

Maya Mathew vs State Of Kerala & Ors on 18 February, 2010

Equivalent citations: AIR 2010 SUPREME COURT 1932, 2010 (4) SCC 498, 2010 AIR SCW 2396, 2010 LAB. I. C. 2039, (2010) 125 FACLR 165, (2010) 3 SERVLR 175, (2010) 3 ALLMR 987 (SC), (2010) 2 LAB LN 591, (2010) 2 SCT 658

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Bench: R.V. Raveendran, H.L. Dattu

CASE NO.:

Appeal (civil) 1833 of 2005

PETITIONER:

Maya Mathew

RESPONDENT:

State of Kerala & Ors.

DATE OF JUDGMENT: 18/02/2010

BENCH:

R.V. Raveendran & H.L. Dattu

JUDGMENT:

JUDGMENT 2010 (3) SCR 16 The Order of the Court was delivered by O R D E R R.V. Raveendran, J. 1. The appellant is a Pharmacist (Homeopathy) in the Homeopathy Department of State of Kerala. The Kerala State Homeopathy Services are governed by the `Special Rules for the Kerala State Homeopathy Services, 1989(`Special Rules', for short). All sub-ordinate services in the State of Kerala including the State Homeopathy Services are also governed by the Kerala State and Sub-ordinate Services Rules, 1958 (`General Rules' for short).

2. Rule 3 of the Special Rules provides that the method of appointment to different categories of posts shall be in the manner specified in the Table given under the said rule. Entry No.5 in the said Table relating to Medical Officers (inserted by G.O. dated 27.5.1999, with effect from 12.4.1999) is extracted below:

Category of Post Method of appointment Medical Officer 1. By direct recruitment

2. By transfer from the category of Nurse (Homeopathy)

3. By transfer from the category of Pharmacist (Homeopathy)

4. By transfer from the category of Clerks (Homoeo Department) Note: 1. A ratio of 5:1:1:1 shall be maintained in making appointments between direct recruitment, transfer from Nurses (Homeopathy), Pharmacist (Homeopathy) and Clerks in Homeopathy Department.

2. The appointment by transfer of Nurse (Homeopathy), Pharmacist (Homeopathy), Clerk (Homeopathy) will be done by a selection through the Kerala Public Service Commission from among the three categories. In the absence of candidates by transfer those vacancies in each category will be filled up by direct recruitment from open quota and the backlog for such categories will not be restored."

[emphasis supplied)

3. Rule 5 of the General Rules is a general rule relating to the manner of recruitment. The following was added as Note (3) to the said Rule 5 of the General Rules by the Kerala State Subordinate Services (Amendment) Rules, 1992 :

"Note (3) : Whenever a ratio or percentage is fixed for different methods of recruitment/ appointment to a post the number of vacancies to be filled up by candidates from each method shall be decided by applying fixed ratio or percentage to the cadre strength of the post to which the recruitment/transfer is made and not to the vacancies existing at that time."

4. The Homeopathy department reported 55 vacancies in the post of Medical Officers (Homeopathy) to the Kerala Public Service Commission, for purposes of recruitment. The Commission, by notification dated 1.2.2000, invited applications for filling up the said 55 posts of Medical Officer (Homeopathy) by dividing them (in the ratio of 5:1:1:1) as follows:

(i) Direct recruitment 32

(ii) Transfer from Nurses (Homeopathy) 7

(iii) Transfer from Pharmacist (Homeopathy) 7

(iv) Transfer from Clerks 7

5. The appellant and two others filed a writ petition before the High Court seeking a direction to the state government to report to the Public Service Commission 32 vacancies of Medical Officers (Homeopathy) to be filled by appointment by transfer of Pharmacists (Homeopathy). They contended that the cadre strength of Medical Officers (Homeopathy) was 442; that having regard to the ratio of 5:1:1:1 for making appointments (provided in the Special Rules, vide Note (1) to Entry 5 of the Table), out of the said 442 posts, 277 posts could be filled by direct recruitment and the balance of 165 posts had to be filled by transferees from the posts of Nurses, Pharmacists and Clerks in the Homeopathy department at the rate of 55 each; that due to non-availability of qualified

persons in the categories from which appointments were to be made by transfer, only 23 from the category of Pharmacists, one each from the categories of Nurses and Clerks were holding the post of Medical Officers, and all other Medical Officers (Homeopathy) were direct recruits; that as the direct recruits were occupying posts in excess of their quota, when making further recruitments, the vacancies to be filled have to be determined by applying the fixed ratio to the cadre strength and not the vacancies then existing; and that as the direct recruits were in excess of their quota and transferees were occupying less than their entitlement, the allocation of 55 vacancies to different categories had to be reworked; and all 55 vacancies ought to be distributed among Pharmacists, Nurses and Clerks without providing for any direct recruitment. The writ petitioners relied upon Note (3) to Rule 5 of the General Rules which requires that the ratio should be with reference to the cadre strength and not the actual vacancies existing at the time of recruitment. The appellant contends that Note (3) to Rule 5 of the General Rules will prevail over Note (2) to entry 5 of the Table under Rule 3 of the Special Rules.

6. The respondents resisted the petition. They contended that having regard to Note (2) to Entry 5 of the Special Rules, when in a recruitment, transfer quota posts have to be filled by direct recruits, due to non-availability of candidates from transfer categories, the backlog in regard to such transfer categories cannot be restored in future recruitments. As a result, the number of vacancies to be filled under each category (that is direct recruitment and by transfers) at any subsequent recruitment can be only by applying the ratio for appointment to the number of vacancies existing at the time of such subsequent recruitment and not with reference to the cadre strength. They submitted that the provisions of the Special Rules will prevail over the provisions of the General Rules.

7. A learned Single Judge held that the writ petitioners can claim the quota for Pharmacists only in respect of the vacancies that existed (as on 12.4.1999) and vacancies that arose subsequently. He therefore disposed of the writ petition by order dated 28.6.2001 with a direction to the respondents to fill up the available vacancies by applying the quota mentioned in the Special Rules with reference to the existing vacancies of Medical Officers (Homeopathy), that is vacancies available as on 12.4.1999 and vacancies which arose thereafter. He further directed that if there was any dearth of qualified Pharmacists, Nurses, Clerks within the quota intended for them, those vacancies should be filled by direct recruitment and the backlog shall not be required to be restored in any future recruitment. The appellant challenged the said order by filing a writ appeal. A Division Bench of the High Court by the impugned order dated 29.11.2002, dismissed the writ appeal holding that the recruitment will be governed by the Special Rules.

8. The said order is challenged in this appeal by special leave. The appellant reiterated her submissions in the writ petition relying upon two decisions of this Court in *S. Prakash & Anr. vs. K.M. Kurian & Ors.*, (1999) 5 SCC 624 and *Prasad Kurien & Ors. vs. K.J Augustin & Ors.*, (2008) 3 SCC

529.

9. The question for consideration is whether the respondents were justified in determining the number of posts to be filled by direct recruitment, and posts to be filled by transfer from the three

transfer categories, by applying the prescribed ratio of 5:1:1:1 to the existing vacancies instead of the cadre strength.

10. In this case, the general law contained in Note (3) of Rule 5 of the General Rules, came into effect in the year 1992. On the other hand, Note (2) to Entry 5 of the Table under Rule 3 of the Special Rules which is repugnant to note (3) of Rule 5 of the General Rules came into effect on 12.4.1999.

11. The rules of interpretation when a subject is governed by two sets of Rules are well settled. They are:

(i) When a provision of law regulates a particular subject and a subsequent law contains a provision regulating the same subject, there is no presumption that the later law repeals the earlier law. The rule making authority while making the later rule is deemed to know the existing law on the subject. If the subsequent law does not repeal the earlier rule, there can be no presumption of an intention to repeal the earlier rule;

(ii) When two provisions of law - one being a general law and the other being special law govern a matter, the court should endeavour to apply a harmonious construction to the said provisions. But where the intention of the rule making authority is made clear either expressly or impliedly, as to which law should prevail, the same shall be given effect.

(iii) If the repugnancy or inconsistency subsists in spite of an effort to read them harmoniously, the prior special law is not presumed to be repealed by the later general law. The prior special law will continue to apply and prevail in spite of the subsequent general law. But where a clear intention to make a rule of universal application by superseding the earlier special law is evident from the later general law, then the later general law, will prevail over the prior special law.

(iv) Where a later special law is repugnant to or inconsistent with an earlier general law, the later special law will prevail over the earlier general law.

12. Having regard to the fact that several Special Rules had been tailor made to suit and meet the special requirements of different specified services, the General Rules recognized the need for the Special Rules to prevail over the General Rules. Rule 2 of the General Rules providing for it, is extracted below:

"2. Relation to the Special Rules - If any provision in the General Rules contained in the part is repugnant to a provision in the Special Rules applicable to any particular service contained in Part III, the latter shall in respect of that service, prevail over the provision in the General Rules in this part."

Therefore, the provision of Special Rules (Note (2) under Entry 5 of the Table) will prevail over the provision of the General Rules (Note (3) under Rule 5). Even without such a specific provision, contextually, the said later special Rule would have prevailed over the said prior general Rule.

13. The question whether there can be an exception to the primacy given to special Rules by Rule 2 of the General Rules, was considered by this Court in S. Prakash and Prasad Kurien, with particular reference to Note (3) of Rule 5 of the General Rules.

(13.1) In S. Prakash, this Court considered whether the provisions of Special Rules - Kerala Agricultural Income Tax and Sales Tax Service Rules, will have to yield to Note (3) to Rule 5 of the General Rules. This Court held:

"14. From the aforesaid discussion, it is clear that if the intention of the rule-making authority was to establish a rule of universal application to all the services in the State of Kerala for which the Special Rules are made, then the Special Rules will give way to the General Rules enacted for that purpose. This has to be found out from the language used in the rules which may be express or by implication. If the language is clear and unqualified, the subsequent General Rule would prevail despite repugnancy. If the intention of the rule-making authority is to sweep away all the Special Rules and to establish a uniform pattern for computation of the ratio or percentage of direct recruits and by transfer, in such a case, the Special Rules will give way.. The language of Note (3) is crystal clear and is for removal of any ambiguity by using positive and negative terms. It applies to all the Special Rules whenever a ratio or percentage is prescribed in the rules. It also emphatically states that it has to be computed on the cadre strength of the post to which the recruitment is to be made and not on the basis of the vacancies existing at that time."

(emphasis supplied) (13.2) In Prasad Kurien, while considering whether the Special Rules - Kerala Excise and Prohibition Subordinate Service Rules, 1974, vis-a-vis note (3) to Rule 5 of the General Rules, this Court followed the dictum in S. Prakash.

(13.3) These decisions reiterate the position that if the intention of the rule making authority is to make a later general rule to apply to all services in the State, for which different earlier special rules exist, then the existing special rules will give way to such later General Rule. That is, where the general rule is made subsequent to the special rule and the language of the general rule signified that it was intended to apply to all services and prevail over any prior special rules, the intention of the rule making authority should be given effect by applying the subsequent general rule instead of the earlier special rule. This court held that the language of Note (3) to Rule 5 of General Rules showed that it was intended to prevail over existing Special Rules which indicated a contrary position. What is significant is that the two decisions considered the Special Rules that were earlier in point of time to the General Rules as amended by the 1992 Amendment rules which introduced Note (3) to Rule 5 of the General Rules. This Court held, on reading the General Rules in conjunction with the Special Rules, that Note (3) to Rule 5 of General Rules will prevail over the corresponding provisions in the Special Rules showing a different intention, when deciding whether the ratio of each feeder category should be determined with reference to the cadre strength or existing vacancies.

14. What logically follows from the principle enunciated in the two decisions is that if any Special Rule is subsequent to the General Rule, then the question of examining whether the prior general rule will prevail over a latter special rule will not arise at all having regard to the categorical provision contained in Rule 2 of the General Rules. The principle laid down in those decisions will not apply where the Special Rule is made subsequent to the General Rule. Though the Special Rules are of the year 1989, Entry 5 with its Notes (1) and (2) relating to Medical Officers, prescribing the ratio as also a condition that the backlog will not be restored, was inserted by an amendment with effect from 12.4.1999, vide G.O. dated 27.5.1999. The special rule, being later in point of time to the general rule, it is not permissible to carve out an exception as was done in S. Prakash and Prasad Kurien. Entry 5 of the Table with Notes (1) and (2) in the Special Rules being subsequent to the insertion of Note (3) to Rule 5 of General Rules, and being clear and specific in its terms, will prevail over Note (3) of Rule 5 of the General Rules. The said decisions are therefore of no assistance.

15. Learned counsel for the appellant submitted that even before the 1999 amendment, the entry relating to Medical Officers in the Special Rules contained a provision similar to Note (2) of the Entry 5, inserted by the 1999 amendment; that the said old Special Rule was superseded by Note (3) of Rule 5 of General Rules; and therefore re-insertion of the provision in the Special Rules will not supersede the General Rule. We are afraid that the said contention has no merit. When the Rule Making Authority being aware of the existence of Note (3) in Rule 5 of the General Rules, chooses to subsequently make a contrary provision in the Special Rules, it is to be inferred that the subsequent rule is intended to prevail over the general rule. We therefore hold that Note (2) to Entry 5 of the Table under Rule 3 of Special Rules will prevail over Note (3) to Rule 5 of the General Rules.

16. It therefore follows that the ratio of 5:1:1:1 has to be applied with reference to vacancies which were notified and not with reference to the cadre strength. There is no ground to interfere with the decision of the High Court. Appeal is dismissed. Application for intervention is dismissed.