
(2002) 10 KL CK 0017

In the High Court Of Kerala

Case No : O.P. No's. 34083 and 36395 of 2000 and 7209 and 17754 of 2002
and WA No's. 2325 and 2480 of 2000

Gigi Zachariahs, High School Assistant, Jessy Mathew, High School Assistant and Swapna P. Thomas, High School Assistant APPELLANT

Vs

State of Kerala and Corporate Manager, C.M.I. Corporate Educational Agency RESPONDENT

Date of Decision : 09-10-2002

Acts Referred:

Kerala Education Act, 1958 — Section 10, 11, 36

Citation : (2002) 10 KL CK 0017

Hon'ble Judges : K.S. Radhakrishnan, J;J.M. James, J

Bench : Division Bench

Advocate : Binoy Thomas and Paulson Thomas, for the Appellant; Govt. Pleader, C.S. Ajith Prakash, R1 to R3 and R4 and K.M. Varghese, for the Respondent

Final Decision : Dismissed

Judgement

Radhakrishnan, J.—The question involved in all these cases is the same and hence we are disposing of all these cases by a common judgment. OP. 7209/02 is treated as the leading case in which counter affidavit has been filed by the respondents 1 to 3.

2. Original petition was preferred by three High School Assistants who are working in aided schools in the State of Kerala. They are aggrieved by the introduction of the State Eligibility Test (SET) as an essential qualification for appointment to the post of Higher Secondary School Teacher in various aided school by the Kerala Educational Amendment Rules 2001. Alternatively they also sought for a declaration that they are entitled to be considered for appointment by transfer/promotion as Higher Secondary School Teachers on the basis of their educational qualification in respect of the vacancies which arose prior to 9-11-2001, the date on which the rules came into force. They also sought for a

declaration that the special qualification of passing SET cannot be enforced in respect of appointment by transfer/promotion to vacancies of Higher Secondary School Teachers (HSSTs) in aided schools which arose prior to coming into force of statutory rules. Various other incidental reliefs were also sought for. A detailed counter affidavit has been filed on behalf of respondents 1 to 3 justifying the introduction of the rules and the action taken on the basis of the direction of the Supreme Court in *M.M. Dolichan and Ors. v. State of Kerala and Ors.*, 2001 (1) SCC 151. Before we deal with the validity or otherwise of the Rules we may refer certain facts which led to the introduction of the Kerala Educational (Amendment) Rules 2001.

3. The Higher Secondary System of Education, popularly known as Plus-two Course was introduced in the State during 1990-91 as part of the National Education Policy to replace the pre-degree Course in a phased manner. In the beginning, during the academic year 1990-91 only 31 Government High Schools were sanctioned with Higher Secondary Courses and complete delinking of the Pre-degree System was achieved during 2000-2001 with sanctioning of Higher Secondary Courses in 932 Government and Aided High Schools, thus creating Higher Secondary seats commensurate with pre-existing Pre-degree seats available in the State. Delinking of Pre-degree Course from the College was on the basis of the Pre-degree Course (Abolition) Act 1997. The qualification which was originally prescribed when the Higher Secondary Scheme was introduced as per G.O. (MS) No. 138/90/G.Edn. dated 27-6-1990 for the post of HSSTs was a second class master's degree in the concerned subject with B.Ed. and the selection was subject to seniority and suitability. If sufficient qualified hands were not available direct recruitment could be resorted to. Government vide G.O. (MS) No. 162/98/G. Edn. dated 13-5-1998 ordered apportionment of specified quota for direct recruitment by transfer from among qualified lower level teachers in the matter of appointment to the post of HSSTs. It was ordered that 75% of vacancies of HSSTs both in the Government and aided Higher Secondary Schools would be earmarked for direct recruitment whereas the remaining 25% would be set apart for appointment by transfer from among qualified lower level teachers. Subsequently vide G.O. (MS) No. 268/99/G.Edn. dated 3-11-1999 Government had decided to conduct a State Eligibility Test for selection and appointment of HSSTs. Government later constituted an expert committee for recommending the desirability of conducting such a test. Expert committee submitted their report and on the basis of the report Government issued G.O. (MS) No. 289/99/G.Edn. dated 25-11-1999 prescribing SET as a necessary qualification for appointment as HSST. It was also ordered that those HSSTs whose appointments were already approved or whose approvals are awaited would be exempted from passing SET provided they were appointed prior to the date of the Government Order. Later Government issued G.O. (MS) No. 3441/99/G.Edn. dated 30-12-1999 and ordered that in modification to the earlier orders to the effect that SET would be essential qualification for all the appointment of HSSTs made after 1995-96. It was also clarified that those who were appointed prior to the academic year

1995-96 would be exempted from acquiring the SET qualification.

4. The first SET examination was held on 28-6-2000. Aided Private School Teachers, provisionally appointed teachers including Guest Lecturers, Managers of Private Aided Schools etc. raised a grievance against the introduction of the SET qualification and approached this Court and later the Hon'ble Supreme Court. Managers of Private Aided Schools objected to the provision earmarking 25% of vacancies for qualified lower level teachers as they wanted the entire vacancies to be filled up by direct recruitment. Department teachers and private aided school teachers objected to the provisions setting apart 75% of vacancies for direct recruitment and they wanted the entire vacancies to be filled up from among themselves. Supreme Court in Civil Appeal Nos. 71544 7155 and other connected matters passed various interim orders on the subject. Ultimately all the cases were disposed of by the Hon'ble Supreme Court on 14-11-2000. Judgment is reported in 2001(1) SCC 151. Supreme Court disposed of all those matters issuing various directions which we extract below:

1. All the teachers in the Private Schools who have been appointed during the pendency of these cases pursuance to the interim order dated 7-12-1999 would be held to be duly appointed to the post and their services will not be annulled.
2. All the teachers who have been appointed also in the Government Schools pursuance to the order dated 1-2-1999 shall also be held to be duly appointed and those appointments will not be annulled.
3. If there has been any appointment made pursuance to the Government Order of 13-5-1998 as on today those appointments also would continue and will not be annulled.
4. There will be no further appointment from any source either in the Private School or in the Government Schools from today for a period of 3 months.
5. The State Government is directed to bring into force the Statutory Recruitment Rules within the aforesaid period of 3 months where after recruitment to the vacancies in the Higher Secondary Grade could be dealt with in accordance with the said Statutory Rule.
6. If for any unforeseen circumstances the Statutory Rule cannot be notified and brought in force within the aforesaid period of 3 months and on such event there exists any necessity for immediate recruitment of teachers then it would be open for the parties to move this Court for appropriate direction.

The State of Kerala therefore later issued G.O. (MS) No. 389/2000/G.Edn. dated 15-11-2000 regularising all such appointments on the basis of the direction given by the Supreme Court. Subsequently orders were issued vide G.O. (MS) No. 367/2001/G.Edn. dated 17-12-2001 exempting teachers whose appointments have already been regularised vide order dated 25-11-2000 from passing the SET examination in view of the fact that their appointment cannot be annulled. The State Government could not frame the Rules within three months as

stipulated in the judgment of the Supreme Court. However, later Government in exercise of the powers conferred u/s 36 of the Kerala Education Act, 1958 framed Kerala Education (Amendment) Rules 2001 vide G.O. (P) No. 331/2001/G.Edn. dated 9-11-2001 which was published in the Kerala Gazette Extra Ordinary dated 12-11-2001. The Rules prescribed the method of appointment to the post of Higher Secondary School Teacher:

1. By transfer from Junior Lecturer in the subject concerned under the management/Higher Secondary School Teacher (Junior).

2. In the absence of qualified hands under clause (1) above, the vacancies shall be apportioned in the ratio 1:3 between appointment by transfer and direct appointment as detailed below:

I (a) By transfer from High School Assistants, who possess the requisite qualifications, under the Educational Agency.

(b) In the absence of qualified persons under (a) above, by transfer from qualified Upper Primary School Assistants/Lower Primary School Assistants who possess the requisite qualifications in the subject concerned, under the Educational Agency.

ii. By direct appointment:

Note:

(i) When qualified persons are not available to fill up the vacancies set apart for appointment by transfer under item 2(i) above, such vacancies shall also be allotted for direct appointment.

(ii) Appointments under item (1) above shall be made from select lists of qualified persons prepared on the basis of seniority and merit.

Rule 6 deals with the qualification. Relevant portion of the rule is extracted below:

Higher Secondary School Teacher & Higher Secondary School Teacher (Junior) in -

1. English

2. Communicative English.

3. Malayalam.

4. Hindi.

5. Arabic

6. Urdu.

7. Tamil.

8. Kannada.

9. Sanskrit.

By Transfer and by direct appointment:

(1) Master's Degree in the concerned subject with not less than 50% marks from any of the Universities in Kerala, or a qualification recognised as equivalent thereof in the respective subject by any University in Kerala.

(ii) (1) B.Ed. in the concerned subject acquired after regular course of study from any of the Universities in Kerala or a qualifications recognised as equivalent thereto by a University in Kerala.

(2) In the absence of persons with B.Ed. Degree in the concerned subject B.Ed. degree acquired in any one of the subjects under the concerned Faculty as specified in the Acts/Statutes of any of the Universities in Kerala.

(3) In the absence of persons with B.Ed. Degree as specified in items (1) and (2) above, persons with B.Ed. Degree in any subject acquired after a regular course of study from any of the Universities in Kerala or a qualification recognised as equivalent thereto by any one of the Universities in Kerala.

(iii) Pass in the State Eligibility Test for the post of Higher Secondary School Teacher conducted by Govt. of Kerala or by the agency unauthorised by the State Government.

Counsel appearing for the petitioner submitted that introduction of the SET qualification on the basis of various executive orders prior to 9-11-2000 is illegal. It was pointed out that qualified lower level teachers who were already working in the lower level before 9-11-2000 have a right to be considered for appointment by transfer to the vacancies on the basis of seniority on the basis of the qualification then existing. Counsel placed reliance on the decision of the Supreme Court in State of Rajasthan Vs. R. Dayal and Others, Counsel also submitted that the Amendment Rules 2001 cannot be given effect to retrospectively. Counsel also submitted introduction of SET qualification would be ultravires of Section 10 and 11 of the Kerala Education Act 1958. In any view of the matter, counsel submitted that the petitioners are entitled to get appointment to those vacancies arose prior to the introduction of the Rules.

5. Learned Government Pleader submitted that State was strictly following the directions of the Supreme Court in 2001(1) SCC 151 (supra). It is also his contention that State Government has got freedom to issue executive orders so as to assess suitability of candidates. Pass in SET examination is only to assess the suitability of candidates for appointment to the post of HSSTs. Learned Government Pleader also submitted that the teachers have to be paid from the State exchequer and consequently State has got a duty to ensure that they impart better education to the student community. SET was also introduced on the basis of report submitted by export committee. SET as an essential qualification was subject matter of series of cases before the Apex Court. After considering all aspects of the matter the Apex Court issued six directions. It has been specifically stated by the Apex Court in 2001(1) SCC 151 that there will be

no further appointment from any source either in the Private School or in the Government Schools from 1-11-2000 for a period of three months. State Government was also directed to bring into force the Statutory Recruitment Rules within three months and thereafter recruitment to the vacancies in the Higher Secondary Grade could be dealt with in accordance with the said Statutory Rule.

6. It is evident from the direction of the Supreme Court that all the teachers in the Private Schools who have been appointed during the pendency of the matter before the Supreme Court would not be annulled and also the appointment made on the basis of the interim order dated 7-12-2000 as well. Supreme Court also ordered that those appointments made on the basis of the Government order dated 13-5-1998 as on 14-11-2000 would not be annulled. Those directions of the Supreme Court, we find, have been complied with by the State. The contention raised by the counsel for the petitioners that the vacancies should be filled up without insisting the SET qualification cannot be accepted in view of the positive direction given by the Supreme Court that no further appointment from any source either in private schools or in Government schools shall be made subsequent to 14-11-2000 unless statutory Rules are framed. We are of the view all vacancies could be filled up only after framing statutory Rules and appointment could be effected to those vacancies only on the basis of the qualification prescribed in that Rules. The Supreme Court in M.M. Dolichan's case has sustained various Government Orders such as G.O. dated 13-1-98 introducing SET as an essential qualification. Therefore vacancies occurred prior to the introduction of the Rules would be governed by the Supreme Court decision and the executive orders. Admittedly petitioners have not passed the SET examination and they did not possess the qualification examination and they did not possess the qualification laid down in the statutory Rules. Under such circumstances petitioners are not entitled to the reliefs prayed for.

7. Writ petitions as well as writ appeals would stand dismissed.