

Baiju Kumar Vs. D.E.O.

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Court : Kerala

Decided On : Jul-10-2003

Reported in : 2003(3)KLT240

Judge : K. Balakrishnan Nair, J.

Acts : Kerala Education Rules, 1959 - Rules 9 and 51B; Kerala Education Act - Sections 7 and 7(2)

Appeal No. : O.P. Nos. 14830/99 and 8968/02

Appellant : Baiju Kumar

Respondent : D.E.O.

Advocate for Def. : S. Gopakumaran Nair,; T.M. Abdul Latiff,; B. Raghunathan

Advocate for Pet/Ap. : K. Raveendran and; T.M. Abdul Latiff, Advs.

Judgement :

K. Balakrishnan Nair, J.

1. These two cases have been filed by the very same petitioner to enforce his right under Rule 51B of Chap.XIVA of the K.E.R. So, they are heard and disposed of by a common Judgment.

O.P. No. 14830/99-M

2. The petitioner's mother Smt. S. Christi Bai was working as H.S.A. (Malayalam) in the school managed by the 2nd respondent from 3.8.1970 onwards. She died on 18.5.1989 while in service. At the time of her death, she had completed 19 years of service. The petitioner's date of birth is 30.5.1978 and at the time of his mother's death, he was only a minor aged about 11 years. He attained majority on 30.5.1996. Thereafter, on 30.11.1998, the petitioner submitted an application for appointment under Rule 51B of Chap.XIVA of the K.E.R. on finding that a vacancy of Peon has arisen in the school on 30.9.1998. Ext.P1 is the application submitted by him in the prescribed format. Thereafter, he moved the Director of Public Instructions seeking appropriate reliefs. Still later, he also submitted Ext.P2 representation dated 3.4.1999 before the District Educational Officer praying that appropriate directions may be issued to the Manager to consider his application. Rule 51B in Chap.XIVA of the K.E.R. was introduced as early as on 30.3.1990. However, because of the objections raised by the Managers of various aided schools, the Government, by an executive order, kept in abeyance the said amendment. Thereafter, as per the direction of this Court in O.P. No. 664/95, the Government decided to enforce Rule 51B of Chap.XIVA of the K.E.R. Ext.P3 is the order issued by the Government in this regard. The petitioner, feeling aggrieved by the inaction of the Manager, the District Educational Officer and the Director of Public Instructions, filed this Original Petition seeking appropriate reliefs. He sought for a writ of mandamus against the respondents to appoint him as Peon. He also sought stay of filling up the vacancy of Peon which arose on 30.9.1998 by another candidate other than him.

3. The 2nd respondent Manager has filed a counter affidavit in the Original Petition. In the said counter affidavit, it is submitted that he has received Ext.P1 application. It is also stated that by Ext.R2(b), he has rejected the claim of the petitioner on the ground that Ext.P3 order has only prospective effect and the dependents of employees dying in harness on or after 30.3.1990 alone are eligible for employment assistance. The Manager has also produced Ext.R2(c) communication of the Government to the Headmaster of an aided school, which states that Ext.P4 has got only prospective effect.

O.P. No. 8968/02-

4. During the pendency of O.P. No. 14830/99, this Original Petition was filed. The Manager filled up the vacancy of Peon which arose on 30.9.1998 by promoting the additional 6th respondent Mr. Sasikumar, who was a Full Time Menial. In the resultant vacancy of Full Time Menial, the 5th respondent Mr. Rule Anilkumar was appointed, but the said appointment was not approved by the District Educational Officer, the Deputy Director and the Director of Public Instructions. Therefore, the 5th respondent filed a revision before the Government on 22.01.2001 claiming approval of his appointment. The Government, by Ext.P5 order, directed approval of appointment of the 5th respondent as Full Time Menial on the ground that the petitioner did not claim that post. This Original Petition is filed challenging Ext.P5 and seeking consequential reliefs.

5. The 1st respondent has filed a counter affidavit supporting the impugned order. The 4th respondent Manager has also filed a counter affidavit. The Manager is denying the pleading of the petitioner that he has submitted an application for appointment to the vacancy of Peon that arose on 30.9.1998. It is also submitted that the petitioner is not eligible to get appointment in terms of the scheme. Since the petitioner's mother was a teacher, it is submitted that he cannot claim a post on the ministerial side. It is further submitted that since the death of his mother took place in 1989, a claim for employment made in 1998 cannot be entertained.

6. I heard both sides. Going by Ext.P5 in O.P. No. 8968/02, the Manager has not raised many of the contentions before the Government, which he has raised in the counter affidavit in the second Original Petition. The Government have summarised the case of the Manager as under:-

'The contention of the Counsel for the Manager is that the claim of Shri. Baijukumar is for the post of Peon/Attender whereas the appointment of Shri. Anilkumar is as Full Time Menial. This has been admitted by the Director of Public Instruction in his order dt. 15.1.2001.

The retirement vacancy of Peon was filled up by a Rule 43 claimant. As per the interim order dt. 17.6.99 in C.M.P. No. 23953/99 in O.P. No. 14830/99 of the Hon'ble High Court there is no barrier to approve the appointment of Shri. Anilkumar as Full Time Menial on 15.6.99. The post applied for by Shri.

Baijukumar is as Peon. So the appointment of Shri. Anilkumar as F.T.M. is liable to be approved and the order of the Director of Public Instruction is to be set aside. The Manager reported that he has received the application of Shri. Baijukumar only through the Director of Public Instruction vide his letter dt. 19.6.2000.'

The above quoted portion will show that the petitioner has applied only for the post of Peon/Attender. He did not apply for the post of Full Time Menial. Therefore, according to the Government, he has no claim for the post of Full Time Menial and the appointment of the 5th respondent is liable to be approved in the post of Full Time Menial. The Government, reversed the orders of the lower authorities, in Ext.P5 upholding the said contention of the Manager. The Government found that the post of Peon has been filled up by a Rule 43 claimant working in the post of Full Time Menial and the resultant vacancy in the post of Full Time Menial was rightly filled up by appointing the 5th respondent as the petitioner did not make any claim for appointment to that post. Before considering the validity of Ext.P5, I think it will be beneficial to examine the relevant statutory provisions and orders, Rule 51B of Chap.XIVA of the K.E.R. reads as follows:-

'The Manager shall give employment to a dependent of an aided school teacher dying in harness. Government orders relating to employment assistance to the dependents of Government servants dying in harness shall mutatis mutandis, apply in the matter of such appointments.'

The opening sentence in Rule 51B is couched in mandatory words. Section 7(2) of the Kerala Education Act says that 'the Manager shall be responsible for the conduct of the school in accordance with the provisions of the Act and Rules made thereunder.' Rule 9 of Chap.III also states that 'the Manager shall be responsible for the conduct of the school strictly in accordance with the provisions of the Kerala Education Act and Rules thereunder.' So, in the light of the provisions contained in Section 7 of the Act and Rule 9 of Chap.III of the Rules, the Manager is bound to run the school in accordance with the provisions of the Act and Rules. He has to respect and obey the mandate of Rule 51B also. The said Rule creates a corresponding right in the dependent of a deceased employee. Rule 51B does not say that the dependent of a teacher cannot be appointed as a non-teaching

staff. If the vacancy of Peon/Attender had to be filled up by a Rule 43 claimant and only the vacancy of Full Time Menial was available, the Manager should have informed the petitioner regarding the availability of that vacancy and offered him appointment as Full Time Menial.

7. A number of cases are coming up before this Court under Rule 51B of Chap.XIVA of the K.E.R. The Managers in most of the cases contend that the application was not submitted in time, it was not in the prescribed format etc. All these contentions illcome from the mouth of the Manager in the light of the mandatory provision in Rule 51B which says that the Manager shall give employment to a dependent of an aided school teacher dying in harness. When a teacher of his school dies, it must be presumed that the Manager knows who are the dependents and whether anyone of them is eligible for appointment. Going by the provisions of the Act and Rules, he has to offer appointment to them whenever a suitable vacancy arises. He cannot take shelter behind the plea that the dependent did not apply in time etc. The Manager alone knows, when the vacancy arises. It is impossible for the dependent to keep track of the vacancies that may arise in a school or schools under the management. The claimant cannot know whether anybody else is appointed overlooking his claim. The Manager can inform the dependent about the vacancy and direct him to apply in the prescribed format within a time frame. Atleast these positive actions can be implied from the mandatory words of Rule 51B. It cannot be read down to mean that only if the dependent applies in time and pesters him, he need act under Rule 51B. In the absence of provisions containing procedures or orders for filling up the lacunae, this grey area is abreeding ground for so many disputes and litigations. I think the Government should bestow its attention to this aspect.

8. The only ground for rejection of the claim of the petitioner for appointment in the post of Full Time Menial is that he has not applied for that post. But the said defence is not available for the Manager in the face of the mandatory nature of the duty under Rule 51B. Only if the petitioner declines to accept the post of Full Time Menial, the Manager can go in for appointing a fresh hand. The petitioner submits, though he prefers the post of Peon, he is willing to accept the post of Full Time Menial.

9. The Manager has raised some new contentions in the counter affidavit which he has not raised either in O.P. No. 14830/99 or before the Government. They are regarding the ineligibility including financial position of the petitioner etc. Those contentions have been raised as a result of an afterthought as a desperate attempt to sustain Ext.P5. In those efforts, he has made conflicting pleas which may amount to commission of perjury warranting an order under Section 340 of the Cr.P.C. directing his trial for perjury by the competent Criminal Court. In O.P. No. 14830/99, the Manager has pleaded regarding the submission of the application by the petitioner in the following manner:-

'3. It is true that the petitioner has preferred an application for employment assistance under the scheme issued in G.O.MS. 15/97/9 Edn. dated 16.1.1997. The said application was received by this respondent as forwarded by the Director of Public Instructions. True copy of the covering letter of the D.P.I, is produced herewith and marked for identification as Ext.R-2(a).

4, The application was considered by this respondent and rejected with intimation to the D.P.I. The reply sent by this respondent is produced herewith and marked for identification as Ext R-2(b).'

In O.P. 8968/02, the Manager's pleadings regarding the submission of the application by the petitioner are contained in paragraph 3 of his counter affidavit. The same reads as follows:-

'The petitioner had not submitted any application for appointment in the vacancy, which arose on 30.9.1998. He had not submitted any application as stated by him on 30.11.1998. Even if he had submitted any such application, he is not entitled for the same.'

The above pleadings would show that the Manager is determined not to speak the truth. So, I am not inclined to readily act on the submissions made by the Manager in his counter affidavit regarding the ineligibility of the petitioner.

10. But the learned counsel for the 4th respondent Manager in O.P. No. 8968/02 relied on a decision of a Division Bench of this Court in Deepak v. Secretary,

General Education Department (2002 (3) KLT 288) and submitted that going by the principles laid down therein, the petitioner is ineligible for appointment. In the said case, the father of the petitioner therein died in 1978. After the lapse of about 21 years, the petitioner therein put forward his claim. In the background of the facts of that case, the said 'decision has to be understood. It is true, this Court, in Deepak's case, has noticed the observations of the Apex Court that the appointment under the dying in harness scheme is meant to give immediate relief to the family of the deceased and it is not to be treated as another method of appointment.

11. The decisions of the Apex Court in *State of Haryana v. Umeshkumar Nagpal* (JT 1994 (3) SC 525) and other cases were concerning appointment to public services under the dying in harness scheme. So, if a candidate is not appointed on compassionate ground, the said vacancy will go to a meritorious candidate. So, any appointment to an ineligible candidate to public service otherwise than in accordance with the Rules will result in denial of opportunity to a meritorious candidate. The observations of the Apex Court has to be understood in the light of this crucial aspect. The appointment under the dying in harness scheme is a concession granted by the Government. Normally, in the light of Articles 14 and 16 of the Constitution of India, every vacancy should be filled up after giving a fair opportunity to all eligible candidates and the most meritorious among them should be appointed. An exception to that Rule is made when an appointment is made on compassionate ground. Therefore, the executive orders granting this concession should always be subject to the mandate contained in Articles 14 and 16 of the Constitution of India. This is the principle underlying the decisions of the Apex Court. But those decisions cannot be mechanically imported while considering an appointment on compassionate ground in an aided school. The Manager of an aided school can appoint any person having the prescribed qualification. Merit is never a criterion for many educational agencies. In most of the schools, appointments are made on other considerations. Only a very few managements are concerned with the merit of the candidates. So the provisions of Articles 14 and 16 are not applicable while making appointment to the vacancies in aided schools. Therefore, the observations made by the Apex Court are not applicable to the appointments on compassionate ground in aided schools with its full vigour.

Apart from that, the right to get appointment in an aided school on compassionate ground is not a concession granted by any executive order. It is a statutory right. The executive orders governing appointment on compassionate ground in public services is incorporated in the Rule by adoption. It is legislation by reference (See the decision in Mahindra and Mahindra Ltd. v. Union of India (1979 (2) SCC 529). Unless Rule 51B and the relevant orders which form part of that Rule are challenged, the Manager cannot rely on the general observations of the Apex Court to reject the claim of an applicant under Rule 51B.

12. When the petitioner submitted the application, the order governing employment to dependents under the dying in harness scheme in public services was G.O.(P) No. 7/95/P&ARD; dated 30.3.1995. As per paragraph 18 of that order, there was no time limit for submitting the application. The said paragraph reads as follows:-

'There shall be no time limit for preferring applications under the scheme. Dependents can apply for the benefit of the scheme at any time but within the upper age limit prescribed for the direct recruitment to the post requested for by him/her.'

As per that Government Order, there was no income limit also. Paragraph 12 of the said G.O. reads as follows:-

'There shall be no income limit restriction.'

13. The petitioner became major on 30.5.1996 and he applied for appointment on 30.11.1998. Since the above said Government Order was, at the relevant time, part of the Rules, there was no time limit or income limit. Therefore, the contentions of the Manager contained in paragraph 3 of his counter affidavit in O.P. No. 8968/02 regarding the eligibility of the petitioner (delay in applying and financial position) are unsustainable. The said Government Order came under severe criticism from this Court in the matter of appointment to public services in the judgment in O.P. No. 10287/95. The said criticism was made relying on Umeshkumar Nagpal's case mentioned above. Therefore, the Government accepted the adverse criticism made by this Court in the judgment in O.P. No.

10287/95 and issued G.O.(P) No. 12/99/P&ARD; dated 24.5.1999. As per that G.O., time limit for submission of application and also income limit were introduced. The time limit was that the application should be submitted within two years after the death of the employee and in the case of minors, within three years after attaining majority. The income of the family should not exceed Rs. 1.5 lakhs. In the new G.O., it has been specifically provided that pending applications as on the date of that order shall be dealt with as per the earlier orders. This Government Order also being part of the Rule by virtue of legislation by reference, the 4th respondent Manager cannot escape from the liability of giving appointment to the petitioner. In view of the above position, Original Petitions are allowed. Ext.P5 in O.P. No. 8968/02 is quashed. It is declared that the petitioner is entitled to get appointment to the post of Full Time Menial in which the 5th respondent was appointed, with effect from the date of appointment of the said respondent. The Manager shall pass consequential orders appointing the petitioner within one month from the date of receipt of a copy of this judgment. The petitioner will be entitled to all consequential benefits except arrears of salary. The District Educational Officer shall take further action in accordance with law on the basis of the order passed by the Manager as directed above. The 5th respondent shall be entitled to get salary for the period he has actually worked provided there was a post to accommodate him as per the staff fixation orders for the relevant years.

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