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Court : Kerala

Decided On : Oct-12-2015

Judge : K. Vinod Chandran

Appeal No. : W.P. (C) Nos. 10813 of 2015-B & 14797 of 2015-Y

Appellant : A.R. Sameena

Respondent : State of Kerala, represented by Secretary to Government, General Education Department and Others

Judgement :

1. Myriad facts and dates arise in the above writ petitions, which essentially raise a claim for compassionate appointment under Rule 51A of Chapter XIV-A of Kerala Education Rules, 1959 [for brevity KER].
2. The parties, facts and documents are referred from W.P.(C).No.10813 of 2015, wherein the petitioner is the claimant under Rule 51B and additional 4th respondent, the rival claimant under Rule 51A. Rule 51B claimant has filed the above writ petition seeking to enforce Exhibits P14 and P15 orders, while the rival claimant challenges the said orders in W.P.(C). No.14797 of 2015.
3. I have heard Sri.C.P.Sudhakara Prasad, learned Senior Counsel for the Rule 51B claimant, Sri.K.K.Mohamed Ravuf for the Manager [3rd respondent] and

Sri.P.M.Pareeth for the Rule 51A claimant as also the learned Government Pleader.

4. The petitioner's mother was working as a High School Assistant [for brevity HSA], Malayalam in the aided school under the management of the 3rd respondent when she passed away on 24.10.1994. The petitioner admittedly was a minor at that point of time. On attaining majority in the year 1998, the petitioner filed an application for compassionate appointment under Rule 51B. The said application was for the post of a Lower Division Clerk. No vacancy arose in the school and the petitioner could not be accommodated thereat.

5. Subsequently, the petitioner having completed her higher studies, applied on 29.08.2003, again for compassionate appointment; but to the post of HSA [Social Science], since she had by then acquired the required qualification. The Manager then informed the petitioner, by Exhibit P3, that there was no vacancy of HSA [Social Science] in the Corporate Management and, hence, her request for appointment as HSA [Social Science] would be considered as and when a vacancy arises.

6. The petitioner subsequently is said to have been appointed in a leave vacancy between 01.07.2005 and 30.06.2010, the approval of which was rejected by Exhibit P4. The reason for rejection was that though one HSA [Social Science] had proceeded on leave, there were in existence two excess hands in HSA [Social Science] who had to be accommodated in the vacancy of HSA [English] to avoid their retrenchment. Despite one teacher having gone on leave, there were in existence five HSA [Social Science] against four sanctioned posts. The petitioner's approval was rejected by Exhibit P4 and the same is said to be pending consideration in a revision; the petitioner having failed before the lower authorities. The same is not a subject matter of the above writ petition.

7. Subsequently, a leave vacancy arose on 01.06.2007, which extended upto 12.06.2012. Despite the petitioner being entitled under Rule 51B, the contention raised is that, the petitioner was not granted appointment. Two persons for different periods are said to have been appointed; both of whom failed to get approval of their appointments. This is also alleged to be for reason of the

Manager having not appointed the Rule 51B claimant. Again a vacancy arose on 11.05.2009. The Manager communicated the same to the petitioner and directed the petitioner to join before 01.06.2009, as is evidenced at Exhibit P10. The petitioner submits that the petitioner did not receive Exhibit P10 communication, which was a registered letter, since she was out of India during that time. To the said vacancy, the additional 4th respondent was appointed and continued till 2007, which gave rise to the Rule 51A claim of the additional 4th respondent. Subsequently when one vacancy arose, the petitioner approached the authorities under the KER, who has issued Exhibits P14 and P15 directing the appointment to be made. The additional 4th respondent too staked a claim to that post under Rule 51A.

8. The additional 4th respondent challenges Exhibits P14 and P15, in the other writ petition, on the ground that the claim under Rule 51A acquired by her, by reason of the failure of the petitioner to take up the appointment when offered in 2009, enures a preferential claim as against that of the petitioner under Rule 51B. The Manager, however, contends that the claim under Rule 51B itself is not sustainable, since going by Exhibit R4(c): Compassionate Employment Scheme, the petitioner is disentitled from making such claim for reason of the petitioner's second application being out of time. The Manager does not deny that he had offered her an appointment in leave vacancies twice, which arose prior to the vacancy at present; but, however, contends that the disentitlement is a question which goes to the root of the matter and the mere fact that the Manager called her for appointment, would not remove the said defect as such. The Manager also has a contention that the Manager had informed the petitioner about the vacancy that arose on 01.06.2007 and offered it to her personally, in the additional reply affidavit. This contention is only to be noticed, to be rejected. The Manager cannot be deemed to have so offered the petitioner an appointment in 2007.

9. The learned Senior Counsel would rely on a Division Bench decision of this Court in W.A.No.1164 of 2005 dated 20.09.2006 [Kumari Sreepriya B.Unnithan v. State of Kerala], to contend that the petitioner's claim arose prior to the claim of the Rule 51A claimant, i.e., in 2007 when a vacancy arose. In such circumstance, despite the fact that the petitioner was offered the subsequent vacancy, the

petitioner has a preferential claim, since it relates to a date prior to the date on which the additional 4th respondent was appointed, is the argument. It is also submitted on the basis of the decision in *Shreejith v. Deputy Director (Education), Kerala* [2012 (3) KLT 214] that, the Manager having accepted the application and offered her appointment at one point of time, cannot now turn around to deny such claim on the basis of Exhibit R4(c) Scheme, especially since the Scheme was one which was brought in after the petitioner's application.

10. The learned counsel for the additional 4th respondent relies on *Manager, N.S.S. Karayogam U.P.S. v. Soumya Nair* [2005 (2) KLT 867] to urge her better claim under Rule 51A over that of the petitioner under Rule 51B. The learned counsel also would rely on *Deepak v. Secretary, General Education Department* [2002 (3) KLT 288], which found that even the statutory Scheme under the KER does not deem a dependant to be always a dependant and there must be some proximity with the date of death as well as the date of application, which principle has been reduced as a guideline in Exhibit R4(c), long prior to the judgment.

11. A leave vacancy of an HSA [Social Science] admittedly arose on 13.06.2007, which ought to have been granted to the petitioner. The contentions with respect to the offer made by the Manager in the reply affidavit as noticed cannot be countenanced. The additional 4th respondent's claim under Rule 51A arose only subsequent to the petitioner's claim on 13.06.2007. The additional 4th respondent's claim under Rule 51A arose only by the appointment of 11.05.2009. Hence if the petitioner's claim under Rule 51B is upheld, then the petitioner should be preferred. But it is also significant that the Rule 51A claim arose only since the Rule 51B claimant refused to join. When a vacancy arose and she was offered; could the Rule 51B claimant seek to enforce her claim subsequently, is also an issue to be addressed.

12. On an overall analysis of the myriad facts, what assumes significance is the fact that the petitioner seeks appointment under the compassionate employment scheme to a vacancy which arose in 2014 when, admittedly, the death in harness occurred 20 years back on 24.10.1994. The support garnered from the decision of the Division Bench in *Kumari Sreepriya B.Unnithan* (supra), according to this

Court, does not squarely apply to the facts in the instant case. There, the dependant raised a claim on the death of the employee on 24.10.1999 and was entitled to a vacancy which arose on 01.04.2002. The facts also disclose that the applicant under Rule 51B was fully qualified to be appointed to the post of Lower Grade Hindi Teacher, the incumbent of which retired. The Manager appointed a person on 11.09.2002 ignoring the statutory claim; which gave rise to a Rule 51A claim of the 4th respondent therein. When a subsequent vacancy arose, there was a tussle between these two claimants and despite the Rule 51A claim having a preference, the Division Bench held that the Rule 51A claim arose only on account of the appointment made on 11.09.2002 ignoring the statutory claim of the dependant who sought compassionate appointment, which ought to have been granted on 01.04.2002 when a retirement vacancy arose. Since the petitioner therein ought to have been appointed before the Rule 51A claimant, the petitioner therein was held to have a better claim. Herein the Rule 51A claim arose since the petitioner failed to enforce her right, when she was offered appointment.

13. The facts and law applicable clearly are distinguishable. The petitioner herein cannot be said to have a better claim than the additional 4th respondent herein. The specific post to which the additional 4th respondent was appointed, was offered to the petitioner, that too by a registered letter addressed to her residence. The petitioner's only case is that the petitioner had not been present within the country when the letter was despatched and the same was returned with the endorsement addressee left India. The Manager had done everything in his capacity to see that the petitioner was offered an appointment. Only on the failure of the petitioner to take up employment, that the additional 4th respondent was appointed. The mere fact that the petitioner ought to have been appointed in an earlier vacancy cannot enure to the benefit of the petitioner to claim precedence over the additional 4th respondent herein, since the claim of the additional 4th respondent under Rule 51A arose only on account of the petitioner's failure to join duty as directed.

14. In Soumya Nair (supra) the claimant under Rule 51B was held to be entitled to appointment only after satisfying the claimants who have already vested right for appointment under Rule 51A. Herein, the right acquired by the additional 4th

respondent under Rule 51A is not at all marred by the claim under Rule 51B, since the claimant was offered such appointment. Whatever be the circumstance, the petitioner had been issued a letter, that too by registered post, which was returned for the reasons stated above. If the petitioner was keen to obtain such appointment, the petitioner should have necessarily given a forwarding address to the Manager when she left her permanent address as recorded in the application. The right of the petitioner under Rule 51B stands extinguished by the failure to join.

15. The petitioner's alleged claim on the basis of a vacancy which occurred on 13.06.2007 is also not sustainable going by the additional counter affidavit dated 23.06.2015 filed by the 3rd respondent. The vacancies in HSA [Social Science] has been delineated therein. The vacancy which occurred on 01.07.2015 in which the petitioner was appointed, extended upto 30.06.2010. However, the petitioner after joining, left the school on 14.03.2006, when another person was appointed. The said appointment also suffered from the defect that there was one excess HSA [Social Science], who had to be accommodated in HSA [English]. In the next academic year, being 2007-08, the claim raised by the petitioner is to the vacancy which arose on 01.06.2007 in a leave vacancy. Exhibit R3(b) shows that there were five HSAs [Social Science] as on that date against the four sanctioned posts. On one Smt.T.V.Sameena proceeding on leave, a vacancy had to be conceded to HSA [English] and a person was appointed to that vacancy. The next vacancy arose on 13.06.2007, when another HSA [Social Science] - Fousiya - entered on leave. This also was accommodated with an HSA [English]. The HSA [English] appointed to the said post resigned and one V.B.Sameera was appointed. On 01.03.2009 V.B. Sameera was shifted to Physical Science and, hence, the leave vacancy of Fousiya became free on 01.06.2009, to which the petitioner was offered an appointment.

16. The contention that, having accepted the application the Manager could not now claim a disability in seeking compassionate appointment, is urged on the basis of the decision of the Hon ble Supreme Court in Shreejith (supra). Considering one among the batch of cases, the Hon ble Supreme Court noticed the fact of one of the respondents having applied under the Compassionate

Employment Scheme well within time and who was intimated by the Manager that he would be considered when a vacancy occurs. However within two years, the appellant therein was appointed as a teacher against an available vacancy. That was interfered with by the Assistant Educational Officer on the strength of the Rule 51B claim. The challenge was against the Assistant Educational Officer's order, directing appointment of the claimant under Rule 51B. The Manager, before the Hon ble Supreme Court, argued that though the application was within time, the same was not in the prescribed format. It was only in that context, the Hon ble Supreme Court found that the Manager having not rejected the application on that ground and not having intimated any defect in the application to the petitioner, should not have taken up such a contention especially when he had accepted the same and also issued an intimation that the claimant would be considered for the next vacancy arising. Herein, the contention raised by the Manager is not a mere technical defect in the form.

17. Exhibit R4(c) is the guidelines for implementation of the Compassionate Employment Scheme, which applies in the case of the petitioner also. Clause 19 and 25 are relevant and are extracted hereunder:

19. The time limit for preferring applications under the scheme will be 2 years from the date of death of Govt. servants. In the case of minor, the period will be within 3 years after attaining majority .

xxx xxx xxx

25. Appointment once offered and the post once applied for shall be allowed to be changed, if the request for change is made within the time limit prescribed in para 19 above .

The petitioner's initial application on 16.12.1998 was immediately on attaining majority. Admittedly the application was for appointment as a Lower Division Clerk. No vacancy arose and the petitioner was not offered any appointment thereat. The petitioner also does not raise any claim to any vacancy of LDC which arose later. The petitioner after completing her higher studies, after five years filed an application on 29.08.2003 based on the qualifications subsequently acquired, to

claim appointment under Rule 51B for a different post, i.e., HSA [Social Science]. The above prescriptions clearly stand against the petitioners second application. Though the initial application was made under the Scheme within the period prescribed under clause 19, i.e., within three years after attaining majority, the post applied for was changed, beyond the time limit prescribed, which is prohibited under clause 25. The contention that Exhibit R4(c) dated 24.05.1999 was subsequent to the application of the petitioner on 16.12.1998 cannot be accepted, since the second application was after Exhibit R4(c). The second application could not also have been made even within the time prescribed under clause 19, since within that time the petitioner could not have obtained the qualifications for the post applied for.

18. A Full Bench of this Court had specifically considered the issue as to whether there is any vested right conferred on a claimant under the Compassionate Employment Scheme on an application being made; in B.S.N.L v. Rajesh [2015 (2) KLT 478 (FB)]. It was held that mere filing of an application does not create any right on the applicant, since the application would have to be considered on the basis of the regulations existing on the date of consideration. This Court is quite conscious of the fact, that, therein the Full Bench was dealing with a Scheme brought out by the Central Government and herein there is a statutory provision which creates a vested right on the claimant when an application is made. The vested right created in the petitioner on the initial application made is to seek for appointment to the post of LDC. The petitioner does not claim any such right in the present writ petition; nor did she claim that in the ensuing years. The claim raised is on the basis of the application dated 29.08.2003, which could not have been accepted or acted upon.

19. The mere fact that the Manager had offered appointment twice earlier would not at all cure the defect in her claim when it is sought to be asserted legally. If appointment was granted by the management and it was approved and continued, then probably neither the Manager nor the Government could resile from that after a long lapse of time. However, herein the petitioner did not get such a benefit. Though the petitioner was appointed in a leave vacancy, the same was not approved and is said to be pending in revision. The revision definitely will have to

be considered de hors the observations made herein. An approval granted thereat would also not tilt the balance in the petitioner's favour, since again the petitioner then would be a Rule 51A claimant in 2009; when she was offered appointment and she failed to join. The additional 4th respondent's claim even then would remain undisturbed. Herein it is also to be noted that the petitioner though appointed in a leave vacancy, that arose on 01.07.2005 and continuing till 30.06.2010, she admittedly left on 14.03.2006 and proceeded abroad. The service which was less than one year does not create a Rule 51A claim [amendment to KER w.e.f. 27.04.2005]. The precedence claimed by the petitioner over the additional 4th respondent cannot be sustained on any count.

20. Further, the Hon'ble Supreme Court has also in Deepak (supra) considered the provisions of the KER and held that a dependant is not always a dependant. The Hon'ble Supreme Court therein was concerned with a totally different issue of retrospective application of Rule 51B. But the principles noticed as reiterated by the various decisions of the Hon'ble Supreme Court, regarding Compassionate Appointments, squarely apply herein. The Supreme Court also noticed the time limit brought in by Exhibit R4(c) on the basis of the directions issued by this Court in Sajeesh Babu v. State [1996 (2) KLT 542]. The statutory vested right created on the applicant by the 1st application made in the year 1998 can no longer be urged. The 2nd application for the post of HSA [Social Science] is out of time and creates no such right. If at all the Manager's action of offering appointment under Rule 51B can be deemed to be condoning the defect; the right if any accrued is extinguished by the failure to take up the appointment in 2009. The claim raised on the basis of 2007 vacancy is also hereinabove negatived. In such circumstance, this Court is unable to sustain the claim of the petitioner and, therefore, W.P. (C).No.10083 of 2015 would stand dismissed.

21. As a consequence, W.P.(C).No.14797 of 2015 would stand allowed. The claim of the petitioner herein being found to be valid for appointment under Rule 51A, the directions of the Educational authorities in Exhibits P3 and P4 shall be set aside.

Ordered accordingly. Parties are left to suffer their respective costs.

