

**Balakrishnan Vs. A.E.O.**

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**Court :** Kerala

**Decided On :** Jul-28-2005

**Reported in :** 2005(4)KLT64

**Judge :** K.A. Abdul Gafoor and; K. Hema, JJ.

**Acts :** Public Service Act, 1961; Kerala Education Act - Sections 12; Kerala Education Rules, 1959 - Rules 37(1), 37(2), 45B and 45C; Kerala State and Subordinate Service Rules, 1956 - Rule 28

**Appeal No. :** W.A. No. 1329 of 1999

**Appellant :** Balakrishnan

**Respondent :** A.E.O.

**Advocate for Def. :** Vaheeda Babu, Government Pleader,; C.K. Pavithran,; C. V

**Advocate for Pet/Ap. :** B. Gopakumar and Chincy Gopakumar, Advs.

**Disposition :** Appeal dismissed

**Judgement :**

**K.A. Abdul Gafoor, J.**

1. A post of Headmaster arose in L.P. School Chorode, Kozhikode, of which the 4th respondent is the Manager. On 1.5.1991, the 4th respondent preferred the 3rd

respondent, who according to him was the senior most teacher in the school. There upon the appellant/writ petitioner staked his claim for the post. The educational officer as per Ext.P4 resolved the dispute in favour of the 3rd respondent. Challenge of Ext. P4 in O.P.5173/1993 did not succeed. Therefore this Writ Appeal.

2. Two contentions are mainly urged by the appellant/writ petitioner to substantiate his claim for the post of Headmaster, in preference to the 3rd respondent. One is that he is senior to the 3rd respondent and the other is that he had acquired the necessary obligatory test qualification for promotion as Headmaster, earlier than the 3rd respondent.

3. Admitted facts revealed that both of them commenced continuous qualified service on 2.6.1981. There is no dispute. Both of them did have earlier underqualified spells of service. The 3rd respondent is considered as senior, counting such service. This is not permissible in terms of Rule 37 Chapter XIV-A KER, which determines the seniority of aided school teacher in a unit. It is submitted relying on the decision reported in K.P. Mathiri v. State of Kerala and Ors. (1973 KLT 284) that only qualified service can be counted for seniority. Under qualified service cannot be reckoned, the appellant asserts.

4. Both of them were appointed on regular basis on 2.6.1981. On that date, both of them were duly qualified for the post of LP School Assistant. None of them is given seniority from an anterior date. Both are given seniority from that date alone; because Rule 37 Chapter XIV A KER permits that alone. But, when two incumbents commenced qualified continuous service on the same date, one shall have to be ranked below the other. What shall be the order, that alone is the issue here. There is no question of reckoning any temporary or underqualified service for the purpose of seniority. The answer to the question lies in Sub-rule (2) of Rule 37. In order to conceive the issue in its real perspective, it is necessary to read Rule 37 as such.

'37(1). Seniority of a teacher in any grade in any unit shall be decided with reference to the length of continuous service in that grade in that unit provided he is duly qualified for the post.

(2) In the case of teachers in the same grade in the same unit whose date of commencement of continuous service is the same, seniority shall be decided with reference to the date of first appointment. If the date of first appointment is also the same, seniority shall be decided with reference to the age, the older being the senior.'

## 5. Sub-rule

(1) cannot answer the issue because both of them commence the qualified continuous service on the same date. Necessarily we have to step over to Sub-rule

(2) which provides that the seniority of such incumbents commencing continuous qualified service on the same day shall be reckoned 'with reference to the date of first appointment'; obviously meaning earlier temporary appointment, which may be either qualified or under qualified. It is pertinent to note Sub-rule

(1) which stipulates commencement of continuous service 'provided he is qualified for the post.' Commencement of continuous service shall be thus qualified continuous service. But Sub-rule

(2) while mentioning 'the date of first appointment' as the order to reckon seniority among the persons having same date of continuance service, the word 'qualified' is not made mention of. What is mentioned in Sub-rule

(2) is not 'first qualified appointment' but only 'first appointment.' Necessarily, that is a conscious omission by the legislature, which we cannot fill up. We cannot therefore accept the contention that while determining the preference between the two or more persons, who are having the same date of qualified continuous service, the earlier first appointment also shall be qualified appointment, because several orders permitted appointment of under qualified hands as teachers in the absence of fully qualified hands. The decision reported in K.P. Mathiri v. State of Kerala and Ors. (1973 KLT

284) is of a time when Sub-rule

(2) was not amended in the present form. At that time it did not give an answer to a situation when two teachers commenced qualified continuous service on the same date. It was in that situation the rule was amended to provide an answer. After amendment, the very same question had been adverted to by this Court in the decision reported in Johny v. State of Kerala (1980 KLT 734). It had been taken in appeal and confirmed. Later also this Court had adopted the same view in the decision in Vijayamma v. State of Kerala (1998

(1) KLT 706). More over, we see from the decision in Mathri's case that the continuous service that can be counted for seniority must be qualified service. That alone is counted in this case. When both have same date of continuous qualified service, the ranking shall be as per Rule 37(2). Mathri's case does not deal with this aspect. So the appellant cannot claim seniority.

6. The vacancy arose on 1.5.1991. Admittedly by both, none among them had the test qualification prescribed in Rule 45B Chapter XIV-A KER for appointment as Headmaster. Both of them appeared for the Account Test (lower) later and passed it when the result was declared in June, 1992. The vacancy was filled up, until then, following Rule 45 C, on temporary basis. Sub-rule 2 there of provides that as soon as an incumbent became qualified the underqualified temporary hand holding the post of Headmaster shall be replaced. In case the appellant had acquired the obligatory test qualification for promotion as Headmaster earlier than the 3rd respondent, necessarily the appellant ought to have been preferred to replace, the 3rd respondent.

7. Admittedly, both of them had written Account Test (lower) in the same examination and each of them had to pass only one paper out of the four. As the appellant had written the paper which he had to pass on an earlier date than the paper which the 3rd respondent had to pass on a latter date, he should be taken as qualified earlier than the 3rd respondent, it is contended. To re-enforce this contention, the principle contained in Rule 28(bbb) of the General Rules in Part II KS & SSR is pressed into service. If this principle is not pressed into service, the appellant cannot improve his case. So we will examine whether this can be applied in this case.

8. Rule 28(bbb) in the KS & SSR had been framed under the Public Service Act, 1961. It is apparently not applicable to the aided school teachers. The service conditions of aided school teachers are as contained in Chapter XIV-A KER which is prescribed in terms of Section 12 of the Kerala Education Act. Therefore Rule 28(bbb) as such cannot be pressed in to their service conditions, as it does not form part of the Chapter XIV-A KER. Even otherwise it cannot be applied, because Rule 28(bbb) enables one to reckon that he was qualified from the next day of the examination which he had passed; only on satisfaction of three conditions. (1) The promotion post shall be remaining unfilled, (2) Such unfilling shall be for want of qualified hands and (3) The promotional post should not have any change in duties. Here the promotion aspired is to the post of Headmaster. The duties of the Asst. Teacher and Headmaster are entirely different. Even though a Headmaster will have some of the duties of an Asst. teacher; the admission of the pupil in the school and transfer of the students from the school, issuance of TC and administrative matters like drawal of salary, sanctioning of leave, increment etc., are the additional functions of a headmaster. He has supervision and control over other teachers. Therefore, the promotional post does have change of functions. Necessarily even if Rule 28(bbb) is applicable, it cannot be availed of for the purpose of promotion as headmaster.

9. There is yet another aspect going by Clause (a) and (b) of Rule 28(bbb). Admittedly they passed the Test in June, 1992. Clause (a) of Rule 28(bbb) says that the relevant date shall be 'in the case of a person who has passed such examination or test before the 14th August, 1971, on the day following the last day of such examination or test in the subject or subjects'. This is not applicable as they passed the examination held after this date. But clause(b) provides that the relevant date shall be 'in the case of a person who has passed such examination or test on or after 14th August, 1971 as the day following the last day of the whole examination or test in which he has successfully completed the examination or test by passing one or more subjects.' Admittedly by the parties both of them appeared in the same examination, but written different papers on a different dates. The appellant appeared for his paper on an earlier day; whereas the 3rd respondent appeared for his paper on a later date. But as they had acquired the test qualification after 14.8.1971, the relevant date is the day following the last day of

the whole examination or test. This is more clearly explained in Explanation 4 to Rule 28(bbb) which reads as follows:

'The expression 'the last day of the whole examination or test' occurring in Clause (b) of this sub-rule shall mean the day on which, according to the schedule of the examination or test first published by the Kerala Public Service Commission, the examination or test in the last of the subjects comprising the whole examination or test would have been conducted, if the examination or test in any of such subjects had not been postponed to a later date.'

10. In such circumstances, when, in an examination or test having different papers, one had written one or two papers on an earlier date and the other had written other papers on a latter date, it will not make the former qualified earlier, because the last day mentioned in Clause (b) of Rule 28(bbb) is the last day of whole of the examination or test taken together. Therefore, on that count also the appellant cannot improve his case relying on Rule 28(bbb). Necessarily, he could not have been preferred for the post of Headmaster and the Manager had rightly preferred the 3rd respondent.

We find no reason for interference with the judgment impugned. Appeal fails and is dismissed.

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