

(1983) 11 KL CK 0008
In the High Court Of Kerala
Case No : O.P. No. 1882 of 1978C

Gangadharan Nair

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 15-11-1983

Acts Referred:

Constitution of India, 1950 — Article 14, 309, 313
Kerala Education Rules, 1959 — Rule 3
Kerala State and Subordinate Services Rules, 1958 — Rule 39

Citation : (1983) 11 KL CK 0008

Hon'ble Judges : Sukumaran, J; Kochu Thommen, J

Bench : Division Bench

Advocate : Govinda Bharathan and Lekha, for the Appellant; Govt. Pleader for Respondent Nos. 1 to 3, M. Ratnasingh, P. Kuruvilla Jacob for Respondent No. 4, K.P. Dandapani and Sumathi Dandapani, for the Respondent

Final Decision : Dismissed

Judgement

Sukumaran, J.—The point of law, and the validity of the very order impugned in this writ petition, had been the subject-matter of an early decision of this Court. The legal point relates to the interpretation of Chapter I, Rule 3 of the Kerala Education Rules, 1959 (hereinafter referred to as the "K.E.R."). The order impugned is G.O. (Ms) 62/78/G. Edn., dated 17th May 1978, Ext. P-6 in the case. On the legal point, Eradi, J., as he then was, had already expressed himself in K.K. Moidu v. State of Kerala and Ors. 1973 K.L.J. 591. That decision was referred to by one of us (Kochu Thommen, J.) while considering the validity of the self-same order, which had been challenged in another writ petition O.P. No. 2027 of 1978.

2. Our learned brother Narendran, J. before whom the present writ petition was argued felt that the view taken in O.P. No. 2027 of 1978 required reconsideration. The aspect on which the learned Judge felt such reconsideration necessary was whether the powers under Chapter I, Rule 3 could be invoked "to

deal with individual cases only or whether undue hardship caused to a group of persons can be redressed by invoking the rule."

3. Counsel for the Petitioner submitted that Chapter I, Rule 3 of the K.E.R. substantially corresponded to the provisions of Rule 39 of the Kerala State and Subordinate Service Rules, 1958 (for short "K.S. and S.S.R."). The latter rule, he pointed out, had been subjected to a detailed examination by a Full Bench of this Court in *Sreedharan Pillai v. State of Kerala* 1973 KLT 151: 1973 K.L.J. 187. Eradi, J. Speaking for the full court, examined all aspects of the rule and clearly delineated the area of its operations and the limitations of the exercise of the power thereunder. According to counsel for the Petitioner, the decision was authority for the proposition that Rule 39 cannot be invoked, when relief is to be given to a plurality of persons.

4. Though the reference was limited to this aspect of the case, in the course of arguments, the sustainability of the order Ext. P-6, in the light of the guidelines given by this Court regarding the exercise of such power, was also challenged.

5. We shall examine in the first instance the legal question in respect of which reference has been made to the Division Bench by the learned Judge.

6. As stated earlier, the very rule with which we are directly concerned, namely, Chapter I, Rule 3 of the K.E.R. had been considered earlier in 1973 K.L.J. 591 supra. It is also noteworthy that the judgment therein was rendered by Eradi, J. himself. Reference was made in the course of the discussion of that case to the Full Bench decision in 1973 KLT 151 supra. The following passage in Moidu's case 1973 K.L.J. 591 encapsulates the central idea:

In my opinion, it is not possible to construe the above rule as conferring a naked and arbitrary power on the State Government to mete out special treatment to any individual case according to its whim or fancy in a manner directly opposed to the provisions contained in the Rules. Such an interpretation would render the rule open to attack on the ground that it is violative of Article 14 of the Constitution. It is obvious that the purpose of Rule 3 is only to reserve power with the Government to grant a relaxation of the rigour of any of the provisions contained in the Kerala Education Rules in special cases where the circumstances are such as would warrant a valid classification of the said case for purposes of Article 14 of the Constitution and where manifest injustice and inequity would otherwise result. In *T.C. Sreedharan Pillai v. State of Kerala and Ors.* (1973 K.L.J. 187), a Full Bench of this Court had occasion to consider and explain the scope of Rule 39 of Part IE of the Kerala State and Subordinate Services Rules which is a provision substantially similar to Rule 3 with which we are now concerned and the observations contained in the said judgment are fully relevant and applicable in the present case.

This principle was applied while rendering the decision in O.P. No. 2027 of 1978.

7. Before advertng to the pointed contentions raised by the Petitioner's counsel,

it is useful to remember that the Supreme Court had also spoken on this topic. See *Government of Andhra Pradesh and Others Vs. Sri D. Janardhana Rao and Another*, . The rule discussed by the Supreme Court was Rule 47 of the Andhra Pradesh State Subordinate Services Rules which broadly corresponds to Rule 39 of the K.S. and S.S.R., reading:

47. Relaxation of rules by the Governor.--No rule made under the proviso to Article 309 of the Constitution of India or continued under Article 313 of the Constitution shall be construed to limit or abridge the power of the Governor to deal with the case of any class or category of person for being appointed to any civil post, or of any person serving in a civil capacity under the Government of Andhra Pradesh in such manner as may appear to him to be just and equitable:

Provided that, where any such rule is applicable to the case of any person or a class of persons, the cases shall not be dealt with in any manner less favourable to the person or class of persons than that provided by that rule.

The Supreme Court observed:

Rule 47 of the Andhra Pradesh State and Subordinate Services rules gives power to the Governor to relax the rigour of the general rules in such manner as may appear to him to be just and equitable...clearly, the power under Rule 47 is to be exercised in the interest of justice and equity. It is not difficult to see that the occasion for acting under Rule 47 may well arise after the attention of the Government is drawn to a case where there has been a failure of justice. In such cases justice can be done only by exercising the power under Rule 47 with retrospective effect, otherwise the object and purpose of the rule will be largely frustrated.

8. The judicial thought on this topic would reveal that the rule is, in a sense, a built-in safety valve to effectively protect the just claims of those in service, where the plain operation of the rules results in unjust hardship to them. (The Full Bench ruling of this Court to the extent it has held that the power under Rule 39 cannot be exercised by the Government with retrospective effect, appears to be disapproved).

9. Considerable emphasis was made by counsel for the Petitioner on the observations contained in the following passages of the Full Bench to contend that a blanket order in favour of large number of persons is not permissible under Rule 39.

It is not permissible to make use of the said power for passing blanket orders granting en masse exemptions or relaxation of the rules in favour of a large or undefined number of persons without specific application of the mind of the Government to the relevant facts and circumstances of the individual cases.

This observation, according to us, cannot be read in isolation. Nor can it be read in a narrow or pedantic fashion which would sap the vitality of such a useful provision. It is also to be borne in mind that Rule 39 itself had undergone

amendment materially on this question. The rule before the amendment read:

Notwithstanding anything contained in these rules or in the Special Rules, the Governor shall have power to deal with the case of any person serving in a civil capacity under the Government of Kerala or any candidate for appointment to a service in such manner as may appear to him to be just and equitable:

Provided that, where any such rule is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by that rule.

The amended rule reads:

Notwithstanding anything contained in these rules or in the Special Rules or in any other rules or Government Orders the Government shall have power to deal with the case of any person or persons serving in a civil capacity under the Government of Kerala or any candidate for appointment to a service in such manner as may appear to the Government to be just and equitable:

Provided that where such rules or orders are applicable to the case of any person or persons, the case shall not be dealt with in any manner less favourable to him or them than that provided by those rules or orders.

(emphasis supplied)

Even under the earlier rule, it would have been possible for the Government to pass an order in favour of more than one person, for under the General Clauses Act the term "a person" would include "persons" if there is no indication contrariwise. It is evident that the rule-making authority wanted to clarify the position beyond all possible doubts on that aspect. The Full Bench noted that even the earlier rule was not a bar for the Government to pass an order in favour of more than one Government servant, if circumstances justified the same. This is evident from the following observation:

In our opinion, this latter modification is of no consequence at all, since even without the addition of the new words it was perfectly open for the authority designated in the rule to deal with" the case of more than one Government servant in an order passed under Rule 39.

(emphasis supplied)

What is, therefore, objectionable is not the plurality of the beneficiaries of the order under Rule 39. The objection arises out of a conjunction of the very many vitiating factors alluded to therein: a blanket order; exemption or relaxation of an en masse nature; large or undefined number of beneficiaries; non-application of the mind with specific reference to individual cases. One may get enmeshed into an error, if the entire discussion of the Full Bench is not understood with the background emphasis given on each facet of the arguments addressed before the Full Bench. The error may indeed be serious, if one is entirely guided by the sentence expressing the view on this aspect as contained in the summary

contained in paragraph 21. No doubt, while summarising the various conclusions, the Full Bench compressed the idea on this topic in the sentence:

...the said rule does not warrant the passing of any general order with respect to any undefined or large group of persons exempting them from the operation of any existing rule or granting a relaxation of the rules in favour of such a group.

The Full Bench, according to us, did not intend to lay down that an exemption will be obnoxious under law for the only reason that it is in favour of a group of persons. As a matter of fact, there are clear indications in the judgment of the Full Bench itself that the power under Rule 39 could be exercised in favour of a group of persons. Even the immediately preceding paragraph, paragraph 20, visualises contingencies in which orders under Rule 39 being passed in a plurality of cases. Thus, it has been stated therein:

Rule 39 is to be invoked only to meet exceptional situations where gross injustice or inequity is seen to result from the application of the rules in all their rigour. In such cases and such cases alone, Rule 39 empowers the designated authority to mete out equity and justice by passing appropriate orders in relaxation of the provisions of the rules concerned.

(emphasis supplied)

10. Again in paragraph 18, there occur the following sentences:

It goes without saying that the said power is to be sparingly exercised and its use must be restricted to cases of a very exceptional nature...there can be no difficulty in seeing that it can be exercised only in those individual cases where the authority finds that on account of special circumstances a separate or differential treatment is justified

(emphasis supplied)

In paragraph 19 there is a reference to the purpose of Rule 39 as not being one "to empower the authority designated in it to arbitrarily deal out special treatment to any Officer or Officers according to his sweet will and pleasure". Similar sentences could be seen in paragraphs 22 and 26 of the judgment. The application of the ratio to the specific cases before the Full Bench also made the idea clear. Thus in paragraph 32, the court condemned the Government Order as beyond the scope of Rule 39, when the relaxation was made in favour of persons who had not acquired the test qualification till the date of the passing of the order, and when the benefit would continue to be available to them for an indefinite period of time.

11. We are further of the view that there could not possibly be any scope for doubt on this aspect of the interpretation of Rule 39, after the decision of the Supreme Court in Government of Andhra Pradesh and Others Vs. Sri D. Janardhana Rao and Another, . The Government of Andhra Pradesh in exercise of the power under Rule 47, corresponding to Rule 39 of the K.S. and S.S.R.,

relaxed the provisions of the Special Rules relating to the qualification required of Deputy Tahsildars in favour of 63 employees. The Supreme Court pointed out the occasion for exercise of the power is when a failure of justice is brought to the notice of the Government, and that "in such cases, justice can be done only by exercising the power under Rule 47...." The latter limb of Rule 47 of the Andhra Pradesh State Subordinate Services Rules refers to the power of the Government to deal with any person in a civil capacity. The reference to a class or category of persons occurs only in the earlier portion of that rule and that is in the context of the exercise of such power "for being appointed to any civil post". The reference to a class of persons occurring in the proviso to that rule is to be understood in the above background. The case demonstrates an actual exercise of the power under Rule 47 in respect of a group of persons where circumstances justified the invocation of that power. We are, therefore, of the view that the power under Rule 39 of the K.S. and S.S.R. also could be exercised in the case of a group of persons, provided that other conditions for the exercise of the power are satisfied.

12. The two decisions in *K.K. Moidu v. State of Kerala and Ors.* 1973 K.L.J. 591 and *K.K. Prabhakaran and Anr. v. State of Kerala and Ors.* ILR 1982 Ker 397, are easily understood as amounting to decisions where the court found the exercise of the power to be completely obnoxious to the general principles relating to the exercise of such power. It may be noted that the orders impugned in those cases were in favour of a single individual. In the former one, the order was quashed because it did not mention any special facts or circumstances justifying the deviation from the mandatory principles laid down in Rule 43 of Chapter XIV (A) of the K.E.R. The learned Judge also observed:

The Government file leading up to the passing of the order Ext. P-2 was produced in Court by the Government Pleader. There is nothing therein to indicate that the Government was satisfied about the existence of any special circumstances....

In the latter case, it was found by the impugned order that an unqualified teacher got promotion as Headmaster while qualified teachers admittedly senior to him were denied that promotion and that the action amounted to a hostile discrimination against rightful claimants. These decisions do "not in any way affect the conclusion we have reached about Rule 39 of the K.S. and S.S.R. being available in respect of a group of persons also.

13. It only remains for us to consider whether the impugned order is liable to be struck down as being opposed to the principles indicated in the Full Bench ruling in *T.C. Sreedharan Pillai and Ors. v. State of Kerala and Ors.* 1973 KLT 151. As stated earlier, the order has been scrutinised in the judgment in O.P. No. 2027 of 1978 by one of us. We are not persuaded to take a different view, in this case. The contentions of the Petitioner on this aspect are highlighted in ground E of the original petition. The serious objections therein are: (i) The order ignored the case of graduate teachers with requisite experience and (ii) The assumption in the order that the beneficiaries thereunder are a small vanishing group is

incorrect. The order specifically refers to the fact that the category of Headmasters dealt with thereunder is an isolated and vanishing group of aged Headmasters. The counter-affidavit reiterates this position. The cause for that situation is also indicated in the counter-affidavit. The H.E.T.T.G. course had been discontinued way back in 1956. The continuity of the flow of H.E.T.T.G. holders into the school service therefore got attenuated; the source itself had dried up. After 22 years of the source having dried up, it is quite likely that the category of H.E.T.T.C. holders remained a small vanishing group. It must be remembered that the holders of S.S.L.G. with T.T.C. were also eligible to be appointed as teachers earlier; they continue to be virtually the sole source of recruitment for nearly a quarter of a century. In these circumstances, there is nothing to doubt the correctness of the statement in the counter-affidavit.

14. A reading of the order indicates that the Government had adverted to important and relevant aspects. Among others, it referred to the existing provisions in the K.E.R. relating to the eligibility of persons to hold the post of Headmaster. The exemption is subject to an added limitation introduced by the stipulation contained in the last sentence of the order, namely, that the exemption would be available only "in the event of the lower primary schools in which they are Headmasters are/were upgraded into complete upper primary schools."

15. In this connection, it must also be borne in mind that normally and ordinarily, it is for the Government to judge the facts and assess the necessity for the invocation of a provision like Rule 39, K.S. and S.S.R. or Chapter I, Rule 3, K.E.R. The Government runs the service and not the Court. In the absence of vitiating factors, the court would decline interference with a bona fide and proper exercise of the power. The court does not assess the correctness of the Government's decision as if it were an appellate authority. In the present case, we are fully satisfied that there has been a proper application of the mind, that factors relevant to the exercise of the power under Chapter I, Rule 3, K.E.R. have been adverted to and that the order does not suffer from any arbitrariness or any unfairness to other sections of teachers.

16. Counsel has a complaint that as a result of the impugned order, the Petitioner would be deprived of his chances of ever becoming the Headmaster, for, according to him, by the time teachers like the 5th Respondent retire from service, graduate teachers working in the school would have attained the necessary length of service and would possess superior claims entitling them to be appointed as Headmasters. That fortuitous circumstance cannot in any way affect the validity or legality of Ext. P-6 order.

17. In the light of the foregoing discussion, the original petition has to fail. It is accordingly dismissed but without any order as to costs.