
(2001) 10 AP CK 0045

In the Andhra Pradesh High Court

Case No : Writ Appeal No. 1519 of 1999 and Writ Petition No. 6045 of 2001

Govt. of A.P. and Others

APPELLANT

Vs

P. Thirumala Devi and Others

RESPONDENT

Date of Decision : 03-10-2001

Acts Referred:

Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools Under Private Managements) Rules, 1993 — Rule 12(6)

Citation : (2001) 10 AP CK 0045

Hon'ble Judges : S.B. Sinha, C.J.;V.V.S. Rao, J

Bench : Division Bench

Advocate : A.A.G, for the Appellant; P. Balakrishna Murthy, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—Vires of sub-rule (6) of Rule 12 of the A.P. Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Managements) Rules, 1993 (hereinafter referred to as "the Rules") issued in G.O.Ms.No.1 Education (P.S.2), dated 1.1.1994 is in question in this case.

2. The 2nd respondent-school issued a notification calling for applications to two aided posts of S.G.B.T. teachers pursuant where to the writ petitioner-1st respondent herein applied for the same. Inter alia on the ground that those posts were reserved for SC and BC "A" candidates the 1st respondent-writ petitioner was not considered. Thereupon she filed a writ petition before this Court which was allowed. Assailing the said order the present appeal is filed.

3. By reason of an interim order passed in this appeal, the 1st respondent was also considered for appointment and she has been continuing in the said post. By an order dated 15.12.2000 the 3rd appellant herein rejected to admit the post held by the 1st respondent herein to grant-in-aid. Questioning the said order the 1st respondent herein filed another writ petition marked as Writ Petition No.6045

of 2001. The writ appeal and the writ petition are being disposed of by this common order.

4. The impugned rule reads thus:

Appointment of staff:

(6) The selection of the posts in all private educational institutions shall conform to the communal rotation roster. However this shall not apply to minority educational institution only if they are selecting a candidate belonging to the concerned minority community. Where such a candidate is fitted in a vacancy belonging to SC/ST, then the SC/ST vacancy shall be carried forward to the next point.

5. The learned single Judge allowed the writ petition holding that the said rule is not in consonance with the rule making power contained in the A.P. Education Act, 1982 (for short "the Act"). The learned Addl Advocate General appearing on behalf of the appellants assailed the said judgment on the ground that the State has the requisite power to regulate education under the provisions of the said Act. The learned counsel would contend that there are educational agencies which run several institutions and, therefore, there cannot be any difficulty in implementing the communal roster. The learned counsel would contend that communal roster being a permanent one the same can be given effect to. In this connection our attention has been drawn to the proceedings of the District Educational Officer, Kurnool, dated 20.1.1996 which is to the following effect:

After careful consideration of proposal received in the reference 5th and 7th read above and in view of the applications laid down in this office proceedings 2nd cited and as powers vested under Rule 3 in G.O.ms.No.1 Ed., dt 1.1.94 the District Educational Officer, Kurnool is pleased to accord permission to the Correspondent, A.K.P., A.J.B. School, Kothapeta, Kurnool to fill up 2 Aided S.G.T. vacancies in A.R.P.M. A.J.B. School, Kothapeta Kurnool. He is requested to fill up the above 2 Aided S.G.T. vacancies by the candidates of respective communities as shown below:

1.Secondary Grade Teacher 1(Roster point 2 - SC)

2.Secondary Grade Teacher 1 (Roster Point 4 - BC "A")

6. The correspondent is requested to follow strictly the rule of reservation and fill up the vacancies only by the candidates of the respective communities as noted above, duly following the procedure laid down under Rule 12 and 13 of G.O.ms.No.1 Edn dt 1.1.94. If there is any deviation the correspondent alone will be held responsible for such deviation and such appointments will not be approved.

7. The learned counsel would contend that it is incorrect to hold that the said rule was made in contravention of the rule making power. According to the learned counsel, even in terms of the power conferred upon the State under

Article 161 of the Constitution the policy of reservation can be directed to be implemented. The school in question being an aided one, the State has otherwise also the power to take regulatory measures so as to keep the standard of the institution.

8. Mr P.Balakrishna Murthy, the learned counsel appearing on behalf of the 1st respondent, on the other hand, would submit that the field of reservation being occupied by Articles 16(4) and 15(4) of the Constitution and having regard to the fact that the field in relation to reservation is occupied by the Act, the matter relating to reservation could be enforced only by a statute and not by a rule which would be beyond the rule making power of the State thereunder. Reliance in this connection has been placed on *Jawaharlal Nehru University Vs. Dr. K.S. Jawatkar and Others*, and *V. Sudeer Vs. Bar Council of India and Another*, .

9. The Act was enacted to consolidate and amend the laws relating to the educational system in the State of Andhra Pradesh for reforming, organising and developing the said educational system and to provide for matters connected therewith or incidental thereto.

"Educational agency" and "educational institution" have been defined in Section 2(17) and 2(18) of the Act respectively.

"educational agency" means in relation to -

(a) any minority educational institution, any body of persons which has established and is administering or proposes to establish and administer such minority educational institution, and

(b) any other private educational institution, any body of persons entrusted with the establishment, management and maintenance of such private educational institution;

"educational institution" means a recognised school, colleges including Medical Colleges, special institution or other institution (including an orphanage or boarding home or hostel attached to it by whatever name called, the management of which carries on (either exclusively or among other activities) the activity of imparting education therein, and includes every premises attached thereto; but does not include a tutorial institution;

"General education" has been defined in Section 2 (19) of the Act to mean every branch of education including special education, but does not include medical education or technical education. "Special education", "special institution" and "technical education" have been defined under Sections 2 (38), 2 (39) and 2 (44) respectively which read thus:

"Special education" means education imparted in a special institution;

"Special institution" means reformatory school, school for physically handicapped or mentally retarded or other defective pupils and includes any other type of special institution which may be notified as such by the Government.

"Technical education" means any course of study in engineering, technology, architecture, ceramics, industrial training, mining, fine arts or in any other subject which may be notified by the Government in this behalf.

"Private institution" has been defined in Section 2 (35) of the Act to mean:

An institution imparting education or training, established and administered or maintained by any body of persons, and recognised as educational institution by the Government, and includes a college, a special institution and a minority educational institution, but does not include an educational institution -

(a) established and administered or maintained by the Central government or the state government or any local authority;

(b) established and administered by any University established by law; or

(c) giving, providing or imparting only religious instruction, but not any other instruction.

10. Chapter II of the said Act deals with administrative machinery, Board of Secondary Education and State Board of Technical Education and Training. Chapter III deals with school education. Chapter IV deals with primary education and its implementation. Chapter VI deals with establishment of educational institutions, their administration and control. Section 18 of the said Act is in the following terms:

Government to provide facilities for imparting education:- The Government may, for the purpose of implementing the provisions of this Act, provide adequate facilities for imparting general education, technical education, special education and teacher education in the State by -

(a) establishing and maintaining educational institutions;

(b) permitting any local authority or a private body of persons to establish educational institutions and maintain them according to such specifications as may be prescribed; and

(c) taking, from time to time, such other steps as they may consider necessary or expedient.

11. Section 20A of the Act prohibits establishment of an institution by an individual. Section 21 provides for grant or withdrawal of recognition of institutions imparting education. Section 20 provides for power of the State for the purpose of grant of permission for establishment of educational institutions. A registered school has been defined u/s 33A to mean a school recognised u/s 21 but not receiving aid from the Government. Section 33B provides for permission for establishment of registered schools. Sub-section (3) of Section 33B provides:

The authority empowered to grant permission under sub-section (2) may, after satisfying that the conditions prescribed for the grant of permission are fulfilled, grant the permission and register the school in such manner as may be

prescribed or refuse such permission after giving reasons therefore and where the school is so registered, a certificate to that effect may be issued in the name of the school.

12. Section 33E provides for the conditions of service of staff. Section 33 D reads thus:

Cancellation of registration of the registered schools:- Where the competent authority is of the opinion that the management of a registered school has failed to fulfil all or any of the conditions of registration u/s 33B or the rules made thereunder, it may after giving a notice not less than thirty days to the manager of such school cancel the registration of the school and the certificate granted u/s 33B.

13. Chapter VII of the Act deals with education funds of local authorities. Chapter VIII deals with grant-in-aid. Section 42 of the Act reads thus:

Government to set apart sum for giving grant-in-aid to certain recognised institutions:- The Government shall, within the limits of its economic capacity, set apart a sum of money annually for being given as grant-in-aid (hereinafter in this Act referred to as grant to local authority institutions and private institutions in the State, recognised for this purpose in accordance with rules made in this behalf.

14. Sections 45 and 46 provide for making of an application for grant of such aid and the power of the Government to withhold, reduce or withdraw grant. Sub-section (2) of Section 46 reads thus:

Without prejudice to the generality of the provisions of sub-section (1) or any other provision of this Act, the Government may, after such enquiry as they may deem fit, withhold, reduce or withdraw any grant payable to any educational institution if the manger of the institution concerned, -

- (i) fails to fulfil all or any of the conditions of grant;
- (ii) denies admission to any citizen on grounds only of religion, race, caste, language or any of them;
- (iii) allows any employee of the institution to take part in any agitation intended to bring or attempt to bring into hatred or contempt, or intended to excite or attempt to excite disaffection towards, the Government established by law in India;
- (iv) directly or indirectly encourages any propaganda or practice of wounding the religious feelings of any class of citizens of India or insulting the religion or the religious beliefs of that class;
- (v) is guilty of falsification of registers, of misuse of funds for purposes other than those for which they are collected;
- (vi) fails to remedy within such reasonable time as may be specified by the

competent authority, the defects in the maintenance of accounts pointed out by the auditors; or

(vii) fails to restore, within the time specified by the competent authority, an employee whose services have been wrongfully dispensed with or fails to pay him any arrears of salary or other benefits when directed to do so by the competent authority.

15. Section 47 mandates the institution to utilise the funds and movable property for the purposes for which they are intended and to account for the same by the manager in such manner as may be prescribed. Chapter XIV deals with payment of salaries and allowances to and disciplinary action against employees of private institution. Section 99 provides for the rule making power of the State. Clause (xxxiv) of Section 99 (1) (b) reads thus:

All matters expressly required or allowed by this Act to be prescribed or in respect of which this Act makes no provision or makes insufficient provision and a provision is, in the opinion of the Government, necessary for the proper implementation of this Act.

16. It is not in dispute that by reason of any of the provisions of the said Act, no power has been conferred upon the State to direct reservation of the posts in the school service.

17. The State, it is beyond any cavil of doubt, can enforce its legislative policy as regards reservation by issuing executive instructions in that behalf in exercise of its power under Article 162 of the Constitution. However, when the field is covered by a legislation, a matter coming within the purview thereof can only be done through the rule making power. If such rules are ultra vires the Act, they cannot, except in some extraordinary situations, be considered to be executive instructions under Article 162 of the Constitution. However, in the fact of the present case it may not be necessary to delve deep into the matter.

18. The power of reservation of the State emanates only from Articles 15 and 16 of the Constitution. Such power of the State can be exercised only in relation to its own employees. In other words, the reservation policy can be extended in the field of public employment only. Control over the educational institutions in terms of the provisions of the Act can only be exercised, as noticed hereinbefore, for reforming, organising and developing the educational system. The State while exercising its control in relation to the school does not exercise only control over education. For the said purpose, there would be a compelling State interest. The words "control over the institution" by the State is for the purpose of overseeing its administration. The activities of private school are not State activities but only supplemental activities. In *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc.*, it has been held:

.... These educational institutions follow the syllabus prescribed by the Government/ University, have the same courses of study, follow the same

method of teaching and training. They do not award their own degrees/ qualifications. They prepare their students for University /Government examinations, request the University /Government to permit them to appear at the examinations conducted by them and to award the appropriate degrees to them. Clearly and indubitably, the recognised / affiliated private educational institutions, supplement the function performed by the institutions of the State. Theirs is not an independent activity but one closely allied to and supplemental to the activity of the State. Since the recognising / affiliating authority is the "State, it is under an obligation to impose such conditions as part of its duty enjoined upon it by Article 14 of the Constitution. It cannot allow itself or its power and privilege to be used unfairly. The incidents attaching to the main activity attach to supplemental activity as well. Affiliation / recognition is not there for anybody to get it gratis or unconditionally. In our opinion, no Government, authority or University is justified or is entitled to grant recognition / affiliation without imposing such conditions. Doing so would amount to abdicating its obligations enjoined upon it by Part-III; its activity is bound to be characterised as unconstitutional and illegal. To reiterate, what applies to the main activity applies equally to supplemental activity. The State cannot claim immunity from the obligations arising from Articles 14 and 15. If so, it cannot confer such immunity upon its affiliates.

19. Those observations were made in the context of private institutions charging capitation fee for giving admission and Supreme Court evolved a scheme of fee structure to "eliminate discretion in the management in the matter of admission".

20. The reservation policy of the State in the field of public employment having been emanated from Article 16(4) of the Constitution cannot be implemented for the aforementioned purpose by way of incidental power under the Act. It is not in dispute that there are schools which consist of one teacher or two teachers only. In an institution there may be posts which are specialised posts. When there is more than one teacher one of them would be appointed as a headmaster.

21. The teachers of a private institution, having regard to the scheme and object of the Act cannot come within the purview of doctrine of public employment. Article 16 of the Constitution thus per se cannot be held to be applicable. It is one thing to say that the employee enjoys a status having been holding public office but it is another thing to say that that in relation to a section of employees, protection of services had been granted to a class of servants who are under the private management having regard to the nature of their services.

22. So far as the State of Andhra Pradesh is concerned, the matter relating to reservation is provided by rule 22 of the A.P. State and Subordinate Service Rules. The said rule itself was framed by the State in exercise of the powers conferred upon it by the proviso appended to Article 309 read with clause (4) of Articles 16 and Article 335 of the Constitution. Admittedly, the said constitutional provisions are not applicable in the case of the teaching and non-teaching staff of a private institution. Rule 22 of the said Rules was amended by notification dated

23.6.1999 and it is in the following terms:

Special Representation (Reservation):- (1) Reservations may be made for appointments to a service, class or category in favour of Scheduled Castes, Scheduled Tribes, Backward Classes, Women, physically handicapped, Meritorious Sportsman, Ex-Servicemen and such other categories, as may be prescribed by the Government from time to time, to the extent and in the manner specified hereinafter in these rules or as the case may be, in the special rules. The principle of reservation as hereinafter provided shall apply to all appointments to a service, class or category -

(i) by direct recruitment, except where the Government by a General or special order made in this behalf, exempt such service, class or category;

(ii) otherwise than by direct recruitment where the special rules lay down specifically that the principle of reservation in so far as it relates to Scheduled Castes and Scheduled Tribes only shall apply to such services, class or category to the extent specified therein.

(2) (a) The unit of appointments for the purpose of this rule shall be one hundred vacancies, of which fifteen shall be reserved for Scheduled Castes, six shall be reserved for Scheduled Tribes, twenty five shall be reserved for the Backward Classes and the remaining fifty four appointments shall be made on the basis of open competition and subject to Rule 22-A of these rules.

(b) Out of fifty four appointments to be made on the basis of open competition, three appointments shall be reserved for direct recruitment of the physically handicapped persons.

(c) In the case of appointments to clerical posts including the posts of typists i.e., in Group II and Group IV services and in the case of posts in the Andhra Pradesh Police Subordinate Service, to which the principle of reservation of appointments applies, out of fifty four, as the case may be, fifty one appointments to be made on the basis of open competition, two appointments shall be reserved for direct recruitment for Ex-servicemen.

(d) In the case of appointments to the posts of Senior Assistants, Junior Assistants, Junior Stenographers, Typists and Record Assistants in the Offices.

23. Rosters are provided therein in relation to 100 posts which are to be operated in the order of rotation specified therein in a unit of 100 vacancies. For the said purpose the reservation is to be granted to SC, BC and STs. As for example, in Group "A" the 1st, 3rd, 5th, 6th and 9th posts are to be filled up by open competition whereas 2nd and 7th posts are to be filled up by SCs. 4th post is to be filled up by BC and 8th post is to be filled up by ST. However, in Group "D", 10th post is to be filled up by class IV; 12th, 13th and 14th posts are to be filled up by open competition.

24. Having regard to the decision of Indra Sawhney etc. etc Vs. Union of India

and others, etc. etc., , no reservation can be made in excess of 50%. In respect of a school having one teacher or two teachers it is wholly unworkable to give effect to the communal rotation roster.

25. The State has enacted the Rules in exercise of its power conferred upon it by Sections 99 read with 20, 21, 79, 80 and 83 of the Act. Rule 12 deals with appointment of staff. Sub-rule (2) of Rule 12 reads thus:

All the staff teaching as well as non-teaching shall be recruited through staff Selection Committee to be constituted by the educational agency in accordance with these rules.

Rule 13 deals with constitution of the Staff Selection Committee.

26. The submission of the learned Advocate General to the effect that having regard to the provisions of sub-rule 2 of rule 12 read with rule 13 thereof, as recruitment is to be made through Staff Selection Committee to be constituted by the educational agency the communal roster system can be given effect to, cannot be accepted. As noticed hereinbefore, the Act separately defines "educational agency" and "educational institution". The selection in relation to an educational institution or an educational agency may be made in terms of sub-rule (2) of Rule 12 read with Rule 13 thereof. But sub-rule (6) of rule 12 provides for selection of posts in all private educational institutions only.

27. It is, therefore, not correct to contend that the purported reservation policy of the State can be implemented in relation to the institutions belonging to an educational agency. In other words, for the purpose of giving effect to sub-rule (6) of rule 12, all private educational institutions shall be treated as separate units.

28. Furthermore, the State merely grants aid in terms of Grant-In-Aid Code. However, rule 12 (6) would apply both in relation to an aided and unaided institution. The State for the purpose of implementing the reservation policy must have a power therefor. It cannot exercise such power only because it gives grant-in-aid. The reservation theory has no nexus with grant-in-aid by the State. Such a power of the State will also have to be considered having regard to the provisions contained in Article 29 read with clause (1) of Article 30 of the Constitution, in terms whereof any discrimination by the State is prohibited.

29. Even in terms of sub-rule (6) of Rule 12 a minority educational institution has been exempted from applying this communal rotation roster only in the event they select a candidate belonging to the concerned minority community and where such candidate is fitted in a vacancy belonging to SC/ST such vacancy shall be carried forward to the next point. Such a provision even in relation to a minority institution will, therefore, be violative of Article 30 of the Constitution. In regard to private educational institutions, reservation is an essential legislative function. Such an essential legislative function cannot be delegated to a rule making authority. In *Kunj Behari Lal Butail and Others Vs. State of H.P. and*

Others, the apex court held:

It is well settled that the legislature cannot delegate its essential legislative functions which consist in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up the details. We are also of the opinion that a delegated power to legislate by making rules "for carrying out the purposes of the Act" is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.

30. In SUPREME COURT EMPLOYEES' WELFARE ASSN v UNION OF INDIA, it has been held:

.... (A) delegated legislation or a subordinate legislation must conform exactly to the power granted.

31. Rules, whether made under the Constitution or a statute, must be intra vires the parent law under which power has been delegated.

32. In General Officer Commanding-in-Chief and Another Vs. Dr. Subhash Chandra Yadav and Another, the Supreme Court was dealing with a case of transfer of employees in terms of rule 5 (c) and the said rule was held to be ultra vires stating:

When Rule 5-C was inserted into the Rules, it was void as being contrary to and in excess of the rule making power of the Central Government as contained in the unamended clause (c) of sub-section (2) of section 280 of the Cantonments Act. It does not become valid merely because of the amendment of clause (c), inter alia, conferring power on the Central Government to frame rules relating to conditions of service.

33. The question whether the interest of the transferee has been protected or full safeguard has been provided for by Rule 5-C is quite irrelevant, if it is invalid and void. Moreover, the provisions of Rule 5-C are clumsy and lack clarity and a transfer may affect the transferee prejudicially. It is not necessary for us to discuss how the provisions of Rule 5-C may be prejudicial to the interest of an employee transferred to another Cantonment Board within the State, for, we are of the view that Rule 5-C is ultra vires the provision of the rule making power of the Central Government under the Cantonments Act.

34. Before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) it must also come within the scope and purview of the rule-making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void.

35. The rule making power must have nexus with the object of the Act. If any

rule has been made which does not fulfil the object or does not satisfy the nexus theory or in any event, is unreasonable.

36. In *V.SUDEER v BAR COUNCIL OF INDIA & ANR* 1999 (2) Supr 460 it has been held:

.... the rule making power entrusted to the Bar Council of India by the legislature is an ancillary power for fructifying and effectively discharging its statutory functions laid down by the Act. Consequently, Rules to be framed u/s 49 (1) must have a statutory peg on which hang. If there is no such statutory peg the rule which is sought to be enacted de hors such a peg will have no foothold and will become still born. Any rule framed by rule making authority going beyond its statutory functions must necessarily be held to be ultra vires and inoperative at law.

37. The submission of the learned Additional Advocate General to the effect that the principle that wrong mentioning of provisions shall not invalidate a statute has no application in the instant case inasmuch as, as noticed hereinbefore, the sources are different. In any event, having regard to the fact that the State has no legislative competence in the matter nor Article 309 of the Constitution being applicable, the impugned rules must be held to be ultra vires.

38. For the reasons aforementioned, we are of the opinion that Rule 12 (6) is ultra vires and is unconstitutional. Accordingly, the appeal is dismissed. The writ petition is, therefore, allowed. There shall be no order as to costs.