

V.B. PRASAD
v.
MANAGER, P.M.D.U.P. SCHOOL AND ORS

APRIL 10, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Service Law:

Promotion/Appointment—Eligibility condition—Held: Must be satisfied before a person is considered for promotion/appointment in respect of a particular post—Kerala Education Rules—rr.45 and 44—Kerala Education Act.

Promotion/Appointment—To post of Headmaster in primary school—Two contenders, Respondent No.2 and No.6—Respondent No.2 appointed Challenge by Respondent No.6 upheld by Single Judge of High Court—Appellant who was never considered for the said post and was not a party in any of the proceedings between Respondent No.2 and 6 filed intra-Court appeal contending that he should have been considered for the post of Headmaster—Held: Appellant was nowhere in the picture at the relevant time—At his instance, the Court cannot embark upon a larger question which had not been raised for its consideration directly—What cannot be done directly, cannot be done indirectly—Kerala Education Rules—rr.45 and 44—Kerala Education Act.

Interpretation of Statutes—Note appended to a statutory provision—Held: To be read in context of the substantive provision and not in derogation thereof.

The primary school in question is a minority institution within the meaning of clause (1) of Article 30 of the Constitution. For the post of Headmaster in the school there were two contenders, viz. Respondent No. 2 and Respondent No.6. Rule 45 of the Kerala Education Rules framed under the Kerala Education Act stipulated the eligibility conditions viz. essential qualifications/teaching experience required for the post of Headmaster. Respondent No.2 was appointed which was challenged by Respondent No.6 by filing writ petition. The latter claimed preferential right of appointment vis-

A à-vis the former. The petition was allowed by a Single Judge of High Court.

B Appellant, a Drawing teacher in the school, was not a party in any of the proceedings initiated by Respondent No.2 or 6 and his case was never considered by Management of the school or by the Government or by the Court. He filed an intra-Court appeal, contending that he should have been considered for appointment in the post of Headmaster, as he had the requisite qualifications therefore. According to him, being a specialist teacher, his case came within the purview of the note appended to Rule 45.

C The question which arose for consideration in the present appeal is whether Appellant is entitled to be considered for promotion to the post of Headmaster.

Dismissing the appeal, the Court

D HELD: 1. Appellant joined the school as a Drawing teacher on 17.07.1978 and has been working on a regular basis only with effect from 02.06.1980. While discharging his duties as a teacher, Appellant applied for and granted study leave for higher studies for two years with effect from 01.06.1991. He remained on leave upto 28.02.1993. He was not a candidate who was considered for appointment to the post of Headmaster. He indisputably gave consent for appointment of Respondent No.2. His case, therefore, never fell for consideration either by the management of the school or by the Government or by the High Court. [Para 8] [1081-G-H; 1082-A-B]

F 2. For the time being, it may be assumed that in view of fact that he had also acquired the qualification of B.Ed. in April 1980, his case also could be considered in terms of Rule 45; although it is well-settled principles of law that the note appended to a statutory provision or the subordinate legislation must be read in the context of the substantive provision and not in derogation thereof. Five years' teaching experience for appointment to the post of Headmaster was a *sine qua non*. Such teaching experience was to be 'teaching experience' and not a deemed teaching experience. [Para 10] [1083-C]

G *Punjab State Electricity Board Ltd. v. Zora Singh and Ors.*, [2005] 6 SCC 776 and *A. P. SRTC v. STAT* ILR (2001) AP 1, referred to

H 3. Appellant was on study leave for the period 01.06.1991 to 28.02.1993. During the said period, he was not teaching. He did not gain any teaching experience during the said period. If the said period is excluded for the purpose

of computing teaching experience as envisaged under Rule 45 of the Rules, the question of his being considered for promotion to the post of Headmaster would not arise. Eligibility condition must be satisfied before a person is considered for promotion/appointment in respect of a particular post.

[Para 14] [1084-B]

4.1. The contention of the Appellant that the High Court failed to notice that Rule 45 would not govern the minority institution is stated to be rejected. Validity of Rule 45 is not under challenge. He, in any event, cannot raise the said contention. A contention to that effect would be raised only by the institution. It has not preferred a special leave petition. Whether Respondent No. 2 could validly be appointed by the management in view of its minority character protected under clause (1) of Article 30 of the Constitution of India, therefore, does not fall for consideration. [Para 15] [1084-C-D]

4.2. The argument that such a contention is available to Appellant also as in the event, appointment of Respondent No.2 is held to be valid, the post of Headmaster must be held to have fallen vacant again on her retirement which would enable the authorities to consider his case for promotion thereto, cannot be accepted. Vacancy arose in 1994. The management of the school, the State Government as also different benches of the High Court in various litigations considered only that aspect of the matter, namely, Respondent No. 6 had fulfilled the eligibility criteria and had, therefore, been appointed. Appellant was nowhere in the picture at the relevant time. At his instance, the court cannot embark upon a larger question which had not been raised for its consideration directly. What cannot be done directly, it is well-settled, cannot be done indirectly. [Para 16, 17] [1084-E-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1870 of 2007.

From the Judgment and Order dated 07.06.2005 of the High Court of Kerala at Ernakulam in W.A. No. 1163 of 2002.

V. Shekhar, P. Sreekumar, S. Ganesh, R.P. Wadhvani and Pradeep K. Dubey for the Appellant.

C.S. Rajan, Ramesh Babu M.R. (NP), A. Raghunath, C.K. Sasi, G. Prakash and Beena Prakash for the Respondents.

The Judgment of the Court was delivered by

A **S.B. SINHA, J. 1.** Leave granted.

B 2. A primary school known as 'P.M.D. Upper Primary School' was established in the year 1917. It is an educational institution governed by the provisions of the Kerala Education Act and the Rules framed thereunder known as 'Kerala Education Rules' (for short, 'the Rules'). A post of Headmaster in the said institution governed by the said Act and the rules was to be filled up in terms of Rules 44 and 45 of the Rules. The School in question is said to be a minority institution within the meaning of clause (1) of Article 30 of the Constitution of India. The post of Headmaster in the said school fell vacant on or about 01.06.1994. There were two contenders therefor, Respondent Nos. 2 and 6 herein. Respondent No. 2 was appointed in the said post. Various writ petitions were filed by the parties hereto before the Kerala High Court at various stages as the competent authority, either itself or pursuant to the directions made by the High Court in the writ petitions, passed diverse orders from time to time.

D 3. As the history of the litigations may not be very material for our purpose, we may only notice that ultimately the writ petition filed by Respondent No.6 herein claiming a preferential right of appointment to the post of Headmaster *vis-a-vis* Respondent No.2 was allowed by a learned Single Judge of the Kerala High Court by a judgment and order dated 08.04.2002, directing :

E "This Original Petition is filed by the petitioner seeking a direction to the respondents to appoint her as Headmistress with effect from 01.06.1994 and to grant her all consequential benefits. The petitioner herein is the fifth respondent in OP No. 3409/99. In view of the dismissal of that Original Petition, this Original Petition is liable to be allowed. The first respondent is directed to appoint the petitioner as Headmistress with effect from 01.06.1994 and she will be entitled to all consequential benefits arising out of that appointment in accordance with law. Respondents 4 and 5, if they think fit, will be free to proceed against the Manager for recovering any amount paid to the second respondent in accordance with law."

F 4. Appellant herein was not a party in any of the proceedings initiated by Respondent No. 2 or Respondent No. 6. He upon obtaining leave in this behalf, preferred an intra-court appeal, *inter alia*, on the premise that his case should have been considered for appointment in the post of Headmaster, as he had the requisite qualifications therefor. The Manager of the School also

preferred a writ appeal against that part of the judgment wherein an observation in relation to the recovery of the amount paid to Respondent No. 2 had been made by the learned Single Judge. A

5. Respondent No. 2 admittedly had retired during the pendency of the writ appeal. A writ petition was also filed by the Manager, *inter alia*, praying for dropping the proceeding to recover the loss suffered by the Government. B

6. The Division Bench despite noticing that though Respondent No. 2 was wrongly appointed, in view of the fact that she had been performing her duties, directed that the amount paid to her may not be recovered. In regard to the claim of Respondent No. 6, it was directed that although she should be appointed as Headmistress with effect from 01.06.1994, but would not be entitled to arrears of salary from the said date upto the retirement of Respondent No.2. It was directed : C

“...We fully agree with the learned single Judge. We have already held that during the period second respondent was actually working, salary cannot be denied and Government is also not at loss as we have not directed to pay arrears of salary for that period to the fifth respondent. Once Educational Authority also approved the appointment of second appellant. Hence, we cannot say that action of the management is not bonafide. Therefore, Ext. P5 notice in O.P. No. 39254 of 2003 ordering recovery of alleged loss from the manager is set aside. Ext. P4 passed by the Government in O.P. No. 3409 of 1999 is affirmed subject to the above directions regarding equitable relief with respect to drawal of salary. Arrears and other benefits as per the observations in this judgment should be paid to the fifth respondent who is the petitioner in O.P. No.4017 of 2002 within three months from the date of receipt of a copy of this judgment and she should be posted as headmistress and appointment order with effect from 1.6.1994 shall be issued on or before 1st August, 2005.” D E F

7. The Manager of the School has not preferred any petition for grant of special leave before us. G

8. Before embarking upon the contentions raised by the learned counsel for the parties, we may notice the admitted fact. Respondent No. 2 joined the School on 16.07.1969. Appellant herein joined the school as a Drawing teacher on 17.07.1978 and has been working on a regular basis only with effect form 02.06.1980. He was declared a protected teacher from 01.06.1989. While H

A discharging his duties as a teacher, Appellant applied for and granted study leave for higher studies for two years with effect from 01.06.1991. He remained on leave upto 28.02.1993. It is accepted that he was not a candidate who was considered for appointment to the post of Headmaster. He indisputably gave consent for appointment of Respondent No. 2. His case, therefore, never fell for consideration either by the management of the school or by the Government or by the High Court. Rule 45 of the Kerala Education Rules in the aforementioned context, interpretation whereof falls for our consideration may now be noticed :

C “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 S.S.L.C. or equivalent and T.T.C. issued by the Board of Public Examination Kerala or T.C.H. 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.

F Note : The language/specialist teachers, according to their seniority in the combined seniority list of teachers shall also be appointed as Headmaster of U.P. School or Schools under an Educational Agency provided the teacher possesses the prescribed qualifications for promotion as Headmaster of U.P. School on the date of occurrence of vacancy.”

G 9. The said rule, thus, provides for essential qualification. Rule 45 is in three parts. The first part provides for the qualification of a teacher who can be appointed in the post of Headmaster. He must be graduate with B.Ed. or other equivalent qualification and must have at least five years' experience in teaching after acquisition of B.Ed. degree. The second part of the rule

provides for consideration of such teachers only in the event a graduate teacher is not available. Indisputably, Respondent No. 6 fulfils the educational qualification as also five years' experience in teaching after acquisition of B.Ed. degree. Ignoring her claim, Respondent No. 2 was appointed whose case comes within the purview of the second part of Rule 45, as she did not have the qualification specified in the first part thereof. Appellant was a Drawing teacher. He, therefore, was a specialist teacher. According to him his case comes within the purview of the 'note' appended to Rule 45.

10. For the time being, we may assume that in view of fact that he had also acquired the qualification of B.Ed. in April 1989, his case also could be considered in terms of Rule 45; although it is well-settled principles of law that the note appended to a statutory provision or the subordinate legislation must be read in the context of the substantive provision and not in derogation thereof. Five years' teaching experience for appointment to the post of Headmaster was a *sine qua non*. Such teaching experience was to be 'teaching experience' and not a deemed teaching experience.

11. In *Punjab State Electricity Board Ltd. v. Zora Singh and Ors.*, [2005] 6 SCC 776, this Court noticing a decision of a Full Bench of the Andhra Pradesh in *A.P. SRTC v. STAT* ILR (2001) AP 1, observed :

"23. In *A.P. SRTC v. STAT* a Full Bench of the Andhra Pradesh High Court has noticed thus: (An LT p. 544, para 31)

31[24]. The meaning of note as per *P. Ramanatha Aiyars Law Lexicon*, 1997 Edn. is a brief statement of particulars of some fact, a passage or explanation.

24. The note, therefore, was merely explanatory in nature and thereby the rigour of the main provision was not diluted."

12. Mr. V. Shekhar, the learned Senior Counsel appearing on behalf of Appellant, however, has drawn to our attention to a circular letter dated 30.12.2005 issued by the Government of Kerala Finance (Rules) Department, from a perusal whereof it appears that the leave without allowance under rule 91 for study purpose would carry service benefit in regard to seniority/promotion accumulation of HPL but would not be counted towards seniority/promotion and accumulation of earned leave.

13. Apart from the fact that the said circular was issued only on 30.12.2005 and had not been given a retrospective effect, a clarification had been issued in respect of reckoning of period for service benefits only and not for seniority/promotion. It had been issued by the Finance Department and not by the

A Education Department. It does not and in law cannot supersede the statutory rules.

14. Indisputably, Appellant was on study leave for the period 01.06.1991 to 28.02.1993. During the said period, he was not teaching. He did not gain any teaching experience during the said period. If the said period is excluded for the purpose of computing teaching experience as envisaged under Rule 45 of the Rules, the question of his being considered for promotion to the post of Headmaster would not arise. Eligibility condition must be satisfied before a person is considered for promotion/appointment in respect of a particular post.

C 15. Submission of Mr. Shekhar that the High Court failed to notice that Rule 45 of the rules would not govern the minority institution is stated to be rejected. Validity of Rule 45 is not under challenge. He, in any event, cannot raise the said contention. A contention to that effect could be raised only by the institution. It has not preferred a special leave petition. Whether Respondent No. 2 could validly be appointed by the management in view of its minority character protected under clause (1) of Article 30 of the Constitution of India, therefore, does not fall for our consideration.

D 16. Mr. Shekhar faintly argued that such a contention is available to Appellant also as in the event, appointment of Respondent No. 2 is held to be valid, the post of Headmaster must be held to have fallen vacant again on her retirement which would unable the authorities to consider his case for promotion thereto.

E 17. We are not in a position to persuade ourselves to accept the said contention. Vacancy arose in 1994. The management of the school, the State Government as also different benches of the High Court in various litigations considered only that aspect of the matter, namely, Respondent No. 6 had fulfilled the eligibility criteria and had, therefore, been appointed. Appellant was nowhere in the picture at the relevant time. At his instance, the court cannot embark upon a larger question which had not been raised for its consideration directly. What cannot be done directly, it is well-settled, cannot be done indirectly.

F 18. For the reasons aforementioned, there is no merit in this appeal, which is dismissed accordingly with costs payable by the Appellant to Respondent No. 6. Counsel's fee is assessed at Rs. 10,000/-.

G H B.B.B.

Appeal dismissed.