

# SUPREME COURT OF INDIA

Smitha Johny

Vs.

Josny Varghese

S.L.P. (C) No.20822 of 2006

(Altamas Kabir J.)

22.10.2010

## JUDGEMENT

### **Altamas Kabir, J.**

1. The Respondent No.1 herein sought a direction from the educational authorities to promote her as High School Assistant (English), hereinafter referred to as "HSA (English)", in a vacancy which, according to her, had arisen on 1st April, 2005.

“One Smitha Johny, who was not initially impleaded in the writ petition, got herself impleaded as Respondent No.5 and has filed the Special Leave Petition questioning the judgment and order dated 20th June, 2006, passed by the Kerala High Court at Ernakulam in Writ Appeal No.1925 of 2005 and order dated 2nd August, 2006, passed by the said High Court in Review Petition No.568 of 2006.”

2. As mentioned hereinabove, the Respondent No.1, writ petitioner, who was serving in St. George's High School, Arakkunnam, as Upper Primary School Assistant, hereinafter referred to as "UPSA", claimed promotion to a vacancy, which, according to her, had occurred in HSA (English) on 1st April, 2005. On the other hand, the Petitioner was appointed as Lower Primary School Assistant, hereinafter referred to as "LPSA", on 21st June, 2000, in the said School and was serving in such capacity throughout. At the time of entering into service, the Petitioner was a graduate in English and had also obtained Teachers' Training Certificate (TTC). Subsequently, the Petitioner also acquired a B.Ed. degree in English from the Kerala University.

3. The Writ Petitioner/Respondent No.1 claimed that she was a graduate in the English language and had a B.Ed. degree and was, therefore, fully qualified to be promoted to the post of HSA (English) in terms of the aforesaid Government Order. It is also her case that one post of HSA (English) had been sanctioned in terms of the staff fixation order for the year 2004-05. However, one Smt. Alice Mathew, HSA (Social Science) who was not qualified as HSA (English), had been permitted to continue in the post of HSA (English) to

avoid retrenching her. In the meantime, Smt. Lissy George K., Head Mistress of the School took voluntary retirement with effect from 31st March, 2004. Smt. Alice Mathew, being the senior-most HSA, was accommodated against that vacancy.

4. Consequently, with effect from 1st April, 2005, a vacancy arose in the post of HSA (English) and according to the writ petitioner/Respondent No.1, such vacancy was required to be filled up by a qualified English Teacher. The Manager of the School, however, without understanding the Government Order correctly, requested recall of the Respondent No.4, a protected HSA (Social Science), but such request was turned down. Thereupon, the writ petitioner/Respondent No.1 submitted a representation that she be promoted to the said post under Rule 43 of Chapter XIV-A of the Kerala Education Rules. Although, according to the writ petitioner/Respondent No.1, no sanction was required for the said purpose and the Manager was free to promote her, the Respondent No.4, Smt. Valsamma Pathrose, was recalled and she rejoined her duties. In the writ petition the Respondent No.1, therefore, prayed for a writ in the nature of Mandamus or direction commanding the respondents, the Deputy Director (Education), Civil Station, Kakkanad, the District Educational Officer, Ernakulam, Kerala, and the Manager of the School to promote her to the post of HSA (English), as on the date of the occurrence of the vacancy on 1st April, 2005, she was the only qualified candidate amongst the UPSA Cadre, who could be given such promotion.

“A further prayer was made for a writ in the nature of Mandamus to command the aforesaid respondents not to post Valsamma Pathrose in the vacancy which had arisen in the post of HSA (English), with effect from 1st April, 2005.”

5. The writ petition filed by the Respondent No.1 was rejected by the learned Single Judge on 27th July, 2005, upon holding that since Smt. Alice Mathew was promoted as Head Mistress on 31st March, 2005 while she was holding the post of HSA (Social Science), the vacancy created on account of her promotion was also to be treated as that of HSA (Social Science), notwithstanding the fact that she had been functioning as HSA (English).

“Accordingly, Valsamma Pathrose, a protected HSA (Social Science) teacher working in a Government School would have to be recalled, as otherwise, the Manager would have to appoint a new teacher in the resultant vacancy of UPSA, if the Respondent No.1 was promoted as HSA (English).”

6. Aggrieved by the order of the learned Single Judge, the Respondent No.1 filed a writ appeal, being WA No.1925/2005. At this stage it may be pointed out that on 15th June, 2005, the Petitioner herein got herself impleaded as Respondent No.5 in the writ petition filed by the Respondent No.1 herein claiming that the actual date of vacancy, was 15.7.2005, the date on which the staff fixation order was to take effect, and that she was fully qualified and was the senior-most in the cadre of HSA (English) for promotion as HSA (English) in the vacancy caused by the promotion of Smt. Alice Mathew to the post of Head Mistress. According to her, although, she may not have possessed the requisite B.Ed. degree on 1st April, 2005, when Smt. Alice Mathew was promoted to the post of Head Mistress,

subsequently she acquired the said qualification when the results of the B.Ed. examination for the year 2005 was published by the Kerala University on 29th June, 2005.

7. The Writ Appeal filed by the Respondent No.1 was allowed on 20th June, 2006, upon holding that when the vacancy occurred on 1st April, 2005, the Petitioner herein did not possess the B.Ed. qualification, though she may have been senior to the writ petitioner/Respondent No.1 and that it was incorrect on the part of the Petitioner to suggest that the vacancy had arisen from the date of the staff fixation order. The Division Bench, accordingly, dismissed the claim of the Petitioner herein and held that the vacancy was of HSA (English). Furthermore, in view of the Government Order dated 7th January, 2002, the Manager was not required to fill up the post of HSA with a protected teacher. However, the Division Bench also held that since Valsamma Pathrose had rejoined service, it would not be proper to upset the arrangement. Accordingly, the Division Bench indicated as follows:

“.....Therefore, we hold that the Petitioner/Appellant was not liable to be overlooked for promotion being the only qualified hand. We are not unsettling the present arrangements, since because of the subsequent development that a vacancy of HSA has arisen during the current year.

The appellant should be accommodated thereto, for the reason that she had been denied her rightful claims during the last school year, and she is entitled to the benefits of the declaration, we have made above.

The Writ Appeal is disposed of as above.”

8. The review petition filed for reviewing the judgment was also dismissed on 2nd August, 2006.

9. It is against the said two orders that the present Special Leave Petition has been filed by Smitha Johny, who was impleaded as Respondent No.5 in the writ proceedings.

10. The case sought to be made out on behalf of the Petitioner is that the vacancy which had arisen on account of the promotion given to Smt. Alice Mathew on 1st April, 2005, should have been for an HSA (Social Science) and not for an HSA (English), as held by the High Court, since Smt. Alice Mathew was an HSA (Social Science) during the academic year 2004-05, when the vacancy had occurred. Learned counsel appearing in support of the Special Leave Petition submitted that the Division Bench of the High Court had erred in holding otherwise. In this regard, reference was made to Rule 12 of the Kerala Education Rules which deals with the strength of teaching staff. Learned counsel pointed out that the actual attendance on the date of visit of authorized persons, plus five per cent of the roll strength, not exceeding the roll strength of each class alone, is to be reckoned as the effective strength of the School for fixing the number of divisions and the strength of staff. Furthermore, the staff sanctioned by the Competent Authority during the previous year would continue till the 14th of July of the succeeding year. Learned counsel submitted that

since the vacancy had occurred on 1st April, 2005, during the continuance of the staff sanctioned by the Competent Authority, the vacancy caused by the promotion of Smt. Alice Mathew as Head Mistress should have been for an HSA (Social Science Teacher) since Smt. Alice Mathew was holding the said post at the time of her elevation.

“Learned counsel submitted that the Petitioner had been wrongly denied her right to be promoted as HSA (Social Science) being the senior-most High School Assistant in the School.”

11. Learned counsel appearing for the respondent urged that the relief prayed for by the Petitioner was misconceived since on the date of the vacancy, the Petitioner did not even possess the B.Ed. qualification. The submission made on her behalf that the vacancy would be deemed to have been created not from the date of the vacancy, but from the date of the staff fixation order, is entirely misconceived, as has been held by the Division Bench of the High Court, while disposing of the appeal preferred by the Respondent No.1 herein.

12. Having considered the submissions made on behalf of the respective parties, we are not inclined to interfere with the impugned judgment of the High Court since, in our view, the High Court has correctly analysed the position consequent upon the elevation of Smt. Alice Mathew as Headmistress of the School. The Division Bench of the High Court has dealt with the provisions of Rule 7A(2) of Chapter XIV-A of the Kerala Education Rules, which provides that the posts which fell vacant on a closing date are to be filled up only by the reopening date. The High Court has rightly held that the staff fixation order for the ensuing year did not result in reduction of posts available and that it could not be disputed that the vacancy came to exist because of the promotion of Smt. Alice Mathew. Moreover, since the Petitioner did not have the B.Ed. qualification as was required as an essential requisite on 1st April, 2005, we agree with the High Court that she was not eligible for being considered for filling up the vacancy.

13. Rule 43 of Chapter XIV-A of the Kerala Education Rules as it stood at the relevant time and was relied upon by the Writ Petitioner/Respondent No.1, is extracted below:

“43. Subject to Rules 44 and 45 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 promotions to the post of High School Assistant (subject), the minimum subject requirements alone need be satisfied, to safeguard the interest of trained graduates who are awaiting promotions as High School Assistants.

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."

It is not in dispute that as per Rule 43 of Chapter XIV-A of the Kerala Education Rules, a U.P.S.A. who is qualified for the post of HSA has a claim for promotion to the post of HSA against a vacancy arising in the same School. As per Note (2) under Rule 43, promotion under the said rule shall be made from persons possessing the prescribed qualifications at the time of occurrence of vacancy (emphasis supplied). It is not disputed that as on 1st April, 2005, the Petitioner, Smt. Smitha Johny, did not possess the prescribed qualifications for the post of HSA (English), whereas the Respondent No.1 Smt. Josny Varghese did possess the qualifications. It is clear from the pleadings in the case that as on 1st April, 2005, Smt. Josny Varghese was the only U.P.S.A. working in the School who was qualified for promotion as HSA (English). Even according to the Petitioner, she acquired the qualification of B.Ed. in English only on 1st July, 2005. Hence, if a vacancy of HSA (English) arose in the School on 1st April, 2005, the Respondent No.1 Josny Varghese, being the only U.P.S.A. qualified for the post of HSA (English), was entitled to be promoted against the said vacancy in preference to the Petitioner Smt. Smitha Johny who, though senior to Smt. Josny Varghese, was not qualified for the post of HSA (English) on the date of occurrence of the vacancy."

14. Hence, the next question is whether a vacancy of HSA (English) arose in the School on 1st April, 2005, as contended by the Respondent No.1.

"According to the staff fixation for the academic year 2004-05, there was only one post of HSA (Social Science) in the St. George High School, Arakkunnam. As against one sanctioned post, there were two teachers, Smt. Alice Mathew and Smt. P.P. Leelamma, working as HSA (Social Science). Since Smt. Alice Mathew was senior to Smt. P.P. Leelamma, Smt. Alice Mathew was rightly accommodated in the only post of HSA (Social Science). Since there was a sanctioned post of HSA (English) and since, as per Annexure P1 G.O.(MS) No.11/2002/G.Edu. dated 7th January, 2002, the creation of the new cadre of HSA (English) should not cause retrenchment of existing HSAs in the core subjects, the management and the education authorities allowed Smt. P.P. Leelamma to continue in the School against the sanctioned post of HSA (English), though she was not qualified for the post of HSA (English). Later, in the vacancy of Headmistress which arose on 1st April, 2005, Smt. Alice Mathew, HSA (Social Science) was promoted w.e.f. 1st April, 2005. Consequent on the said promotion of Smt. Alice Mathew as Headmistress, the post of HSA (Social Science) held by her was vacated by her w.e.f. 1st April, 2005. But a vacancy of HSA (Social Science) did not actually arise, as Smt. P.P. Leelamma was already available in the

School to occupy the post of HSA (Social Science) vacated by Smt. Alice Mathew. If Smt. P.P. Leelamma was accommodated in the only post of HSA (Social Science) w.e.f. 1st April, 2005, the only vacancy available as on 1st April, 2005 was in the post of HSA (English). Thus, a vacancy of HSA (English) arose in the School on 1st April, 2005.

Smt. Valsamma Pathrose, who was not qualified for the post of HSA (English) and who was working as HSA (Social Science) in a Government School as a protected teacher, could not be accommodated in the post of HSA (English). During the academic year 2004-05, Smt. P.P. Leelamma, HSA (Social Science) had been allowed to continue in the School against the post of HSA (English) in terms of Annexure P1 Government Order dated 7th January, 2002 to avoid her retrenchment. Such a benefit could not be claimed by Smt. Valsamma Pathrose who was working in another School and who did not face any retrenchment on account of the creation of the cadre of HSA (English). Thus, the post of HSA (English) fell vacant on 1st April, 2005, when Smt. Alice Mathew, HSA (Social Science) was promoted as Headmistress w.e.f. 1st April, 2005 and Smt. P.P. Leelamma was accommodated in the resultant vacancy of HSA (Social Science). When the vacancy of HSA (English) arose on 1st April, 2005, the Respondent No.1, Smt. Josny Varghese, was the only U.P.S.A. qualified for the post of HSA (English) and hence she was entitled to be promoted against the said vacancy. Though the Petitioner Smt. Smitha Johny was senior to the respondent, she was not qualified for the post of HSA (English) as on 1st April, 2005 and hence, she had no claim for promotion to the said vacancy.”

15. There is no legal basis for the contention of the Petitioner that the vacancy of HSA (English) would have arisen only on 15th July, 2005, when the staff fixation for the academic year 2005-06 was made. Admittedly, a post of HSA (English) was sanctioned for the School in the staff fixation for the year 2004-05. No appointment was made against the said post of HSA (English) as one excess HSA (Social Science) was allowed to continue in the School against the said post, to avoid her retrenchment. As per Rule 12 of Chapter XXIII of the Kerala Education Rules, the staff sanctioned by the competent authority during the previous year shall continue till the 14th of July of the succeeding year. Therefore, the post of HSA (English) sanctioned in the staff fixation for the year 2004-05 continued till 14th of July, 2005.

“When the excess HSA (Social Science) Smt. P.P. Leelamma, who was continuing against the post of HSA (English), was accommodated in the vacancy of HSA (Social Science) which arose on 1st April, 2005, due to the promotion of Smt. Alice Mathew, HSA (Social Science) as Headmistress, the post of HSA (English) would fall vacant w.e.f. 1st April, 2005 and the Respondent No.1, being the only U.P.S.A. qualified for the post of HSA (English), was entitled to be promoted in the said vacancy.”

16. The directions ultimately given by the Division Bench have not been questioned by the Respondent No.1 herein possibly because of the fact that while expressing unwillingness to

unsettle the settled position, the High Court was also of the view that since the Respondent No.1 was the only qualified hand, she was entitled to be considered for promotion, particularly since a vacancy of HSA had occurred during the said period. The Division Bench gave a direction that the Respondent No.1 should be accommodated therein.

17. In our view, the decision of the Division Bench of the High Court does not call for any interference and the Special Leave Petition is, therefore, dismissed.

18. There will, however, be no order as to costs.