

K.J. Sulatha and ors. Vs. State and ors.

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Court : Kerala

Decided On : Jun-04-1993

Reported in : (1994)ILLJ997Ker

Judge : K.K. Usha, J.

Acts : Kerala Education Rules, 1959 - Rules 1, 7, 43, 65 and 76

Appeal No. : O.P. No. 656, 2005 and 7737/1990

Appellant : K.J. Sulatha and ors.

Respondent : State and ors.

Advocate for Def. : Benny Gervacis, Govt. Pleader and; Mary Benjamin and; Ja

Advocate for Pet/Ap. : Sukumaran Nair,; A.K. Chinnan and; A.V. Ramakrishna
Pani

Disposition : O.P. No. 2005/90 partly allowed. O.P. No. 656/1990 and 7737/1990
dismissed

Judgement :

K.K. Usha, J.

1. A vacancy in the post of clerk arose in Mutharamman Coil High School, Kottukalkonam, Neyyattinkara on January 1, 1984. Who is the rightful claimant to

the above post, is the issue raised in these three original petitions. It was therefore agreed by all parties that the above three original petitions could be heard and disposed off together. While in O.P. 656/90 and 7737/90, Government Order dated January 15, 1990 issued in exercise of its power under Rule 92 of Chapter XIV-A of Kerala Education Rules is under challenge in toto, in O.P. 2005/90 challenge is restricted only to a portion of the order. Since almost all the relevant documents are produced in O.P. 7737/90 reference is made to exhibits as marked in O.P. 7737/90.

2. Petitioner in O.P. 7737/90 is the Manager of the school. It is alleged that the educational agency is Hindu Nadar Mahajana Sangham, a Society registered under the Travancore Cochin Literary, Scientific and Charitable Societies Act, 1955. The President of the Sangham is the ex-officio manager of the school. In the permanent vacancy of a Clerk which arose on January 1, 1984, the Manager appointed one Sulatha, petitioner in O.P. 656/90 on January 16, 1984. N. Thankamani, petitioner in O.P.2005/90 was working as a full time menial in the above school from June 7, 1978 onwards. He acquired SSLC qualification in March 1983. It was contended by Thankamani that he was fully qualified and entitled to be promoted as Clerk in the vacancy which arose on January 1, 1984 in accordance with the relevant rules and therefore the appointment of Sulatha, daughter of the Manager, was illegal. The District Educational Officer refused to grant approval of appointment of Sulatha by Ext. P11 proceedings dated February 24, 1984, on the ground that Thankamani had a legal claim for being promoted to the post. Aggrieved by the above order the Manager filed an appeal before the Deputy Director. Ext. P12 dated March 30, 1984 is the Memorandum of Appeal. The appeal was allowed by the Deputy Director under Ext. P13 proceedings dated June 20, 1984 relying on a letter of the Director of Public Instruction dated February 15, 1984 to the effect that so long as no amendment has been issued to Rule in No. 132/ 82/G. Eddn. dated September 17, 1982. The above order was challenged by Thankamani by way of a revision under Rule 92 of Chapter XIV-A of K.E.R. before the 1st respondent. The Manager filed Ext. P14 objection before the Government in the above revision petition. Chapter XXIV-B, non-teaching staff appointed after October 1, 1964 are not entitled to get the benefit of amendment issued in G.O. (P) No.

3. By a detailed order dated January 15, 1990 evidenced by Ext. P15, the 1st respondent allowed the revision petition and held that Thankamani was the rightful claimant for the vacancy which arose on April 1, 1984 and the appointment of Sulatha was against the Rules. The Manager was directed to appoint Thankamani against the post of Clerk in the school immediately terminating the service of Sulatha. The District Educational Officer was further directed to take immediately action to disburse the salary due to Sulatha for the period in which she had actually worked. Thankamani, petitioner in O.P. 2005/90 challenges the above direction regarding disbursal of salary. He has also put forward a claim for appointment with effect from January 1, 1984 and all service benefits including payment of salary and allowances from that date. There is a further prayer for a writ of mandamus directing the Government as well as the District Educational Officer to take appropriate action against the Manager for not implementing the order issued by the Government in his favour.

4. In O.P.7737/90, counter affidavit has been filed by Thankamani who was impleaded as 4th respondent therein. In O.P. 656/90 counter affidavit has been filed by the State Government as well as Thankamani as 5th respondent. In O.P. 2005/90, counter affidavits have been filed by the Government and the manager as 4th respondent.

5. The challenge against Ext. P15 by the Manager and Sulatha is mainly on two grounds. Firstly, it was contended that Thankamani had no legal claim for promotion to the post of Clerk which arose on January 1, 1984 in accordance with the provisions contained in Chapter XXIV-B of the Kerala Education Rules. His case would come within Chapter XXIV-B as he was appointed after October 1, 1964. Explanation (ii) to Rule 1 of Chapter XXIV (A) provides for promotion of peons, sweepers and other staff to the post of L.D. Clerk, if they possess the prescribed qualification. The above Explanation was added under G.O. (P)No. 132/84/G. Edn. dated September 17, 1982. Rule 3 of Chapter XXIV (B) does not take in all the provisions of Rule 1 of Chapter XXIV A. Adoption of Rule 1 is restricted to the provisions regarding strength of non-leaching staff. On the above basis it is contended that Thankamani cannot claim promotion relying on the provisions contained under Explanation (ii) to Rule 1 of Chapter XXIV A. Reliance

was placed on a letter issued by the Director of Public Instruction dated February 15, 1984, a copy of which is produced as Ext. P10(a).

6. I do not find any merit in the above contention. Rule 43 of Chapter XIV-A provides that vacancy in any higher grade of pay shall be filled up by promotion of qualified hands in the lower grade according to seniority. Rule 7 of Chapter XXIV-B adopts the provisions contained in Chapter XIV-A regarding appointment, promotion etc. Therefore Thankamani who was governed by the provisions contained under Chapter XXIV-B is also entitled to claim promotion for the post of Clerk. A Division Bench of this court had occasion to consider similar case in W. A. No. 309/93, wherein a part-time Menial was refused promotion as Clerk and the Manager appointed a fresh hand. While upholding the claim of the Menial, this court held that the combined effect of Rule 43 of Chapter XIV-A., Rule 7 of Chapter XXIV-B and Explanation (ii) of Rule 1 of Chapter XXIV-A is that a qualified peon, sweeper or a member of other staff shall be eligible for appointment as Clerk, provided he is qualified for the post.

7. The second contention raised by the petitioners in O.P. 7737/90 and 656/90 was that Thankamani was ineligible for promotion in the vacancy which arose on January 1, 1984 as the Manager had imposed a punishment on him permanently barring his promotion. According to the Manager, he had been receiving complaints against Thankamani for sometime. Exts. P1, P2 and P3 are alleged to be copies of such complaints dated April 23, 1982, October 18, 1982 and August 5, 1983. It is his further case that he had issued Ext. P5 show cause memo dated September 10, 1983 to Thankamani along with Ext. P6 statement of allegations referring to Exts. P1 and P3 complaints and Thankamani requested for time under Ext. P7 to submit his statement. Since he failed to give explanation, ultimately Ext. P8 proceedings dated November 15, 1983 was issued imposing the punishment of withholding promotion with effect from November 15, 1983. He further claims that Ext. P8 had been served on Thankamani through the Headmaster and Ext. P9 is his acknowledgement and the D.E.O. was also informed about the order of punishment. In the counter affidavit filed in O.P. 7737/90 and in the pleadings in O.P. 2005/90, Thankamani has denied the allegations against him, receipt of the show cause memo and the order imposing the punishment. State in its counter

affidavit filed in O.P. 656/90 has categorically stated that no information was received from the Manager regarding the disciplinary action taken against Thankamani or about the punishment imposed on him.

8. In Ext. P12 memorandum of appeal filed by the Manager before the Deputy Director challenging the order of the District Educational Officer rejecting the appointment of Sulalha, it had been stated as follows:

'Moreover the incumbent for whom the D.E.O. has shown favouritism is a menial on whom the penalty of permanent withholding of promotion has been imposed by the Manager vide my letter No. 23/83 dated November 15, 1983 addressed to the D.E.O....Neyyattinkara'.

But no reference is seen made to the above argument in Ext. P13 order passed by the Deputy Director in favour of the Manager. The appeal was allowed on a different ground. Subsequently in Ext. P14 objections filed before the Government the Manager had stated as follows:-

'For grave and serious misconduct, disciplinary proceedings were initiated against Shri. Thankamany and his promotion withheld permanently as proceedings dated November 15, 1983. (A copy of the said proceedings is filed herewith for kind perusal). In view of the punishment imposed, Sri. Thanakamani is ineligible for promotion even if he is otherwise eligible. The proceedings dated November 15, 1983 has become final since it has not been challenged in any appeal or revision before any of the departmental authorities and in view of the operation of punishment order, the action of the petitioner in appointing a fresh competent qualified hand is perfectly in order.'

9. After considering the arguments put forward on behalf of the Manager, the Government under its revisional jurisdiction has come to the conclusion that the contention relating to the disciplinary action was not genuine. Ext. P15 order would show that the original file relating to disciplinary action was not made available before the revisional authority. Of course in Ext. P16 affidavit filed by the counsel, who appeared on behalf of the Manager before the Government, it has been stated that the original file relating to the disciplinary action was placed before the

Addl. Secretary who heard the matter. This claim has been denied by Thankamany in his counter affidavit in O.P. 656/90. According to him, the records produced as original file contained only photostat copies. Thankamany submits that signatures seen on Ext. P7 and Ext. P9 are not his signature. His specific case is that, in order to deny him his due promotion the Manager had concocted a story of disciplinary action against him. He further submits that a reading of Ext. P5 show cause notice itself would show that it had been issued not in accordance with Rule 76 of Chapter XIV-A of K.E.R. It would also reveal the mala fide intention of the Manager. Before issuing notice to show cause, why disciplinary proceeding shall not be taken against him. Ext. P5 contained a clear proposal to impose a punishment. So also, he submits that the imposition of penalty is bad in law as it had been issued without consulting the Headmaster as per the mandate of the Rule. The Manager was bound to inform the D.E.O. (about) the imposition of penalty. The department has taken the stand that no such information has been received from the D.E.O. and the Manager has no material to be placed before this court to show that he had complied with that provision. Under these circumstances it is submitted on behalf of Thankamany that even if an order has been issued by the Manager (it is not admitted) imposing a punishment of barring of promotion, the order is totally void in the eyes of law and should be ignored.

10. In the impugned order, Government has come to a categorical finding that the story of imposition of punishment on Thankamany by order dated November 15, 1983 was not genuine. The signatures in Exts. P7 and P9 have no resemblance to the signature of Thankamany as seen in his affidavits filed before this court. Ext. P9 does not even bear a date. These facts go to support Thankamany's version that he was not served with Ext. P5, P6 and P8. Apart from the above, a reading of Ext. P5 show cause notice would show that it has not been issued in accordance with the Rules. There is no reference in Ext. P5 to the specific misconduct alleged against him. Ext. P6 also does not satisfy the requirement of a statement of allegations. Mere forwarding of copies of the complaints is not sufficient. The allegations supporting the misconduct alleged should be specifically shown in the statement.

11. Rule 76 of Chapter XIV-A contains the procedure to be followed for taking disciplinary proceedings before imposition of penalty provided under items (i), (ii) and (iii) of Rule 65. Rule 76 reads as follows:-

'The procedure for imposing minor penalties:- (I) No orders imposing any of the penalties specified in items (i),(ii) and (iii) of Rule 65 shall be passed except after -
(a) the teacher is informed in writing of the proposal to take action against him and of the allegation on which it is proposed to be taken and given opportunity to make any representation he may wish to make (b) such representation, if any, is taken into consideration.

(2) The record of proceedings in such cases shall include-

- (i) a copy of the intimation to the teacher of the proposal to take action against him;
- (ii) a copy of the statement of allegations communicated to him;
- (iii) his representation, if any; and
- (iv) the orders of the case together with the reasons therefor.'

Following are the penalties provided under items (i), (ii) and (iii) of Rule 65-

- (i) Censure;
- (ii) Withholding of increments or promotion;

Withholding of increments or promotion referred to may be either permanent or temporary for a specified period.

- (iii) (a) Recovery from pay of the whole or part of any pecuniary loss caused to the State Government by negligence or breach of orders;
- (b) Recovery from pay to the extent necessary of the monetary value equivalent to the amount of increments ordered to be withheld where such an order cannot be given effect to;

12. In the show cause memo contemplated under Rule 76, the proposal to take disciplinary action against the delinquent, the specific misconduct alleged and the allegations on the basis of which such action is contemplated are to be delineated and his explanation sought. After considering the explanation, the disciplinary authority has to take a decision whether the delinquent is guilty of the misconduct alleged against him and if he is found guilty, what would be the appropriate penalty to be imposed on him. As mentioned earlier different penalties are provided under items (i), (ii) and (iii) of Rule 65. Depending upon the nature and gravity of the misconduct found against the delinquent, one among the penalties can be imposed. A reading of Ext. P5 would clearly show that even before disciplinary proceedings were initiated against Thankamony, the 5th respondent had already come to a decision that a punishment of withholding promotion to higher post shall be imposed on him. It is open to the disciplinary authority to take a tentative decision even at the initial stage whether the misconduct is of such grave nature so that the procedure for imposition of major penalty contemplated under Rule 75 has to be followed or is it sufficient to follow the procedure under Rule 76 and impose a minor penalty. But the disciplinary authority cannot prejudge the particular penalty to be imposed on the delinquent before considering his explanation and entering a finding against him. Such an action would be unfair and arbitrary and against the spirit of the Rules. A similar view has been taken by the High Court of Punjab and Haryana in *M.L. Gara v. Chief Engineer* I. W.Pb. 1973 (1) SLR 1076). Apart from the above, Ext. P5 memo does not even refer to the specific misconduct.

13. In Ext. P5 reference is made to complaint alleged to have been received as early as on April 23, 1982 (Ext. P1). There is no explanation forth-coming from the Manager, why he did not issue a memo to Thankamany within a reasonable time after receipt of Ext. P1 complaint, if he had, as a matter of fact, received such a complaint against Thankamany. Admittedly Ext. P3 complaint was sent by none other than the son of the Manager. It is addressed to the D.E.O. There is nothing to show that such a complaint had even been received by D.E.O. The nature of allegation made therein and the language of the petition would go a long way to support the contention of Thankamany that it was concocted to mar his chances of promotion, when the Manager found that he had acquired qualification for

promotion as Clerk in the arising vacancy. In the above circumstances, I am not persuaded to interfere with the finding in Ext. P15 that the allegation of disciplinary action taken against Thankamany was not genuine.

14. There is yet another legal infirmity regarding the alleged imposition of punishment. Under the unamended provisions of Rule 7 of Chapter XXIV-B of K.E.R. which were in force during relevant period it was provided as follows:

'b. The authority which may impose the penalty of with-holding increments or promotion or reduction to a lower stage in a time scale shall be the Manager who shall consult the Headmaster before imposing the penalty. The Educational Officer shall also be informed of the imposition of the penalty.'

The pleadings in these three cases and the documents produced therewith would show that the Manager had not complied with the above mentioned two mandatory conditions. Ext. P17 dated February 22, 1990 is a letter addressed by the Manager to the Headmaster directing him to explain why he had not made necessary entries in the service book of Thankamany regarding imposition of penalty on him. Reply given to the above letter by the Headmaster is Ext.P18. He has categorically stated therein that he was not consulted by the Manager before imposing punishment on Thankamany. He has explained that since the order was not issued in accordance with Rule 7(b), it cannot be treated to have legal force and therefore he had no authority to make any entry in the service book in that respect. The definite stand taken by the department is that they were not informed about the punishment imposed on Thankamany as contemplated by the Rule. Therefore on the ground of non-compliance with the provisions under Rule 7 (b) also, I find that no punishment which would stand in the way of his promotion as Clerk was imposed on Thankamany in the eye of law. For these reasons the challenge against Ext. P15 made in O.P. 656/90 and 7737/90 stand repelled.

15. What is left is the contention raised by Thankamany against the direction issued in Ext. P15 to disburse the salary of Sulatha for the period in which she had actually worked. It is submitted that he was denied promotion due from January 1, 1984 by the Manager deliberately with the mala fide intention of appointing Sulatha, his own daughter. Under these circumstances he is entitled to claim

promotion from January 1, 1984 with all monetary and other benefits. Sulatha whose appointment was illegal has no claim for the salary.

16. The learned counsel appearing on behalf of Sulatha relying on the decision of this court in *State of Kerala v. Radhamony Amma* (1990 (1) KLT 602) judgment in Writ Appeal 282/83 and Writ Appeal 272/89 contended that Sulatha is entitled to salary during the period in which she had worked. He further submitted that there are no peculiar circumstances in this case which would persuade this court to take a different view from the above mentioned judgments. I find substance in the contention raised on behalf of Sulatha. The above mentioned decisions support her stand. Therefore the challenge against Ext. P15 in O.P. 2005/90 to the extent Government had directed payment of salary to Sulatha during the period in which she had actually worked fails.

17. But the claim of Thankamany for all service benefits including arrears of salary with effect from January 1, 1984 cannot be defeated for the above reason. If the incumbent legally entitled for appointment is denied the benefits, while granting the same to the usurper, it would amount to paying a premium to illegal and arbitrary actions of the Manager, more so in the facts of this case, where the beneficiary of Manager's illegal action is none other than his own daughter. I am not impressed by the argument put forward by the learned counsel appearing on behalf of the Manager that it was the Committee of the Educational Agency which took the decision regarding appointment and therefore no charge of mala fides can be placed on him. He is the President of the Sanghom which is the Educational Agency. Admittedly his son was also appointed as a Clerk in the school. Therefore the Manager cannot plead innocence in the matter of the illegal appointment of his daughter Sulatha. I come to the conclusion that Thankamany is justified in his claim.

18. In the light of the above discussion, the petitioner in O.P. 2005/90 is granted a declaration that he is entitled for promotion as Clerk in the vacancy which arose on January 1, 1984 in the school of the 4th respondent therein. He will be deemed to have been promoted as Clerk with effect from January 1, 1984 and entitled to salary, emoluments and other service benefits on that basis. In W.A. 309/93, a

Division Bench of this court had granted such relief to a menial who was refused promotion as Clerk for a long period under similar circumstances. Respondents 1 and 2 in O.P. 2005/90 would take immediate steps to see that the 4th respondent implements the Government order dated January 15, 1990 by appointing the petitioner as Clerk forthwith.

19. It is stated at the Bar that petitioner in O.P. 656/90 has not yet been paid the salary for the period in which she worked in the school. The State cannot be burdened with the liability to pay two sets of salary in respect of one post. Public money is not for distribution among persons who have benefited by patently illegal actions. Therefore, I direct the State Government as well as the Director of Public Instruction to take necessary action to recover from the Manager, petitioner in O.P. 7737/90, the entire amount to be paid to the petitioner in O.P. 656/90 as salary pursuant to the direction contained in the Government order dated January 15, 1990 and pay the same to the petitioner in O.P. 656/90. The arrears of salary and other monetary benefits due to the petitioner in O.P. 2005/90 shall be paid as expeditiously as possible.

20. In the result Original Petition 2005/90 is partly allowed. O.P. 656/90 and 7737/90 stand dismissed.