

SUPREME COURT OF INDIA

State of Kerala

Vs.

Sneha Cheriyan

C.A.No.1643 of 2013

(K.S. Radhakrishnan and Dipak Misra JJ.)

22.02.2013

JUDGMENT

K.S. RADHAKRISHNAN, J

Delay condoned.

1. Leave granted.

2. We are in these cases called upon to decide whether a minimum continuous service in an academic year is a pre-requisite for raising a claim for re-appointment under Rule 51A of Chapter XIV A of the Kerala Education Rules, 1959 (for short ‘the KER’) in view of sub-rule (3) of Rule 7A of the same chapter of the KER.

3. In the State of Kerala, the power for appointment of teachers in aided schools is conferred on Managers of such schools under Section 11 of the Kerala Education Act, 1958 (for short ‘the Act’) while the salary and other benefits are to be borne by the State Government under Section 9 of the Act. Qualified teachers who are so appointed when relieved as per Rule 49 or 52 or on account of termination of vacancies shall have preference for appointment to future vacancies as per Rule 51A of Chapter XIV A of the KER. Therefore, when vacancy arises, the Manager is bound to comply with the procedure under Rule 51A and cannot deny that statutory claim. When once a valid appointment is given to the teachers and such appointments are approved ipso facto they become entitled to the benefits under Rule 51A.

4. The Management and the teachers, it is generally known, started misusing the above statutory provisions for getting preference for future appointments by effecting appointments by creating vacancies during the academic year. Such unethical and unhealthy practices led to creation of anticipatory vacancies and multiple claimants under Rule 51A causing drain on State exchequer since the State is paying the salary. The Government in order to check such practices issued an order G.O.(P) No.169/04.G.Edn. dated 15.06.2004 stating that the claim for re-appointment under Rule 51A of the KER would be limited to those who had been appointed against regular/ leave vacancies having a duration of not less than one academic year. Further, it was also stated that vacancies having duration of less than one academic year would be filled up on daily wage basis and in order to give effect to that Government order, it was ordered that necessary amendments would be made to sub-rule (3) of Rule 7A, Chapter XIV A of the KER.

5. The Government of Kerala in exercise of the powers conferred under Section 36 of the Act amended the KER vide its notification dated G.O.(P) No. 121/2005/G. Edn. Dated 16.04.2005.

Unamended sub-rule (3) of Rule 7A reads as follows:

“Vacancies the duration of which is two months or less shall not be filled up any appointment”

Amended sub-rule (3) of Rule 7A reads as follows:

“Vacancies the duration of which is less than one academic year shall not be filled up.”

The explanatory note to the above-mentioned Rules reads as follows:

“(This does not form part of the notification but is intended to indicate the general purpose).

Under the existing sub-rule (3) of Rule 7A Chapter XIV A, General Education Rules vacancies the duration of which is two months or less shall not be filled up by any appointment. Managements of aided schools are appointing teachers in short leave vacancies the duration of which is more than two months and it results in huge financial commitment to Government. After detailed examination of the matter Government inter alia issued order

as per G.O.(P) 169/2004/G. Edn dated 15.06.2004 to the effect that claim for appointment under rule 51A of the Kerala Education Rule be limited to those who have been appointed against regular/leave vacancies having a duration of not less than one academic year. The Government has now decided to give statutory validity to the above Government order.

The notification is intended to achieve the above object.”

6. The Government issued another clarificatory order G.O.(P) No. 31/06GE dated 19.01.2006 dealing with the appointment of teachers in short vacancies which is not of much relevance, but for completeness, the operative portion of the same is given below:

“In the above circumstances, Government are pleased to clarify that the condition in Para 6 of G.O. (P) No. 169/2004/GE dated 15.06.2004 shall not apply to the appointments on promotions to the post of Head Master, to the appointments given under Rule 43, Chapter XIV A KERs and to the reappointments of those who had acquired the claim under Rule 51A, Chapter XIV A KERs, if the reappointment is to a vacancy having the duration of more than 2 months as existed prior to the amendment. Necessary amendment to the rules shall be made to this effect and the Director of Public Instruction shall furnish proposals for the same.”

7. The Government of Kerala later issued a clarificatory order vide G.O. (P) No. 104/2008/G Edn. Dated 10.06.2008 regarding the nature of appointment and admissibility of vacation salary as per Rule 49 of Chapter XIV A of the KER to teachers appointed in leave / regular vacancies making it applicable to appointments in both leave vacancies and regular vacancies. The operative portion of clauses 5, 6 and 7 reads as follows:

“5. As per rule 7A (3) of Chapter XIV A KER, if the period of appointment is less than one academic year, the appointment cannot be approved on regular basis. This has caused many doubts among various quarters, requiring clarification regarding the nature of appointment and admissibility of vacation salary as per Rule 49 of Chapter XIVA KER to teacher appointed in leave / regular vacancies. In view of the above, the following orders are issued with immediate effect. These are applicable to appointments in both leave vacancies and regular vacancies:-

i) If the period of appointments does not cover one academic year (i.e. from the re-opening day of the school after summer vacation to the closing day for summer vacation), the appointment shall be made only on daily wages.

ii) If the period of appointments commences after the beginning of the re-opening day but extends over the next academic year/years, the period up to the first vacation shall be approved on daily wages only. Re-appointment can be approved on regular basis, only if the duration of the period of re-appointment completes one academic year. If the period of re-appointment is also less than one academic year, that re-appointment will also be considered only on daily wages basis. In short, fractions of an academic year will not be considered for approval on regular basis;

iii) In the case of appointment of Rule 51A claimants, promotion of Rule 43 claimants and appointment / promotion of teachers as Headmasters, temporary Headmaster/teachers-in-charge, approval will be granted on regular basis if the period of appointment is more than 2 months;

iv) The appointments made against training vacancies shall also be filled up on daily wages only except in the case of (iii) above;

v) If a leave substitute, appointed on daily wages continues in service without any break for one full academic year consequent to extension of leave, the appointment shall be revised and approved as on regular basis. However, if different leave substitutes are appointed to the same post, this benefit shall not be extended to them;

vi) Appointments in leave vacancy and regular vacancy shall be treated separately;

vii) The admissibility of vacation salary as provided in rule 49 Chapter XIV A KER will not be applicable to appointments on daily wage basis. Necessary amendments to this effect in the KER shall be made separately.

6. The claim under Rule 51A Chapter XIVA KER will not be admissible to those teachers appointed on daily wage basis.

7. This order will take effect from the date of the order only. The approval of appointments given prior to this order shall not be reviewed.”

8. The main challenge is with regard to the validity of clause 5(i) and (ii) of the above mentioned that Government order which according to the respondents go contrary to sub-rule (3) of Rule 7A, Chapter XIV A of the KER and hence ultra vires and unenforceable.

9. Shri, C.S. Rajan, learned senior counsel appearing for some of the respondents submitted that sub-rule (3) of Rule 7A speaks of “vacancies” the duration of which is less than one “academic year” which means if the vacancy is having a duration of one academic year or more, appointment can be made to fill up the same. Learned senior counsel pointed out that the term of appointment need not be co-terminus with the term of the vacancy. Further, it was pointed out that if in fact, the vacancy is having a duration of one academic year or more, even if, there is some delay in making the appointment, such appointment will have to be approved since Rule 7A speaks of duration of vacancy and not duration of appointment.

10. Shri P.A. Noor Muhamed, learned counsel appearing for some of the respondents while submitting written arguments pointed out that as per the scheme of the KER and conjoint reading of the provisions of Chapter XXIII and sub-rule (3) of Rule 7A and Rule 49 under Chapter XIV A of the KER it is clear that “time of appointment” is immaterial and what is material is the “duration of vacancies”. Further, it was pointed out that as per the scheme contemplated under the provisions in Chapter XXIII of the KER, appointments in regular vacancies can be made only after the receipt of orders of departmental authorities on staff fixation which is in turn based on the students’ strength as well, which can be ascertained only after the beginning of the academic year. It was pointed out that merely because appointment was not made in consonance of the first academic year, approval of appointments cannot be denied ignoring the fact that the vacancy in which the appointment made runs to more than one academic year. The delay, if any, in making appointment is not due to the fault of the teachers and hence they shall not be penalized.

11. Learned counsel appearing for the respondents therefore submitted that the impugned G.O. dated 10.06.2008 is contrary to sub-rule (3) of Rule 7A of the KER and has rightly been declared so by the High Court which calls for no interference by this Court.

12. Shri V. Giri, learned senior counsel appearing for the State of Kerala submitted that the Government have issued the notification dated 14.06.2005 amending Sub

rule (3) of Rule 7A followed by the Government order dated 10.06.2008, so as to avoid the unhealthy practices followed by certain aided school managers by appointing teachers in short spells thereby creating more 51A claimants creating multiple claims. Learned senior counsel submitted that the Government Order is only a clarification to the statutory amendment made in sub-rule (3) of Rule 7A of the Rules. Learned senior counsel also submitted that there is no restriction in the matter of appointment of teachers in anticipated vacancies due to retirements, promotions, resignations etc. provided it is an established vacancy which could be anticipated well in advance. Learned senior counsel submitted that the Managers of the aided schools are free to appoint teachers on regular basis from the starting of the academic year against regular/established vacancies and they need not wait for appointments till completion of staff fixation as per the provisions under KER. Learned senior counsel also submitted that the Managers can make appointments in anticipation of sanction of additional posts by the educational authorities as per Rule 12B Chapter XXIII of the KER and such posts shall be deemed to have been created from the date of appointments.

13. Learned senior counsel also submitted that permanency/promotional vacancy which are in existence on the beginning of the academic year though filled up during the academic year is also not covered by the impugned notification so also the vacancies which arise due to death are also not hit by the impugned notification. Further, it is also pointed out that leave vacancies which are in existence on the beginning of the academic year can also be filled up during the academic year which also are not covered by the impugned notification.

14. We have heard learned counsel on either side at length. WP (C) No. 2563 of 2009 against which SLP (C) No. 22332 of 2009 arises was treated as the main case by the High Court, hence we treat that case as the leading case for disposal of these batches of appeals since questions of law arise for consideration are the same.

15. Shri Shinoj T. Elias, High School Assistant (HSA) (English) who was working in St. Mary's Higher Secondary School, Morakkala, an aided school, applied for leave from 08.07.2008 to 07.07.2013 and the leave was granted by the Manager of that school. The first respondent (herein) who was the writ petitioner before the High Court was appointed in that vacancy on 06.10.2008 and the period of her appointment would normally expire only on 07.07.2013. The Manager of the school forwarded that appointment order for approval to the District Educational Officer (DEO). But the DEO approved the appointment from 06.10.2008 to 31.03.2009 only on daily wage basis based on the Government order dated

10.06.2008. Based on the impugned G.O. dated 10.06.2008, it was pointed out by the first respondent before the High Court that the vacancy had duration of five years and therefore her appointment should have been approved without any time limit in the same scale of pay applicable to HSAs. Reliance was placed on sub-rule (3) of Rule 7A of the Rules which was found favour by the Division Bench of the High Court.

16. We may before examining the scope of sub-rule (3) of Rule 7A and the proviso to Section 51A read with the Government Order dated 10.06.2008 examine the scheme of the Act and the KER and the object and purpose of sub rule 3 of Rule 7A as well as the impugned order dated 10.06.2008. We have already indicated that as per the Kerala Education Act and the KER, the Manager of the aided School is free to make appointment of teachers in their respective schools who are qualified according to the Rules and the entire salary and other allowances have to be borne by the State Government.

17. Rule 51A of the Chapter XIVA of the KER states qualified teachers in aided schools who are relieved on account of termination of vacancies shall have preference for re-appointment in future vacancies in the aided schools. Rule 43, Chapter XIV A of the KER states that the vacancies in any higher grade of pay shall be filled up by promotion in the lower grade according to the seniority.

18. We cannot read sub rule (3) of Rule 7A in isolation, it has to be read in the light of the proviso to Section 51A, they have to be read as parts of an integral whole and as being interdependent. Legislature has recognized that interdependency since both sub rule (3) of Rule 7A and the proviso to Section 51A were inserted by the same amendment in the year 2005.

19. The expression “vacancies” used in sub-rule (3) to Rule 7 means ‘posts which remain unoccupied’. Rule does not say that the duration of vacancy is to be determined from the time when the vacancy occurs to the time when it expires. Duration means the time during which something continues, i.e the continuance of the incumbent. As stated in the Notification dated 15.06.2004 the vacancies having a duration of less than one academic year can be filled up on daily wage basis. Sub-rule (3) to Rule 7A uses the expression “academic year”. Rule 2A of Chapter VII of the KER refers to the academic year, which reads as follows:

“2A. Academic year shall be deemed to commence on the re-opening day and terminate on the last day before the summer vacation.”

20. Rule 1 of Chapter VII says “all schools shall be closed for the summer vacation every year on the first working day on March and re-opened on the first working day of June unless otherwise notified by the Director.” The Notification dated 10.06.2008 only says if the period of appointment does not cover one academic year i.e. the re-opening of the school after summer vacation to the closing day for summer vacation, the appointment shall be made only on daily wage basis. So also if the period commences after the beginning of the re-opening day, but extends either next academic year/years the period upto the first vacation shall be approved on daily wages only which does not take away the right of the managers of the aided schools to appoint teachers in vacancies that may arise by way of promotion, death, resignation etc. Restriction is only with respect to the minimum tenure/period for a new appointee to become a 51A claimant, that is the object and purpose of sub-rule (3) to Rule 7A read with proviso to Rule 51A of Chapter XIV-A of the KER.

21. The object and purpose of the Notification dated 16.04.2005 issued by the Government in exercise of the powers conferred under Section 36 of the Kerala Education Act is to curb the unhealthy practices adopted by certain managers of aided schools by creating short-term vacancies or appointing several persons in a relatively long leave vacancies itself thereby making several 51A claimants against one and the same vacancy. The object and purpose of the above-mentioned notification is also to end the practice of creation of multiple claimants in anticipatory vacancies creating more 51A claimants imposing huge financial commitment to the Government.

22. Sub-rule (3) to Rule 7 does not restrict the right of the managers of various schools in making the regular appointments in the established vacancies, what it does is to prevent the misuse of that provision and to prevent the aided school managers in creating short-term vacancies and appointing several persons in those vacancies so as to make them claimants under Rule 51A. Looking to the mischief or evil sought to be remedied, we have to adopt a purposive construction of sub-rule (3) of Rule 7A read with proviso to Rule 51A of Chapter XIV-A of the KER.

23. We are inclined to adopt such a construction since the stand of the respondents is that Rule 7A speaks of “duration of vacancies” and not “duration of appointment”. The expression “vacancy” used in sub-rule (3) to Rule 7A has to be read along with the expression “academic year” so as to achieve the object and purpose of the amended sub-rule (3) to Rule 7A so as to remedy the mischief. Evil,

which was sought to be remedied was the one resulting from wide spread unethical and unhealthy practices followed by certain aided school managers in creating short term vacancies during the academic year. We are adopting such a course, not because there is an ambiguity in the statutory provision but to reaffirm the object and purpose of sub-rule (3) to Rule 7A read with proviso to Section 51A and the Government Order dated 10.06.2008.

24. We notice later the Government passed yet another GO(P) 56/11/Gen.Edn dated 26.02.2011 clarifying the earlier GO dated 15.06.2004 and 10.06.2008. The operative portion of the same reads as under:

“1. Approval can be granted subject to the conditions under Rule 49 Chapter XIV-A of the K.E.R. for the appointments to the vacancies arising due to the existing teachers’ retirement, resignation, death long leave etc. and to the approved vacancies arising and continuing beyond 31st March due to sanctioning of additional divisions.

2. Appointments for a duration of less than 8 months in an academic year can be approved on daily wage basis and appointments of a duration of more than that are to be approved as regular (on pay scale).”

25. We have referred to the above GO, for the sake of completeness, which has of course no bearing on the interpretation which we have placed on sub- rule (3) to Rule 7A read with the proviso to Rule 51A of Chapter XIV-A of the KER, but may have application on facts in certain cases which have to be decided independently.

26. We are, therefore, inclined to allow these appeals and set aside the judgment of the Division Bench with the following directions:

i) A teacher, who was relieved from service under Rules 49 and 53 of Chapter XIVA of the KER, is entitled to get preference for appointment under Rule 51A only if the teacher has a minimum prescribed continuous service in an academic year as on the date of relief.

ii) The Manager of an aided school can, however, appoint teachers in vacancies occurred due to death, retirement, promotion, resignation, long-term leave etc. provided they are established vacancies and the approval can be granted subject to the conditions under Rule 49 of Chapter XIV A of the KER.

iii) Approval can also be granted to appointments made to the approved vacancies arising and continuing beyond 31st March due to sanctioning of additional divisions.

iv) The Manager can make appointments in school even if the duration of which is less than one academic year but on daily wages basis and if the duration of vacancy exceeds one academic year that can be filled up on scale of pay basis.

v) The Manager is free to appoint teachers on a regular basis from the re-opening date itself against regular established vacancies and need not wait for the appointments till completion of the staff fixation as per the KER.

vi) Teachers who have been appointed in the midst of the academic year and not completed the requisite minimum continuous service before vacation will not be entitled to get vacation salary.

27. Appeals are accordingly allowed and disposed of as above setting aside the judgment of the High Court but there will be no order as to costs.