

Krishnan Vs. R.D.D. and ors.

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Court : Kerala

Decided On : Aug-05-1974

Reported in : AIR1976Ker110

Judge : Chandrasekhara Menon, J.

Acts : [Constitution of India](#) - Article 226; Kerala Education Rules, 1959 - Rules 37(2) and 92

Appeal No. : Original Petn. No. 4195 of 1973

Appellant : Krishnan

Respondent : R.D.D. and ors.

Advocate for Def. : V.B. Nambiar and;Govt. Pleader

Advocate for Pet/Ap. : S. Narayan Poti, Adv.

Judgement :

ORDER

Chandrasekhara Menon, J.

1. A rather vexed question in regard to seniority as between two teachers--petitioner and the 4th respondent--under the provisions of the Kerala Education Rules (shortly stated the Rules) arises for consideration in this O. P.

2. Petitioner and 4th respondent are High School Assistants working in an aided High School of which the 3rd respondent is the Manager. Both of them were appointed on the same date 3-6-1953 and holding their posts continuously thereafter.

3. At the time of their appointment the school was governed by the Madras Education Rules which were non-statutory in character. At that time no management was required to keep any seniority list of the staff. The Management's discretion in the matter of appointment of Head Master was absolute and unfettered. There were neither statutory nor administrative curbs on such power.

4. The Kerala Education Act, 1958 (hereinafter called the Act) came into force with effect from 1st June, 1959. The High School concerned came under the provisions of the Act and the Rules framed thereunder. Rule 34 of Chapter XIV-A of the Rules requires the Management of schools to prepare and maintain a staff list indicating the order of seniority in a prescribed form. The relevant Rules are herewith extracted (all these Rules are in Chapter XIV-A): Rule 34 reads:

'Seniority list--Every management shall prepare and maintain in the prescribed form a staff list, otherwise called seniority list, of teachers.'

Rule 35 reads:

'If the Educational agencies have more than one school in a District they shall be constituted into one unit and a common seniority list shall be prepared for all the schools in the unit together and shall be submitted to the concerned District Educational Officer for approval. If the Educational Agencies have schools in more than one District within a Region they shall be constituted as one unit and a common seniority list shall be prepared for all the schools in the unit together and submitted to the concerned Regional Deputy Director for approval. If the Educational Agencies have schools in more than one Region they shall be constituted as one unit and a common seniority list shall be prepared for all the schools together and shall be submitted to the Director for approval.'

The District Educational Officer, the Regional Deputy Director and the Director, as the case may be, may approve the list provisionally pending finalisation of appeals, if any, preferred by aggrieved teachers.

XX XX XX.'

Rule 36 reads:

'The staff list as provisionally approved shall be circulated to the teachers and representations if any received from the teachers within one month from the date of circulation, shall be submitted to the concerned officer competent to approve the list with the management's remarks within two months from the date of receipt of the list provisionally approved to the authorities specified in Rule 35. The list shall be maintained by the managements and produced whenever required by the departmental authorities.'

Rule 39 reads:

'The staff list shall be prepared with reference to the position existing on the date of commencement of the school as an aided school under the Act unless there is a staff list already approved by the department which conforms to these Rules and shall thereafter be maintained upto date'.

5. Rule 37 (1) indicates that the seniority of a teacher in any grade in any unit has to be decided on the basis of the length of continuous service in that unit provided he is fully qualified for the post. Under Sub-rule (2) of the same Rule in the case of teachers in the same grade in the same unit where the date of first appointment is the same, the seniority shall be fixed with reference to age, the older being senior.

6. It was only in 1965 that a staff or seniority list was published in the particular High School. In the provisional list circulated in accordance with the Rule the 4th respondent was shown senior to the petitioner. Petitioner is older in age to 4th respondent. The provisional list was objected to by the petitioner who claimed seniority over the 4th respondent obviously on Sub-rule (2) of Rule 37. Petitioner alleges that there was no further action on it.

7. In 1968 a combined seniority list of the teachers of the concerned High School and of a U. P. School under the same management (of the same Educational Agency) was prepared, which was provisionally approved by the District Educational Officer by his proceedings dated 6-2-1969. On its circulation, as contemplated in Rule 36 petitioner put in his representation on the list to the District Educational Officer. The petitioner's objection to the list was that it was quite contrary to the Rules and also disregarding his objections to the earlier list, the 4th respondent is shown as senior to him.

8. By order dated 7-5-1971, copy of which is Ex. P-4, the District Educational Officer rejected the petitioner's contentions that seniority as between the petitioner and the 4th respondent is to be decided under Rule 37 (2). The officer held that the Management had before the introduction of the Rules decided and accepted Smt. Bhavani, the 4th respondent as senior to the petitioner which had not been complained of by the petitioner till the publication of the provisional list of 1966 and therefore, that question cannot be reopened now in view of G. O. Ms. 222/ 64/Edn. dated 21-4-1964 (marked as Exhi-bit P-8 in these proceedings). Ex. P-8 says that cases where seniority has already been decided and accepted by the Management need not be reopened. On appeal to the Regional Deputy Director of Public Instruction, the 1st respondent in the O. P., he only confirmed the District Educational Officer's order. The relevant portion of the appellate order, copy of which is Ex. P-7 is extracted below.

'According to M. E. R. there was no provision for approval of staff list of aided schools by the department. Therefore, the staff list as on the date of commencement of the school as an aided school under the act has to be prepared by the manager. In this case, the Manager has prepared the staff list showing Smt. Bhavani as senior, because that was the position existing on the date of commencement of the school under the Act. Since the previous Manager has definitely stated that he had appointed Smt. Bhavani senior to Krishnan, I cannot find any flaw in the orders issued by the District Educational Officer, Cannanore. G. O. Ms. 222/64 also directs that wherever seniority has already been decided and accepted as per practice then followed by the Manager, such case need not be reopened.

All these go to show that the Manager had appointed Smt. Bhavani as senior to Sri Krishnan under Madras Rules. Act and Rules framed subsequently do not alter this position. I therefore find no reason to interfere in the orders of the District Educational Officer, Cannanore. The appeal is rejected.'

9. The petitioner has, therefore, filed this original petition seeking to quash Exs. P-4 and P-7 orders and also prayed for a direction for preparation of the staff list of the concerned High School showing the petitioner as senior to the 4th respondent and for approval of the list so drawn.

10. . The' main contention that Sri. S. Narayanan Poti, learned counsel for the petitioner urged before me was that as in this school no seniority list has even been prepared or maintained before the Act came into force, it is mandatory that the said list shall be prepared in the manner provided for in the Rules. Rule 37 (2) has, therefore, to be applied. He pointed out that in two cases--O. P. 56/66 and O. P. 3059/68--this Court has pointed out that after the Rules came into force, the seniority list will have to be prepared only in accordance with the same. According to Mr. Poti, the departmental authorities in this case have wrongly placed reliance on Ex. P-8 G. O. That G. O. is clearly not applicable in view of the fact that there was no determination or decision of the seniority between the petitioner and the 4th respondent by the Management in this case. Manager's words alone without positive proof of such determination cannot conclude the matter. Nor will the mention of the 4th respondent's name above the petitioner in the attendance register and the acquittance roll be any evidence of fixation of such seniority. These records would not constitute determination of seniority as required under Ex. P-8.

11. The contentions of Mr. Bhaskaran Nambiar, learned counsel for the 4th respondent were:

(1) Seniority has been determined by the Management prior to the coming into force of the Act itself in favour of the 4th respondent which fact has indeed been admitted by the petitioner himself. At the time of appointment of the parties Manager could fix seniority in any way he liked which fixation cannot be reopened after the rules in question came into force. Apart from the Manager's words, the

entries in the attendance register, the pay acquittance roll and other records indicate that there had been such determination. The petitioner himself in many of his communications' to the authorities had admitted that the Manager made such a determination. Nor did he complain about such a fixation for a fairly long time. He is estopped from contending that he is senior to 4th respondent;

(2) Rule 37 (2) came into force only on 19-3-1963. It could have no retrospective operation;

(3) Rule 39 which says that the staff list shall be prepared with reference to the position existing on the date of commencement of the school as an aided school under the Act unless there is a staff list already approved of by the department which conforms to these rules, is really a proviso to Rule 37;

(4) Ex. P-8 squarely applies in this case. It really clarifies the position that Rule 37 (2) cannot have any retrospective operation; and

(5) The petitioner has not exhausted his remedies under the Act and Rules.

12. Similar contentions have been raised on behalf of the departmental authorities also opposing the original petition.

13. In his counter affidavit the present Manager has taken up a stand quite contradictory to what the previous Manager stated. He says that he found no records or materials to support the stand taken that the inter se seniority as between the petitioner and the 4th respondent was decided and accepted before the Act came into force or even after the Act before 1965 when the staff list was prepared for the first time.

14. In spite of these detailed contentions it is clear that the controversy between the parties lies within a narrow compass. In regard to the question of alternative remedy open to the petitioner under the Act, I might state that I am not prepared to dismiss the O. P. on that ground. In the first place it is not an invariable rule that the petitioner should exhaust his remedies under the Statute concerned before this Court can entertain a petition under Article 226. The other remedy, the petitioner can be said to have, is a revision before the Government under Rule 92 of Chapter

XIV-A. In a case of this nature where the scope and ambit of the statutory Rules come up for consideration it is only proper that the matter is dealt with on merits by this Court.

15. There could be no dispute with, regard to the contention that Rule 37 (2) is not retrospective in nature. Nor could it be so in the absence of any provision in the Act itself, which enables the making of Rules with retrospective effect. As pointed out in *Rev. Fr. Xavier v. State*, (1971 Ker LT 941), law does not permit the making of rules with retrospective effect, particularly when the statute has not specifically conferred any such power. 16. However, when there has been no determination of the. question of seniority before the coming into force, of the Rules concerned and the law also does not provide for any such fixation, then after the Rules had come into force, the seniority list has to be prepared only in accordance with these Rules. In O. P. 56/66 a controversy arose between the petitioner in that O. P. and the 4th respondent therein in regard to seniority. Both the persons were appointed on the same date and at that time they were governed by what is known as the P. S. S. Scheme. Petitioner was earlier confirmed though 4th respondent was older in age. Mr. Justice Gopalan Nambiyar who decided the case after quoting Rule 37 (2) observed:

'In accordance with the above rule, the 4th respondent who is the older of the two is entitled to seniority over the petitioner. Neither under the P. S. S. Schemenor under the Kerala Education Rules is date of confirmation relevant to decide seniority.'

The learned Judge then upheld the seniority that was given to 4th respondent by the department. This decision was considered by Mr. Justice Mathew in O. P. 3059/68, who said:

'After this Rule came into force, the seniority list has to be prepared only in accordance with law. This is the view taken in O. P. 56/66.'

17. Before going into the present case I might also refer to a decision of Mr. Justice Isaac in *Rev. Fr. John v. Director of Pubilc Instruction*, (ILR (1970) I Ker 480). There his Lordship said that Rule 39 should be read as a proviso or a

qualification to Rule 37. Rule 39 provides that the seniority list shall be prepared not only as on the date on which the school commences as an aided school under the Act, but also with reference to the position existing on that date. In other words, the seniority as it exists on the said date has to be retained; and Rule 37 would apply only subject to that condition.

18. On the basis of the above decisions the question in this case would reduce to whether there was a determination by the Management on the question of seniority as between the petitioner and the 4th respondent before the date of commencement of the school as an aided school under the Act or afterwards before Rule 37 (2) came into force. If there had been such a determination and the 4th respondent was held to be senior, then the petitioner can have no case. On the other hand, if there had been no such determination, then the staff list will have to be prepared in accordance with Rule 37 (2) and then the petitioner will succeed in his contentions in this O. P.

19. Has there been a determination by the Management of the seniority of the 4th respondent over the petitioner? What the 4th respondent says is that she was treated as senior to the petitioner and others who were appointed on the same date. In the attendance register she was shown as 7th assistant while the petitioner was shown as 9th assistant. Similarly, it is also stated that this rank is adhered to in the acquittance roll and Inspection Report. The then Manager has also said that 4th respondent was appointed senior to the petitioner. It is also argued that the petitioner had at no time made any protest against this.

29. I do not think these facts will constitute as such any positive evidence that the Management had determined the question of relative seniority as between the petitioner and the 4th respondent. To determine a question means to settle a question or controversy about, to resolve or decide a disputed matter. There should be a conscious advertence to the question and a decision thereon. It is difficult to come to a conclusion that any such decision had been taken by the Management here. Under the Madras Educational Rules there was no such necessity for determination of seniority as between two persons. The question of inter se seniority between the teachers was absolutely immaterial at that time as

question of promotion or of appointment of Headmaster etc., was in the absolute discretion of the Manager. Therefore, there could not have been an assignment of seniority before the Rules came into force. I am inclined to accept the contention of the petitioner that Ex. P-8 G, O, makes only provisions for accepting what has been done in fact by the Managements between the date of the Act and the date of the introduction of Sub-rule (2) of Rule 37 when the said Sub-rule, was not available for the managements for guidance. It only saves acts of the managements fixing seniority in between the date of the Act and date of introduction of Sub-rule (2) of Rule 37. In this case a seniority list came into existence for the first time when such a list was forwarded for approval in 1966, long after Rule 37 (2) came into force. The rank given in the' attendance register or other records cannot be said to be based on a determination of seniority.

21. I am, therefore, of the view that seniority as between the petitioner and the 4th respondent will have to be fixed on the basis of Rule 37 (2) of Chapter XIV-A of the Rules. I quash Exs. P-4 and P-7 and direct the staff list to be prepared showing the ranks of the petitioner and the 4th respondent therein in accordance with Rule 37 (2). The O. P. is disposed of as above. In the circumstances of the case I make no order as to costs.