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SMT. MARY OOMMEN

v.

MANAGER, M.G.M. HIGH SCHOOL, KURUPPAMPADDY,
KERALA & ORS.

FEBRUARY 25, 1987

B

[V. KHALID AND G.L. OZA, JJ.]

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Kerala Education Rules—Chapter XIV(A)—Rule 51(A)—Teacher—Appointment to a permanent vacancy—Scope of Note appended to section—Whether a teacher who had worked in a temporary vacancy earlier has a preferential right over a teacher who worked later in the same school.

Statutory Interpretation—Note to a Rule—Although not having binding effect has persuasive force.

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Rule 51(A) of Chapter XIV(A) of the Kerala Education Rules provided that qualified teachers who are relieved as per Rules 49 or 52 or on account of termination of vacancies shall have preference for appointment to future vacancies in schools under the same Education Agency. A Note was appended to this Rule on 4.7.1972 which provided that if there are more than one claimant under this Rule the order of the preference shall be according to the date of first appointment. If the date of first appointment is the same, then preference shall be decided with reference to age, the older being given the first preference. In making such appointment, due regard should be given to requirement of subjects and to the instructions issued by the Director under sub-Rule(4) of Rule 1 as far as High Schools are concerned.

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The appellant, who was duly qualified, was appointed as a teacher in a temporary vacancy in the school of the first respondent from 13.1.1970 and her appointment was approved by the District Educational Officer, the second respondent. On the vacancy being ceased to exist she went out of job on 16.3.1970. She again worked in a further vacancy from 22.8.70 to 17.12.1970. She went out of service when this vacancy ceased. Respondent No. 4, another teacher, worked in the same school in another leave vacancy from 1.9.1970 to 26.11.1970.

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In the academic year 1971-72 a permanent vacancy arose for Social Studies. The appellant being a Social Studies teacher made a representation claiming appointment against that vacancy. But the first

respondent appointed the 4th respondent. On a complaint being made by the appellant, the second respondent found the appointment of the 4th respondent irregular and held that the legitimate claimant for the permanent post was the appellant and, therefore, did not approve the appointment of the 4th respondent. The Regional Deputy Director of Public Instructions, respondent No.3, allowed the appeal of the management. The appellant filed a petition under Article 226 challenging the validity of the order passed by the third respondent, *inter alia*, contending that she had a preferential claim and that the appointment of the 4th respondent was illegal.

A Single Judge dismissed the petition on the ground that Rule 51(A) conferred a right on the appellant for appointment in the future vacancies in the school and it did not restrict the right of the management to make his own choice among the thrown out teachers. The Division Bench also dismissed the appeal preferred by the appellant.

On the question whether a teacher who had worked in a vacancy earlier has preferential right over a teacher who worked later in the same school, allowing the appeal,

HELD: 1.Rule 51(A) of Chapter XIV(A) of the Kerala Education Rules does not mandate that the one who worked earlier should be preferred to the one who worked later. [441B]

2.1 Although a Note to a Rule does not have any binding effect, it does indeed have a persuasive force. [441E]

2.2 It cannot be ignored that the Note has come as an appendage to Rule 51(A) for qualificatory purposes though it does not form a part of the Rule. [441F]

3. The preference in Rule 51(A) should be based on priority of title. [442G]

4. The High Court while interpreting Rule 51(A) was influenced more by the words in the abstract contained in the Rule and not fairness behind the Rule. The interpretation given by the High Court to this Rule can result in abuse of discretionary power with the management. If the Government wanted to clothe the Manager with the power to choose among rival contenders to a future vacancy, the Rule should be suitably amended. [443C-D]

A 5. The Rule as it stands clearly confers priority to the earlier appointee. The appellant, therefore, is entitled to succeed. The appellant will be entitled to all the benefits as though she was appointed when the vacancy in question arose. However, this will not enable her to draw salary for the period she had not worked but only other benefits such as seniority, increments etc. [443D-F]

B CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1284 of 1973.

From the Judgment and Order dated 18.1.1973 of the Kerala High Court in transfer petition No. 45 of 1972.

C G. Vishwanath Iyer and N. Sudhakaran for the Appellant.

P.K. Pillai and Miss Lily Thomas for the Respondents.

The Judgment of the Court was delivered by

D **KHALID, J.** This appeal by special leave is directed against the Judgment dated 18-1-1973, passed by the High Court of Kerala in Writ Appeal No. 45 of 1972.

E This appeal involves the correct interpretation and the scope and effect of Rule 51(A) of Chapter XIV-A of the Kerala Education Rules. The Rule reads as follows:

F “51-A. Qualified teachers who are relieved as per Rules 49 or 52 or on account of termination of vacancies shall have preference for appointment to future vacancies in schools under the same Education Agency, provided they have not been appointed in permanent vacancies in schools under any other Educational Agency.”

G This Rule gives a teacher, discharged for want of vacancy or relieved as per Rule 49 or 52, a right to reappointment when a future vacancy comes into existence. It is usual for managers of schools to appoint teachers to leave vacancies. Sometimes more than one teacher get so appointed when there are more than one vacancies. When such vacancies cease to exist by the permanent incumbent coming back, the temporary appointees go out. When thereafter a permanent vacancy

H arises, those who had temporarily worked in leave vacancies get pre-

ference to be appointed to that vacancy. The question in this appeal is whether the Manager who has to appoint a teacher to a permanent vacancy has to go by the rule of "last come—first go", to use the usual industrial jargon, in reverse, or whether the Manager has a right to choose between the temporary teachers, ignoring the principle usually accepted that a person who gets a right to a post by virtue of earlier appointment should not be ignored in preference to a person who gets such title later. Before dealing with this case it will be useful to take note of a Note to Rule 51(A) which reads as follows:

"If there are more than one claimant under this rule the order of preference shall be according to the date of first appointment. If the date of first appointment is the same, then preference shall be decided with reference to age, the older being given the first preference. In making such appointment, due regard should be given to requirement of subjects and to the instructions issued by the Director under sub-rule (4) of Rule 1 as far as High Schools are concerned."

This note gives the correct guideline based on justice and fair play.

Now, we will briefly state the facts. The appellant is a B.A., B.Ed. degree holder. She is fully qualified to be appointed as a teacher in any Government or aided school in the State of Kerala. She was appointed in a temporary vacancy in the school of the first respondent, from 13-1-1970 to 16-3-1970, in the academic year 1969-70. The appointment has to be approved by the District Educational Officer, the second respondent herein, which was duly done. Since the vacancy in which the petitioner was working ceased to exist. She went out of the job on 16-3-1970. A further vacancy arose on 22-8-1970 and it continued till 17-12-1970. She worked in this vacancy also. She went out of service when this vacancy ceased. Respondent No. 4 is another teacher who worked in the same school in another leave vacancy, from 1-9-1970 to 26-11-1970. The appellant thus had a total service of six months and one day while the 4th respondent had 2 months and 25 days of service, under the 1st respondent.

A permanent vacancy arose in the school for the academic year 1971-72, for Social Studies when the Head Master in that school retired. The appellant made a representation to the Manager for being appointed against that vacancy. The 1st respondent appointed the 4th respondent. The appellant is a Social Studies teacher. She thereupon

A complained to the second respondent. The second respondent found the appointment of the 4th respondent irregular and held that the legitimate claimant for the permanent post was the appellant. On this finding he did not approve the appointment of the 4th respondent. The management took the matter in appeal before the Regional Deputy Director of Public Instruction, respondent No. 3, who by his order dated 9-11-1971, allowed the appeal. Aggrieved by this order the appellant moved the High Court of Kerala by filing Original Petition No. 5064 of 1971, challenging the validity of the order passed by the 3rd respondent, inter alia, contending that as per Rule 51(A), of Chapter XIV(A) of the Kerala Education Rules, she had a preferential claim and that the appointment of the 4th respondent was illegal.

C The learned Single Judge dismissed the original petition by his Judgment dated 1-2-1972, on the short ground that Rule 51(A) conferred a right on the appellant for appointment in the future vacancies in the school and it did not restrict the right of the management to make his own choice among the thrown out teachers. The appellant pursued the matter by filing Writ Appeal 45 of 1972. The Division Bench dismissed the appeal agreeing with the learned Single Judge that the management had a discretion to choose among the thrown out teachers. Hence this appeal by special leave.

E Though long years have passed by since this dispute arose wherefore we would have normally declined interference with the Judgment under appeal, we think it necessary to lay down the law correctly to avoid injustice in cases like this and to prevent abuse of power of those in whom right is conferred under Rule 51(A). Now, both the appellant and the 4th respondent are working in the same school. Though the subject to be taught by the appellant and the 4th respondent figured at one stage as an additional plea before the learned Single Judge, it is inconsequential for this Judgment, though the learned Single Judge held in favour of the appellant on the question of the subject.

G Let us read the rule in question. This rule speaks of qualified teachers. Both the appellant and the 4th respondent satisfy this requirement. It speaks of teachers being relieved as per Rule 49 or Rule 52 or on account of termination of vacancies. Rule 49 speaks of termination of teachers after vacation, when the vacancy in which they work extend over summer vacation and Rule 52 speaks of teachers relieved on account of reduction in the number of posts under orders of the department. We are not concerned with these rules. Here, both H the teachers were relieved on account of termination of vacancies. The

Rule states, that such teachers shall have preference for appointment to future vacancies in schools under the same Educational Agency. A future vacancy has arisen. The school where appointment is sought is under the same Educational Agency. The proviso is not material in this case. All the conditions for application of this Rule are satisfied. The only question that has to be answered is whether a teacher who had worked in a vacancy earlier has a preferential right over a teacher who worked later in the same school. It is true that the rule does not, in terms, mandate that the one who worked earlier should be preferred to the one who worked later. But would it be in accord with justice and fair play, to prefer the one who worked later to the one who worked earlier? In the absence of anything in the Rule giving to the management a right to choose between the two, on the ground of suitability, merit or efficiency. The Judgment of the Division Bench under appeal was delivered on 18-1-1973. The note quoted above was inserted on 4-7-1972. This note leaves no doubt as to how Rule 51(A) has to be construed. The Rule states that preference will be given with reference to the date of appointment. When the date of appointment is the same, age should prevail; the elder being given the first preference. Of course, it contains a rider that due regards should be given to the requirements of subject as far as High Schools are concerned. The Division Bench did not choose to accept the clarification contained in the note. The learned Judges held against the appellant, on the wording of the Rule that, in terms, it did not provide for any preference between two or more persons and did not consider it proper to read more into this Rule by considering the note to Rule 5 in the same chapter. Although we do not say that a note to a Rule has any binding effect, it does indeed have a persuasive force. It cannot be ignored that this note has come as an appendage to Rule 51(A) for clarificatory purposes though it does not form a part of the Rule. The learned Judges held that propriety and fairness required a decision in favour of the appellant, when they observed: "It would be proper no doubt to give an earlier appointee preference. But seeing the rule as we ought to see every rule and every section in the Kerala Education Rules and the Kerala Education Act as restrictions or regulations in the matter of the free right of the manager to choose and appoint, it is impossible to read more into the rule."

With respect, we feel that the learned Judges were influenced more by the words in the abstract contained in the rule and not with the fairness behind the rule.

The learned Judges of the Division Bench had before them H

A another Division Bench Judgment where the identical rule fell for consideration. The relevant portion of that Judgment was extracted by learned Judges. We also find it useful to extract it here:

B “5. Very recently, in Writ Appeal No. 44 of 1970, we had occasion to construe Rule 51-A. And we then observed that despite its unhappy wording, in particular, the use of the words, “preference for appointment” to mean “right to appointment,” we had little doubt that what the rule meant was that a person discharged for want of vacancy had a right to be appointed in future vacancies, provided, of course, he had not by word or deed given up that right or, we might now add, disqualified himself meanwhile.

C And we added that the present tense of the words, “are relieved” appearing in the rule was the present tense of logic, not of time, so that, in effect, the rule should be read as if it said “qualified teachers who stand relieved” shall have preference. In that view, it is, no doubt, true that the petitioner’s appointment’s between 1957 and 1961 furnished here with a title to re-appointment notwithstanding that they were made before the rule came into force, and it is at least arguable that where no priority in preference is prescribed by the rule, priority should be determined by priority of title. The question, then, is whether the plea of abandonment to donment taken by

D the 3rd respondent is well founded.”

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The above observation was got over by the Division Bench with the observation that “it was obiter and are certainly not intended to be conclusive observations in the matter. If so, we would have referred this case to a Full Bench.” We would have been happy if the appellate

F Bench had referred this question to a full Bench and resolved the controversy since the High Court felt that the appellant’s contention carried with it the element of fair play and justice and was at least, to put it mildly, in some measure supported by another Division Bench of the same Court. We agree that the preference in Rule 51-A should be

G based on priority of title. In this case, we do not have a plea of abandonment or other disqualification.

The learned counsel for the appellant brought to our notice how this Rule was understood by the Manager of the same school when another vacancy arose earlier. At that time also the present appellant

H applied to the Manager, seeking appointment in the vacancy conse-

quent on the retirement of a Head Master. The Manager declined the request and sent a reply to the appellant, the relevant portion of which, eloquent in favour of the appellant, reads as follows:

“Rule 51(A) Chapter XIV-A K.E.R. lays down that qualified teachers who are relieved on account of termination of vacancies shall have preference for appointments to future vacancies. When two persons apply for a post by virtue of the concession laid down in Rule 51-A, it is the natural justice to select the persons who has earlier and longer period of previous service. Hence considering all the aspects of the question, the management has appointed Smt. P.E. Sosamma in the said vacancy.”

The Manager then understood the rule correctly, but later incorrectly. That is why we said earlier in our Judgment that the interpretation given by the High Court to this Rule can result in abuse of this discretionary power with the Manager. If the Government wanted to clothe the Manager the power to choose among rival contenders to a future vacancy, the rule should be suitably amended. The rule as it stands clearly confers priority to the earlier appointee. The appellant, therefore, is entitled to succeed. We set aside the order of the Division Bench under appeal and allow this appeal. The appellant will be entitled to all the benefits as though she was appointed when the vacancy in question arose. We would like to make it clear that this direction of ours will not enable her to draw salary for the period she had not worked but only other benefits such as seniority, increments etc. The first respondent will pay costs of the appellant.

A.P.J.

Appeal allowed.