Nanu Vs. Balan Master

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Court : Kerala

Decided On : Sep-29-2006

Reported in : 2006(4)KLT702

Judge : K.K. Denesan and; K.R. Udayabhanu, JJ.

Acts : Kerala Education Act - Sections 10; Kerala Education Rules, 1959 - Rules 2(7), 28, 44, 45, 45B and 45B(1); Constitution of India; Sant Ram v. State of Rajasthan AIR 1967 SC 1910;

Appeal No. : W.A. Nos. 876 and 1022 of 2006

Appellant : Nanu

Respondent : Balan Master

Advocate for Def. : Kurian George Kannanthanam, Adv. and; Augustine Joseph, Government Pleader

Advocate for Pet/Ap. : George Abraham, Adv.

Judgement :

K.K. Denesan, J.

1. These Writ Appeals arise from the judgment in WP (C) No.27307 of 2004. They were heard together and are disposed of by this judgment.

2. Thattolikara U.P.School, Chombala is an aided private school governed by the provisions of the Kerala Education Rules. W.P.(C) No.27307 of 2004 was filed by the Manager of the school as the 1st petitioner and Smt. P.Anitha, who was appointed as the Headmistress of the school, as the 2nd petitioner. They are the appellants in W.A.No.876 of 2006. Shri.P.Nanu, the 5th respondent in the Writ Petition and rival claimant for the post of Headmaster, is the appellant in W. A.No. 1022 of 2006. Parties are referred to, hereinafter, as they are shown in. the cause title of the Writ Petition.

3. The post of Headmaster fell vacant on 29.9.2003. The 1st petitioner appointed the 5th respondent as Teacher in charge against the said vacancy. Subsequently, on 14.10.2003. the 2nd petitioner was appointed as the Headmistress. Objections raised by the 5th respondent before respondents 2 to 4 were rejected and the appointment of the 2nd petitioner was approved. The matter was carried in revision before the 1st respondent-Government. As per Ext.P10 order, the Government reversed the orders passed by the lower authorities and held in favour of the 5th respondent. Challenging Ext.P10 order, the petitioners filed the Writ Petition.

4. Before the learned Single Judge, contentions for and against Ext.P10 order were raised by the respective parties. The learned Judge held that the 2nd petitioner possessed the academic, the training and the service qualifications for the post of Headmaster but did not possess the requisite test qualification as on the date of occurrence of the vacancy and declined to interfere with Ext.P10 order. The finding against the petitioners is under challenge in W.A.No.876/06. The 5th respondent, while seeking to sustain the order dismissing the Writ Petition, would contend that the impugned judgment is wrong in so far as the learned Single Judge held that the 2nd petitioner had service equal to half the period of his service. According to the 5th respondent the 2nd petitioner had not acquired the test qualification prescribed under Rule 45B, for two reasons: (i) The acquisition of the qualification is after the date of occurrence of the vacancy and (ii) out of the 4 papers for Account Test (Lower), the 2nd petitioner had passed three papers in Account Test (Lower) and the paper in Account Test (Higher) which is not sufficient to make her test qualified.

5. We have heard Shri.Kurian George Kannanthanam, learned Counsel for the appellants in W.A.No.876 of 2006, Shri.George Abraham, learned Counsel for the appellant in W.A. No. 1022 of 2006 and learned Government Pleader for the State and other educational authorities.

6. Rule 45 of Chapter XIVA, KER governs the appointment of Upper Primary School Headmasters. For easy reference the above rule is extracted below:

45. Subject to Rule 44, when the post of Headmaster of complete U.P.School is vacant or when an incomplete U.P.School becomes a complete U.P.School, the post shall be filled up from among the qualified teachers on the staff of the School or Schools under the Educational Agency. If there is a Graduate Teacher with B.Ed, or other equivalent qualification and who has got at least five years experience in teaching after acquisition of B.Ed. Degree he may be appointed as Headmaster provided he has got a service equal to half of the period of service of the senior most under graduate teacher. If graduate teachers with the aforesaid qualification and service are not available in the School or schools under the same Educational Agency, the senior most primary School Teacher with SSLC or equivalent and TTC issued by the Board of Public Examination Kerala or TCH issued by the Karnataka Secondary Education Examination Board, Bangalore or, a pass in Pre-degree Examination with pedagogy as an elective subject conducted by the University of Kerala or any other equivalent training qualification prescribed for appointment as primary school Assistant may be appointed.

R.45B(1) mandates that Account Test (Lower) conducted by the Kerala Public Service Commission shall be an obligatory qualification for promotion as headmasters of Lower Primary and Upper Primary Schools. Sub-clause (4) of Rule 45B provides for permanent exemption from test qualification for teachers who have attained the age of 50 years.

7. The 5th respondent who has crossed the age of 50 years is eligible for test examination. He is the seniormost UPSA in the School. He has passed SSLC and TTC and is fully qualified for the post of Headmaster in terms of Rule 45. Ordinarily, he is eligible to be considered for promotion to the post of Headmaster as provided in Rule 44 of Chapter XIVA, KER.

8. The 2nd petitioner is a graduate with B.Ed, qualification. She has got more than 5 years experience in teaching after acquisition of B.Ed, degree. If the conditions prescribed in Rule 45 are satisfied, a graduate teacher will have preferential right to be appointed as Headmaster over a non-graduate teacher.

9. Facts as well as the statement of law in paragraphs 7 and 8 above are free from dispute or controversy.

10. The contentious issues, however, are: (1) Has the 2nd petitioner the requisite length of service, that is, service equal to half of the period of service of the 5th respondent who is the senior most under graduate teacher. (2) Whether the period during which the 2nd petitioner had worked as teacher in the same school against a protected post can be reckoned as service for the purpose of Rule 45? (3) Whether the requirement of Rule 45B(1) of Chapter XIV A is satisfied by passing some of the papers in Account Test (Lower) and the remaining papers in Account Test (Higher)? And (4) Whether the 2nd petitioner acquired the test qualification with effect from the date of publication of the result of the test in the office of the PSC or the date shown in the certificate issued by the PSC as proof of the test qualification

Points 1 & 2

11. The 5th respondent commenced service as UPSA on 3.8.1970. As on the date of occurrence of vacancy in the post of Headmaster he had to his credit a service of 33 years and one month. The 2nd petitioner commenced service as UPSA with effect from 27.2.1986. She had completed 17 years and 7 months service as UPSA as on the date of occurrence of vacancy in the post of Headmistress. Though treated as surplus for the period from 15.7.1997 to 14.7.2000 as per the staff fixation order, she was retained in the same school without being deployed or retrenched. No doubt, had the period from 15.7.1997 to 14.7.2000 been discounted from the total service of 17 years and 7 months, the 2nd petitioner will not have half the service of the 5th respondent. Indisputably, the 2nd petitioner had rendered service as teacher during the academic year 1997-98,1998 -99 and 1999-2000 also. Her service was not terminated nor was she retrenched from the post of UPSA. She was continuing in the School in a post sanctioned by the

authorities applying the teacher-student ratio of 1:40. Even assuming that the above service of the 2nd petitioner was against a protected post, that is no good ground in the facts and circumstances of this case to discount the period from 15.7.1997 to 14.7.2000 from the total service for the purpose of Rule 45 of Chap.XIV A, KER. We are, therefore, of the opinion that the 2nd petitioner has got service equal to half of the period of service of the senior most undergradate teacher. Hence, the position is that among the graduate teachers who satisfied the above requirement, the 2nd petitioner stood first in that school.

12. Learned Counsel for the 5th respondent cited the decision of the Division Bench of this Court in Leelabai v. Anandavally 2002 (3) KLT 942. The Division Bench held in that decision that a protected teacher who was retrenched from the parent school and working in another school cannot claim to be a member of the service of the parent school and that such protected teacher cannot stake a claim for promotion to the post of Headmaster. The above proposition of law has no application to the facts of this case. Indisputably, the 2nd petitioner was not a protected teacher as on the date of occurrence of the vacancy of Headmaster. She was very much a member of the teaching staff of the school and entitled to be included in the staff list of the teachers of Thattolikara U.P.School. The 2nd petitioner comes within the purview of the words 'from among the qualified teachers on the staff of the school' in Rule 45, Chap.XI VA of KER. Points are found in favour of the petitioners.

Point No.3

13. The vacancy of Headmaster arose on 29.9.2003. Rule 45B of Chapter XIV A insists a pass in Account Test (Lower) conducted by KPSC as obligatory qualification for promotion to the post of Headmaster. The 2nd petitioner passed Papers I, II and III of Account Test (Lower) and Paper IV of Account Test (Higher) viz. Kerala Treasury Code, Vol.1 and II and Kerala Account Code, Vol. II (with books). Account Test (Lower) consists of four papers, viz.:

I. Kerala Service Rules Vols. I land II (With books).

II. Kerala Financial Code Vols. I &1I;HBA; and Kerala Budget Manual (All with books).

III. Introduction to Indian Government Accounts & Audit (V Edn.- Except Chapters 12, 26,27,28 & 29)(Without books) and Kerala Account Code Vol.1 (With books).

IV. Kerala Treasury Code Vols. I & II and Kerala Account Code Vol.11 (All with books)

Account Test (Higher) also consists of four papers, viz.,

(1) Part II-III Paper.

Kerala Service Rules (With books)

(2) Part 1-11 Paper.

Kerala Financial Code Vols. I & II and Kerala Budget Manual (With books).

(3) Part 11-1 Paper

Introduction to Indian Government Accounts & Audit (V Edn.- Except Chapters 12, 26, 27, 28 & 29)(Without books), the Constitution of India -- Bare Acts only and the Kerala Account Code Vol. I (With books)

(4) Part 11-11 Paper

Kerala Treasury Code Vol. I & II and Kerala Account Code Vol. 11 (with books)

The contention of the 5th respondent is that since Rule 45B (1) specifically says that the test qualification required is a pass in Account Test (Lower), the requirement of that provision will be satisfied only if the candidate appears in all the four papers of Account Test (Lower) and secures a pass in those papers. In other words, it will not suffice if the candidate secures a pass in one or more papers of Account Test (Higher) in lieu of the corresponding papers of Account Test (Lower). Syllabi of papers I, II and IV of Account Test (Lower) and the corresponding papers of Account Test (Higher) are the same. Not only that. The above papers of Account Test (Higher) are higher in standard when compared to the corresponding papers of Account Test (Lower). Paper III of Account Test (Lower) is Introduction to Indian Government Accounts & Audit and Kerala Account Code Vol.1. The corresponding paper for a pass in Account Test (Higher) is Introduction to Indian Accounts and Audit, the Constitution of India -Bare Acts and Kerala Account Code Vol.1. Thus the syllabi for Account Test (Lower) and that of Account Test (Higher), as' far as the above paper is concerned, make it clear that for a pass in Account Test (Higher) in that paper the candidate has not only to answer questions in all the subjects included in the syllabus of Account Test (Lower), but an additional subject also, viz., the Constitution of India - Bare Act. In this context, it is worth noticing the order issued by the Government in the Public Services and Administrative Reforms (Advice-C) Department on 9.1.1996 accepting the suggestion made by the KPSC. The relevant portion is extracted below:

The Kerala Public Service Commission has suggested that the Account Code Vol.1 included in the syllabus of Account Test (Higher) Part I-II Paper may be deleted therefrom and the same may be included in the syllabus for Account Test (Higher) Part II-I paper so as to enable the Commission to issue Account Test (1) and Account Test (Higher) Part II-I paper.

Government have examined the matter in detail and are pleased to revise the syllabi of the Account Test (1) 111 Paper, Account Test (H) Part 1-11 Paper and Account Test (H) Part 11-1 Paper as given below:

Account Test (Lower III Paper)

1) Kerala Account Code Vol.1 (with books)

2) Introduction to Indian Government Accounts & Audit (V Edn.- Except Chapters 12, 26,27,28 & 29)(Without books).

Account Test (Higher) Part 11-1 Paper

Introduction to Indian Government Accounts & Audit (V Edn.- Except Chapters 12.26,27, 28 & 29)(Without books). The Constitution of India (With books) and Kerala Accounts Code Vol.1 (With books)

Account Test (Higher) Part 1-11 Paper

Kerala Financial Code Vols. I & II and Kerala Budget Manual (With books).

After revising the syllabus as above the Government ordered that candidates passing the various papers in Account Test (Higher) shall be deemed to have passed the corresponding papers in Account Test (Lower).

14. In Jyothi K.K. v. Kerala Public Service Commission JT 2002 (Suppl. 1) SC 85 it has been held that 'if a person has acquired higher qualifications in the same faculty, such qualification can certainly be stated to presuppose the acquisition of the lower qualifications prescribed for the post'. Following the dictum laid down by the Apex Court and having regard to the fact that the Account Test (Higher) is a higher qualification in every respect when compared to that of Account Test (Lower), a candidate who passes the former test shall be deemed to have passed the latter also.

15. Learned Counsel for the 5th respondent argued that the Government order dated 9.1.1996 mentioned above would not ensure to the benefit of the 2nd petitioner because it has relevance only in the context of Rule 28(bbb) of the Kerala State and Subordinate Service Rules which rule governs the service conditions of Government employees and is not applicable to private school teachers. The above contention, in our view, is devoid of merit. Syllabi for Account Test (Lower) and Account Test (Higher) are prescribed by executive orders issued by the Government and not by the provisions of the Kerala Education Rules or the Kerala State and Subordinate Service Rules. Revisions or modifications to the syllabi also are done by executive orders only. Hence, to understand what is meant by a pass in Account Test (Lower) reference to the executive orders issued by the Government is absolutely essential. The agency that conducts the examination is the State Public Service Commission. Revision of syllabi and equation of the papers are within the powers of the State Government. Section 10 of the Kerala Education Act empowers the Government to prescribe the qualifications to be possessed by persons for appointment as teachers in Government and private schools. Rule 2(7)(a) of Chapter I, KER says that teacher includes the Headmaster also. Neither Rule 45B(1) nor any other provisions in

KER enumerates or even indicates what are the papers or subjects for a pass in Account Test (Lower). De hors the government orders which prescribe the syllabi, Rule 45B(1) will remain unworkable. It is trite that when the statutory rule is silent on any particular point, the gap can be filled up by executive instructions not inconsistent with the rules already framed. This dictum laid down by the Supreme Court in Sant Ram v. State of Rajasthan : (1968)IILLJ830SC has been followed in a catena of decisions by the Apex Court and the various High Courts. Here the executive orders only supplement the Rule and do not come into conflict with Rule 45B of Chap.XIV A. Hence, the argument that Rule 45B of Chap.XIVA shall be given effect to in isolation and divorced from the Government Orders is fallacious. We have no hesitation to hold that teachers who pass Account Test (Higher) shall be deemed to have passed Account Test (Lower). Acquisition of the test qualification in Account Test (Lower) will be complete even if the candidate does not pass one or more papers in Account Test (Lower) provided he secure a pass in the corresponding paper or papers in Account Test (Higher) as the case may be. We repel the contention of the 5th respondent that the 2nd petitioner has not acquired the requisite test qualification.

Point No. 4

16. Now we propose to examine the challenge against the finding in the impugned judgment that the 2nd petitioner was not test qualified as on the date of occurrence of the vacancy in the post of Headmaster, viz., 29.9.2003. The results of the departmental test in which the 2nd petitioner had appeared were published in April 4, 2003 in the office of the PSC. Ext.P2 is the certificate issued by the PSC on 6.10.2003 in proof of the fact tat the 2nd petitioner has passed the Account Test (Lower) conducted by the Commission. Examination for Papers I and II was held in December, 2002, that for Paper III in June, 2002 and that for Paper IV in December, 2002. The 2nd petitioner contended that she had passed Account Test (Lower) with effect from 4.4.2003, the date of publication of the results in the office of the Commission. She placed reliance on the statement filed by the legal retainer for the additional 6th respondent, Public Service Commission, stating that the result of the departmental tests in question was published on 4th April, 2003. The learned single Judge did not place reliance on the statement filed by the additional

6th respondent for the reason that 'no corresponding document in substantiation of the above contention has been produced either by the petitioners or the Commission'. Consequently, the learned Judge held that the date of publication of the result is the date of issue of Ext.P2 certificate, ie., 6.10.2003. We are of the view that the learned Judge has erred in not placing reliance on the statement filed by PSC. In paragraph 2 of the statement filed on behalf of the Kerala Public Service Commission the following facts were stated:

Smt.Anitha (2nd petitioner) appeared for Paper I, II and IV in the Departmental Test December, 2002 with Reg. No. 25917. The test was conducted from 30.12.2002 to 22.1.2003 and the date on which the results were published is 4.4.2003. The results are yet to be published in the official gazette. In relation to Part III the second petitioner Smt. Anitha appeared for the test with Reg. No.26913. The date of publication of the result was on 22.10.2002....

The date shown in Ext.P2, ie., 6.10.2003 is not the date of publication of the result. The certificate is only a piece of evidence to substantiate that the candidate had passed the test. The respondent-Commission issues certificates to candidates who apply for the same as need arises. Naturally, the certificates issued to different candidates will bear different dates in respect of the same departmental test, the result of which is published by the Commission on one and the same date. The result of the departmental test is officially announced by PSC by publication in its notice board. The same will be republished in the government gazette also on a subsequent date. The certificates are issued based on request made by the candidates who require such evidence to be produced when demanded by the office authorities. In a case where the result of the examinations or tests are published on different dates, by more methods than one, the date of its first publication has to be taken as the date of publication of the result unless a contrary intention'is discernible from the relevant statutory provision. We find absolutely no valid reason to discard the statement of the additional 6th respondent made in writing concerning relevant official information. The additional 6th respondent is a functionary under the Constitution of India. It has no interest in any of the parties to this litigation. The date of publication of the results of the examination conducted by the PSC is a date common to thousands of candidates who appear for the examination and it cannot be assumed for a moment that the Commission will come forward with an incorrect or irresponsible statement in such matters. The burden was heavy on the 5th respondent to establish that the result of the publication of the examination was not 4.4.2003 but some other date. The date of publication of the result of the examination and the date of issuance of the certificate may not always coincide. The certificate is only a piece of evidence in proof of the factum of acquisition of the qualification. The distinction between the fact to be proved and the evidence to prove the same has to be kept in mind. The Apex Court, speaking through Krishna Iyer, J. held, as follows, in Charles K. Skaria v. C. Mathew : [1980]3SCR71 :

Mode of proof is geared to the goal of the qualification in question. It is subversive of sound interpretation and realistic decoding of the prescription to telescope the two and make both mandatory in point of time. What is essential is the possession of a diploma before the given date; what is ancillary is the safe mode of proof of the qualification. To confuse between a fact and its proof is blurred perspicacity.

17. We therefore set aside the impugned judgment to the extent it holds that as on the date of occurrence of the vacancy, the 2nd respondent was not test qualified and that the 5th respondent alone was eligible to be promoted as Headmaster. It follows that Ext.P10 is also liable to be set aside.

In the result, the judgment in W.P.(C) No.27307 of 2004 is set aside in part. It is declared that Ext.PI order approving the appointment of the 2nd petitioner as Headmistress with effect from 14.10.2003 is valid. Ext.P10 is quashed. W.P.(C) No.27307 of 2004 and W.A.No.876 of 2006 are allowed. WA No. 1022 of 2006 is dismissed.