

Bindu Thomas Vs. State of Kerala

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Court : Kerala

Decided On : Jul-03-2003

Reported in : 2003(3)KLT217

Judge : K. Balakrishnan Nair, J.

Acts : [Education Act, 1958](#) - Sections 36(1); [Constitution of India](#) - Article 226

Appeal No. : W.P.(C) No. 21154 of 2003

Appellant : Bindu Thomas

Respondent : State of Kerala

Advocate for Def. : K.J. Josemon, Govt. Pleader

Advocate for Pet/Ap. : Abrabam Vakkanal,; Saji Kuriachan,; M.R. Nandakumar

Disposition : Petition dismissed

Judgement :

K. Balakrishnan Nair, J.

1. The petitioner challenges the retrospectivity given to an amendment introduced in the Kerala Education Rules by Ext.P9 dated 3.4.2003. By the said amendment, a rival claimant became eligible for appointment as High School Assistant. The petitioner apprehends that the said eligibility acquired by the 3rd respondent may

affect her claim for approval of her appointment. The brief facts of the case are the following:

2. The petitioner is presently working as High School Assistant (Malayalam) in St. Mary's High School, Vynthala managed by the 4th respondent. She was appointed as HSA (Malayalam) in this School in a leave vacancy by Ext.P3 order dated 12.8.1999. The appointment was for a period extending from 12.8.1999 to 15.10.1999. That was approved by the D.E.O. She was reappointed in a leave vacancy of HSA (Malayalam) from 11.1.2000 to 15.3.2000 by Ext.P4. The said appointment was also approved. The petitioner was again appointed in a leave vacancy from 19.9.2000 to 18.9.2002. The said appointment was also approved as evident from Ext.P6 appointment order. The approval of appointment was restricted upto 14.7.2001. The petitioner submits, feeling aggrieved by the approval being restricted upto 14.7.2001 instead of granting upto 18.9.2002, she has preferred a revision before the Government and the same is pending. While so, as a result of retirement of a senior HSA (Malayalam), a vacancy arose from 1.4.2002. The petitioner was reappointed in that vacancy by Ext.P7 order with effect from 5.6.2002. The said appointment is yet to be approved.

3. While the above appointments and their approvals were taking place, the 3rd respondent in this Writ Petition was trying to get promotion as HSA (Malayalam). She was staking her claim for promotion even before the first appointment of the petitioner. She is an UPSA qualified to be appointed as HSA (Natural Science). While in service, she acquired M. A. in Malayalam in the year 1996. Ever since her acquisition of the said Post-graduate Degree in Malayalam, she was staking her claim for appointment as HSA (Malayalam) on the strength of Ext.P8 Government order dated 22.8.1987. The said order provided that a Post-graduate in the concerned subject/language even though he may not be a graduate in that subject/language is eligible to be appointed as HSA (Subject) or HSA (Language). One Smt. P. Sindhu was appointed as HSA (Malayalam) in a retirement vacancy on 19.6.61995. Though one post of HSA (Malayalam) was reduced during the academic year 1996-97, she was retained in the School on the strength of the Government orders dated 16.7.1999 and 29.9.1999. With effect from 1.6.1999 a leave vacancy of HSA (Natural Science) and a retirement vacancy of HSA

(Malayalam) arose. The said Smt. P. Sindhu was accommodated as HSA (Malayalam) by Ext.P1 order and the 3rd respondent was appointed as HSA (Natural Science) as per Ext.P2. Both the appointments were approved. Subsequently, a vacancy arose in which the petitioner was accommodated as HSA (Malayalam) . The 3rd respondent ever since the acquisition of qualification of M.A. (Malayalam) was objecting to the appointment made to the post of HSA (Malayalam). But those motions were rejected by the competent authorities, submits the petitioner. It is also submitted that one of those orders, Ext.P5, issued by the DEO is under challenge before this Court in O.P. No. 5099/2001. It is also submitted that O.P. No. 32623/2001 filed by the petitioner and the Manager challenging the validity of Ext.P8 is pending before this Court. While so, the Government amended the Rules in tune with Ext.P8 by issuing Ext.P9 on 3.4.2003. Ext.P9 is given retrospective effect from 22.8.1987, which is the date of Ext.P8 Executive order. This Writ Petition is filed challenging the retrospectivity given to Ext.P9. The petitioner apprehends that the retrospectivity will affect her rights.

4. I heard the learned counsel for the petitioner and the learned Government Pleader for respondents 1 and 2. The main ground of attack urged by the learned counsel for the petitioner against Ext.P9 is that the retrospectivity given to the Rule will affect the petitioner's vested right. So, it is contended that the amendment is bad for disturbing her vested rights. It is also submitted that the retrospectivity given is arbitrary and therefore violative of her fundamental rights under Article 14 of the [Constitution of India](#). So, the petitioner seeks a declaration that the retrospectivity given to Ext.P9 is void ab initio.

5. Section 36(1) of the Kerala Education Act, 1958 empowers the Government to make rules either prospectively or retrospectively, for the purpose of carrying into effect the provisions of the Act. So, admittedly, the Government have the power to frame rules with retrospective affect. So, the only point to be decided is whether it is affecting the vested rights of the petitioner, or it is arbitrary rendering it unconstitutional. Going by the amendment, I think that none of the rights (stricto sensu) of the petitioner is affected by Ext.P9. May be, she is adversely affected by the Governmental action in issuing Ext.P9. That does not mean that her rights are

affected. Salmond in his Jurisprudence explains the concept 'right' co-relating it to duty. The learned Author first explains 'duty'. It is said,

'A duty is roughly speaking an act which one ought to do, an act the opposite of which would be a wrong..... To ascribe a duty to a man is to claim that he ought to perform a certain act'.

The learned Author goes on to add that in the strict sense a duty is something owed by a person to another. Then the concept of 'right' is explained in the following words:-

' We have seen that in the strict sense a duty is something owed by one person to another. Correspondingly the latter has a right against the former. The master has a right against his servant, the parent against his child and so on. To ascribe a right to one person is to imply that some other person is under a corresponding duty'.

The right co-related to duty is described by other learned Authors as 'right stricto sensu' or 'claim'. According to them, jural concepts of liberty/privilege, power and immunity can also be termed as 'rights'.

6. This Court can grant relief only where there is a right stricto sensu which co-relates to a duty in somebody else. The Government, as the delegate of Legislature, have framed Ext.P9 invoking its power to frame rules. The Government do not owe any duty to anyone not to recognise any other new qualification for appointment to the post of HSA (Subjects) or (Languages), Therefore, the petitioner does not have any corresponding right stricto sensu as against the Government. The conferment of new rights on some people may adversely affect the interest of certain others. That does not mean that the same has infringed any of their rights. For example, a hotel owner may be adversely affected by granting permit for construction of a new hotel building in his neighbourhood and by later granting licence for running that hotel. His business will be considerably affected by the opening of the new hotel. But none of his rights are affected by the actions of the competent authority in granting building permit or granting licence for running a new hotel. It is for the reason that the said

authority does not owe any duty to the existing hotel owner not to grant permit or licence for opening a new hotel to somebody else. So, he may be adversely affected. But he cannot have any remedy as none of his rights are infringed. This principle has been considered by the Apex Court while explaining the concept of 'person aggrieved' in *Jasbhai Mothibhai Desai v. Roshan Kumar, Haji Bashir Ahmed* (AIR 1976 SC 578).

7. In view of the above position, I find that none of the legal rights of the petitioner is affected by the issuance of Ext.P9 and therefore she cannot maintain a challenge against it. It is true, the petitioner is challenging only the retrospectivity given to Ext.P9. But, the Government do not owe any duty to the petitioner not to give retrospectivity to Ext.P9 and therefore the petitioner has no legal right to insist that the amendment to the rule should operate only prospectively. Apart from that, on merits also, the petitioner does not have any case. The Government issued the Executive order recognising Post-graduate degree also as an equivalent qualification for appointment as HSA in Subjects and Languages, on 22.8.1987. When the amendment was introduced, it has been given retrospective effect from that date. Normally, rules are amended on the basis of a policy decision taken by the Government to amend the rules. For various reasons, there will be some delay in carrying out the amendment. In such cases, the amendment is introduced with retrospective effect from the date of the relevant decision. That has been done in this case also. So, I find that no ground has been made out warranting interference with Ext.P9 under Article 226 of the Constitution of India.

Accordingly, the O.P. fails and it is dismissed.