

James Vs. State of Kerala

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Court : Kerala

Decided On : Mar-16-2004

Reported in : 2004(2)KLT534

Judge : S. Sankarasubban and; A.K. Basheer, JJ.

Acts : Kerala Education Rules, 1959 - Rules 1(1) and 43

Appeal No. : W.P. (C) No. 32308 of 2003

Appellant : James

Respondent : State of Kerala

Advocate for Def. : P.G. Parameswara Panicker, Adv. and; P. Nandakumar, Govt. Pleader

Advocate for Pet/Ap. : S. Subhash Chand and; Sindhu Muraleedharan, Adv.

Judgement :

S. Sankarasubban, J.

1. This Writ Petition raises an interesting question as to what will happen when a person working as a non-teaching staff is appointed as a Teacher for a short term when his term is over. To put it more clearly, the petitioner in this case was a Full-time Menial. He was promoted as a Lower Grade Hindi Teacher, since he was

fully qualified for the same in a leave vacancy. After the leave vacancy was over, he came back. But the Management thinks that he cannot come back and he is not entitled to any benefit as a non-teaching staff. The entire question depends upon the interpretation of Rule 43 of Chap.XIVA read with Rule 1(1) Notes 1 and 2 of the same Chapter of the Kerala Education Rules (hereinafter referred to as 'the K.E.R.'). Facts of the case are as follows:

2. The petitioner - James was appointed as a Full-time Menial in the Devaswom Board High School, Erumeli by the fourth respondent - Management on 23.12.1998. It was a short term vacancy upto 31.3.1999 and the said period of service of the petitioner was approved by the second respondent -- District Educational Officer as per order dated 26.5.1999. Subsequently, he was appointed in a regular vacancy of Full-time Menial from 13.5.1999 onwards in the Devaswom Board High School, Trikariyoor. The said appointment was also approved with effect from 13.5.1999 by the District Educational Officer, Kothamangalam as per order dated 16.7.1999. Thereafter, the petitioner was transferred and posted as Full-time Menial in the Devaswom Board High School, f hiruvalla with effect from 13.11.2000.

3. The petitioner passed S.S.L.C. Examination conducted by the Board of Public Examinations. Thereafter, he had passed Rashtra Bhasha Visarad conducted by the Dakshin Bharat Hindi Prachar Sabha and Rashtra Bhasha Praveen conducted by the Dakshin Bharat Hindi Prachara Sabha. He had also passed LTT (Hindi Teaching) Examination, which was held in April, 1994. As such the petitioner became fully qualified for being appointed as a Lower Grade Hindi Teacher. The petitioner submitted that as per the provisions contained in Rule 1(1) Notes 1 and 2 of Chap.XIVA of K.E.R., a member of the non-teaching staff shall also be eligible for promotion as Teacher provided he has got the prescribed qualification and there is no Teacher for promotion or for appointment to such post under the Rules.

4. While so, a vacancy of Lower Grade Hindi Teacher had arisen in the Devaswom Board Higher Secondary School, Parumala. Though the petitioner was fully eligible to be promoted to the above Vacancy, the fourth respondent appointed one Suja R. Nair. Again another vacancy had arisen in the very same School and

the fourth respondent appointed one Sumangaladevi. In the above background, the petitioner filed O.P. No. 33638 of 2002. In the said Original Petition, this Court was pleased to issue an interim order directing the third respondent -- District Educational Officer to consider the grievance of the petitioner, copy of which is produced as Ext.P.1. The third respondent considered the matter and held that denial of promotion to the petitioner by the Manager was not sustainable as he has not obtained proper relinquishment of the petitioner. Thereafter, the third respondent directed the Manager to appoint the petitioner.

5. Thereafter, the fourth respondent has promoted and posted the petitioner as Lower Grade Hindi Teacher in the Devaswom Board U.P. School, Changankari against the leave vacancy of one K.R. Suresh. The said order is produced as Ext.P4. The said promotion of the petitioner has been approved by the Assistant Educational Officer, Thalavadi. It is stated that the petitioner was reverted as Full-time Menial and posted in the Devaswom Board Higher Secondary School, Thiruvalla. Subsequently as per order dated 25.6.2003, the fourth respondent again promoted the petitioner as Lower Grade Hindi Teacher and appointed him in Devaswom Board High School, Kangazha in the vacancy of one G. Abhayan. The said order is produced as Ext.P5. Pursuant to Ext.P5 order, the petitioner joined duty in the Devaswom Board High School, Kangazha on 26.6.2003 as Lower Grade Hindi Teacher and the said vacancy was due to expire on 4.11.2003.

6. While the petitioner was working as Lower Grade Hindi Teacher in the Devaswom Board School, Kangazha in a short term vacancy as per Ext.P5 order of promotion, several of his juniors who were working as Full-time Menial were promoted as Peons and posted in various Schools being managed by the fourth respondent. As the promotion of the petitioner was only to a temporary vacancy, the petitioner had submitted a representation before the fourth respondent pointing out the above fact that his juniors have been promoted as Peons and therefore, he may be accommodated in one of the posts of Peons after 4.11.2003. In the said representation he has requested that after termination of the short term vacancy of Lower Grade Hindi Teacher in Devaswom Board High School, Kangazha, if no other post of Lower Grade Hindi Teacher is available to accommodate him, he may not be reverted as Full-time Menial but as Peon since his juniors have been

promoted as per Ext.P6 order. According to the petitioner, the fourth respondent has already appointed one Anukumar as Full-time Menial in Devaswom Board Higher Secondary School, Thiruvalla. Copy of the above order is produced as Ext.P8.

7. While the matters stood thus, the fourth respondent has passed an order on Ext.P7 representation holding that the petitioner was not a Rule 43 claimant under Chap.XIVA of K.E.R. and the appointment of the petitioner as Lower Grade Hindi Teacher from the category of Full-time Menial was not a promotion as the post of non-teaching staff cannot be considered as a feeder category for the post of a Teacher. Therefore, it was held that the petitioner has got no right for appointment against the post of either Full-time Menial or Peon and he will be thrown out of service after 4.11.2003 treating him as a Rule 51 A claimant. True copy of the said order is produced as Ext.P9. The petitioner challenges Ext.P9 and to quash the same and to direct the fourth respondent to revert the petitioner to the post of Peon and for other reliefs.

8. The Board has filed a counter affidavit. In the counter affidavit the Board has taken the contention that once a non-teaching staff is appointed in a leave vacancy as a Teacher, his lien in the non-teaching category is lost. He can only contend that he is Rule 51A claimant. He cannot ask for reversion to the post which he held previously. The question for consideration is whether a non-teaching staff, who was promoted in a leave vacancy in a higher grade is entitled to come back to the post which he was holding before he was promoted or he ceased to be a member of non-teaching staff when he was promoted or appointed as a Teacher in the Lower Grade or Higher Grade.

9. We heard learned counsel for the Devaswom Board and the learned Government Pleader.

10. Before we proceed to consider the claim of the petitioner, it is relevant to look at the relevant provisions in the K.E.R. with regard to promotions. Rule 43 of Chap.XIVA of K.E.R. says thus:

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

Rule 1 of Chap.XIVA of K.E.R. says as follows: 'Managers of Private School shall appoint only candidates who passes the prescribed qualification. As far as High School classes are concerned the appointment shall be made with due regard to the requirement of subjects as determined by Director of Public Instruction with reference to the curricula of studies. Whenever vacancy occurs, the Manager shall follow the directions issued by Government from time to time, for ascertaining the availability of qualified hand and for filling up vacancy. There are two Notes as Notes (1) and (2). Note (1) which says that a member of the non-teaching staff under the category of Clerks, Peons, Sweepers and other staff shall also be eligible for appointment as Teacher provided he has the prescribed qualifications and that there is no teacher eligible for promotion or for appointment to such post under these Rules. Note (2) says that if there are more than one claimant for appointment as teachers under these categories shall be given in the order of Clerks, Peons, Sweepers and other staff. If there are more than one claimant under a particular category, the order of preference shall be according to the date of the first appointment. If their date of first appointment be the same, then preference shall be given with reference to age, the older being given first preference.

11. The question that arises in this case is that whether the appointment of a Peon or Full-time Menial to the post of teaching staff can be said to be a promotion post or a new appointment. The word 'appointment' occurs in Note (1) of Rule 1, according to us, includes promotion. The Department as well as the Manager were of the same view and in fact, the petitioner was reverted as Full-time Menial when

he was originally promoted to the teaching staff. Learned counsel for the Devaswom submitted that when a non-teaching staff is appointed as a Teacher, he loses his lien in the Lower Grade and when his period is over as a Teacher, he can only claim for protection under Rule 51A and he is not entitled to double promotion under Rule 43 as well as Rule 51A.

12. In *Reghu v. State of Kerala* (1993 (2) KLT 82), Usha, J. (as she then was) held as follows: 'Promotion is one of the methods of appointment. The petitioner can claim appointment as a teacher even if he is fully qualified only if there is no teacher eligible for promotion or for appointment to such posts under these rules. We have already seen that a teacher with prescribed qualification can claim appointment by promotion to a post in a higher grade in different category only if there is no teacher with the prescribed qualification in the lower grade of pay of the very same category of post to which promotion is sought. In the same manner a member of a non-teaching staff with prescribed qualification can claim appointment as a teacher provided there is no teacher eligible for promotion or for appointment to such post under the rules. It is not possible to contend that while claiming promotion under Rule 43, the provisions contained under Note (1) to Sub-rule 1 to Rule 1 has to be ignored. A reading of Note (2) under Rule 51A would show that a 'claimant' under Rule 51A has been described as a 'teacher' also. Therefore going by the wording of Rule 51A alone one cannot come to a conclusion whether Rule 51A claimant cannot be treated as a 'teacher' contemplated under Note (1) to Sub-rule 1 of Rule 1'.

This case was taken in appeal in *Reghu v. State of Kerala* (2000 (2) KLT 29). The Division Bench held as follows:

'Rule 43 Note (1) provides that 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 he has the prescribed qualifications and 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. In other words, promotion to a post with higher grade in a different category is also contemplated under Rule 43. Similar provision is found in Note (1) to Rule 1(1) of Chap.XIVA. In a fairly large number of cases it

has been held by this Court that claimant for promotion under Rule 43 has a better claim for appointment compared to those whose claims are referable to Rule 51A. Eligibility for appointment in respect of a person with prescribed qualifications is hedged by two conditions: i.e. (1) there must not be any other teacher eligible for promotion; and (2) there is no other teacher eligible for appointment to such post under the Rules. As promotion is one of the methods of appointment, appellant's case has to be considered in the background as to whether there was any other teacher eligible for appointment to the post under the Rules'.

Thus, it has been held that promotion is one of the methods of appointment. Hence according to us, the Board is not correct in saying that the appointment of a non-teaching staff is only a fresh appointment and not promotion. According to us, when a non-teaching staff is appointed to a higher post, it amounts to promotion.

12. In fact, a similar question had arisen with regard to the Government servant with regard to the interpretation of Rule 8 of the Kerala State and Subordinate Service Rules. A Full Bench of this Court reported in *Balakrishnan Nair v. Ram Mohan Nair* (1998 (1) KLT 766), to which one of us was a party (Sankarasubban, J.) held as follows: 'When an officer is appointed substantively to a permanent post, he acquires a lien on that post and ceases to hold the lien which he acquired previously on any other post'. This judgment was upheld by the Supreme Court in the decision reported in *Alt v. State of Kerala* (2003 (2) KLT 922). It is stated thus: 'It is settled position in law that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier'.

13. In the above view of the matter, we are of the view that a member of the non-teaching staff who has been promoted to a temporary vacancy does not lose his lien to the Lower Grade merely because of such promotion. The petitioner further contended that his juniors have been promoted in the Lower Grade and he is entitled to promotion to such post. The question whether he will be entitled to the post has also to be considered.

14. Hence, we quash Ext.P9 which stated that the petitioner cannot be reverted to the post to which he was originally holding. The petitioner further contended that

he should be reverted as Peon as according to him, his juniors in the Lower Grade have been promoted. In that view, the petitioner is entitled to be reverted to the post to which he was originally holding temporarily. It is also made clear that the petitioner does not lose his lien in the Lower Grade merely because, he was appointed as a Teacher. We direct the fourth respondent to consider the matter and pass appropriate orders regarding the petitioner's contention.

Writ Petition is disposed of as above.

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