

Mary Oommen

Vs

Manager, M. G. M. High School, Kuruppampaddy Kerala and Others

Civil Appeal No. 1284 of 1973

(G. L. Oza, V. Khalid JJ)

25.02.1987

JUDGMENT

V. KHALID, J. -

1. This appeal by special leave is directed against the Judgment dated January 18, 1973, passed by the High Court of Kerala in writ Appeal No. 45 of 1972.
2. This appeal involves the correct interpretation and the scope effect of Rules 51-A of Chapter XIV-A of the Kerala Education Rules. The rule 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 schools under the same Educational Agency, provided they have not been appointed in permanent vacancies in schools under any other Educational Agency.

This rule gives a teacher, discharged for want of vacancy or relieved as per Rule 49 or 52, a right to re-appointment when a future vacancy comes into existence. It is usual for managers of schools to appoint teachers to leave vacancies. Some times more than one teacher get so appointment when there are more than one vacancies. When such vacancies cease to exist by the permanent incumbent coming back, the temporary appointees go out. When thereafter a permanent vacancy arises, those who had temporarily worked in leave vacancies get preference to be appointed to that vacancy. The question in this is whether the manager who has to appoint a teacher to permanent vacancy has to go by the rule of "last come - first go", to use the usual industrial jargon in reverse or whether the manager has right to chose between the temporary teachers, ignoring the principles usually accepted that a person who gets a right to post by virtue of earlier appointment should not be ignored in preference to a person who gets such title later. Before dealing with this case it will be useful to take note of a Note to Rule 51-A which reads as follows :

If there are more than one claimant under this rule the order of preference shall be according to the date of the first appointment. If the date of first appointment is the same, then preference shall be decided with reference to age, the older being given the first preference. In making such appointment, due regard should be given to 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.

This Note gives the correct guidance based on justice and fair play.

3. Now, we will briefly state the facts. The appellant is a B.A., B.Ed. degree holder. She is fully qualified to be appointed as a teacher in any government or aided school in the state of Kerala. She was appointed in a temporary vacancy in the school of the first respondent, from January 13, 1970 to March 16, 1970, in the academic year 1969-70. The appointment has to be approved by the District Educational Officer, the second respondent herein, which was duly done. Since the vacancy in which the petitioner was working ceased to exist, she went out of the job on March 16, 1970. She worked in this vacancy also. She went out of service when this vacancy ceased. Respondent 4 is another teacher who worked in the same school in another leave vacancy, from September 1, 1970 to November 26, 1970. The appellant thus had a total service of 6 months and one day while respondent 4 had 2 months and 25 days of service, under respondent 1.

4. A permanent vacancy arose in the school for the academic year 1971-72, for Social Studies when the Head Master in that school retired. The appellant made a representation to the manager for being appointed against that vacancy. Respondent 1 appointed respondent 4. The appellant is a Social Studies teacher. She thereupon complained to the second respondent. The second respondent found the appointment of respondent 4 irregular and held that the legitimate claimant for the permanent post was the appellant. On this finding he did not approve the appointment of respondent 4. The management took the matter in appeal before the Regional Deputy Director of Public Instruction, respondent 3, who by his order dated November 9, 1971, allowed the appeal. Aggrieved by this order the appellant moved the High Court of Kerala by filing Original Petition No. 5064 of 1971, challenging the validity of the order passed by respondent 3, inter alia, contending that as per Rule 51-A of Chapter XIV-A of the Kerala Education Rules, she had a preferential claim and that the appointment of respondent 4 was illegal.

5. The learned Single Judge dismissed the original petition by his judgment dated February 1, 1972, on the short ground that Rule 51-A conferred a right on the appellant for appointment in the future vacancies in the school and it did not restrict the right of the management to make its own choice among the thrown out teachers. The appellant pursued the matter by filing Writ Appeal No. 45 of 1972. The Division Bench dismissed the appeal agreeing with the learned Single that the management had a discretion to choose among the thrown out teachers. Hence this appeal by special leave.

6. Through long years have passed by since this dispute arose wherefore we would have normally declined interference with the judgment under appeal, we think it necessary to lay down the law correctly to avoid injustice in cases like this and to prevent abuse of power by those in whom right is conferred under Rule 51-A. Now, both the appellant and respondent 4 are working in the same school. Though the subject to be taught by the appellant and respondent 4 figured at one stage as an additional plea before the learned Single Judge, it is inconsequential for this judgment, though the learned Single Judge held in favour of the appellant on the question of the subject.

7. Let us read the rule in question. This rule speaks of qualified teachers. Both the appellants and respondent 4 satisfy this requirements. It speaks of teachers being relieved as per Rule 49 or Rule 52 or on account of termination of vacancies. Rule 49 speaks of termination of teachers after vacation, when the vacancy in which they work extend over summer vacation and Rule 52 speaks of teaches relieved on account of reduction in the number of posts under orders of the department. We are not concerned with these rules. Here, both the teachers were relieved on account of termination of vacancies. The rule states, that such teachers shall have preference for appointment to future vacancies in schools under the same Educational Agency. A future vacancy has arisen. The school where appointment is sought is under the same Educational Agency. The proviso is not material in

this case. All the conditions for application of this rule are satisfied. The only question that has to be answered is whether a teacher who had worked in a vacancy earlier has a preferential right over a teacher who worked later in the same school. It is true that the rule does not, in terms, mandate that the one who worked earlier should be preferred to the one who worked later. But would it be in accord with justice and fair play, to prefer the one who worked later to the one who worked earlier in the absence of anything in the rule giving to the management a right to choose between the two, on the ground of suitability, merit or efficiency ? The Judgment of the Division Bench under appeal was delivered on January 18, 1973. The Note quoted above was inserted on July 4, 1972. This Note leaves no doubt as to how Rule 51-A has to be construed. The rule states that preference will be given with reference to the date of appointment. When the date of appointment is the same, age should prevail; the elder being given the first preference. Of course, it contains a rider that due regard should be given to the requirements of subject as far as High Schools are concerned. The Division Bench did not choose to accept the clarification contained in the Note. The learned judges held against the appellant, on the wording of the rule that, in terms, it did not provide for any preference between two or more persons and did not consider it proper to read more into this rule by considering the Note to Rule 5 in the same chapter. Although we do not say that a note to a rule has any binding effect, It does indeed have a persuasive force. It cannot be ignored that this note has come as an appendage to Rule 51-A for clarificatory purpose though it does not form a part of the rule. The learned judges felt that the propriety and fairness required a decision in favour of the appellant, when they observed :

It would be proper no doubt to give an earlier appointee preference. But seeing the rule as we ought to see every rule and every section in the Kerala Education Act as restrictions or regulations in the matter of the free right of the manager to choose and appoint, it is impossible to read more into the rule.

8. With respect, we feel that the learned judges were influenced more by the words in the abstract contained in the rule and not fairness behind the rule.

9. The learned judges of the Division Bench had before them another division Bench Judgment where the identical rule fell for consideration. The relevant portion of that judgment was extracted by the learned judges. We also find it useful to extract it here :

5. Very recently, in Writ Appeal No. 44 of 1970 we had occasion to construe Rule 51-A. And we then observed that despite its unhappy wording, in particular, the use of the words, "preference for appointment" to mean "right to appointment," we had little doubt that what the rule meant was that a person discharged for want of vacancy had a right to be appointed in future vacancies, provided, of course, he had not by word or deed given up that right or, we might now add, disqualified himself meanwhile. And we added that the present tense of the words, "are relieved" appearing in the rule was the present tense of logic, not of time, so that, in effect, the rule should be read as if it said "qualified teachers who stand relieved" shall have preference. In that view, it is, no doubt, true that the petitioner's appointments between 1957 and 1961 furnished her with a title to re-appointment notwithstanding that they were made before the rule came into force, and it is at least arguable that where no priority in preference is prescribed by the rule, priority should be determined by priority of title. The question, then, is whether the plea of abandonment taken by respondent 3 is well founded.

The above observation was got over by the Division Bench with the observation that "it was obiter and are certainly not intended to be conclusive observations in the matter. If so, we would have referred this case to a Full Bench". We would have been happy of the appellate bench had referred this question to a Full Bench and resolved the controversy since the High Court felt that the appellant's contention carried with it the element of fair play and justice and was at least, to put it mildly, in some measure supported by another Division Bench of the same court. We agree that the preference in Rule 51-A should be based on priority of title. In this case, we do not have a plea of abandonment or other disqualification.

10. The learned counsel for the appellant brought to our notice how this rule was understood by the manager of the same school when another vacancy arose earlier. AT that time also the present appellant applied to the manager, seeking appointment in the vacancy consequent on the retirement of a Head master. The manager declined the request and sent a reply to the appellant, the relevant portion of which, eloquent in favour of the appellant, reads as follows :

Rule 51-A Chapter XIV-A, Kerala Education Rules lays down that qualified teachers who are relieved on account of termination of vacancies shall have preference for appointments to future vacancies. When two persons apply for a post by virtue of the concession laid down in Rule 51-A, it is the natural justice to select the persons who has earlier and longer period of previous service. Hence considering all the aspects of the question, the management has appointed Smt. P. E Sosamma in the said vacancy.

11. The manager then understood the rule correctly, but later incorrectly. That is why we said earlier in our judgment that the interpretation given by the High court to this rule can result in abuse of this discretionary power with the manager. If the government wants to clothe the manager the with the power to choose among rival contenders to a future vacancy, the rule should be suitable amended. The rule as it stands clearly confers priority to the earlier appointee. The appellant, therefore, is entitled to succeed. We set aside the order of the Division Bench under the appeal and allow this appeal. The appellant will be entitled to all the benefits as through she was appointed when the vacancy in question arose. We would like to make it clear that this direction of ours will not enable her to draw salary for the period she had not worked but only other benefits such as seniority, increments etc. The first respondent will pay costs of the appellant.

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