

(1990) 08 KL CK 0011
In the High Court Of Kerala
Case No : W.A. 292 of 1989

C. Cherian

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 29-08-1990

Acts Referred:

Kerala Education Act, 1958 — Section 12, 12(1), 2, 2(6), 35
Kerala Education Rules, 1959 — Rule 1(4), 43, 48, 49, 51A

Citation : (1990) 2 KLJ 459

Hon'ble Judges : K.S. Paripoornan, J;D.J. Jagannadha Raju, J

Bench : Division Bench

Advocate : K.K. Usha and N.D. Premachandran, for the Appellant; V. Ramachadran Government Pleader for Respondents 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

Jagannadha Raju, J.—This Writ Appeal is filed by the Petitioner-Appellant against the dismissal at the stage of admission of O.P. No. 8480 of 1988-H. The O.P. was filed seeking the following reliefs: (1) a declaration to the effect that the directions contained in Ext. P-5 order of the Government are illegal, and without jurisdiction, and accordingly to quash the same; (2) to issue a writ of mandamus directing the Respondents to follow the subject requirement ratio of 1:1:1 in the matter of retrenchment/reversion of teachers consequent on reduction of posts in Annual fixation of staff. A consequential prayer of mandamus directing the authorities not to review or vary Ext. P-4 and interim relief pending the O.P. are also prayed for. When the O.P. came up for admission before His Lordship, Sri U.L. Bhat, J., the learned Judge issued notice to Respondents 1 to 3 and after the Government filed counter taking the view that it is unnecessary to issue notice to the 4th Respondent, the Manager of the Aided High School, the learned Judge dealt with the O.P., and following the decision of this Court in Radha v. District Educational Officer, Badagara 1975 KLT 617, came to the conclusion that the Government was fully competent to issue Ext. P-5, though it did not satisfy the requirements of "prescribed" by rules as contemplated u/s 2(6) of the Kerala

Education Act. The learned Judge was of the view that the State Government has overriding power to "prescribe" conditions of service, and a the State Government is the rule-making authority, which had given the Director of Public Instruction the power to prescribe subject requirement by Rule 1(4) of Chapter XIV-A of the K.E.R. the Government's order is within its competence and hence Ext. P-5 executive order is perfectly competent to modify Ext. P-4 order, and accordingly dismissed the O.P.

2. In this Writ Appeal, Smt. K.K. Usha contends that the approach - adopted by the learned Single Judge is not correct and it is against the provisions of the statute and the prescribed rules. She contended that Ext. P-5 is without authority of law, and under Chapter XIV-A, Rule 1(4) the Director of Public Instruction alone is competent to issue instructions as he may deem necessary, and there is no residuary power for the Government to issue an instructions. She further contended that the subject ratio has always to be maintained as the subject ratio is essential for proper education of the students.

The declarations or instructions issued in Ext. P-5 militate against Section 12 of the Act and the scheme of t the rules in Chapter XIV-A. She points out that the decision referred to by the learned Single Judge is not a case of conflict between executive order and statutory rules. That decision has no application. The learned Judge having noticed that Ext. P-5 does not satisfy the requirements of "prescribed" as defined in Section 2(6) has committed a mistake in invoking the theory of residuary powers for the Government to uphold Ext. P-5. Under any circumstances, Ext. P-5 cannot be sustained. The Writ Appeal has to be allowed and the reliefs as prayed for in the O.P. have to be granted.

3. On behalf of the state, Shri V. Ramachandran contends that if a strict interpretation is given, and the word "prescribed" as defined in the Act is to be applied, then Ext. P-5 cannot be said to be an amendment of the Rules. To that extent it is bad. But he claims that the State Government being the rule-making authority does have the residuary power and the order issued by the State Government will prevail over the instructions issued by the Director of Public Instruction. To that extent Ext. P-5 which modifies Ext. P-4 is perfectly correct. He also contends that by reason of Section 35 the State Government has the power to remove difficulties and Ext. P-5 can be supported as an order passed in exercise of powers u/s 35.

4. To understand the controversy between the parties, narration of a few facts is necessary. The Petitioner was appointed as HSA (Maths) in a regular vacancy on 25th June 1984. The appointment has been duly approved. In the year 1987-88, there was reduction in the number of divisions from 31 to 28. Orders were issued stating that the Petitioner is retrenched, but retained as a protected teacher. He was not aware of this particular fact, because he was getting the salary regularly. He had no grievance against the orders passed as he was not, disturbed from the school. For the year 1988-89 there were 28 divisions. The rule relating to retention of one protected teacher for every 10 teachers was cancelled. As a

consequence of it, the Petitioner would have to be deployed to a Government school. Apprehending deployment, he gave Ext. P-3 representation. On Ext. P-3 representation, Ext. P-4 order was passed stating that the Petitioner is not liable to be retrenched or protected, since according to the prescribed subject ratio there should be 9 HS As for the Maths subject and the Petitioner is the 9th HSA (Maths). The order also indicated that Natural Science teachers are in excess, and a Natural Science teacher will have to be treated as protected. Subsequently the Government passed Ext. P-5 order, dated 11th October 1988 laying down the principle that when retrenchment is necessary, if the minimum subject ratio is satisfied, retrenchment will be done on the principle of last to come first to go. The Petitioner is the junior-most among all the HS As. Therefore he apprehends that he will be treated as protected or deployed to a Government school. Hence he challenges Ext. P-5 order.

5. In the light of the facts stated above, we have to examine the legal position to find out whether Ext. P-5 is valid and in accordance with law.

6. The Point. Ext. P-1 is the order of appointment under which the Petitioner was appointed as HSA (Maths) in the fourth Respondent's school on 5th July 1984. The order clearly mentions that the appointment is subject to the provisions of the Kerala Education Act and the Rules thereunder, and such other rules or orders issued from time to time by the Government or other competent authority. Ext. P-2 is the order, dated 22nd July 1988 passed by the District Educational Officer, Quilon prescribing the staff strength for the year 1988-89. The classification clearly indicates that there were 10 HSA (Science) 9 HSA (Maths) and 9 HSA (Social Studies). Among the 10 HSA (Science) six are for Physical Science and four are for Natural Science. The order fixing the staff strength for the year 1988-89 clearly mentions that the appointments should however be made only in accordance with the instruction issued by the Director of Public Instruction regarding the protection to be given to HS As in "service and the re-appointment of HS As relieved under Rule 49 or 52 of Chapter XIV-A of the Kerala Education Rules, or on account of termination of vacancies under Rule 51A of Chapter XIV A of the K.E.R. The Petitioner gave Ext. P-3 representation clearly indicating that there are only 9 Maths HS As, but in the staff fixation order his post is indicated as abolished and this is sheer injustice and it is against the statutory rules and in violation of the orders fixing the ratio of 1:1:1, and consequent retrenchment or protection of excess HS As. He made some allegations to the effect that one Leelamony George, HSA (Natural Science) is sought to be protected by the Headmaster and the District Educational Officer and for this purpose wrong statistics were given by the headmaster. This representation given on 19th August 1988 was considered and Ext. P-4 order was passed on 7th October 1988. This clearly mentions that in the staff statement furnished by the headmaster, a Natural Science HSA is shown as Maths HSA and hence the present Petitioner, Shri C. Cherian, HSA (Maths); has been declared as protected. Then mentioning about the application of 1:1:1: subject ratio, the order says, there should be nine Maths hands in the school,

and hence Shri C. Cherian, the ninth Maths hand is a regular teacher. Shri C. Cherian, who was declared as protected teacher will have to be deemed as regular teacher and the one excess Natural Science HSA Smt. Leelamony George who has continuous service from 28th July 1983 is declared as protected. Thus it is seen that Ext. P-4 remedied the earlier injustice and granted protection for the Petitioner in strict accordance with the Rules and the Act.

7. Now the trouble arose because of Ext. P-5 order. The crucial question is whether Ext. P-5 is valid or whether Ext. P-6 circular issued by the Director of Public Instruction on 13th May 1985 would prevail. Ext. P-6 is circular No. H2-4211584, dated 13th May 1985. The circular is printed at pages 446-448 of the Hand Book on the Kerala Education Act and Rules by C.V. Vasudevan. To decide whether Ext. P-5 holds the field or whether Ext. P-6 holds the field, we have to see the scheme of the Act and the Rules, and refer to the relevant provisions. Section 2 of the Kerala Education Act, hereinafter called the " Act" which deals with definitions describes "prescribed" as follows:

"prescribed" means prescribed by rules made under this Act.

Section 12 deals with conditions of service of Aided School Teachers. This section also mentions that the conditions of service shall be such as may be prescribed by the Government. Section 36 authorises the Government to make rules for the purpose of carrying into effect the provisions of the Act. Under this power, the Kerala Education Rules have been framed. Chapter XIV-A deals with conditions of service of Aided School Teachers. Rule 1(4) is very important for the purpose of this case. It reads as follows:

In determining the requirement of subjects the Director shall also issue such instructions as he may deem necessary for giving protection to teachers.-

- (i) who are in service and would have continued in service, and
- (ii) who stand relieved as per Rule 48 or 52 or on account of termination of vacancies and who would have been eligible for reappointment under Rule 51A had there been no change in the requirement of subject.

8. It is crystal clear from this rule that the power is given to the Director to issue instructions on these aspects, and no other authority has got any power to issue instructions on these aspects. There is no other provision in the Act under which the Government has a residuary power to issue instructions which are in conflict with the instructions issued by the Director of Public Instruction. Under the scheme of the Rules, the Director is the competent authority that has to issue instructions. Thus it is clear that as far as executive instructions are concerned, the Director alone has the power, and the Government has no power to issue executive instructions. If it finds any difficulty as a result of the instructions issued by the Director of Public Instruction the only course open to it is to amend the rules invoking its rule making powers u/s 36.

9. Bearing-in-mind the above statutory position we have to examine Exts. P-5

and P-6. Ext. P-6 is dated 13th May 1985, and it is a circular issued by the Director of public Instruction. Hence it is in strict conformity with Rule 1(4) of Chapter XIV-A of the Rules. This clearly mentions that the following revised instructions are issued in supersession of all existing instructions on this subject. The earlier subject ratio of 3:4:5 has been altered and the revised ratio of 1:1:1 was introduced from the school year 1974-75. It then mentions that from the school year 1985-86, the distribution of posts of HS As shall be in the ratio of 1:1:1 and the break-up within the Science HS As Category is 3:2. Instruction No. 3 clearly lays down, that the practice of giving permissive sanction to follow the subject ratio of 3:4:5 will be dispensed with from 1985-86 onwards. Instruction No. 10 clearly mentions that "the existing staff should not however be retrenched for satisfying the subject ratio if they are otherwise eligible to continue. The excess hands in a school in any of the core subjects may be distributed among the schools under the same management by suitable adjustments. If there is only one School under a management, the excess hands in anyone of the core subjects may be retained in the school if they are otherwise eligible to be adjusted against future vacancies". Instruction 11 mentions that "new appointments of HSAs for one subject and re-appointments of retrenched HSAs of aided High Schools under Rule 51A Chapter XIV-A, K.E.R., should be made observing strictly the subject". Under the scheme of the Rules, Ext. P-6 circular has to be strictly followed. If Ext. P-6 is applied, the Petitioner, who is the ninth HSA (Maths), has to be reckoned as a regular teacher, and he cannot be retrenched or treated as protected teacher. What was done by Ext. P-4 is in strict accordance with Ext. P-6. Smt. Leelamony George, Natural Science Teacher, who is in excess of the subject ratio of 1:1:1 should be declared as protected.

10. Ext. P-5, the controversial document, is a G.O. issued by the Government. The G.O. does not indicate in exercise of what powers the G.O. is issued. The G.O. also does not indicate that it is amending the rules or that it is setting aside any instructions issued by the Director of Public Instruction in exercise of the powers under Rule 1(4) of Chapter XIV-A of the Rules. Ext. P-5 simply reads as if it is a set of orders issued for protection of teachers and non-teaching staff in aided schools. The G.O. was issued on 11-10-1988. It was issued four days after Ext. P-4 order was passed by the District Educational Officer". Part D of this G.O. deals with HSA (Core Subjects) subject ratio. It mentions that due to implementation of the ratio 1:1:1 as between Social Studies, Science and Maths. HSAs, senior HSAs are declared as protected teachers, and junior HSAs are retained in the schools. In order to remove the difficulties to senior teachers, it is ordered as follows:

(a) promotions to the posts of High School Assistants will be confined strictly in accordance with the subject ratio for each category of High School Assistant (core subjects) viz., Social Studies, Science, Mathematics, i.e. each category will be a watertight compartment for promotion.

(b) when retrenchment/reversion is necessary consequent on reduction of posts

in Annual fixation of staff if the minimum subject ratio is satisfied, retrenchment/reversions will be done on the principles of "last to come first to go".

(c) claims under Rule 43 will prevail over Rule 51A.

(d) the Deputy Directors/Controlling Officers are authorised to implement these orders, even in cases where staff fixation orders have already been passed.

It is true that Smt. Leelamony George would, become a surplus teacher as she is the 10th hand in Science. Though she is senior to the Petitioner by virtue of her service, she is occupying the 10th post in that branch, while the branch has only nine posts. The Petitioner is the ninth HSA (Maths), and according to the staff fixation there are nine posts of HSA (Maths) in the school. Naturally the Petitioner will have to be treated as a regular teacher as was rightly done under Ext. 14. It should be remembered that even Ext. P-5 clearly mentions that when retrenchment/reversion is necessary consequent on reduction of posts in Annual fixation of staff, if the minimum subject ratio is satisfied, retrenchment/reversion will be done on the principle of "last to come first to go". Though the Petitioner is the junior, most, he cannot be retrenched or reverted or treated as protected teacher because he is the ninth HSA (Maths) in that school which has nine HSA (Maths) posts.

11. Considering the scheme of the Act and the Rules, and the power to issue instructions, it is not open to the Government to issue executive instructions or orders as was done by issuing Ext. P-5. The Director of Public Instruction is the competent authority to issue instructions as per Rule 1(4) of Chapter XIV-A. Ext. P-5 cannot be treated as conforming to Section 2(6). It cannot be termed as "prescribed by rules" made in exercise of the rule-making authority u/s 36. We are unable to agree with the learned Judge's observations in page 8 of his judgment that the State Government has over-riding powers to prescribe conditions of service, and that the power given to the Director to prescribe subject requirement by Rule 1(4) of Chapter XIV-A subordinate to the over-riding statutory power of the State Government. The learned Judge referred to Section 12(1) and the opening words of Section 2 and remarked that Section 12(1) does not contain any indication to the effect that the expression "prescribed" is used therein subject to any such limitation. With respect, we are unable to agree with the learned Judge's opinion. It should be remembered that in all statutes, the definition section will normally carry the phrase "unless the context otherwise requires". It is also axiomatic that words defined in the definition section will normally carry the same meaning throughout the Act and the Rules framed thereunder. Section 12(1) only lays down that the conditions of service shall be, such as may be prescribed by the Government. That clearly mentions that as prescribed by the Rules made under the Act. Section 12 does not in any way indicate that the conditions of service would be prescribed in a manner other than the one contemplated by framing rules in exercise of the powers conferred u/s 36.

12. On examination of the statutory provisions and the scheme of the Act and the Rules, it is quite clear that Ext. P-6 instructions issued by the Director of Public Instruction cannot be varied or modified as a result of Ext. P-5 G.O. issued by the Government on 11th October 1988. Ext. P-5 which is an executive order is not competent, and. it cannot in any way alter the instructions issued under Ext. P-6, which alone will held the field. In this view of the matter, Respondents 1 to 3 are not entitled to vary, alter or review Ext. P-4 order which is in strict conformity with Ext. P-6, circular issued by the Director of Public Instruction.

13. For the various reasons given above, we allow the Writ Appeal. The O.P. stands allowed. We declare that the Government's directive in Ext. P-5 directing the authorities to follow the principle of "last to come first to go" cannot be implemented, in so far as it is in deviation of Ext. P-6. A. Writ of mandamus shall issue directing the Respondents 1 to 3 to follow the subject requirement ratio of 1:1:1 in the matter of retrenchment/reversion of teachers as a consequence of reduction of posts in annual fixation of the staff. There shall be a direction to Respondents 1 to 3 not to review or vary Ext. P-4 on the basis of directions contained in Ext. P-5. Each party shall bear its own costs.