected to teach the subject to the students in the medium in which he is admitted. Any distraction in the communication between the students and the teacher will curtail the instructional objectives. Therefore it is evident that the Government have indirectly accepted the contention that an H.S.A appointed in a particular subject in Kannada medium could not be appointed as a teacher in that subject in Malayalam medium. The above said view on the subject matter would only lead to a conclusion that, the 4th respondent could not be appointed as H.S.A Social Science in Malayalam medium based on his Rule 51A claim.

7. But in Ext.P16 the Government have considered the fact that the 4th respondent had passed the language proficiency test conducted by the PSC in January 2009. It was observed in the said order that in the Government Schools during appointments in Tamil and Kannada medium there is provision of testing proficiency in the language, by the PSC. In the case at hand the Government considered that the language proficiency test passed by the 4th respondent will be taken as his additional qualification facilitating his eligibility for handling classes in Malayalam medium and therefore held that the 4th respondent is eligible for the post of H.S.A (Social Science) in Malayalam medium.

8. There exist a controversy between the petitioner and the 4th respondent, even with respect to the language proficiency test alleged to have been passed by the 4th respondent. Admittedly the 4th respondent was retrenched from the post of H.S.A in the year 2008. The additional qualification of language proficiency test mentioned in

Ext.P16 was acquired by the 4th respondent in January 2009 and the result of such test was published in May, 2009. The petitioner had produced a copy of the certificate obtained by the 4th respondent as Ext.P15 (a). The certificate is to the effect that the 4th respondent had passed language test in Kannada conducted by the KPSC. According to the learned counsel appearing for the petitioner, the findings in Ext.P16 to the effect that the 4th respondent had passed language proficiency test in Malayalam, is not true and correct, in view of Ext.P15 (a). But learned counsel appearing for the 4th respondent contended that the certificate contains a mistake and infact the 4th respondent had appeared only for the language test in Malayalam conducted by the KPSC. He had produced the admission ticket of the examination conducted by the PSC as Ext.R4 (b). It would indicate that in January 2009 the 4th respondent had appeared in the "Department test. Second class language test (in Malayalam)". Learned counsel for the 4th respondent pointed out that even Ext.P15 (a) certificate will reveal that

in the paper in part-A he had appeared for the subject of translation of a passage of Kannada into Malayalam. This would indicate that the petitioner had appeared and passed the language test in Malayalam, is the contention.

9. Even without resolving the controversy regarding passing of language test in Malayalam, this court has to consider the question as to whether the acquisition of language test, even if it is in Malayalam, will entitle the 4th respondent to raise a claim under Rule 51A with respect to a post of H.S.A in the Malayalam medium. Admittedly the retrenchment of the 4th respondent was from the post of H.S.A in Kannada medium. At the time of retrenchment the 4th respondent was not possessing any qualification of language test in Malayalam. Even assuming that by virtue of Ext.P15 (a) the 4th respondent had acquired any such qualification, that is only after his retrenchment. Whether the subsequent qualification acquired after retrenchment will entitle the incumbent to claim posting in a different post other than one held by him in the school on previous

occasion. In a Division Bench ruling of this court in **Anilkumar V. Beena (2000 (1) KLT 286)** this court held that Note-I to Rule 51A amply makes it clear that if there are more than one qualified person preference shall be given in accordance with the date of first appointment. But the Rule never emphasize that preference will given those person who have acquired subsequent qualification. It is held that the preferential claim of various thrown out teachers must be in tune with their qualification on the basis of which they held the post earlier. In other words, it is held that, a thrown out teacher could aspire only for getting appointment in respect of those type of posts which they held earlier and in which their appointment was approved. Following the dictum contained in **Anilkumar's case** (supra), a learned Judge of this court had decided an identical case, W.P (c) No.30865/2011 through judgment dated 22-07-2014. In the said case the appointment with respect to a bilingual school having both Kannada and Malayalam, as medium of instruction. The contesting

respondent in the said case cleared minority language test after his retrenchment. But this court found that subsequent qualification acquired by the party cannot be a basis for a claim under Rule 51A of Chapter XIVA K.E.R. Learned counsel for the petitioner had also placed reliance on another decision of this court in **Meenakshy V. Komalakumari (1980 KLT SN 9** (Case No.22.). It is held therein that a person cannot invoke Rule 51A unless he was having the requisite qualification for the post at the time when he was relieved with respect to the post to which he aspires to get later. This court takes note of the subsequent amendment in Rule 51A brought from 25-06-2005 widening scope of the Rule by enabling preference for appointment in future vacancies either in the same or higher or lower category of teaching post which may arise for which the claimant is qualified. But this court is of the opinion that the amended provision will not enable any claim under Rule 51A with respect to a different post for which a person was not qualified at the time of relief/retrenchment. In other

words, the basis or preference with respect to the claim need to be decided based on the qualification which the person was possessing at the time of relief/retranchment and not on the basis of of the qualification which he acquires thereafter, as held in the rulings cited above.

10. Under the above mentioned circumstances this court is of the considered opinion that the findings contained in Ext.P16 declaring the 4th respondent as eligible Rule 51A claimant for the post of H.S.A (Social Science) in Malayalam medium cannot be sustained, even by assuming (without admitting) that the 4th respondent had subsequently acquired qualification of passing language test in Malayalam.

11. In the result the writ petition is allowed and Ext.P16 order is hereby quashed. It is declared that the appointment of the petitioner to the post of H.S.A (Social Science) in the Malayalam medium of the school which stands approved shall not be disturbed based on any claim made by the 4th respondent under Rule 51A.

12. However it is made clear that the above judgment will not stand in the way of the 4th respondent raising claim with respect to any vacancy in the school concerned in the post of H.S.A (Social Science) in Kannada medium.

Sd/-
C.K. ABDUL REHIM
JUDGE

MJL/AMG

True copy

P.A. to Judge