

**Usha Devi Vs. State of Kerala**

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**Court :** Kerala

**Decided On :** Oct-11-2001

**Reported in :** [2002(93)FLR503]

**Judge :** P.K. Balasubramanyan and; M. Ramachandran, JJ.

**Acts :** Kerala Education Rules, 1959 - Rules 35A and 38(2)

**Appeal No. :** O.P. Nos. 31283/2000 and 1694 and 11107 of 2001

**Appellant :** Usha Devi

**Respondent :** State of Kerala

**Advocate for Def. :** Roy Chacko, Govt. Pleader,; N.N. Sugunapalan,; K.K. Rama

**Advocate for Pet/Ap. :** V.A. Mohamed,; E.S.M. Kabeer,; K.P. Seemandini and;

**Disposition :** O.P. Nos. 1694 and 31283 dismissed. O.P. No. 11107 allowed

**Judgement :**

**M. Ramachandran, J.**

1. Common questions arise in these three Writ Petitions. When O.P. No. 31283 of 2000 had come up for hearing, a learned single Judge had referred the matter for decision by the Division Bench, and the two other cases also got posted along with them. Mr. Justice Gafoor had been invited to the decisions in Rehelamma v. State

of Kerala (1997 (2) KLT 429) and *Manager, Mar Sleeba U.P. School v. State of Kerala* (1990 (1) KLT 626) as confirmed by W.A. No. 207 of 1990 which has laid down that a retrenched teacher, though on protection, on going back to the school was obliged to surrender seniority, in favour of subsequent appointees. The learned Judge was of the opinion that the said line of decisions required a fresh look, as the quoted decisions had not taken note of the circumstance that such a protected teacher came back and continued in the school, on the basis of the original appointment order, and the effect thereof might be a legal fiction that the date of appointment remained unaltered.

2. However, on the facts of the present cases, we are of the opinion that they could be disposed of without going to the above aspect or by making a reference to a Full Bench, and the question posed could be reserved to be agitated in a more appropriate case.

3. O.P. No. 31283 of 2000 is filed seeking for quashing the order of the Educational Authorities, whereunder petitioner's claim for promotion has been negated. O.P. No. 11107 of 2001 concerns the rival claims of two teachers of N.S.V. High School, Kollam for seniority and consequent eligibility for being appointed as Headmistress of the school. The brief facts are as following:

In O.P. No. 31283 of 2000, the petitioner was appointed as HSA (Mathematics) on 6th July, 1979. Her continuance thereafter is uninterrupted. The 6th and 7th respondents respectively were appointed as HSAs on 3rd June, 1977 and 8th November, 1977 in the above school, but were deployed in 1984 and were protected teachers for about three years, and had rejoined the school only on 20th October, 1987. The claim projected is that the respondents-teachers can claim continuous service from 20th October, 1987 only, and in view of Rule 37(1), Chapter XIVA of the Kerala Education Rules, the petitioner was to be adjudged as senior to them. In the seniority list prepared, the above position had been overlooked, to be noted. Petitioner equated the claim of a protected teacher that to a 51-A claimant. She had also pointed out that the appointment of the 7th respondent, though irregular, had been ratified by a special order, and in no case, the benefit of the initial date could have been taken advantage of.

4. The petitioner therefore had challenged the assignment of seniority to the said persons, but the District Educational Officer, by Ext. P-4 dated 17th December, 1999, had rejected the petition, as according to him, the list stood finalised as on 1st January, 1995, and had not been subjected to challenge at appropriate time. According to him, at the distance of time, it was impermissible to attack it. On appeal by the petitioner, however, the said decision was set aside, but the Revisional Authority viz., the Government had by Ext. P-9 restored the order of the District Educational Officer. The Government found that as against the final seniority list published as on 1st January, 1995 the petitioner has chosen to file objections only in 1999. The order reads:

'In the final seniority list published as on 1st January, 1995 the petitioner was shown as senior to Smt. Usha Devi. This seniority list was published after circulating the provisional seniority list calling for objection. Smt. Usha Devi has not filed any objections against the provisional seniority list. Even after publishing the final seniority she has not challenged the seniority of the petitioner. Therefore the seniority position of the petitioner is final as on 1st January, 1995. Seniority list for subsequent years is prepared only to accommodate the new entrants in service and not to revise the settled position of others. She has not challenged the seniority list published in the year, 1995 and filed objection on the provisional seniority published in the year 1999 questioning the settled seniority of the petitioner. As rightly pointed out by the petitioner it is well settled position in service law that every person is entitled to sit back and consider that his seniority settled long ago would not be unsettled after the lapse of a number of years. This proposition has been upheld by the Supreme Court and the High Courts in a number of cases.'

We do not think that this is such an arbitrary stand, which requires correction and interference in exercise of powers under Article 226 of the Constitution of India. Reliance by the petitioner had been placed on the reported decisions as confirmed by the appeals. It was also urged that the Government had taken the view that a protected teacher is not a member of the parent school and could not claim the service, and on return after protection can claim seniority from the date of rejoining. Ext. P-3 is the Government Order issued in the above context supporting

the stand taken by the petitioner. Of course, as could be seen therefrom Government had, on the basis of the law clarified by this Court, held that a protected teacher has no right for seniority in the parent school from the initial date of appointment. But by the laches of the petitioner, she had lost opportunity to challenge her supersession. Erosion of rights by passage of time is a principle well recognised in law. By resorting to complacency over a span of years, the petitioner has lost whatever rights she had to challenge the 'irregular' assignment of seniority to her juniors. It had been argued by Sri Hamsa, learned counsel for the petitioner in O.P. No. 31283 of 2000 that the claim was to be considered as lying dormant and in hibernation project it, and when the vacancy of Headmaster arose in the school. According to him, whether or not challenged, the assignment of a higher position of seniority in records was of no consequence, and sit back theory could not have had application. But it is clear that the contention is merely self serving. The seniority of a person once recognised, remained as a right throughout, and was not liable to be brushed aside at the fancy of a third person, and at his will. To think otherwise renders the position absurd, if not meaningless. We are fortified in these region, as Mr. Sugunapalan, learned counsel for the respondents, points out that the matter had come a statutory finality. The seniority list of 1995 had been approved by the competent authority, by proceedings dated 27th May, 1995, and the same had never been subjected to challenge. Rule 38(2), Chapter XIVA of the Kerala Education Rules provides for an appeal against a final seniority list, and the upper time limit prescribed was one month. The seniority list was to be updated every year, so as to incorporate further details, and by not resorting to statutory remedy the petitioner had forfeited her right to challenge the order for all time to come.

5. The analogous legal position has been explained by Prof. H.W.R. Wade in the following manner:

'The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he was waived his rights, or for some other legal

reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another. A common case where an order, however void, becomes valid is where a statutory time-limit expires after which its validity cannot be questioned. The statute does not say that the void order shall be valid; but by cutting off legal remedies it produces that result.' (Page 342, Administrative Law, 7th Edition)

6. It may also be interesting to note the averments made by the first respondent - Government and especially extracts from paragraph 4 of the counter affidavit filed:

'Protected teachers cannot be equated at par with a 51A claimant who has been thrown out from service for want of vacancy. Protected teachers are working in another school on working arrangement without break in service and they retain lien in their parent school (vide G.O. (Ms) No. 104/69/G.Edn.). They were deployed as protected teachers due to circumstances beyond their control. So unlike teachers voluntarily seeking transfer to other schools or transferred to Government schools, the protected teachers retain their lien in the parent school. The Act and Rules do not contemplate forfeiture of past service of a protected teacher in the parent school as well as the service rendered as protected teacher. So, for the purpose of Rule 37(1) of Chapter XIVA, Kerala Education Rules, a protected teacher is having continuous service in the same grade, but in another unit retaining the lien in the parent school. Since their lien is retained in the parent school they do not acquire lien in the transferred school. As such in the case of protected teachers 'Unit' as mentioned in Rule 37(1) of Chapter XIV A shall be construed as also the school in which they have worked as protected teachers.'

7. The Government has explained their stand taken in Ext. P-9. Though the stand runs counter to the judgment in *Mar Sleeba U.P. School v. State of Kerala* (1990 (1) KLT 626), it is not expedient to upset the decision on the above circumstance alone. We are in full agreement with the reasoning given by Ext. P-9, viz., that the order has attained finality by efflux of time (extracted earlier). The petitioner is disabled from challenging Ext. P-1 seniority list, as a statutory finality has set in. The fortuitous circumstance that she continued in the school undisturbed might

have come to her advantage at some point of time, but by acquiescing to the position as prevailing in 1995, the petitioner has irrevocably lost her right to assert for seniority. Consequently she is not entitled to the reliefs claimed in the Original Petition and it stands dismissed.

8. For almost identical reasons, O.P. No. 16948 of 2001 also will have to be dismissed. Seniority of the N.S.V. High School, Punalur had been provisionally approved by the District Educational Officer, Kottarakkara on 8th August, 1995 (Ext. R-4(a)). P.M. Aleyamma, High School Assistant, who is the third respondent, had been assigned seniority position as No. 9 there. Smt. Rani S. Raghavan was occupying the 9th position. The claim of the petitioner (R. Sobhanamony), though positioned lower in the list, is that having had continuous service in the school from 1988, she is entitled to seniority from the said date. This is for the reason that the third respondent though had her initial date of appointment (as HSA) as 23rd June, 1978, she was retrenched and deployed to Government Schools and private school, and had been recalled to the parent school only on 3rd March, 1991, initially as U.P.S.A. and later started to work as H.S.A. from 20th June, 1991. Therefore the petitioner claimed that she was the rightful claimant for the vacancy of Headmistress, by virtue of her seniority. But the third respondent had been appointed to the above said post on 1st April, 2000, and this was pointed out by her as irregular. Before that promotion, a seniority list had been published in January, 2000 and she has been shown as junior to the third respondent, and this had been objected to. The matter had been duly taken up with the educational authorities; however she met with no success. In the meanwhile, she had challenged the appointment of the third respondent as Headmistress, and had filed an Original Petition as well. She had been relegated to seek departmental remedies. Ultimately, by Order dated 17th March, 2001, in the revision application, Government had accepted her case that her continuous service could be considered from 18th January, 1988, whereas the third respondent can count seniority only from 20th June, 1991. On the basis of the orders, the seniority was ordered to be recast.

9. In the meanwhile, the third respondent independently had challenged Ext. P-3 Order, in O.P. No. 11107 of 2001 (marked as Ext. P-4 therein) which is the other

connected Writ Petition. There was no interlocutory orders prohibiting the reversion, and the petitioner was constrained to file O.P. No. 16948 of 2001 for enforcement of Ext. P-3, which had upheld her stand and claims. According to her, the appointment of the third respondent as Headmistress rightly deserves to be set aside.

10. However, for the reasoning adopted in the earlier connected case, we have to reject the contentions. The petitioner had projected a case on the basis that Ext. R-4(a) is a provisional seniority list, which had not attained finality, and there were no final lists ever thereafter, and the list published as on 1st January, 2000, produced by her as Ext. P-8, though showed that the third respondent had been assigned seniority, had been signed by her under protest. She also heavily relied on Exts. P-5 and P-6, as according to her, by the above she had protested against the seniority position conferred on the third respondent in 1995. The authenticity of the documents have been questioned by the third respondent. The petitioner has not brought any convincing evidence to show that such objections were in fact presented. It is obvious that she is aware of her disability arising from the accepted seniority lists maintained in the school. The school manager has filed an affidavit categorically denying the claim of the petitioner that such an objection had been presented as claimed by the petitioner. The third respondent also has stated that the previous seniority list, from 1991 onwards also showed her as senior than the petitioner. The petitioner has gone to the length of producing Ext. P-7, stated to be a letter of the manager dated 29th August, 1985, acknowledging Ext. P5. But it is pointed out that the Manager Sri. K. Raghavan is no more and there was no reference to any such acknowledgment till the date of his death. The affidavit of the manager in fact shows that the petitioner has fabricated the three letters, so as to suit her convenience and Ext. P-7 is not typed by the typewriter in the school. The relevant portion of the additional affidavit of the 4th respondent-Manager runs as following:

'It is strange that the petitioner failed to produce Ext. P-7 or make mention of it at the time of hearing before the D.E.O. when Sri Raghavan himself was prosecuting the case as Manager. The springing up of such a communication at this stage after the death of Sri. Raghavan, the alleged author, is suspect. However, neither

the inward register shows the receipt of any objection in 1995 nor does the outward register show the issue of any reply in 1995. But the outwards register does show the issuance of a letter to the petitioner on 12th June, 2000, the content of which is one and the same as Ext. P-7. At the same time, it may also be noted that Ext. P-5 is alleged to have been served on 15th August, 1995, which is a national holiday. The petitioner may therefore be put to strict proof regarding Ext. P-7 and the original may be called for.'

It is indeed difficult for the petitioner to explain as to why the letter was kept back for such a long time, and when the dispute was there before the D.E.O. when the former manager was alive. However, we are inclined to let off the matter as such, and proceeded on the assumption that the seniority list from 1991 onwards showed petitioner as junior to the third respondent, and her attempt to sabotage the same after ten years cannot be permitted. It is further pointed out that the third respondent did not have the requisite continuous service of 12 years as stipulated in Rule 37(1) and 44(4) of Chapter XIV A of the Kerala Education Rules. In view of the stand we have taken that the third respondent was considered as senior teacher of the school, it may not be necessary to take note of the contentions coming under the purview of Rule 37(1). Smt. Seemanthini, however, argued that the continuous service referred to in the Rule is to be read as the service rendered in the school in which the appointment is to be made.

11. It is not possible to countenance such an argument in the terms of the express language employed in the Rule. The said provision reads as following:

'44A.(1) Subject to the provisions contained in Sub-rule (1) of Rule 44, the minimum service qualification for appointment as Headmaster, in Aided Complete High Schools/Training schools shall be twelve years of continuous graduate service with pass in the test in the Kerala Education Act and the Kerala Education Rules and a pass in Account Test (Lower) conducted by Kerala Public Service Commission.'

Whereas Rule 37 while referring to seniority of a teacher specifically refers to 'service in that grade in that unit', such a stipulation is conspicuously absent in the latter rule. What is mandatorily required is twelve years continuous graduate

service, and of course possession of other obligatory qualifications. The third respondent has been successful in establishing that she is qualified to be appointed as a Headmistress, and therefore the petitioner may not be justified in challenging the appointment on that score.

12. In the aforesaid view, Smt. Aleyamma, petitioner in O.P. No. 11107 of 2001, is entitled to succeed, and the Government Order dated 17th March, 2001 directing the District Educational Officer to recast the seniority, and insisting for a fresh appointment of Headmistress has to be set aside. At this juncture, we may also note that an Original Petition as O.P. No. 17624 of 2001, has been filed by another teacher, Rani Raghavan, claiming that she was the rightful claimant for the post of Headmistress, by virtue of her earlier appointment. But the Original Petition was dismissed on 4th September, 2001, finding that she went on leave even before her probation period was completed, and therefore had lost her claim for seniority, though since permitted to rejoin in the school and there was no substance in her contention that the date of appointment was to govern the seniority.

13. Ext. P-4 in O.P. No. 11107 of 2001 (Ext. P-3 in O.P. No. 16948/2001) is therefore set aside. It is declared that Smt. P.M. Aleyamma is validly appointed as Headmistress. We may observe that there is poetic justice since Smt. Aleyamma is aged 46, and she had joined service in 1977, whereas Sobhanamony, aged 38, had joined as an HSA only in 1988, and she has opportunity to develop her career.

14. During the course of hearing, we had occasion to pass an Order on 5th September, 2001 directing the Manager, N.S.V. High School, Punalur to produce the finally approved staff list for the relevant years. There was also a further direction issued to the Director of Public Instruction, Trivandrum and the District Educational Officer, Punalur to file an affidavit disclosing whether there are finally approved staff list for the school for the years 1994-95 to 1999-2000 and if there is no such list, the reason for not having such a list and the reason for not insisting on the performance of the statutory obligations by the Manager of the aided school.

15. By an affidavit dated 18th September, 2001, the Manager had submitted that he happened to take over the managership after the demise of the former

Manager Sri. K. Raghavan on 14th September, 2000. He has further submitted that there was only a provisionally approved list as on 1st April, 1995 and he could not locate the seniority list of 1996 and 1997. However, the seniority list as on 1st January, 1998 and 1st January, 1998 and 1st January, 2000 signed by the teachers had been produced. He has submitted that it was not due to any laches or negligence and the former manager was unwell and due to the sudden demise of the said person he was not in a position to explain the full details. The explanation has to be accepted in the peculiar nature of the case.

16. The Personal Assistant to the District Educational Officer, Punalur, (Smt. L. Jagadamma) had filed an affidavit dated 12th September, 2001 purporting to be on the directions issued by this Court on 5th September, 2001. We express our displeasure in the matter, since the direction was specific that the Director of Public Instruction or the District Educational Officer, Punalur or either of them, were to file an affidavit showing the details, as the circumstances appeared to be of grave importance to us. Deputing the Personal Assistant for swearing to an affidavit, in spite of the specific directions of this Court was therefore in bad taste and the responsibility ought not have been shirked by them.

17. We have to further observe that the explanation submitted in not insisting for enforcing maintenance of seniority list was thoroughly unsatisfactory. What has been deposed is that 'It is most respectfully submitted that on account of the pressure of work in the office no specific direction was given to the educational agencies for the production of seniority list in every year'. Thereafter it is undertaken that the District Educational Officer, Punalur will in future insist for production of seniority list of the teachers from the concerned Educational Agencies in every year as required under the Rules.

18. Note 2 of Rule 35A of Chapter XIV A (A) of the Kerala Educational Rules mandates that the seniority list shall be made as on the 1st day of January of every year. The list should be made up-to-date and renewed every year. The supplementary list during a school year, showing the names of teachers appointed and got approved by the Controlling Officers, shall be sent by the Educational Agency to the authority competent to approve the list with copies to all sub

controlling officers concerned before 31st May, every year. The competent authority is expected to approve the list provisionally by 30th June and finally by 31st August every year. The maintenance of a seniority list is absolutely essential in respect of every establishment, as the absence of the same is likely to create unwanted and unnecessary disputes. The relevance of such statutory provision cannot but be emphasized. Such list is to be made up-to-date and renewed every year and supplementary list showing the names of fresh appointees is also to be prepared and got approved so as to ensure its authenticity. In the case at hand, because of the non-availability of an approved seniority list, the claims and counter claims became difficult to be resolved. The whole blame for the predicament can be traced to the negligence and inaction of the department for not insisting compliance with the specific rules. The Rule provides that if the educational agency fails to comply with the provisions, it shall be deemed to be sufficient cause for taking action against the institution. The importance attached to the exercise prescribed should not have been overlooked. We direct that the State Government, who is a party to these proceedings, should ensure that the Director of Public Instruction shall take adequate and effective steps for enforcing the statutory obligations. The Educational Agencies are to be directed to scrupulously adhere to the Rules. Steps taken in this regard should be informed to this Court within a period of two months from today.

A copy of this Judgment shall be forwarded to the Government for compliance.

19. O.P. Nos. 31283 of 2000 and 16948 of 2001 are dismissed. O.P. No. 11107 of 2001 is allowed, as indicated above. The parties will bear their respective costs.

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