

(1989) 09 KL CK 0042**High Court Of Kerala****Case No:** W.A. No. 968 of 1987

District Educational Officer

APPELLANT

Vs

K.T. Joseph

RESPONDENT

Date of Decision: Sept. 19, 1989**Acts Referred:**

- Constitution of India, 1950 - Article 14
- Kerala Education Rules, 1959 - Rule 11, 13A, 13B, 43A

Hon'ble Judges: V.S. Malimath, C.J; V. Bhaskaran Nambiar, J**Bench:** Division Bench**Advocate:** N. Sugathan, Government Pleader, for the Appellant; K. Vijayan and N.N. Sugunapalan, for the Respondent**Final Decision:** Allowed**Judgement**

V.S. Malimath, C.J.

This appeal is by the District Educational Officer, Kasaragod, and the Accountant-General, Trivandrum, against the judgment of the learned Single Judge rendered in O.P. No. 3422 of 1984. The first Respondent Sri K.T. Joseph was appointed in the year 1959 as a High School Assistant in the St. Joseph's High School, Parayoor. On 2nd June 1980 he was transferred and appointed as Headmaster of the Mary Giri High School, Thertallai, under a different educational agency. This was done with the mutual consent of the two educational agencies and that of the first Respondent with the approval of the Education Department. On the date of his transfer the first Respondent was drawing a pay of Rs. 795 in the senior grade of H.S.A., namely Rs. 570-20-670-25-920-30-1070. On his being appointed as Headmaster of the Thertallai High School his pay was fixed at Rs. 830 in the scale of pay of Headmasters namely Rs. 700-25-800-30-890-35-1030-40- 1270. The Accountant-General who audited the accounts raised an objection about the fixation of pay of the first Respondent at Rs. 830. According to him the pay should have been fixed in accordance with Rule 13A of Chapter XIV A of the Kerala Education Rules. If

the pay of the first Respondent was fixed in accordance with the said provision, he should have been fixed at Rs. 775 in the scale of Headmasters viz., Rs. 700-1270 with an additional personal pay of Rs. 20, thus maintaining the pay of Rs. 795 which the first Respondent was drawing on the date of his transfer and appointment as Headmaster. Obviously the first Respondent having received a much higher amount than he was entitled to, according to the Accountant-General he was required to refund the excess amount deceived by him. It is in this background that the first Respondent approached this Court with O.P. No. 3422 of 1984.

2. The learned Single Judge has allowed the writ petition by his judgment dated 1st April 1987 and directed the Appellants to fix the salary of the first Respondent as per Rules 28A and 37 of Part 1 of the Kerala Service Rules, in super session of Rule 13A of Chapter XIV A of the Kerala Education Rules. It is the said judgment that is challenged in this appeal.

3. The learned Single Judge has accepted the case put forward by the first Respondent that his pay should have been fixed in accordance with Rule 28A of Part 1 of the K.S.R. and not in accordance with Rule 13A of Chapter XIV A of the K.E.R. The learned Single Judge has pointed out that Rule 28A of Part 1 of the K.S.R. becomes applicable by virtue of Rule 43A of Chapter XIV A of the K.E.R. which provides:

43A. A teacher promoted from a lower scale of pay to a higher scale of pay shall have his initial pay in the higher scale of pay fixed applying Rules 28A and 37 of Part I, Kerala Service Rules. A reification of pay will be allowed whenever there is a change of pay in the lower time scale.

Rule 28A of Part I of the Kerala Service Rules, which admittedly governs fixation of pay of teachers in Government schools reads:

Notwithstanding anything contained in these rules, where an officer holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to Anr. post carrying a higher time scale of pay, his initial pay in the higher time scale of pay shall be fixed at the stage next above the pay notionally arrived at in the lower time scale of pay by increasing the actual pay drawn by him in the lower time scale by one increment. A re-fixation of pay will be allowed whenever there is a change of pay in the lower time scale.

If Rule 28A of the K.S.R. governs the case of the first Respondent, the original fixation of pay of the first Respondent at Rs. 830 would be justified. But as already pointed out, the Accountant-General took the stand that what governs this case is not Rule 28A of the K.S.R. but Rule 13A of Chapter XIV A of the K.E.R. which reads as follows:

13A. When a teacher is transferred to a school under a different educational agency in a higher scale of pay he will draw the minimum in the higher scale provided his pay in the lower scale is below the minimum fixed in the higher scale. If he was

drawing higher pay in the lower scale at the time of transfer then he will draw the same pay in the higher scale. If this pay is not a stage in the higher scale he may be allowed the next lower stage plus the difference as personal pay which may be absorbed in the next increment.

If what governs his case is Rule 13A of Chapter XIV A of the K.E.R., the pay of the first Respondent should have been fixed as ordered by the Accountant-General at Rs. 775 in the scale of Headmasters of Rs. 700-1270 with an additional personal pay of Rs. 20. The learned Single Judge felt that a person like the first Respondent who gets appointed to a higher post in accordance with Rule 11 of Chapter XIV A of the K.E.R. is in the same position as a teacher of the Government school or of an aided school who earns promotion thereby becoming entitled to fixation of pay in accordance with Rule 28A of Part I of the K.S.R. As fixation of pay of a teacher governed by Rule 11 of Chapter XIV A of the K.E.R. under Rule 13A is less advantageous to the fixation of pay of a teacher who is governed by Rule 28A of the K.S.R., the learned Single Judge has come to the conclusion that Rule 13A operates oppressively and is therefore violative of Article 14 of the Constitution. The learned Single Judge has pointed out that though consent is required for transfer and appointment under different educational agencies as provided in Rule 11 of Chapter XIV A of the K.E.R., whereas the question of such consent does not arise when promotion is accorded to a teacher of an aided school under the same educational agency or to a teacher of a Government school, that it should make no difference so far as the fixation of pay is concerned. We find it difficult to agree with this reasoning of the learned Single Judge. When a teacher is transferred from a school under one educational agency to a school under Anr. educational agency and appointed to a higher post of Headmaster, it is done not in recognition of any right to transfer and appointment to such a higher post. The transfer and appointment of a teacher under one educational agency as a Headmaster in a school under Anr. educational agency depends entirely on the consent of both the educational agencies and that of the teacher concerned, in addition to the approval of the departmental officers. That is clear from Rule 11 of Chapter XIV A of the K.E.R. A transfer and appointment which is brought about by the operation of the said provision is therefore not in recognition of any pre-existing right of the teacher concerned. It depends entirely on the volition of the teacher and the agreement between the two educational agencies. A transfer and appointment under such circumstances cannot therefore be treated on par with, a regular promotion which a teacher earns by virtue of his seniority, qualifications and record of service under the same educational agency or in the service of the Government. It is therefore clear that Rule 13A governs fixation of pay of a special species of appointments which are governed by Rule 11 of Chapter XIV A of the K.E.R. The general rule contained in Rule 28A of Part I of the K.S.R. which becomes applicable by virtue of Rule 43A of Chapter XIV A of the K.E.R. has to yield place to Rule 13A which is a special provision which governs fixation of pay of teachers who are transferred and appointed to Anr. educational agency in

accordance with Rule 11 of Chapter XIV A of the K.E.R. Teachers who are transferred and appointed in accordance with Rule 11 of Chapter XIV A of the K.E.R. form a different and distinct class. A different mode of fixation of pay in regard to persons governed by Rule 11 of Chapter XIV A of the K.E.R. is therefore clearly justified. Teachers who are transferred and appointed under Rule 11 of Chapter XIV A of the K.E.R. get their pay adequately protected by Rules 13A and 13B. Fixation of pay by the operation of Rule 13A of Chapter XIV A of the K.E.R. cannot therefore be regarded as arbitrary or violative of Article 14 of the Constitution. As the case of the first Respondent is clearly governed by Rule 13A which is a special provision applicable to his case, the question of finding fault with the fixation of pay made by the Accountant-General does not arise.

4. Before concluding we should advert to the order of the State Government dated 10th August 1989 brought to our notice by the learned Counsel for the first Respondent, whereby the pay of the first Respondent has been fixed in accordance with Rule 28A of Part I of the K.S.R. subject to the rider that, the same should not be quoted as a precedent in other cases. Learned Counsel for the first Respondent stated that as the State Government itself has made a special order in his favor, we should not say anything which would come in the way of his receiving the benefit under the said order. The preamble to the said order makes it clear that the same has been passed in compliance with the directions issued by the learned Single Judge in O.P. No. 3422 of 1984, which judgment has been challenged in this appeal. We are surprised as to why the State Government has thought it fit to make such an order though an interim order of stay was granted in this appeal on 19th February 1988 which was further continued by order dated 9th March 1988. When we asked the learned High Court Government Pleader as to why we should not draw an inference that this order is passed by way of favoritism shown to the first Respondent, the learned High Court Government Pleader submitted that we may not draw such an inference as it is possible that the interim order of stay granted by this Court was not brought to the notice of the concerned authorities. When the Appellants themselves obtained an interim order of stay, it is difficult to appreciate the stand taken by the learned High Court Government Pleader. The learned High Court Government Pleader however stated that it is not proper on the part of the State Government to have made such an order on 10th August 1989 and that too without making any attempt to ascertain the relevant facts from the Government Pleader. Be that as it may, it is obvious that the said order cannot confer any benefit on the first Respondent and has to be rescinded and appropriate action taken in accordance with this judgment.

For the reasons stated above, this appeal is allowed, the judgment of the learned Single Judge is set aside and the writ petition is dismissed. The Appellants are entitled to their costs from the first Respondent, Advocate's fee Rs. 250.