

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

&

THE HONOURABLE MR. JUSTICE VIJU ABRAHAM

THURSDAY, THE 23RD DAY OF DECEMBER 2021 / 2ND POUSHA, 1943

OP(KAT) NO. 377 OF 2021

AGAINST THE ORDER/JUDGMENT IN OA (EKM) 645/2016 DATED 17.10.2018 OF
KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM, ADDITIONAL BENCH,
ERNAKULAM

PETITIONERS/RESPONDENTS 1 TO 3 IN O.A.:

1 THE DEPUTY DIRECTOR OF EDUCATION, ERNAKULAM,
PIN-682 030.

2 THE HEADMASTER, GOVERNMENT VOCATIONAL HIGHER
SECONDARY SCHOOL,
MATHIRIPPALLY, ERNAKULAM-686 691.

3 THE DIRECTOR OF GENERAL EDUCATION (FORMERLY KNOWN AS
DIRECTOR OF PUBLIC INSTRUCTION),
JAGATHY, THIRUVANANTHAPURAM-695 014.

SRI.SAIGI JACOB PALATTY SR. GOVT. PLEADER

RESPONDENT/APPLICANT IN O.A.:

P.A.SUHURA,
PRIMARY DEPARTMENTAL TEACHER, GOVERNMENT VOCATIONAL
HIGHER SECONDARY SCHOOL, MATHIRIPPALLY, ERNAKULAM
DISTRICT, RESIDING AT MEDAYIL HOUSE, ELAMBRA,
P.O.NELLIKUZHI-686 691, ERNAKULAM.

OTHER PRESENT:

SRI.SAIGI JACOB PALATTY, SR.GOV.T.PLEADER

THIS OP KERALA ADMINISTRATIVE TRIBUNAL HAVING COME UP FOR
ADMISSION ON 23.12.2021, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

ALEXANDER THOMAS & VIJU ABRAHAM, JJ.

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O.P (KAT) No.377 of 2021

*[Arising out of the impugned final order dated 17.10.2018 in
OA(EKM) No.645/2016 of the KAT,EKM]*

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Dated this the 23rd day of December, 2021

JUDGMENT

Viju Abraham, J.

Respondents 1 to 3 in O.A.(EKM) No.645 of 2016 before the Kerala Administrative Tribunal, Ernakulam Bench has filed the present Original Petition challenging Ext.P7 final order dated 17.10.2018 in the said Original Application.

2. Brief facts necessary for the disposal of the present Original Petition are as follows: The respondent herein/applicant in the OA entered service in the General Education Department in the year 1993 and is presently working as a Primary Departmental Teacher in the Govt. Vocational Higher Secondary School, Mathirippally near Kothamangalam in Ernakulam District. While working so, as per Annexure-A1 order, the applicant was promoted as Primary Headmistress and posted at Kuzhikkattussery Government Lower

Primary School. Since she was not in a position to take up the post for personal reasons mainly due to her and her husband's health condition, the applicant decided to relinquish her right for promotion temporarily for a period of 5 years, and therefore, she submitted Annexure-A2 application dated 03.07.2015 in this regard, in the prescribed format. After Annexure-A2 was forwarded to the Deputy Director of Education, Ernakulam through the proper channel, nothing was heard in reply to the same. However, it is contended that the Headmaster, GVHSS, Mathirippally had instructed that the applicant need not be relieved on the basis of Annexure-A1 and she was allowed to continue in the said school. Though no formal orders were issued accepting her request made in Annexure-A2, the applicant reasonably thought that her request for relinquishment has been accepted. To the surprise of the applicant, Annexure-A3 order dated 03.05.2016 was issued by the Deputy Director of Education, Ernakulam, the 1st petitioner herein, promoting the applicant as Primary Headmistress and posting her at Govt. Lower Primary School, Neeleswaram, near Kalady. Since the applicant had already forwarded her request for relinquishment of promotion for a period of 5 years, she genuinely felt that issuance of Annexure-A3 order was due to an oversight on the part of the Deputy Director of Education, Ernakulam and therefore, she submitted

Annexure-A4 representation dated 02.06.2016 requesting to cancel her promotion. It is contended that the applicant was given to understand that the 1st respondent in the O.A. has taken a decision to grant the request for relinquishment only for a period of one year and also to grant no further relinquishment. It is in the said circumstance that the applicant has filed O.A. No.645 of 2016 before the Kerala Administrative Tribunal, Ernakulam Bench challenging Annexure-A3 order of promotion to the post of Primary Headmistress and for a consequential direction to allow the request made in Annexure-A2 and permit relinquishment of her promotion to the post of Headmistress for a period of five years. While the said matter was pending before the Tribunal, the applicant produced Annexure-A7 order dated 16.7.2015 whereby she was allowed to temporarily relinquish her promotion only for a period of one year mainly relying on Annexure A-6 Government Order, G.O.(P)No.39/91/P&ARD dated 07.12.1991 in which it has been specified that though the promotion can be relinquished either permanently or temporarily, temporary relinquishment can only be for a minimum period of one year. Annexure-A7 order also mandated that no further temporary relinquishment can be allowed on any account. Therefore, an application was filed seeking to amend the O.A. incorporating a challenge against Annexure-A7 order dated 16.07.2015

and for a declaration that Sub Clauses (iii) and (iv) of Clause 3 of Annexure-A6 Government Order are void and have no effect as being ultra virus to Rule 38 of Part II Kerala State & Subordinate Service Rules, 1958.

3. Before the Tribunal, a detailed reply statement was filed by the 1st respondent in the O.A. mainly contending that the applicant submitted an application for relinquishment of promotion as Headmistress only for a period of one year and that as per Annexure-A7 order the request of the applicant for temporary relinquishment of promotion for a period of one year was granted, subject to the condition that no further request will be accepted on any account. It was further contended that after the expiry of the period of the relinquishment granted, the applicant was again promoted as Headmistress and posted to GLPS, Neeleswaram as per Annexure-A3 order dated 03.05.2016 and that at this point of time she submitted a request to cancel the promotion as Headmistress and the same could not be accepted as the Rules do not permit an employee to put forward a second claim for relinquishment of promotion. It was also contended that the applicant submitted a request for relinquishment of promotion only for a period of one year and not five years as contended by her. Temporary

relinquishment of promotion can be made only for a minimum period of one year and that too only once in service. It was also contended based on Rule 38 of Part II KS & SSR and the provisions of Annexure-A6 Government Order dated 07.12.1991 that the right for relinquishment of promotion either permanently or temporarily is only for a minimum period of one year. In support of the said contention, Ext.R2(a) relinquishment application submitted by the applicant was produced to show that she has sought for relinquishment of promotion only for a period of one year. Based on the said contentions the official respondents sought for dismissal of the O.A.

4. A rejoinder was filed by the applicant in the O.A. in which it was contended that the only stipulation in Annexure-A6 Government Order is that temporary relinquishment shall be for a minimum period of one year and not that it cannot be beyond one year. The applicant further contended that she has submitted an application seeking relinquishment of promotion for a period of five years and the correction of the period of five year as one year was not done by the applicant in as much as the said correction will not be to the benefit of the applicant since she wanted temporary relinquishment of promotion for a period of 5 years.

5. The Tribunal to decide on the question as to whether the

applicant had in fact submitted an application for temporary relinquishment of promotion for a period of five years or for one year, passed an order on 20.07.2018 directing the official respondents to produce the covering letter dated 03.07.2015 addressed to the Deputy Director of Education enclosing the statement of temporary relinquishment submitted by the applicant. The respondents have produced the same along with Ext.P5 memo dated 02.02.2018 and as per the same, temporary relinquishment has been sought by the applicant for a period of 5 years and the Tribunal found that the contention of the applicant that she has submitted a request for temporary relinquishment for a period of five years is well supported by the contemporary official records maintained in the school. The Tribunal, after appreciating the provisions of Rule 38 of Part II KS & SSR as well as Annexure-A6 Government Order observed that Annexure-A6 Government Order only mandates that temporary relinquishment shall be for a minimum period of one year and held that the relinquishment can be for any period above one year. Further, the Tribunal held that as the Rules do not put any restriction regarding the number of times temporary relinquishment can be sought, Annexure-A6 Government Order cannot whittle down the scope of Rule 38 and in case of any conflict between the statutory Rules and the Government Order,

the statutory Rules shall prevail. Holding so, the Tribunal found that Annexure-A7 order by which the temporary relinquishment was restricted for a period of one year cannot be justified and found that the promotion granted to the applicant as per Annexure-A3 does not hold good. In view of the above findings, the Tribunal allowed the original application directing the 1st respondent in the O.A. to issue an order accepting the temporary relinquishment in the case of the applicant to the post of Headmistress for a period of five years on the strength of Annexure-A2 submission of relinquishment and also set aside Annexure-A3 to the extent it promoted the applicant and also ordered that the applicant will continue to be in service as Primary Departmental Teacher in GVHSS, Mathirippally. It is the said decision of the Tribunal dated 17.10.2018 in O.A. No.645 of 2016, which is assailed in the present Original Petition.

6. We have heard the learned Senior Government Pleader appearing for the petitioners and also the learned counsel appearing for the respondent/applicant in the O.A.

7. The issues that arise for consideration in this Original Petition is as to whether Annexure-A2 statement of relinquishment for promotion submitted by the respondent/applicant in the O.A. was for a period of five years and also as to whether Rule 38 of Part II KS & SSR and

Annexure-A6 Government Order only permits temporary relinquishment for a period of one year.

8. The petitioners relying on Exhibit-R2(a) statement of relinquishment contended that the temporary relinquishment of promotion sought was only for a period of one year whereas the respondent/applicant contended on the basis of Annexure A2 statement of relinquishment that she has sought for temporary relinquishment of promotion for a period of five years. The Tribunal to resolve the dispute as to whether the applicant in the O.A. has sought for temporary relinquishment for a period of five years or for a period of only one year, directed the official respondents to produce the covering letter dated 03.07.2015 addressed to the Deputy Director of Education, enclosing the statement of temporary relinquishment by the applicant. A perusal of the said temporary relinquishment submitted by the applicant, which is produced before the Tribunal along with Annexure-A5 memo dated 02.02.2018 will clearly show that the applicant has sought temporary relinquishment for a period of five years. In view of the above, we feel that the Tribunal has rightly found that the applicant in the O.A. had in fact submitted her application for temporary relinquishment for a period of five years and not one year as contended by the official respondents.

9. The next issue to be considered is whether Rule 38 of Part II KS & SSR and Annexure-A6 Government Order only permit temporary relinquishment for a period of one year. It is profitable to extract Rule 38 of Part II KS & SSR and also Sub Clauses (iii) and (iv) of Clause 3 of Annexure-A6 Government Order for a proper consideration of the said issue.

Rule 38 of Part II KS & SSR

“Rule 38. Relinquishment of rights by members.- Any person may, in writing, relinquish any right or privilege to which he may be entitled under these rules or the Special Rules, if, in the opinion of the Appointing Authority, such relinquishment is not opposed to public interest; and nothing contained in these rules or the Special Rules shall be deemed to require the recognition of any right or privilege to the extent to which it has been so relinquished.

Explanation.- The relinquishment of the right for promotion under this rule shall entail loss of seniority and a relinquishment of the right for promotion shall not be permissible unless such relinquishment entails loss of seniority.”

Sub-Clauses (iii) and (iv) of Clause 3 of Annexure-A6 Government Order

(G.O.(P)No.39/91/P & ARD dated 07.12.1991)

“xxx xxx xxx

(iii) Temporarily relinquishment shall be for a minimum period of one year.

(iv) Temporary relinquishments from one grade to another shall be permitted only once in the service of an officer.

xxx xxx xxx”

Rule 38 of Part II KS & SSR only mandates that an employee may

relinquish any right or privilege to which he may be entitled under the Rules or the Special Rules if, in the opinion of the appointing authority, such relinquishment is not opposed to the public interest. The Rule does not put any restriction regarding any minimum period or the number of times the relinquishment could be sought by an employee. Restriction regarding the same was brought in only as per Annexure-A6 Government Order. The reason for the imposition of such a restriction as per Annexure-A6 is discernible from a reading of the said Government order itself. Paragraphs 1 and 2 of Annexure-A6 Government Order read as follows:

“According to the provisions contained in Rule 38 Part II Kerala State and Subordinate Services Rules, 1958, Government employees can relinquish their right for promotion/appointment by transfer/appointment, either permanently or temporarily. Definite guidelines were also issued in this regard in the G.O. read as first paper for the guidance of both the appointing authorities and employees themselves.

2. The existing rules/guidelines however do not limit the number of times one can relinquish promotions temporarily. Also, no minimum period for temporary relinquishment has been set. This has resulted in employees relinquishing promotion for short periods to the same grade, a number of times, to suit their convenience. Such temporary relinquishments piecemeal by the same individual on a number of occasions cause administrative inconveniences. It has, therefore, become necessary to limit the number of times one can relinquish promotion temporarily and to stipulate a reasonable minimum period for such temporary relinquishments.

xxx xxx xxx ”

A reading of the same will clearly show that the said Government Order was issued taking into consideration the administrative inconvenience

caused as a result of temporary relinquishment of promotion by the employees for short periods to the same grade for a number of times and to suit their convenience as the existing rules/guidelines do not limit the number of times an employee could relinquish promotion temporarily and no minimum period for such relinquishment has been prescribed by the existing Rules and therefore Government deemed it necessary to limit the number of times one can relinquish promotion temporarily and to stipulate a reasonable minimum period for such temporary relinquishment. Therefore the wording in Sub Clause (iii) of Clause 3 of Annexure-A6 Government Order that temporary relinquishment shall be for a minimum period of one year can only be read to understand that temporary relinquishment should be at least for a minimum period of one year and not that it can only be for a period of one year. Therefore, the contention of the petitioners herein that temporary relinquishment can only be for a period of one year cannot be accepted. In view of the above, we hold that Sub Clause (iii) of Clause 3 of Annexure-A6 Government Order does not put a rider for temporary relinquishment for a period of more than one year, and therefore the applicant in the O.A. is entitled to seek temporary relinquishment for a period of five years, for which she has rightly sought for as per Annexure-A2 statement of relinquishment.

The Tribunal issued Ext.P7 order granting the reliefs sought for by the applicant in the O.A after considering all these relevant aspects and the same does not call for any interference by this Court. Therefore, the challenge against the same is repelled and the Original Petition is accordingly dismissed.

sd/-

ALEXANDER THOMAS, JUDGE

sd/-

VIJU ABRAHAM, JUDGE

APPENDIX OF OP(KAT) NO.377 OF 2021

EXHIBIT P1 - TRUE COPY OF THE OA(E) NO.645/2016 WITH ANNEXURES

EXHIBIT P2 - TRUE COPY OF THE MISCELLANEOUS APPLICATION DATED 21.06.2016

EXHIBIT P3 - TRUE COPY OF MA DATED 16.11.2017

EXHIBIT P4 - TRUE COPY OF THE REPLY STATEMENT FILED ON BEHALF OF THE FIRST RESPONDENT

EXHIBIT P5 - TRUE COPY OF THE MEMO ALONG WITH DOCUMENTS FILED BY THE GOVERNMENT PLEADER DATED 02.02.2018

EXHIBIT P6 - COPY OF THE REJOINDER

EXHIBIT P7 - TRUE COPY OF THE FINAL ORDER DATED 7.10.2018 IN OA(EKM) 645/2016

ANNEXURES:

ANNEXURE A1 - TRUE COPY OF THE PROCEEDINGS DATED 2.7.2015 OF THE 1ST RESPONDENT

ANNEXURE A2 - TRUE COPY OF THE STATEMENT OF RELINQUISHMENT DATED 3.7.2015 OF THE APPLICANT

ANNEXURE A3 - TRUE COPY OF THE PROCEEDINGS DATED 30.5.2016 OF THE 1ST RESPONDENT

ANNEXURE A4 - TRUE COPY OF THE REPRESENTATION DATED 2.6.2016 SUBMITTED BY THE APPLICANT TO THE 1ST RESPONDENT

ANNEXURE A5 - TRUE COPY OF THE LETTER DATED 10.6.2016 OF THE 1ST RESPONDENT

ANNEXURE A6 - TRUE COPY OF THE G.O(P) NO.39/91/P&ARD DATED 7.12.1991

ANNEXURE A7 - TRUE COPY OF THE ORDER NO.A5-3390/2015 DATED 16.07.2015

ANNEXURE R1(A) TRUE COPY OF THE DESPATCH-CUM-STAMP ACCOUNT REGISTER

ANNEXURE R2(A) TRUE COPY OF THE RELINQUISHMENT SUBMITTED BY THE PETITIONER