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C. C. PADMANABHAN & OTHERS

v.

THE DIRECTOR OF PUBLIC INSTRUCTIONS AND OTHERS

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July 30, 1980

[V. R. KRISHNA IYER, A. D. KOSHAL AND O. CHINNAPPA REDDY, JJ.]

Promotional post—Post of Assistant Educational Officer in Kerala Educational Service is a promotional post and a reversion therefrom is, therefore, C *invalid—Articles* 14, 16 *of the Constitution read with Clause* (2) *of the Rules of the Kerala State and Subordinate Services Rules,* 1915, *Rule* 2(5) *and* 2(7) *(a) of the Kerala Education Rules,* 1958 *and Section* 12*A of the Kerala Education Act,* 1958—*The two posts of Assistant Educational Officer and the High School Assistant are not inter-changeable—Kerala Education Subordinate Service (Special) Rules,* 1972, *Rule* 3.

D Each of the appellants had been holding the post of Assistant Educational Officer for more than six years continuously when his reversion was ordered in implementation of the instructions issued by the State Government through a letter dated 19th May, 1977 to the effect that every Assistant Educational Officer should be transferred after six years of service as such or even earlier, on administrative grounds. Having failed before the High Court to get these orders quashed on the ground that the posts of Assistant Educational Officers, being promotional posts, their transfer to the posts of High School Assistant amounted E to reversion and, therefore, violated Articles 14 and 16 of the Constitution, the appellants have now come up in appeal by special leave.

Allowing the appeals, the Court,

HELD: (1) The directions contained in the letter dated 19th May, 1977 that an Assistant Educational Officer should be transferred back as a High School Assistant after six years of incumbency as Assistant Educational Officer F is wholly arbitrary and not based on any principle and is therefore violative of Article 16 of the Constitution. Firstly, the post of A.E.O. carries a special pay of Rs. 50/- per month and therefore ensures for its incumbent higher emoluments than are available to a High School Assistant. Secondly, the special pay is counted towards pension under Rules 12, 23 and 62 of the Kerala Service Rules. Any transfer of an Assistant Educational Officer to that of High School Assistant deprives him of these benefits and, therefore, is violative of G Article 14. [137H, 138A-D]

P. C. Joshi and others etc. etc. v. *The Director General, Posts and Telegraphs, New Delhi etc.*, [1975] 2 S.C.R. 115, distinguished.

(2) The very fact that the post of Assistant Educational Officer carries a special pay of Rs. 50/- falling within sub-clause (a) of clause 31 of Section 12 of the Kerala Service Rules, goes to prove that the post is higher than that of H High School Assistant. [136B-C, 137F-G]

(3) Rule 2(ii) of the Kerala State and Subordinate Service Rules, 1958, Rule 2(v), Rule 2(vii)(a) of the Kerala Education Rules, 1959 and Section 12A of the Kerala Education Act, 1958 make it clear that if so authorised by the

Government an A.E.O. shall have the power to take disciplinary proceedings against a teacher, including a Headmaster, of an aided school, to suspend him when such proceedings are proposed to be taken and to impose upon him all or any of the penalties to which he may be liable under the relevant rules. Item 4 of the functions to be performed by an Assistant Educational Officer detailed in the Education Department Guide Book, 1978 empowers him to institute disciplinary proceedings against non-gazetted officers under his control as per Kerala Civil Services (Qualification, Control and Appeal) Rules, and admittedly High School Assistants are non-gazetted officers who are eligible for appointment and are normally appointed as Headmasters of upper primary school and, therefore, they would while functioning as Headmasters be amenable to disciplinary action by their respective Assistant Educational Officers. It follows that the post of an Assistant Educational Officer lies in a higher category than that of a High School Assistant who does not wield any corresponding disciplinary jurisdiction. [132C-G]

The qualifications prescribed by the Government Order dated 25th June, 1966 and Rule 3 of the Kerala Education Subordinate Service (Special) Rules, 1972 make it clear that the two posts of Assistant Educational Officer and High School Assistant are not inter-changeable. A High School Assistant cannot be posted as an Assistant Educational Officer unless he has the qualification (in addition to those making him eligible to hold the post of High School Assistant) of having passed the test in Kerala Education Act and Rules. The broad guidelines issued by the State Government to the effect that "care must be taken to see that only officers of high integrity and efficiency should be posted to work as Assistant Educational Officers", the Government Order of 29th August, 1961, the letter dated 7th February, 1969 issued by the Director of Public Instructions and the Order dated 19th October, 1974 issued by the State Government introducing direct recruitment to the posts of A.E.Os. and District Educational Officers also specifically indicate that the functions to be performed by an Assistant Educational Officer are substantially different from and entail higher responsibility than those of an H.S.A. so that the appointment to the post of A.E.O. from amongst officials already serving the State Government is a matter of promotion and not a mere transfer and that is how the Kerala Government itself has been viewing the matter all along prior to the issuance of the letter dated 19th May, 1977. [131G, 133B-C, E, F, 134G-H]

(4) If the rules do not permit Assistant Educational Officers to become Headmasters of High Schools but the Government has been posting them as such in contravention of the rules it would not follow that the rules automatically stand amended to be read in conformity with the contravention. There is no incongruity in the two categories of the posts, one higher and the other lower, furnishing two sources of recruitment to another higher post and it would not necessarily follow from such a practice that the two sources must be regarded as equivalent to each other for all purposes. [135G-H, 136A]

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 3520-3524 of 1979.

(Appeals by Special Leave from the Judgment and Order dated 11-9-1979 of the Kerala High Court in Writ Appeals Nos. 241, 242/77 and Original Petition Nos. 1791, 1836 & 1892/79.)

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P. Govindan Nair, Mrs. Baby Krishnan and *N. Sudhakaran* for the Appellants.

M. M. Abdul Khader, V. J. Francis and *Sushil Kumar* for the Respondents.

B The Judgment of the Court was delivered by

KOSHAL, J.—By this judgment we shall dispose of Civil Appeal Nos. 3520 to 3524 of 1979 which are directed against a common judgment dated 11-9-1979 of a Division Bench of the High Court of Kerala holding that in the Department of Education of the State of Kerala the post of Assistant Educational Officer (hereinafter described as C A.E.O.) is not a promotion post vis-a-vis that of a High School Assistant (hereinafter referred to as H.S.A.), that the two posts are interchangeable and that consequently the reversion of the solitary appellant in each case from the post of A.E.O. to that of H.S.A. is not violative of article 16 of the Constitution.

D 2. It is not disputed before us that each of the appellants had been holding the post of A.E.O. for more than six years continuously when his reversion was ordered in implementation of the instructions issued by the State Government through a letter dated the 19th May, 1977 to the effect that every A.E.O. should be transferred back as H.S.A. after six years of service as A.E.O. or even earlier on adminis- E trative grounds. Each reversion was challenged before the Kerala High Court by means of a petition under article 226 of the Constitution of India with the prayer that the same be quashed. Two of the petitions were dismissed by a learned single Judge whose orders were challenged in letters Patent appeals which were heard and dismissed by the impugned judgment along with the other three petitions. The F five appeals have been admitted in pursuance of special leave granted by this Court.

3. On behalf of the appellants two contentions have been raised:

(a) The post of A.E.O. lies in a category and carries a grade higher than those of the post of H.S.A. is, therefore, a G post of promotion vis-a-vis the other so that the two cannot be considered as inter-changeable especially because there is no rule, direction or instruction laying down expressly or by necessary implication that they are equivalent to each other.

(b) Even if the appointment of an H.S.A. as an A.E.O. cannot be regarded as a promotion, the impugned reversions are vio- H lative of article 14 as no guidelines to regulate them have been provided inspite of the fact that the post of an A.E.O. carries a special pay which is not available to an H.S.A.

After hearing learned counsel for the parties at length we find both these contentions to be weighty.

4. Promotion is thus defined in clause (11) of rule 2 of the Kerala State and Subordinate Services Rules, 1958:

> "(11) 'Promotion' means the appointment of a member of any category or grade of a service or a class of service to a higher category or grade of such service or class."

This definition fully conforms to the meaning of 'promotion' as understood in ordinary parlance and also as a term frequently used in cases involving service laws. According to it a person already holding a post would have a promotion if he is appointed to another post which satisfies either of the following two conditions, namely—

(i) that the new post is in a higher category of the same service or class of service;

(ii) the new post carries a higher grade in the same service or class.

It is common ground between the parties that in the instant case the two posts belong to the same service or class of service. Applying the above test, therefore, to them it would follow that the appointment of an H.S.A. to the post of an A.E.O. would be a promotion if, and only if—

(a) the post of an A.E.O. is of a higher category than that of an H.S.A.

or

(b) the post of an A.E.O. carries a higher grade than that of an H.S.A.

In case of either of these conditions being fulfilled, the appointment of an H.S.A. to the post of an A.E.O. would be a promotion within the meaning of the clause above reproduced.

5. For ascertaining whether or not the post of A.E.O. lies in a category higher than that of an H.S.A. a reference may be made to clauses (5) and (7a) of rule 2 of the Kerala Education Rules, 1959 and section 12A of the Kerala Education Act, 1958. Rule 2(5) defines Educational Officer as meaning the District Educational Officer or the Assistant Educational Officer having immediate inspectional and administrative control over the schools within his respective jurisdiction, while rule 2(7a) states that the term 'Teacher' includes the Headmaster. Sub-sections (1) & (2) of section 12A run thus:

A "(1) Notwithstanding anything contained in section 11 or section 12 and subject to such rules as may be prescribed, the Government or such officer not below the rank of an Educational Officer, as may be authorised by the Government in this behalf, shall have power to take disciplinary proceedings against a teacher of an aided school and to impose upon him all or any of the penal-
B ties specified in the rules under this Act.

"(2) The Government or the officer authorised under sub-section (1) as the case may be, may suspend a teacher of an aided school when any disciplinary proceedings are proposed to be taken against him under that sub-section or when such disciplinary pro-
C ceedings are pending: .....".

The combined effect of these provisions is that if so authorised by the Government an A.E.O. shall have the power to take disciplinary proceedings against a teacher, including a Headmaster, of an aided school, to suspend him when such proceedings are proposed to
D be taken and to impose upon him all or any of the penalties to which he may be liable under the relevant rules.

The Education Department Guide Book, 1978 issued by the State Government contains a detailed description of the powers and duties assigned to various officials of the Department. The list of functions
E to be performed by the A.E.Os. contains 40 items of which item 4 reads:

"To institute disciplinary proceedings against non-gazetted officers under his control as per Kerala Civil Services (C. C. and A.) Rules."

F Now H.S.As. are admittedly non-gazetted officers who are eligible for appointment and are normally appointed as Headmasters of Upper Primary schools (vide paragraph 1(a)(i) of G.O. (Ms) No. 32/71/S. Edn., dated 19-3-1971). They would thus while functioning as Headmasters, be amenable to disciplinary action by their respective A.E.Os. It
G follows that the post of the A.E.O. lies in a higher category than that of the H.S.A. who does not wield any corresponding disciplinary jurisdiction.

6. The qualifications for the two posts may now be looked into. A.E.Os. are appointed from amongst first grade graduate teachers hav-
H ing the following qualifications (vide No. G.O.M.S. 393/Edn., dated 25-7-1966):

(a) General: B.A. or B.Sc.

(b) Special: (i) B.T. or B.Ed. of a recognised University. A

(ii) Account Test Lower.

(iii) Kerala Education and rules.

Rule 3 of the Kerala Education Subordinate Service (Special) Rules framed in 1972 runs thus:

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"3. No High School Assistant shall be considered for being selected for posting as an Assistant Educational Officer unless he has passed the test in Kerala Education Act and Rules."

This rule seriously militates against the proposition propounded on behalf of the State that the two posts are inter-changeable. An H.S.A. cannot be posted as an A.E.O. unless he has the qualification (in addition to those making him eligible to hold the post of H.S.A.) of having passed the test in Kerala Education Act and Rules. The reason for the additional qualification is obvious and that is that in his supervisory and disciplinary jurisdiction the A.E.O. has to discharge functions which he cannot efficiently carry out if he is not a master of the law which calls for day to day application by him to different cases with which he has to deal. This is another factor pointing in the same direction that the post of an A.E.O. lies in a higher category. C D

7. An additional circumstance leading to the same inference is provided by the broad guidelines issued by the State Government to the effect that "care must be taken to see that only officers of high integrity and efficiency should be posted to work as Assistant Educational Officers" (vide judgment dated 11th January, 1977 of the High Court of Kerala in O.P. No. 3627 of 1974). H.S.As. are, therefore, appointed to the posts of A.E.Os. not as a matter of course but under a process of selection for which the basic is integrity-cum-efficiency. E F

Further evidence in the same direction is provided by three documents forming part of the paper book at pages 31-38 and marked as annexures 'C', 'D' and 'E' respectively. Annexure 'C' is an order dated 29th August 1961 issued by the State Government, a part of paragraph 3 of which reads thus:

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"Criteria for promotion:

"(1) Appointment to the posts of District Educational Officers, Headmasters of High Schools, High School Assistants and Assistant Educational Officers are now made mainly on the basis of seniority. Promotion on the basis of seniority alone is not conducive to efficiency. Promotions to these posts will hereafter be made on a selection basis. H

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."(2) The above orders will be given effect from the 1st September 1961 ....."

Annexure 'D' is a letter dated 17th February 1969 from the Director of Public Instructions to the District Educational Officer, Trivandrum and states, inter alia,:

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"The question of probation arises only when there are functional differences. So in the case of Assistant Educational Officers probation has to be insisted on."

The last of the three documents is an order dated 19th October C 1974 issued by the State Government introducing direct recruitment to the posts of A.E.Os. and District Educational Officers. It contains, amongst others, the following directions:

"The persons selected will be required to undergo/pass the following training programme/departmental tests:

D *"Assistant Educational Officers,*

"Training: One year as Headmaster of an Upper Primary School.

"2. Six months with Assistant Educational Officer of which the last three months shall be as Head Clerk of the Assistant Educational Officer's office.

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"3. Six months in the District Educational Officer's office of which the last three months will be as Junior Superintendent in charge of one of the sections.

"4. Two months OM(?) training in the Directorate or Secretariat Training School.

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"5. Four months as personal assistant to Educational Officer.

"Departmental Tests:

1. Account test (Lower).
2. Test in Kerala Education Act and Rules.

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3. Test in Manual of Office Procedure."

The integrated effect of these three documents is that the functions to be performed by an A.E.O. are substantially different from and entail higher responsibility than those of an H.S.A., that the appointment to the post of an A.E.O. from amongst officials already serving the State Government is a matter of promotion and not a mere transfer, and H that that is how the Kerala Government itself has been viewing the matter all along prior to the issuance of the letter dated 19th May, 1977 mentioned above.

8. Here we may briefly advert to the constitution of the Kerala General Education Service as detailed in G.O. (P) No. 356/PD, dated 28th October, 1967 and published in Kerala Gazette No. 46, dated 21st November 1967. That Service is divided into two classes. The post of the District Educational Officer falls in Class I which is superior to Class II. The posts enumerated in Class II include those of Headmasters of High Schools. The post of H.S.A. does not find a place in either Class. On the other hand the H.S.A. belongs to the Kerala Educational Subordinate Services and works under the Headmaster of a High School. He is, therefore, two steps below the District Educational Officers. Mr. Nair sought to utilise this circumstance as another pointer to the post of H.S.A. lying in a category lower than that of an A.E.O.; for, according to him, the latter was only *one* step below the post of a District Educational Officer. The argument has not commended itself to us as no foundation has been laid for the assumption that the post of an A.E.O. furnishes an immediate avenue of promotion to that of the District Educational Officer. In fact an indication to the contrary is provided by the various categories listed in Classes I and II mentioned above, neither of which includes either H.S.As. or A.E.Os. This may well mean that the A.E.O. too is to hold another post (out of those listed for the purpose in the G.O. last mentioned) before he would have a chance of promotion as a District Educational Officer. And if that be so, an A.E.O. must also be regarded as two steps below a District Educational Officer. The G.O. under consideration is, therefore, of no help to the case of the appellant, but then this conclusion does not adversely affect the finding already arrived at by us otherwise to the effect that the post of an A.E.O. lies in a higher category.

9. The only argument which Mr. Abdul Khader advanced against the proposition that the post of an A.E.O. lay in a higher category may be stated thus. According to the available rules and instructions an H.S.A., but not an A.E.O., may be appointed to the post of Headmaster of a High School. However, the Government has been appointing A.E.Os. also as Headmasters of High Schools which means that A.E.Os. are equated with H.S.As. Now this is, to say the least, a strange argument. If the rules do not permit A.E.Os. to become Headmasters of High Schools but the Government has been posting them as such in contravention of the rules it would not follow that the rules automatically stand amended to be read in conformity with the contravention. In any case, there is no incongruity in two categories of posts, one higher and the other lower, furnishing two sources of recruitment to another higher post; and it would not necessarily

A follow from such a practice that the two sources must be regarded as equivalent to each other for all purposes.

10. Let us now see if the post of an A.E.O. carries a higher grade. It is common ground between the parties that although the two posts are in the same time scale, a special pay of Rs. 50/- per mensem is attached to post of an A.E.O. in accordance with the orders of the B State Government contained in clause (v) of paragraph 5 of G.O. (P) No. 300/66/Fin., dated 5-7-1966 which also states that this special pay is to be treated as Class I special pay in accordance with Appendix IV, Kerala Service Rules. That Class consists of two items:

(a) Special pay in lieu of higher time scale of pay.

C (b) Special pay for specifically arduous nature of work.

The expression 'special pay in lieu of higher time scale of pay' may be better understood with reference to the provisions of rule 12(31) of the Kerala Service Rules which may be extracted here:

"12(31) Special Pay:—means an addition of the nature of pay D to the emoluments of a post or of an officer granted in consideration of the following:

"(a) Where a post would call for a higher scale of pay in view of the additional and/or higher responsibilities attached to it; or

"(b) Where the nature of work is specially arduous; or

E "(c) Where an officer has to attend to work in addition to normal duties attached to his post."

Sub-clauses (b) & (c) of clause (31) obviously relate to posts having the same designation or the same nature of duties in the same time scale which is not the case here. On the other hand, the special pay granted F to an A.E.O. would squarely fall within the sub-clause (a) of clause (31), in view of the nature of higher responsibilities shouldered by him. And if that be so, the grade of the post of an A.E.O. must be equated to the time scale plus special pay, which would be a grade higher than the one available to an H.S.A.

11. In contending to the contrary Mr. Abdul Khader sought sup- G port from *P. G. Joshi and others, etc. etc.*, v. *The Director General, Posts and Telegraphs, New Delhi, etc.*(1), in which the posts of Wireless Licence Inspectors and Town Inspectors, to such of which a special pay of Rs. 30/- was attached, were held equivalent to those of clerks, the time scale for all the three being the same. The dictum in that case is, however, not applicable to the facts with which we are H concerned. Therein this Court took note of the definition of special pay occurring in Fundamental 9(25) which states:

(1) [1975] 2 S.C.R. 115.

"Special pay means, an addition of the nature of pay, to the emoluments of a post or of a Government servant, granted in consideration of

(a) the specially arduous nature of the duties ; or

(b) a specific addition to the work or responsibility ; or

(c) the unhealthiness of the locality in which the work is performed."

then proceeded to observe:

"The provision for payment of a special pay of Rs. 30/- in addition to the time scale of pay of clerks is inconsistent with the constitution of a separate cadre of Wireless Licence Inspectors and Town Inspectors. The provision for special pay shows that they continue in the cadre of time-scale clerks. Appointment as Wireless Licence Inspectors or Town Inspectors is not a case of transfer from one cadre to another or a case of promotion from a lower cadre to a higher cadre or from a lower post to a higher post. Though, for directly recruited Wireless Inspectors, there is an avenue of promotion from those posts to the post of Wireless Investigating Inspectors, no such avenue of promotion has been shown to exist for Wireless Licence Inspectors appointed from amongst time-scale clerks. Their avenues of promotion are from their substantive posts of time-scale clerks. The posts of Wireless Licence Inspectors to which time-scale clerks are appointed by selection did not constitute a separate cadre and the appointments are not by way of promotion. The posts of Wireless Licence Inspectors are in the cadre of time-scale clerks and carry a special pay on account of additional work."

Special pay of Rs. 30/- in that case, it may thus be seen something quite different from the special pay in the instant case which, as we have already found, was fitted in lieu of a higher scale of pay consistent with the higher responsibilities which are entailed in the performance of his functions by an A.E.O. All the three clauses of Fundamental Rule 9(25) correspond with the definition of special pay contained in sub-clauses (b) & (c) of clause (31) of rule 12 of the Kerala Service Rules and none of them takes within its sweep the type of special pay envisaged by sub-clause (a) of rule 12(31). The case cited is thus fully distinguishable and is of no assistance to the case propounded on behalf of the State Government.

12. We now take up the second limb of the argument of Mr. Nair, namely, that even if the post of an A.E.O. is not regarded as higher to that of an H.S.A. either category-wise or grade-wise, the impugned reversions are still hit by article 14 of the Constitution of

A India. In this connection two important factors have to be taken note of. The first is that the post of an A.E.O. carries a special pay of Rs. 50/- per month, and, therefore, ensures for its incumbents higher emoluments than are available to an H.S.A. The second is that the special pay is counted towards pension as is made out on a reading of rules 12(23) and 62 of the Kerala Service Rules. According to rule B 12(23) special pay is part of 'pay' while rule 62 states *inter alia* that emoluments which are reckoned for pension include pay as defined in rule 12(23). The post of an A.E.O. thus carries with it not only benefits enjoyable by the incumbent so long as he holds the post but also such as are available to him after retirement. The substantial improvements in the benefits which an H.S.A. thus enjoys after his posting as an A.E.O. constitute a compelling circumstance which would necessitate the formulation of rational criteria to be followed in transferring an H.S.A. as an A.E.O. and vice-versa so that mere caprice does not deprive an A.E.O. of the benefits enjoyed by him. The direction contained in the letter dated 19-5-1977 that an A.E.O. should be transferred back as an H.S.A. after six years of service as A.E.O. D is wholly arbitrary and not based on any principle. It is, therefore, violative of article 14 and we hold it to be so.

13. In the result all the five appeals succeed and are accepted. The impugned judgment is set aside and the orders 'transferring' the appellants from the posts of A.E.Os. to those of H.S.As. are quashed. E As a necessary consequence if any of the appellants has had to relinquish charge of the post of A.E.O. in compliance with such orders, he shall be deemed to have continued to hold the post of an A.E.O. (in spite of and right from the date of the order of his transfer as H.S.A.) and to be entitled to all the benefits pertaining to that post, and the respondents are directed to repost him as A.E.O. as expedi- F tiously as possible and within a month from the date of this order at the latest.

14. We make it clear that the vice of arbitrariness and other infirmaties we have pointed out are curable if only the State Government amends the rules fairly and rationally. This judgment does not stand G in the way of Government framing new rules or amending the old rules but such rules must be in conformity with Part III of the Constitution.

S.R. *Appeals allowed.*
Appeal, allowed.