

(1968) 06 KL CK 0015

In the High Court Of Kerala

Case No : Writ Appeal No's. 206, 207 and 245 of 1966 and O.P. No. 1419 of 1967

Assistant Educational Officer, Kuthuparamba

APPELLANT

Vs

P.R. Mammoo and Others

RESPONDENT

Date of Decision : 17-06-1968

Acts Referred:

General Clauses Act, 1897 — Section 15
Kerala Education Act, 1958 — Section 11, 12(1), 12(2), 36
Kerala Education Rules, 1959 — Rule 67, 75, 77

Citation : AIR 1969 Ker 91

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J;M. Madhavan Nair, J;K. Sadasivan, J

Bench : Full Bench

Advocate : Govt. Pleader and S.A. Nagendran, in O.P. No. 1419 of 1967, for the Appellant; K. Chandrasekharan, T. Chandrasekhara Menon and K. Vijayan, (for No. 1) and N.N. Sugunapalan, (for No. 2) (in W.A. No. 206 of 1966), K. Velayudhan Nair, K.J. Joseph and N.R.K. Nair, (in W.A. No. 207 of 1966) and T.C. Karunakaran and P.K. Shamsuddin, (in W.A. 245 of 1966) and Govt. Pleader (in O.P. No. 1419 of 1967), for the Respondent

Judgement

Madhavan Naik, J.—On the writ petitions, O. P. Nos. 1688 and 1903 of 1965, disposed of by a common judgment (reported in 1968 Ker LT 537), Mathew, J., has held Rule 67 (1) of the Kerala Education Rules, 1959, "in so far as it authorises the various educational authorities and the Government to suspend a teacher" of an aided school to be "repugnant to Section 12 (2)" of the Kerala Education Act, 1958; and that has been followed by the learned Judge in O. P. No. 1461 of 1966. The State challenges those decisions in Writ Appeals Nos. 206, 207 and 245 of 1966, and a Division Bench has referred them to a Full Bench. As the appeals awaited hearing, O. P. No. 1419 of 1967, in which a penalty of reduction-in-rank imposed by a Regional Deputy Director of Public Instruction on the headmaster of an aided school is challenged on ground of a like incompetency, has also been posted to be heard along with them. It is clarified at

the bar that the particular rules relevant to the O. P. are Rules 75 and 77 of the Kerala Education Rules. Thus, the question in these cases is the validity of the empowerment of departmental authorities to suspend and punish teachers of aided schools under Rules 67, 75 and 77 of the Kerala Education Rules, 1959.

2. The abovementioned rules have been made by the Government of Kerala as amendments to the original rules issued in 1959 and are published in the Kerala Gazette dated 2nd February, 1965. The main controversy is about the rules being consistent with Sections 11 and 12 of the Kerala Education Act, 1958. The learned Judge has observed that at the time the Act was passed, the Managers of aided schools had exclusive power of appointment, dismissal and suspension of teachers (inclusive of the headmaster) therein and that the policy of the Act is to affirm that pre-existing power of the Manager, subject to restrictions upon the exercise thereof mentioned in the Act. The learned Government Pleader, Sri Kuruvilla, urges that a consideration of conditions before the Act may not be of assistance in assessing the powers of Managers after the Act has come in force, as all the Managers are now statutory authorities "appointed under the Act" and therefore having powers and disabilities as provided in the Act only. We find force in that submission as the Explanation to Section 7(1) of the Act provides:

"All the existing managers of aided schools shall be deemed to have been appointed under this Act." If managers are authorities appointed under the Act, their powers and disabilities must be only as mentioned in the Act.

3. Sections 11 and 12 of the Act read thus:

"11. Appointment of teachers in aided schools:-- Subject to the rules and conditions laid down by the Government, teachers of aided schools shall be appointed by the managers of such schools from among persons who possess the qualifications prescribed u/s 10.

12. Conditions of service of aided school teachers:-- (1) The conditions of service of teachers in aided schools, including conditions relating to pay, pension, provident fund, insurance and age of retirement, shall be such as may be prescribed by the Government.

(2) No teacher of an aided school shall be dismissed, removed or reduced in rank by the manager without the previous sanction of the officer authorised by the Government in this behalf, or placed under suspension by the manager for a continuous period exceeding fifteen days without such previous sanction."

4. Obviously Section 11 concedes the power to appoint teachers to the Manager, to be exercised "subject to the rules and conditions laid down by the Government." The argument that, in laying down "rules and conditions" for the appointment, it is open to the Government to provide that the Manager can appoint only if the departmental authorities do not appoint one to fill the vacancy, does not commend to us. A like contention advanced before the

Supreme Court has been repelled in the State of Punjab and Another Vs. Hari Krishan Sharma, . Gajendragadkar, C. J., speaking for the Constitution Bench, observed thus:--

"That takes us to Section 5 which must be read:--

"5. (1) The licensing authority shall not grant a licence under this Act unless it is satisfied that--

(a) the rules made under this Act have been complied with; and

(b) adequate precautions have been taken in the place, in respect of which the licence is to be given, to provide for the safety of the persons attending exhibitions therein.

(2) Subject to the foregoing provisions of this section and to the control of the Government, the licensing authority may grant licences under this Act to such persons as it thinks fit, on such terms and conditions as it may determine.

(3) Any person aggrieved by the decision of the licensing authority refusing to grant a licence under this Act may, within such tune as may be prescribed, appeal to the Government or to such officer as the Government may specify in this behalf and the Government or the officer, as the case may be, may make such order in the case as it or he thinks fit".

The question which we have to decide in the present appeal lies within a very narrow compass. What appellant No. 1 has done is to require the licensing authority to forward to it ail applications received for grant of licences, and it has assumed power and authority to deal with the said applications on the merits for itself in the first instance. Is appellant No. 1 justified in assuming jurisdiction which has been conferred on the licensing authority by Section 5 (1) and (2) of the Act? It is plain that Section 5 (1) and (2) have conferred jurisdiction on the licensing authority to deal with applications for licences and either grant them or reject them. In other words, the scheme of the statute is that when an application for licence is made, it has to be considered by the licensing authority and dealt with u/s 5 (1) and (2) of the Act. Section 5 (3) provides for an appeal to appellant No. 1 where the licensing authority has refused to grant a licence; and this provision clearly shows that appellant No. 1 is constituted into an appellate authority in cases where an application for licence is rejected by the licensing authority, The course adopted by appellant No. 1 in requiring all applications for licences to be forwarded to it for disposal, has really converted the appellate authority into the original authority itself, because Section 5 (3) clearly allows an appeal to be preferred by a person who is aggrieved by the rejection of his application for a licence by the licensing authority.

It is, however, urged by Mr. Bisban Narain for the appellants that Section 5 (2) confers very wide powers of control on appellant No. 1 and this power can take within its sweep the direction issued by appellant No. 1 that all applications for licences should be forwarded to it for disposal. It is true that Section 5 (2)

provides that the licensing authority may grant licences subject to the provisions of Section 5 (1) and subject to the control of the Government, and it may be conceded that the control of the Government subject to which the licensing authority has to function while exercising its power u/s 5 (1) and (2), is very wide; but however wide this control may be it cannot justify appellant No. 1 to completely oust the licensing authority and itself usurp his functions. The legislature contemplates a licensing authority as distinct from the Government. It no doubt recognises that the licensing authority has to act under the control of the Government; but it is the licensing authority which has to act and not the Government itself. The result of the instructions issued by appellant No. 1 is to change the statutory provision of Section 5 (2) and obliterate the licensing authority from the Statute-book altogether. That, in our opinion, is not justified by the provision as to the control of Government prescribed by Section 5 (2).

..... To hold that the control of the Government contemplated by Section 5 (2) would justify their taking away the entire jurisdiction and authority from the licensing authority, is to permit the Government by means of its executive power to change the statutory provision in a substantial manner; and that position clearly is not sustainable.

..... The basic fact in the scheme of the Act is that it is the licensing authority which is solely given the power to deal with such applications in the first instance, and this basic position cannot be changed by Government by issuing any executive orders, or by making rules u/s 9 of the Act"

Section 11 of the Kerala Education Act specifies the authority to make appointment of teachers to be the Manager of the school, and the authority to lay down the rules and conditions of such appointment to be the Government. That Section does not empower the Government to oust the Manager and specify the authority to make the appointments to be some other or itself. We hold that u/s 11 of the Act the Manager alone has the power to appoint teachers (inclusive of headmasters) in an aided school.

5. Section 15 of the Interpretation and General Clauses Act 1125, as amended by the Kerala Acts III of 1957 and XXIII of 1958, which admittedly applies to the Kerala Education Act, reads thus:

"Where, by any Act, a power to make any appointment is conferred, then unless a different intention appears, the authority having for the time being power to make the appointment shall also have the power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power."

As has been observed by the Supreme Court in *The Chief Inspector of Mines and Another Vs. Lala Karam Chand Thapar etc.*, at p. 843 "whatever the General Clauses Act says, whether as regards the meaning of words or as regards legal principles, has to be read into every statute to which it applies." It then follows that Section 11 of the Kerala Education Act has to be read along with Section 15

of the Interpretation and General Clauses Act and that therefore the power of dismissal of teachers is also conceded to the Managers and no others. It does not require a long discussion to hold that the powers of appointment and dismissal vested in an authority will include the power to initiate disciplinary action and to impose lesser punishments than dismissal, as also the power of suspension pending enquiry into conduct. Cui licet quod majus non debet quod minus est non licere (He who has authority to do the more important act is not debarred from doing that of less importance).

6. It is contended vehemently by the learned Government Pleader that the power of dismissal is not vested by the Act in the Manager alone, as Sub-section (2) of Section 12 of the Act (quoted above) prescribes his authority to dismiss, remove or reduce in rank or suspend beyond 15 days to be subject to "the previous sanction of the officer authorised by the Government in this behalf", That sub-section does not confer a power of dismissal on anybody; it only restricts the exercise of the power conferred elsewhere. The power it concedes to "the officers" is not to impose a penalty on teachers, but only to approve or disapprove the action of Managers in that regard. Section 11 of the Act, read, as it ought to be, with Section 15 of the Interpretation and General Clauses Act. is the only provision in the Act that constitutes authority to dismiss and therefore to remove or reduce in rank, or to suspend teachers of aided schools; and that authority is the Manager and Manager only. When the rule-making authority purports to confer that power on other authorities, it overrides the Act It-self which is not permitted. Rules must subserve the Act and cannot run parallel to much less, supersede it.

Ganpati Singhji v. State of Aimer AIR 1955 SC 188 seems pertinent here. The Chief Commissioner of Ajmer was empowered by the Aimer Laws Regulation. 1877. "to make rules about the maintenance of watch and ward, and the establishment of a proper system of conservancy and sanitation at fairs and other large public assemblies." The Commissioner made a rule prohibiting the holding of a fair except under a permit issued by the District Magistrate, who was enjoined by the rule to "satisfy himself, before issuing any permit, that the applicant is in a position to establish a proper system of conservancy, sanitation and watch and ward at the fair", and empowered to "revoke any such permit without assigning any reasons or giving any previous notice". When Ganapati Singhji, the appellant, applied for a permit the District Magistrate replied:

"It has been decided that as a matter of policy permits to hold fairs will be issued only to local bodies and not to private individuals. It is, therefore, regretted that you cannot be permitted to hold the fair and you are therefore requested to please abandon the idea."

Five learned Judges of a Full Court observed:

"In our opinion, the rules travel beyond the Regulation in at least two respects. The Regulation empowers the Chief Commissioner to make rules for the

establishment of a system of conservancy and sanitation. He can only do this by bringing a system into existence and incorporating it in his rules so that all concerned can know what the system is and make arrangements to comply with it. What he has done is to leave it to the District Magistrate to see that persons desiring to hold a fair are in a position "to establish a proper system of conservancy, etc." But who, according to this, is to determine what a proper system is: obviously the District Magistrate. Therefore, in effect, the rules empower the District Magistrate to make his own system and see that it is observed. But the Regulation confers this power on the Chief Commissioner and not on the District Magistrate, therefore, the action of the Chief Commissioner in delegating this authority to the District Magistrate is "ultra vires".

Further, under the fourth sub-rule of Rule 1 the District Magistrate is empowered to revoke a permit granted "without assigning any reasons or giving any previous notice". This absolute and arbitrary power uncontrolled by any discretion is also "ultra vires". The Regulation assumes the right of persons to hold fairs, and all it requires is that those who do so should have due regard for the requirements of conservancy and sanitation; and in order that they may know just what these requirements are the Chief Commissioner (not some lesser authority) is given the power to draw up a set of rules stating what is necessary. If they are in a position to observe these rules, they are, so far as the Regulation is concerned, entitled to hold their fair, for there is no other law restricting that right. Therefore, the Chief Commissioner cannot by Rule invest the District Magistrate with the right arbitrarily to prohibit that which the law and the Constitution, not only allow, but guarantee.

As these sub-rules of Rule 1 are "ultra vires", the District Magistrate's order, which in effect prohibits the holding of the fair, is also bad; for without the aid of these rules or of some other law validly empowering him to impose the ban, he has no power in himself to do it." The other two learned Judges of the Full Court also concurred with the above, observing:

"The rules themselves under which the permit has been asked for and with reference to which the District Magistrate declined to grant the permit are not within the ambit of the rule-making power. These rules purport to have been framed in exercise of the powers conferred by Sections 40 and 41 of the Ajmer Laws Regulation, 1877. Section 40 authorises the framing of the rules:

"for the maintenance of watch and ward and the establishment of a proper system of conservancy and sanitation at fairs, and other large public assemblies".

But the actual rules as framed establish a system of "ad hoc" control by the District Magistrate through the issue of a permit and by the vesting of other powers in him under the rules. These cannot be said to be rules which in themselves constitute a system of conservancy, sanitation and watch and ward. Thus the result that is brought about is not within the intendment of the section which authorises the making of the rules.

A system of "ad hoc" control of responsible officers may, possibly be one method of regulating the sanitary and other arrangements at such large gatherings. But if it is intended to constitute a system of "ad hoc" control with reasonable safeguards, the power to make rules in that behalf must be granted to the rule-making authority by the legislative organ in appropriate language," In the light of the above dicta, we are clearly of opinion that neither Section 11 nor Section 12 (2) of the Kerala Education Act empowers the Government to frame rules superseding the Manager and authorising departmental officers to initiate disciplinary proceedings and/or to impose penalties. A power to prescribe general rules and conditions for an act or to give or refuse approval for a particular act of an authority cannot be construed to involve a power to oust or supersede the authority. Laying of conditions and giving of approvals relate only to the mode of doing a thing, and not to the constitution of authority to do the thing.

7. Much reliance was had by the learned Government Pleader and Shri Easwara Iyer on the provisions of Section 12 (1) (quoted above) which authorises the Government to prescribe "the conditions of service of teachers in aided schools." Even if the expression "the conditions of service of teachers" would normally include the constitution of authorities for appointment and dismissal of teachers, it cannot be held so when the latter matters have been particularly provided for elsewhere in the Act itself. For between general provisions and particular provisions the maxims *generalia specialibus non derogant*, and *specialia generalibus derogant* come to play. The contention has therefore to be repelled.

8. Shri Easwara Iyer contended that under the scheme of the Act and the Rules, the Managers are only agents of the Government, who pays salaries to and is therefore the real master of the teachers of the aided schools. The short answer to this contention is, in the language of the Supreme Court (Vide: paragraph 13 of the first cited precedent *State of Punjab and Another Vs. Hari Krishan Sharma*, that as the Legislature has named the Manager as distinct from the Government, and specified the Manager to act under rules and conditions laid down by the Government, it is the Manager who has to act and not the Government itself. The fact that Section 9 directs the Government to "pay the salary of all teachers in aided schools" does not mean that the Government can overlook the mandates of Sections 11 and 12 of the Act.

9. The learned Government Pleader pointed out that instances may arise where a Manager is not available or refuses to take disciplinary action against a headmaster as the two offices might combine in the same person or the Manager may be in collusion with the misconducting headmaster. But, provisions are in the Act and the Rules empowering the Government and its officers to revise the orders of Managers and also to take over management of a school wherein the Manager "has neglected to perform any of the duties imposed by or under this Act or the Rules made thereunder."

10. We hold Rules 67, 75 and 77 of the Kerala Education Rules 1959, as amended in 1965, to the extent they constitute original authority in officers

(other than the Manager of the schools) to take disciplinary action and to impose penalties on teachers (inclusive of headmasters) in aided schools, repugnant to the provisions of the Kerala Education Act and therefore to that extent void.

In the result, we dismiss W. A. Nos. 206, 207 and 245 of 1966. We allow O. P. 1419 of 1967 and quash the impugned order Ext. P-5, leaving the authorities free to transmit the enquiry reports, Exts. P-2 and P-3, to the Manager of the concerned school for appropriate action thereon.

11. Before leaving this case, we would like to point out to the Government an anomaly in the matter of appointment of teachers by Managers. In V. K. Vasudevan Namboodiri v. V. K. Sarojini Amma 1967 Ker LT 653, a Bench of this Court has held the Government not liable to pay salary to a teacher whose appointment has not been approved by it; and in C. R. P. No. 807 of 1964, Vaidialingam, J., has held that the appointment of a teacher under the Kerala Education Rules being "subject to provisions of the Kerala Education Act" under which the liability to pay salary is that of the Government, the Manager cannot be called to pay his salary. Rule 7 of Chapter XIV (A) of the Kerala Education Rules directs "as soon as a teacher is appointed in a school, the Manager shall immediately issue an appointment order to the teacher in Form No. 27 which runs thus;

"Shri (name and address of teacher) is appointed as a permanent / probationary / acting / temporary teacher under this management on a pay of Rs. per mensem in the scale of Rs. and is posted as (designation) in the (name of School) from to in the vacancy of who has

As the teacher is given a posting as soon as the appointment is made in the above Form, he has necessarily to work from the specified date; and, in the normal course, the disapproval, if any, of his appointment would be communicated to him only several months thereafter, when he has to go without a pie of remuneration for the work done. This is an anomalous position which involves injustice. It is upto the Government to take note of this fact and provide a limit of time for the Educational Officers to decide on their approval of the appointment and direct that the Manager's appointment of the teacher shall not take effect within that time, and also that if the refusal or approval is not intimated within the stipulated period the appointment shall take effect and the teacher shall be entitled to salary till disapproval of his appointment is duly intimated to him.