

**Mini Antony Vs. the District Educational Officer and Others**

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**Court :** Kerala

**Decided On :** Feb-08-2012

**Judge :** C.T. Ravikumar

**Appeal No. :** WP(C).No. 4527 of 2009 (L)

**Appellant :** Mini Antony

**Respondent :** The District Educational Officer and Others

**Judgement :**

1. The rival claims of the petitioner and the 6th respondent for appointment to the post of HSA(Malayalam) in the 5<sup>th</sup> respondent's school against a short term vacancy from 5.6.2007 to 27.9.2007 and thereafter on regular basis from 20.6.2008 are to be resolved in this Writ Petition. The facts, in succinct, relevant for the purpose of deciding the aforesaid issue are as hereunder:-

The petitioner was appointed as HSA(Malayalam) under the 5th respondent's school for the period from 27.10.1993 to 14.1.1994 as per Ext.P1. Later, she was appointed as such in a short term vacancy from 1.1.1998 to 30.3.1998 as per Ext.P2 and then, as per Ext.P3, from 2.6.1998 to 29.8.1998. Again she had rendered service as HSA (Malayalam) against short term leave vacancies in different spells, such as, from 15.9.1998 to 30.11.1998, 10.1.2000 to 10.3.2000, 12.9.2001 to 24.1.2002 and from 6.10.2003 to 5.12.2003. Admittedly, all these appointments were approved by the first respondent. The 6th respondent was

appointed as a UPSA in the 5<sup>th</sup> respondent's school on 6.6.1994. Even at the time of initial appointment as HSA (Malayalam), the petitioner was having all the prescribed qualifications for such appointment. In the case of the 6<sup>th</sup> respondent, he secured B.A Degree in Malayalam in June, 2007 and also possessed B.Ed Degree in Social Studies. Admittedly, he did not possess training qualification in Malayalam. While so, a short term vacancy of HSA(Malayalam) occurred in the 5<sup>th</sup> respondent's school from 5.6.2007 to 27.9.2007. Obviously, at that appointed time, both the petitioner and the 6<sup>th</sup> respondent were working in the post of UPSA in the 5<sup>th</sup> respondent's school. The 5<sup>th</sup> respondent-Manager appointed the petitioner in the said leave vacancy of HSA(Malayalam). In terms of the statutory mandate, the said order of appointment was forwarded to the first respondent for approval. However, as per Ext.P4, the first respondent declined to approve the said appointment of the petitioner on the ground that the 6<sup>th</sup> respondent is the rightful senior claimant under Rule 43 of Chapter XIV-A of the Kerala Education Rules (for short 'KER') against the said vacancy. Ext.P4 was challenged by the petitioner in an appeal before the second respondent. That was rejected as per Ext.P5. Feeling aggrieved by Ext.P5, the petitioner took up the matter in revision before the Director of Public Instruction. As per Ext.P6, the said revision petition was allowed in favour of the petitioner. Feeling aggrieved by Ext.P6, the 6<sup>th</sup> respondent took up the matter before the Government. Aggrieved by the delay in its disposal, the 6<sup>th</sup> respondent approached this court by filing WP(C) No.20680 of 2008. That Writ Petition was disposed of by this court as per Ext.P7 judgment with a direction to the Government to dispose of the revision petition after hearing the petitioner herein and the Manager as well. Thereupon, the Government heard all the parties in terms of Ext.P7 judgment and Ext.P8 order dated 2.2.2009 was passed. It was held therein that both the petitioner and the 6<sup>th</sup> respondent were claimants under Rule 43 of Chapter XIV-A of the KER as regards the vacancy occurred on 5.6.2007 and being the senior most 43 claimant, the 6<sup>th</sup> respondent was entitled to get appointment as HSA(Malayalam) in the leave vacancy from 5.6.2007 to 27.9.2009 and thereafter in the regular vacancy from 20.6.2008. It is in the said circumstances, that this Writ Petition has been filed challenging Ext.P8 on various grounds.

2. The core contention of the petitioner is that while issuing Ext.P8, Government have overlooked the crucial fact that at the time of occurrence of a vacancy in the post of HSA(Malayalam) for the first time after the commencement of service by the petitioner and the 6th respondent under the 5th respondent viz., on 27.10.1993, the 6th respondent was not qualified for appointment as HAS (Malayalam). He acquired B.A Degree in Malayalam only in June, 2007. The petitioner was fully qualified for appointment as HAS (Malayalam) on 27.10.1993, viz., the date of her initial appointment in the school. From 27.10.1993 to 14.1.1994 and thereafter, in six different spells, the petitioner was appointed as HSA(Malayalam) against short term vacancies and all such appointments were duly approved by the first respondent. The contention of the petitioner is that by virtue of such approved service, she became a 51A claimant and therefore, entitled to claim preference over the 6th respondent in the matter of appointment as HSA(Malayalam) on occurrence of the vacancies in question especially contending that on the relevant dates, the 6th respondent was not qualified for such appointment. It is the specific case of the petitioner that at no point of time she had relinquished her claim under 51A of Chapter XIV A of the KER. To buttress her contentions that she is having lien and preferential claim for appointment by virtue of such approved service as HAS (Malayalam), the petitioner relied on Ext.P9 judgment in W.A.No.2920 of 2001 of a Division Bench of this Court. The petitioner has also a contention that in terms of GO(P) No.220/05/G.Edn. dated 19.7.2005, the training qualification in the concerned subject is also essential besides holding a degree in the concerned subject and therefore, the 6th respondent who lacks training qualification in Malayalam was not entitled to claim promotion as HSA (Malayalam) either against the short term vacancy for the period from 5.6.2007 to 29.9.2007 or against the regular vacancy occurred on 20.6.2008.

3. Counter affidavits have been filed separately by the 5th and the 6th respondents. The 5th respondent, who is the Manager of the school supports the claims and contentions of the petitioner whereas the 6th respondent, who is the rival claimant in the post of HSA(Malayalam) that was available from 5.6.2007 to 29.9.2007 and thereafter on regular basis from 20.6.2008, refuted the claims and contentions of the petitioner and supported Ext.P8.

4. With respect to certain factual aspects involved in this case, there is no dispute. The fact that the petitioner was appointed as HSA(Malayalam) as per Ext.P1 from 27.10.1993 to 14.1.1994 and thereafter, in the same post on different short spells and that all such appointments were duly approved by the first respondent are undisputed. So also there is no dispute regarding the date of regular appointment of the 6th respondent as UPSA in the 5<sup>th</sup> respondent's school viz., from 6.6.1994. It is also not in dispute that he acquired the qualification of B.A Degree in Malayalam on 2.6. 2007 and the training qualification acquired by him earlier, is in Social Studies and not in Malayalam. The short term vacancy in question arose on 5.6.2007 and the regular vacancy in the said post occurred on 20.6.2008 and admittedly, at the time of occurrence of the said vacancies, both the petitioner and the 6th respondent were working as UPSAs in the 5th respondent's school. The contention of the 6th respondent is that on the relevant dates, he was not only fully qualified for appointment as HSA (Malayalam) but also was the senior most claimant under Rule 43 of Chapter XIV A of the KER. Therefore, according to him, there is absolutely no illegality in Ext.P8 order holding him as the rightful claimant as against the short term vacancy in the post of HSA(Malayalam) from 5.6.2007 to 29.9.2007 and thereafter, on regular basis from 20.6.2008 and also treating both of them as Rule 43 claimants. The contention of the petitioner is that her appointments as HSA (Malayalam) commencing from 27.10.1993 till 5.12.2003, under different spells, were admittedly approved by the first respondent and by virtue of such approved service in the post of HSA(Malayalam), she became a claimant under Rule 51A of Chapter XIV of KER as regards that post. According to her, by virtue of her being a claimant under 51A, she was entitled to get appointment against the said short term leave vacancy that has arisen on 5.6.2007 and also against the regular vacancy from 20.6.2008. At the same time, it is contended that the 6th respondent was lacking the qualification for being appointed as HSA (Malayalam) inasmuch as his B.Ed Degree is not in Malayalam whilst in Social Studies. According to the petitioner, both the degree qualification and training qualification prescribed under Rule 2(2)(b)(i) of Chapter XIV-A of the KER should be in Malayalam to earn eligibility for appointment as HSA (Malayalam). That apart, it is contended that by virtue of Ext.P9 judgment and in view of the amendment brought into Rule 51A, a Rule 51A claimant was to be

given preference over a Rule 43 claimant in the matter of appointment to higher posts.

5. In view of the above factual and legal contentions, the first point to be considered is whether the action on the part of the first respondent in holding the petitioner as a claimant under Rule 43 of Chapter XIV A of the KER and rejecting her status as a claimant under Rule 51A thereunder is sustainable. Evidently, the petitioner had approved service as such HSA(Malayalam) under the 5<sup>th</sup> respondent's school in different spells commencing from 27.10.1993 to 5.12.2003. At the same time, certain incontrovertible facts emerged but lacking in the pleadings of the petitioner, also assume relevance in the context of this case. After the first spell of approved service as HSA (Malayalam) from 27.10.1993 to 14.1.1994 covered by Ext.P1, the petitioner who acquired 51A claim in that category was, given appointment as UPSA against a short term vacancy from 24.1.1994 to 25.3.1994. Thus, according to the 5<sup>th</sup> respondent, the petitioner became a 51 A claimant as against the category of UPSA, as well. Later, the petitioner was given appointment as UPSA from 3.7.1997 against a regular vacancy under the 5<sup>th</sup> respondent's school. Indisputably, it was while working as UPSA that she was appointed as HAS (Malayalam) against the short term vacancy that occurred from 1.1.1998 to 30.3.1998, as per Ext.P2. Obviously, prior to the regular appointment of the petitioner as UPSA, the 6<sup>th</sup> respondent was appointed as a UPSA against on regular basis under the 5<sup>th</sup> respondent's school on 6.6.1994.

6. The specific case of the petitioner is that she had not relinquished her claim under Rule 51A in the manner prescribed for that purpose at any point of time. A perusal of Ext.P2 order would reveal that the petitioner was, in fact, promoted as HSA(Malayalam) while working as UPSA as per Ext.P2, treating her as a Rule 43 claimant. On termination of the said vacancy, she was obviously reverted to the post of UPSA lest she would not have been promoted and posted as HSA(Malayalam) against the subsequently occurred short term vacancy from 2.6.1998 to 29.8.1998, as per Ext.P3. In fact, Ext.P3 would reveal that against the said short term vacancy of HSA(Malayalam), the petitioner who was then working as UPSA was promoted recognizing her Rule 43 claim under Chapter XIVA of

KER. The petitioner has not produced the orders of her appointment against the short term vacancies, under different spells, from 15.9.1998 to 5.12.2003. Admittedly, the petitioner was appointed as HSA(Malayalam) against short term vacancies, initially from 15.9.1998 to 30.11.1998, thereafter, from 10.1.2000 to 10.3.2000, 12.9.2001 to 24.1.2002 and 6.10.2003 to 5.12.2003. All those appointments were approved by the competent educational authority. The petitioner as also the 5th respondent did not refute the contentions of the 6th respondent that subsequent to the regular appointment of the petitioner as UPSA she was promoted to the post of HSA(Malayalam) against short term vacancies and on termination of such short term vacancies she was not relieved from the school, but only reverted to post of UPSA. Relying on Ext.P9 judgment, it has been contended by the petitioner that the 6<sup>th</sup> respondent should not have been given promotion against the vacancy of HSA(Malayalam) from 5.6.2007 to 27.9.2007 and thereafter, against the regular vacancy from 20.6.2008. Whether the petitioner can rely on Ext.P9 to substantiate her claim for appointment as HSA(Malayalam) in preference to the 6<sup>th</sup> respondent? The appellants in the Writ Appeal in Ext.P9 judgment were working in the post of HSAs in leave vacancies. When regular vacancies in the said category occurred, respondents 5 and 6 were working as UPSAs. However, ignoring the claim of the appellants therein for shifting their lien to the regular vacancies persons like respondents 5 and 6 who were their erstwhile seniors in the category of UPSA were promoted against the regular vacancies. In this context, it is to be noted that the appellants therein were promoted ahead of respondents 5 and 6 therein as HSAs because the respondents 5 and 6 were unqualified for promotion at the time of occurrence of leave vacancies of HSAs against which the appellants therein were promoted. In fact, the appellants therein were since then continuously working as HSAs, though against leave vacancies, while respondents 5 and 6 working as UPSAs till they were promoted against the regular vacancies. In fact, the promotions of the appellants were effected ahead of them in view of the provisions under Note (2) to Rule 43 of Chapter XIV-A of the KER. Taking into account the said factual situation and Rule 37(1) of Chapter XIV-A of the KER as per Ext.P9 judgment, it was directed to shift the lien of the appellants against the regular vacancies and to treat respondents 5 and 6 as having promoted against leave vacancies occupied

by the appellants. The facts obtaining in this case, as expatiated earlier, is different from the facts of the case involved in Ext.P9 judgment. In this case, at the time of occurrence of the short term vacancy of HSA(Malayalam) on 5.6.2007, and thereafter when the regular vacancy occurred on 20.6.2008, both the petitioner and the 6th respondent were working as UPSAs. Though the 5th respondent stated in the counter affidavit that the petitioner was appointed against the short term vacancies occurred in the post of HSA(Malayalam) on different spells mentioned earlier, recognizing her claim as Rule 51A claimant, Exts.P2 and P3 would belie the said contention. They would go to show that on occurrence of such short term vacancies covered by Exts.P2 and P3 in the category of HSA(Malayalam), the petitioner who was working as UPSEA on being appointed on regular basis, was given promotion recognizing/treating her as Rule 43 claimant under Chapter XIV A of the KER. The factual position obtained in this case would undoubtedly suggest that on all such occasions except the initial appointment from 15.9.1998, on termination of the short term vacancies in the post of HSA(Malayalam), the petitioner was never relieved from the school whilst she was only reverted to the post of UPSEA considering her lien in that post. That alone is the irresistible conclusion one can draw from Exts.P2 and P3 and in view of the position that at the time of occurrence of short term vacancy of HAS (Malayalam) on 5.6.2007 and thereafter on occurrence of the regular vacancy of HSA(Malayalam) on 20.6.2008, the petitioner was working as UPSEA under the 5th respondent. It is the admitted position that at the time of occurrence of the aforesaid short term vacancy and the regular vacancy in the category of HSA(Malayalam), both the petitioner and the 6th respondent were working in the category of UPSEA. The question is whether one can claim the benefit of Rule 51A of Chapter XIV A of the KER even when, based on the termination of vacancy, he/she was not actually relieved from the concerned school and only relieved from the higher post.

7. For appropriate consideration of the aforesaid question Rule 51A of Chapter XIV-A of the KER in so far as it is relevant for the purpose of this case requires reference and it reads thus:-

"51A. Qualified teachers who are relieved as per Rule 49 or 52 or on account of termination of vacancies shall have preference for appointment to future vacancies in schools under the same Educational Agency or an Educational Agency to which the school may be subsequently transferred provided they have not been appointed in permanent vacancies in schools under any other Educational Agency.

Provided that a teacher who was relieved under rule 49 or 52 shall not be entitled to preference for appointment under this rule unless such teacher has a minimum continuous service of one academic year as on the date of relief:

Provided further that the first preference under this rule shall be given to protected teachers."

The clause 'in the same or higher or lower category of teaching posts' occurring there under would invariably suggest that relief of the concerned teacher on account of the contingencies specified under Rule 51A should be from the school lest the need for giving preference of appointment to future vacancies in the same or lower category of teaching posts would not arise. In my considered view, the claim under Rule 51A would be available only if, on account of the termination of the vacancy held by the concerned teacher, he/she is relieved from the school and if he or she continues in the school, the question of claiming right under Rule 51A would not arise. I am fortified in my view by a decision this Court in *Catherina v. Manager, H.S.Mundoor* reported in ILR 1985 (2) Kerala 211. It is held thereunder that the right under Rule 51A is restricted to teachers, who have been relieved from schools. No contra decision has been brought to my notice by the parties. In view of the said position, I am of the considered view that the finding in Ext.P8 by the Government that the petitioner was a Rule 43 claimant under Chapter XIV-A of the KER as against the short term vacancy that occurred in the school of the 5th respondent from 5.6.2007 to 27.9.2007 and the regular vacancy that occurred on 20.6.2008 invite no interference. The contentions based on Rule 51A of Chapter XIV-A of the KER therefore fade into insignificance and inconsequential.

8. What remains to be considered is the sustainability of the contention of the petitioner that the 6th respondent was unqualified for being considered for

appointment as HSA(Malayalam), against the short term vacancy and also against the regular vacancy involved in this case. In this context, it is to be noted that the seniority of the 6th respondent over the petitioner in the category of UPSA is not disputed and therefore, the finding that the 6<sup>th</sup> respondent was the senior most Rule 43 claimant under Chapter XIVA of KER is true to the facts. The contention of the petitioner regarding the ineligibility of the 6th respondent on account of his lacking the qualification of B.Ed in Malayalam is sustainable or not, is also to be looked into in the context of the rival contentions. The qualifications for appointment to the post of HSA(Malayalam) has been provided under Rule 2(2)(b)(i) of Chapter XXXI of the KER. It reads thus:

"A Degree in Malayalam or Malayalam as one of the two optional Subjects under Pattern II of Part III and B.Ed/B.T/L.T conferred or recognised by the Universities in Kerala: or

A title of Oriental learning in Malayalam awarded by the Universities in Kerala and certificate in Language Teachers Training issued by the Commissioner for Government Examinations, Kerala." (emphasis supplied)

9. A perusal of the above extracted rule would reveal that for appointment to the post of HSA(Malayalam), a Degree in Malayalam is essential. The question is whether B.Ed Degree in Malayalam is essential or not. A scanning of the above rule would reveal that there is specification in the rule that the qualification of a basic Degree in Malayalam is essential. However, there is no such specification with respect to the qualification of B.Ed Degree. The issue whether for appointment to the post of HSA(Malayalam), the B.Ed Degree should also be in Malayalam came up for consideration before this court. A Division Bench of this Court in *Sindu v. K.P.S.C* reported in 2001(2) KLT 507 held that for appointment to the post of HSA(Malayalam) the B.Ed Degree obtained by the concerned person need not be in Malayalam. It is so found in terms of Rule 2 (2)(b)(i) of Chapter XXXI of KER. It was also found that there is no valid Notification clarifying or declaring that what was intended under the rule is a B.Ed or B.T or L.T in Malayalam. The said view of the Division Bench in *Sindu's case supra* (2001(2) KLT 507) was approved by a Full Bench of this Court in *Manager, M.P.V.H.School*

v. George reported in 2003(1) KLT 935. Full Bench held that for appointment to the post of HSA, the B.Ed need not be in the concerned subject. Obviously, the contention of the petitioner as also the 5th respondent that the B.Ed Degree should also be in the concerned subject, in the instant case in Malayalam, is apparently based on GO(Ms)No.11/2003/G.Edn. dated 7.1.2002 and GO(P) No.220/2005/G.Edn. dated 19.7.2005. As regards G.O dated 7.1.2002, it is admittedly, concerned with English and its scope and validity was considered by a Division Bench of this Court in Baiju v.Suguna Prasad reported in 2003(2) KLT 182. It is a Government Order introducing or creating a new category of HSA(English) by reallocating the posts of core subjects and insisting that those candidates aspiring for the post should have a Degree in English with B.Ed in English. Its validity was upheld by the Division Bench. As per G.O. dated 19.7.2005 taking into account the creation of the new category of HSA(English) by reallocating the posts of core subjects and the insistence for possession of a Degree in English with B.Ed in English for those who aspired the post of HSA English, it was prescribed that B.Ed in the concerned subject along with Degree in the concerned subject shall be qualifications for appointment to the post of HSA(core subjects). In the said G.O. dated 19.7.2005, it is further stated:- "Formal amendment in KER will be issued separately." A perusal of Rule 2(2)(a) would reveal that no such amendment was so far been carried out in the KER even in regard to the HSA subjects viz., core subjects. At any rate, no such Notification qualifying or declaring that what is intended under Rule 2(2)(b)(i) governing the post of HSA(Malayalam) is B.Ed/BT/LT in Malayalam has been issued so far. In fact, no such Notification has been brought to my notice. Even such an amendment to Rule 2(2)(a) cannot have any effect or impact on Rule 2(2)(b)(i). No amendment has been brought to Rule 2(2)(b)(i) of Chapter XXXI of the KER mandating possession of B.Ed in Malayalam for appointment to the post of HSA(Malayalam). There is no challenge against the said rule regarding the possession of qualification in this Writ Petition. In short, as on today, essentially in the light of the decisions reported in 2001(2) KLT 507 and 2003 (1) KLT 935 and also in view of the rule position the petitioner and the 5th respondent cannot be heard to contend that for appointment to the post of HSA(Malayalam), B.Ed Degree in Malayalam is essential. In short, in view of the aforesaid decisions, the

contention of the petitioner that the 6th respondent is unqualified for being considered for appointment against the short term vacancy that occurred on 5.6.2007 and against the regular vacancy on 20.6.2008, in the post of HSA(Malayalam) is only to be repelled. The service particulars of the petitioner vis--vis the 6th respondent would undoubtedly show that the 6th respondent is senior to the petitioner in the category of UPSA. As already noticed hereinbefore, on occurrence of the short term vacancy as also the regular vacancy, in the post of HSA(Malayalam) under the 5<sup>th</sup> respondent's school, both the petitioner and the 6th respondent were UPSAs. In such circumstances, when the claims of the teachers for promotion to a higher post is considered, necessarily their relevant seniority in that category has to be looked into for deciding their claim under Rule 43 in terms of Rule 37(1) of Chapter XIV-A of KER. No doubt, in terms of the said provisions, the senior most teacher in the concerned category subject to the satisfaction of qualification is to be considered as the rightful claimant against the higher post in the matter of promotion. The long and short of the above discussion is that the finding in Ext.P8 that being the senior most claimant, in the 5th respondent school, 6th respondent was the rightful claimant for appointment against the short term vacancy which was available from 5.6.2007 to 27.9.2007, and thereafter for appointment to the regular vacancy from 20.6.2008 are in order.

In the said circumstances, there is no merit in this Writ Petition and accordingly, it is dismissed.

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