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Court : Kerala

Decided On : Dec-09-2011

Judge : C.N. Ramachandran Nair & K. Vinod Chandran

Appeal No. : W.A.No.930 of 2011

Appellant : Mini Venugopal

Respondent : The State of Kerala, Represented by the Secretary to Government, General Education Department, Secretariat and Others

Judgement :

Vinod Chandran, J.

The appellant, the petitioner in the writ petition is aggrieved by Ext.P4 order of the 2nd respondent denying exemption from State Eligibility Test (SET) for being considered to the post of Higher Secondary School teacher. The prayer of the petitioner was rejected by the learned single Judge on the ground that the classification made by the Government granting exemption from SET only to teachers who have completed ten years of approved teaching service at the High School level in the General Education Subordinate Service, for being considered to the post of Higher Secondary School teachers in Government Schools is perfectly valid. The appellant however would impugn the judgment of the learned

Single Judge on the ground that the said classification violates Articles 14 and 16 of the Constitution of India. The appellant claims that the appellant's total service as High School Assistant in the Aided School and the Government School, latter under the General Education Subordinate Service are to be counted together for considering the eligibility for exemption from SET qualification.

2. The appellant had commenced her service as High School Assistant in an aided school on 21/6/1993 and continued as such till she was appointed as High School Assistant in the High School section of a Government Higher Secondary School on 22/12/2004, in which post she joined on 19/1/2005. The appellant has continuous service as HSA at the High School level and is still employed so in the Government Higher Secondary School and she is now a part of the General Education Subordinate Service. The appellant's continuous service as HSA from 21/6/1993, for more than 11 years in an aided school and thereafter from 14.1.05 in a Government school is not disputed. The second respondent has denied consideration of the appellant to be included in the seniority list of qualified departmental teachers for appointment to the post of Higher Secondary School Teacher (Chemistry). This denial is by reason of her having no SET qualification and by reason of not being entitled to exemption from SET qualification. The exemption was denied since the relevant Special Rules of the Kerala Higher Secondary Education Subordinate Service, 2001 granted such exemption only to persons who have completed 10 years of approved teaching service at the High School level in the General Education Subordinate Service.

3. It is also not in dispute that the appointment of staff in the Aided Higher Secondary Schools are governed by the provisions contained in Chapter XXXII of the Kerala Education Rules and that of the Government Schools are governed by the provisions of the Special Rules for the Kerala Higher Secondary Education Subordinate Service Rules, 2001. The method of appointment in the Special Rules for the Higher Secondary Education Subordinate Service and that in accordance with Chapter XXXII of the Kerala Education Rules are practically similar. The appointments are being made by way of transfer from High School Assistants in the subjects concerned and in the absence of such candidates by transfer from qualified Upper Primary School Assistants and Lower Primary School Assistants

and by direct recruitment; in the ratio of 25:75. It goes without saying that such appointments by transfer in the case of Aided schools can only be in the same school or schools under the same educational agency and those appointments by transfer in the Government Schools can only be from Government schools. The appellant's contention is that the Rules providing for exemption from SET qualification in the Higher Secondary Education Subordinate Service violates Articles 14 and 16 of the Constitution of India, in so far as only those teachers who have completed 10 years of approved teaching service in the General Education Subordinate Service alone are exempted. Under the Kerala Education Rules, the exemption provided is for 10 years of approved teaching service at the High School level. The service of a teacher as HSA whether it be under the Aided School Sector governed by the Kerala Education Rules or under the General Education Subordinate Service is similar in all respects, is the contention of the appellant. Hence the exemption provided to a class of persons from qualifying SET, and excluding similarly placed persons, is discriminatory and involves negation of equal treatment, contends the appellant.

4. The Special Rules for the Kerala Higher Secondary Education State Rules, 2001 and that for the Kerala Higher Secondary Education Subordinate Service Rules, 2001 as also Chapter XXXII introduced in the Kerala Education Rules were all brought into effect in the year 2001 along with the specific rule exempting certain persons from passing SET. Rule 10 of the Kerala Higher Secondary Education State Service, Rule 9 of the Kerala Higher Secondary Education Subordinate Service and Rule 10 of Chapter XXXII of the Kerala Education Rules as it originally stood contained only the following provision as sub-rule (3) in the respective Rules.

“(3) Persons with Ph.D/M.Phil/M.Ed/Degree shall be exempted from passing the State Eligibility Test provided the M.Phil in the concerned subject should be one awarded by any of the Universities in Kerala or recognized as equivalent thereto by any of the Universities in Kerala.”

Subsequently clause (4) was introduced in the Special Rules for the Kerala Higher Secondary Education State Service, Kerala Higher Secondary Education

Subordinate Service as also Kerala Education Rules. Clause (4) granted exemption from SET on the basis of experience of the teachers at the High School level. The introduction of the said Sub-rule in the Special Rules of both the 'State' and 'Subordinate Service Rules' as well as the Kerala Education Rules were by consecutive notifications being G.O.(P) No.37/2005/G.Edn, G.O.(P).36/2005/G.Edn and G.O.(P)38/2005/G.Edn. all dated 4/2/2005. The K.E.R. provided for exemption to teachers having completed 10 years of approved teaching service at the High School level from passing the SET. The Special Rules of the Kerala Higher Secondary Education State and Subordinate Service exempted only teachers who have completed 10 years of approved teaching service at the High School level in the General Education Subordinate Service.

5. Classification as has been consistently held by the Hon'ble Supreme Court of India has to be tempered by reasonableness and tested on the anvil of the rational nexus it has with the purpose it seeks to achieve. On specific directions issued by the learned Single Judge, the Joint Secretary to Government, General Education Department filed a counter affidavit, the relevant portions of which are extracted by the learned Single Judge in paragraphs 12 and 13 of the judgment. The contention put forward by the State is that the post of High School Assistant in Aided School not coming under the purview of General Education Subordinate Service, cannot be considered together with the service rendered by the petitioner in a Government School. This contention is put forward despite the admission that the basic qualification for appointment to the post of High School Assistant in both Aided and Government Schools are the same and that both categories of teachers are performing the same duties and also that the payment made to both categories is by the Government. The State would justify the exclusion on the sole premise that the mode of selection and appointment in both the cases are entirely different. The counter affidavit then would elaborate on the definition of 'service' and justify the classification of the Service of the State under two categories, viz. 'State' and 'Subordinate Services'. The justification on this respect, we are afraid, is not relevant for the purpose of determination of the dispute in this case. The appellant does not challenge the said classification made at the High School level or the Higher Secondary level. The appellant challenges the exclusion of approved service in the Aided School on the premise that the services in the 'Subordinate

Service' and under the Aided School system belong to the same class only in so far as exemption to SET is contemplated. The State would then assert that the High School Assistants coming under the Kerala General Education Subordinate Service are appointed in the method prescribed in the Government orders and the ten years teaching service at the High School level under the General Education Subordinate Service is a must for exemption from State Eligibility Test. The said assertion unfortunately is not pleaded to be founded on reasonableness nor on the basis of a rational nexus with the purpose it seeks to achieve. On the contrary the State would justify the classification on the sole ground of the method of appointment being different; while admitting that the essential qualifications for appointment, duties, pay and allowance etc. are the same.

6. The learned Single Judge found that the dispute involved in the writ petition centres around the interpretation to be placed on the term 'General Education Subordinate Service' and whether the term 'General Education Subordinate Service' as contended by the appellant qualifies only teachers in Government service and that it has nothing to do with the teaching experience of 10 years at high school level. The appellant's contention, noticed above, as we understand, is that Clause (4) of Rule 9 only means that the teachers in the General Education Subordinate Service, to be eligible for exemption from State Eligibility Test should have 10 years of approved teaching service at the high school level and that does not mean that such service in the high school level should be in the General Education Subordinate Service. This understanding or interpretation of the Rules, to our mind, cannot be countenanced. The interpretation to be placed on the term General Education Subordinate Service is also not a question upon which the present dispute revolves. There can be no dispute that in appointments by transfer of qualified departmental teachers to the post of Higher Secondary School teacher in Government Schools, the feeder category can only be those persons in the General Education Subordinate Service. A teacher working in an Aided School may not be entitled to apply for a post, in the Higher Secondary Education Subordinate Service by transfer. It is also beyond doubt that the services of a teacher at the High School level under the Aided School category and the services of a person under the General Education Subordinate Service are two classes of services perfectly satisfying the twin tests of classification, in so far as promotions

or appointments by transfer are concerned.

7. The dispute, to our mind, would centre on whether for the purpose of granting exemption from SET, the service at the High School level under the Aided Schools and the Government Schools can be classified as two distinct and separate classes? Whether the said classification is founded on an intelligible differentia and has a rational nexus to the object sought to be achieved?

8. The method of selection as also the period of employment in the respective services would be relevant in the context of prescribing qualifications for promotion or by appointment by transfer. In the instant case, the ten years approved service at the High School level in the General Education Subordinate Service is not a prescription testing the eligibility of a candidate to be appointed, but is a condition prescribed for giving exemption from acquiring the qualification of State Eligibility Test. The object sought to be served is that persons who have been in employment for a long period of time; in this case, in the post of teachers at the High School level by nature of their service and duties are granted exemption from passing a qualifying test by giving due weightage to their experience. Looking at the Rule from the context of the object it seeks to achieve, the method of appointment pales to insignificance. The finding of the learned Single Judge that the Government intended to exempt only those teachers who have completed ten years of approved teaching service at the High School level in the General Education Subordinate Service from passing State Eligibility Test does not put the seal of authenticity on such classification. The intention of the Government though relevant in testing the reasonableness of the classification that does not by itself satisfy the twin test of classification as laid down by the Supreme Court in *D.S. Nakara v. Union of India*, (1983 (1) S.C.C. 305).

9. The object sought to be achieved in granting exemption to persons having ten years approved service as teachers at the High School level is by virtue of the teaching experience at the high school level and is not dependent upon the service or classes or services to which they belonged. Looking at it from this perspective what is discernible is that the qualification for appointment to the post of High School Assistant in both Aided and Government Schools are the same and

both category of teachers are performing the same duties and both of them are paid from the State Exchequer. It is also pertinent to notice that though the appointment of High School Assistants in the Aided and Government Schools are by two different prescribed methods; even an appointment in an Aided School has to be approved by the authorities under the Kerala Education Rules since the pay and allowances are the responsibility and liability of the State.

10. The Supreme Court considered the question whether the teachers employed in various recognized private schools in the State of Himachal Pradesh are entitled to the pay scales which are being paid to their counter parts in the Government Schools. In the decision reported in *State of H.P. v. recognized and Aided Schools Managing Committee* (1995 (4) S.C.C. 507), tracing the history of aided schools in the country and more particularly in the State of H.P., the Supreme Court found that the aided schools have the same syllabus and curriculum and prescribe the same books and courses as per Government directions and prepared students for the very same examinations for which the students studying in Government schools are prepared. The qualification of the teachers in the Aided Schools are also prescribed by the State Government and appointments are made with the approval of the State Government. Fees levied and concessions allowed are under the instructions issued by the Education Department and even the Managing Committees of Aided schools required the approval of the State Government. The service conditions of the teachers including disciplinary proceedings and award of punishment are also governed by the Rules framed by the State Government. The situation in the State of Kerala is more or less similar. Finding that the State Government has a deep and pervasive control over the aided schools, the Supreme Court held on its own and on the strength of precedents that:

“It is therefore late in the day to say that the teachers in the aided schools are not entitled to parity in the matter of salary and allowances etc., with their counterparts in the Government School.”

11. In *Food Corporation of India v. Ashis Kumar Ganguly*, (A.I.R. 2009 S.C. 2582), the Supreme Court was considering the issue whether the grant of one advance

increment on absorption in F.C.I. to deputationists from Central Government while denying the same to deputationists from State Government was discriminatory. The contention of the Corporation was that the employees deputed were from two different services forming different classes and the exercise of discretion in favour of one class was not arbitrary. The Supreme Court noticing that the Corporation conceded that the nature of duties, qualifications and service conditions stand on similar footing held the denial of the advance increment to State Government deputationists, to be discriminatory. The ground of discrimination was upheld on the following reasoning:

“Only because, according to the Corporation, they were treated differently, in our opinion, by itself cannot be a ground not to apply the rules applicable to the employees of the Food Corporation of India on their absorption in the services of the Food Corporation of India only because they have been taken from the different sources. Different treatments meted out to the respondents vis--vis the Central Government employees although drawn from separate cadre for the purpose of grant of benefit to one class only, would, in our opinion, amount to discrimination.”

12. Evidently, the source of recruitment much less the method of recruitment on its own, cannot be the sole ground for classification when the duties attached to a post is the relevant criteria to decide an eligibility. For the purpose of pay and allowances of aided school teachers and Government School teachers, the Supreme Court has oftener than ever held that the duties attached to the post is the relevant consideration and that they constitute a class. What is relevant to resolve the dispute in the instant case is also the duties attached to the post of HSA whether it be in the aided school service or Government service. The said relevant aspect along with the various similarities noticed earlier would amply demonstrate that the construction of the sub-rule granting exemption from SET leads to discrimination and the classification fails the test of reasonableness. The classification has no rational nexus with the object it seeks to achieve. The object sought to be achieved is a good standard of imparting education based on the quality of the teacher evidenced by either the qualification of SET or sufficient experience at the High School level. Keeping this object in view the

reasonableness of the classification has to be tested with the purpose the rule seeks to achieve. Upholding the well established proposition that Article 14 was certainly attracted where equals are treated differently without any reasonable basis, the Supreme Court in D.S. Nakara's case held:

“Thus the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin test of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question.”

The Supreme Court also considered the question as to on whom the burden lies to affirmatively establish that the rational principle on which the classification is founded correlated with the object sought to be achieved and held:

“Legislative and executive action may accordingly be sustained if it satisfies the twin tests of reasonable classification and the rational principle correlated to the object sought to be achieved. The State, therefore, would have to affirmatively satisfy the court that the twin tests have been satisfied. It can only be satisfied if the State establishes not only the rational principle on which classification is founded but correlate it to the objects sought to be achieved.”

The classification in the instant case as provided for in sub-clause (4) of Rule 9 of the Special Rules of the Kerala Higher Secondary Education Subordinate Service, 2001 metes out differential and discriminatory treatment to equals in the matter of exemption from SET. We do not find one single compelling rationale or reason to hold the said classification as being reasonable nor has any been pleaded or established by the State much less correlated with the purpose it seeks to achieve. In the circumstances and on the strength of the law established and discussed above, we are unable to uphold the provision for exemption as it stands since it violates Articles 14 and 16 of the Constitution and treated equals as unequals in the matter of exemption from qualifying SET thus making it discriminatory and arbitrary.

13. In the circumstances the provision of granting exemption from State Eligibility Test qualification has to be declared as arbitrary and discriminatory to the extent it confines such benefit of exemption to only those teachers who have completed 10 years of approved teaching service in the General Education Subordinate Service at the high school level and we do so. Consequently for considering the eligibility for exemption from SET, the period of 10 years approved teaching service at the high school level shall include services of a teacher in the Aided Sector and the General Education Subordinate Service. The appellant shall be considered for being included in the seniority list of qualified departmental teachers for appointment to the post of Higher Secondary School teacher (Chemistry) by granting her exemption from SET computing the period of experience at the high school level in the Aided Sector as also in the General Education Subordinate Service, if otherwise entitled to be included.

14. In the result, the Writ Appeal is allowed on the following terms:

a) Clause (4) of Rule 9 of the Special Rules of Kerala Higher Secondary Education Subordinate Service to the extent it denies the benefit of exemption from SET to those teachers in the General Education Subordinate Service who had 10 years teaching experience at the high school level whether it be in the Aided Sector schools or General Education Subordinate Service is declared as violated of Article 14 of the Constitution of India and is struck down.

b) There shall be a consequent declaration that any teacher who has 10 years of approved teaching service in the high school level irrespective of whether the service was in the Aided category or in the General Education Subordinate Service shall be eligible for exemption from State Eligibility Test qualification as per clause (4) of Rule 9 of the Special Rules of the Kerala Higher Secondary Education Subordinate Service, 2001.

c) Ext.P4 order of the second respondent is hereby set aside. The appellant shall be included in the seniority list of qualified departmental teachers for appointment to the post of Higher Secondary School Teacher (Chemistry) in accordance with the declaration made above with respect to the eligibility for exemption from State Eligibility Test qualification. The said consideration shall be made in accordance

with Ext.P1 application and the appellant shall be notionally given appointment by transfer before the date her next junior was/is appointed.

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