
(2001) 03 KL CK 0053
In the High Court Of Kerala
Case No : W.A. No. 3113 of 2000

Joji

APPELLANT

Vs

Joint Director of Public Instruction

RESPONDENT

Date of Decision : 20-03-2001

Acts Referred:

Constitution of India, 1950 — Article 141
Kerala Education Rules, 1959 — Rule 2(3), 6B, 6B(1)

Citation : (2001) 2 ILR (Ker) 85

Hon'ble Judges : K.S. Radhakrishnan, J;G. Sasidharan, J

Bench : Division Bench

Advocate : C.P. Sudhakara Prasad, for the Appellant; C.K. Pavithran, Government Pleader and S. Chandrasenan, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—The question posed is whether the post of specialist teacher created in any upper primary school or upper primary section of High School prior to the year 1969-1970 would continue to exist under the proviso to R.6B(1) of Chapter XXIII of Kerala Education Rules on the teacher vacating the post.

2. This case presents the following facts. A post of Physical Education Teacher was sanctioned in the S.H.U.P. School, Chullimanoor prior to year 1969-70. Teacher by name Sumathi was working in that post. The teacher continued as such on the strength of proviso to R.6B(1) of Chapter XXIII of Kerala Education Rules. As per R.6B(2)(a) of Chapter XXIII K.E.R. one post of Physical Education Teacher would be sanctioned in each Upper Primary School or Upper Primary Education Teacher would be sanctioned in each Upper Primary School or Upper Primary Section of a High School having an effective strength of 500 pupils and above. The pupils strength of many of the school were less than 500 with the result that there were threat of retrenchment of teacher. Physical Education Teachers had represented before the Government their grievances that if the posts of Physical

Education Teachers were reduced on the basis of staff strength for 1991-92, it would result in retrenchment and deployment of Physical Education Teachers. Government considered their grievances and had passed an order dated 27.12.1991 stating that the posts of Physical Education Teachers existed during the year 1990-91 in the High Schools and the Upper Primary Schools/U.P. Sections of High Schools, both Government and Aided would continue during 1991-92. The Controlling Officers were authorised to implement the orders even in cases where staff fixation orders for 1991-92 had been issued. This was ordered pending finalisation of the proposal for restructuring the Post of Physical Education Teachers in the High Schools and Upper Primary Schools.

3. The teacher Sumanthi continued as Physical Education Teacher till her retirement on 31.3.1998 on the basis of above orders and successive orders by which they were allowed to continue so as to avoid retrenchment and deployment. The question is whether on retirement of Sumathi the post of Physical Education Teacher would exist enabling the Manager to fill up the post.

4. Manager however appointed the petitioner P.Joji as the Physical Education Teacher of the School in the post on retirement of Sumathi on the ground that the post continued to exist. Assistant Educational Officer who issued the staff fixation order dated 15.7.1998 for the year 1998-99 took the view that the post of Physical Education Teacher stood abolished on retirement of Sumathi with effect from 31.3.1998. Appointment of the petitioner was therefore not approved by the A.E.O. Aggrieved by the order Manager took up the matter before the Deputy Director of Education, Trivandrum contending that R.6B(2) of Chapter XXIII K.E.R. restricts the creation of new posts but does not bar for the continuance of the post of specialist teachers already in existence. The Department took up the stand that on retirement of Sumathi on 31.3.1998 the post ceased to exist. According to the department, the effective strength of SHUPS Chullimannoor during 1998-99 was 381 in UP Section and therefore as per R.6B(2) of Chapter XXIII KER the school is not eligible for any specialist post. The Deputy Director accepted the stand of the Department and rejected the claim of the Manager.

5. Manager aggrieved by the said order filed a revision petition before the Joint Director. Directorate of Public Instruction, Thiruvananthapuram. The same was rejected by Joint Director vide order dt. 4.8.1999 holding that on retirement of the teacher the post ceased to exist. Aggrieved by those orders this Writ Petition was preferred by the petitioner. Learned Single Judge did not find any reason to interfere with the orders passed by the educational authorities, against which this appeal has preferred. We heard counsel for petitioners Sri. C.P. Sughakra Prasad as well as Sri C.K. Pavithran, learned Government Pleader.

6. Counsel for the petitioner Sri. Sudhakara Prasad submitted that learned Single Judge has not properly understood the scope of proviso to R.6B(1). According to the counsel going by the proviso to R.68 the post of specialist teacher which was sanctioned prior to 1969-70 would continue to exist even after the incumbent

retired or vacated the office. Counsel placed reliance on the decision of the Apex Court in Civil Appeal No. 1040/95 as well as the Bench decision of this Court in Govinda Pillai v. State of Kerala 1999 (2) KLT 652. Reliance was also placed on the Bench decision of this Court in Krishnankutty v. Commissioner & Secretary to Government 1998 (1) KLT 913. Counsel submitted, interpretation given by the Apex Court as well as this Court in Govinda Pillai's case in respect of proviso to R.2(3) of Chapter XXIII KER would equally applicable in the case of R.6B as well. Counsel submitted, Apex Court found that the interpretation given by this Court in Krishnankutty's case in respect of rule 6B is *pari materia* to R.2(3) as well.

7. Learned Government Pleader on the other hand, submitted that the Apex Court was not dealing with the interpretation of R.6B. Learned Government Pleader submitted the observation of the Supreme Court that the interpretation given by the Division Bench of this Court in Krishnankutty's case to R.6B was very much in *pari materia* to R.2(3) is only an observation and not a law declared. Counsel submitted Supreme Court had no occasion to consider the scope of R.6B since the same was not an issue raised in the case. Learned Government Pleader submitted there is material difference with regard to scope of those two provisions. Learned Government Pleader submitted the interpretation given in Krishnankutty's case is the true interpretation as far as R.6B is concerned. Special Leave to Appeal (Civil) Nos. 10999 and 12073 of 1998 filed against Krishnankutty's case was dismissed by the Apex Court on 18.11.1988.

8. In order to resolve the controversy it is necessary to examine the scope of both the provisos to R. 2(3) and 6B(1) as well as the interpretation given by the Apex Court as well as this Court in Krishnankutty's case and Govinda Pillai's case. Chapter XXIII of the Kerala Education Rules deals Fixation of Strength of Teachers in Department and Aided Schools. In this case we are concerned primarily with R.6B(1) and its proviso. In order to understand the true meaning scope of the provision we have to examine the scope of R.2(3) of Chapter XXIII and the interpretation given to the Rule by the Apex Court and the Division Bench of this Court. We may extract R.2(3) and its proviso for easy reference.

"2(3) Notwithstanding anything contained in the above rules, no post of Specialist Teacher shall be created in any Lower Primary School or Lower Primary Sections of Upper Primary or High Schools:

Provided that post already sanctioned against which specialist teacher are appointed and approved may continue as such".

R.2(3) placed on embargo in creating post of specialist teacher in a Lower Primary School or Lower Primary Sections of Upper Primary or High Schools. However, the proviso says that post already sanctioned against which specialist teachers are appointed and approved may continue as such. We need not examine the scope of the proviso to R.2(3) in detail since the same was already considered by the Apex Court as well as the Bench of this Court in

Krishnankutty's case as well as Govinda Pillai's case.

9. We may extract the interpretation given by this Court in Krishnankutty's case as follows:

"R.2(1) provides the principles for the fixation of the number of specialist teachers with reference to the strength of pupils and subject to the availability of funds. The rule does not compel the appointment of specialist teachers in all cases. R.2(3) prohibits the creation of the post of specialist teacher but protects continuance of "posts already sanctioned against which specialist teachers are appointed and approved."

Apex Court in Civil Appeal 10409 of 1995 also considered the scope of above mentioned rules and held as follows:

"On a plain reading of R.2(3) it will be noticed that it starts with non-obstante clause and proceeds to say that no post of specialist teacher shall be created. The bar is, therefore, against "creation" of a post and not "filling up" of an existing post. The proviso further proceeds to clarify that the "posts already sanctioned against which specialist teachers are appointed and approved" may continue as such. That would mean that even posts already sanctioned but not filled would not continue. It, thus, determined the total number of posts which were to continue and set out two conditions, namely, (i) that it must be a post already sanctioned and (ii) at the relevant point of time it should be occupied by a specialist teacher. If these two conditions are satisfied the embargo against creation of post in R.2(3) would not apply to those number of posts already sanctioned and occupied. Thus, the strength of posts to continue to exist was determined on the basis of the two requirements being satisfied."

The Apex Court further held as follows:

"The next question is whether such a post in existence at the relevant point of time ceases to exist on the incumbent occupying it vacating office. It must be remembered that the embargo does not extend to filling up of existing sanctioned posts. The embargo is against creation of a post with the proviso making an exception in regard to already sanctioned and occupied posts. Once the two conditions were at the relevant point of time satisfied the duration for which the post was sanctioned would continue even if the incumbent vacates office before the date on which was sanctioned post expires. The answer would depend on whether there are any Government orders to the effect that once an incumbent vacates the office the post shall cease to exist or any order of like nature. That is a matter which the High Court would be required to consider which has not been considered and materials is not placed record."

The above mentioned decision of the Apex Court was later considered by a Bench of this Court in Govinda Pillai's case and held as follows:

It cannot therefore be said that Ext. P12 order can nor be relied upon to contend that the post no more survives. It is also clear that Ext. P12 order was passed on

the basis of the interpretation placed by this Court on the scope of the proviso to R.2(3) of Chapter XXIII of the Kerala Education Rules which interpretation has not been accepted by the Supreme Court. We are of the view that since no subsequent order abolishing the posts that were saved by the proviso to R.2(3) of Chapter XXIII of the Kerala Education Rules as interpreted by the Supreme Court in brought to our notice, it has necessarily be held that the petitioners appellants are entitled to relief in the Original Petition. But there is merit in the submission, that the existence or otherwise of the post for a particular academic year will depend upon the staff fixation order in terms of the Kerala Education Rules and will also be subject to R.2(2) of Chapter XXIII of the Kerala Education Rules. Hence the only clarification needed is to make it clear that the continuation of the post occupied by petitioner No.2 appellant No.2 will be subject to the conditions laid down in R.2(2) of Chap. XXIII of the Kerala Education Rules and will depend upon the staff fixation orders for the respective academic years.

While disposing of the matter the Bench held in view of the clear pronouncement by the Supreme Court in Civil Appeal No. 10409 of 1995, the decision of the Division Bench in Mary Thomas v. State of Kerala 1991 (2) KLT 129 relied on by the learned Government Pleader cannot be considered any longer to be gold law.

10. Question to be considered in this case is whether the interpretation placed by the Apex Court and also the Division Bench decision of this Court in Govinda Pillai's case is the interpretation that is to be given to R.6B of Chapter XXIII of the KER. We may examine the scope of said provision which is extracted below for easy reference.

"6B.(1) Notwithstanding anything contained in any other rules in this Chapter no posts of specialist teacher of craft teacher shall be created in any Upper Primary School or Upper Primary Sections of High Schools for a period of 6 years from the school year 1969-70:

Provided that the posts sanctioned before 1969-70 against which specialist teachers and craft teachers are appointed and approved and such teachers who are qualified according to the rules then in force may however continue as such.

(2) Notwithstanding anything contained in any other rules in this Chapter, no post of Specialist Teacher or Craft Teacher shall be created in any Upper Primary School or Upper Primary Section of High School except as specified herein:

(a) One post of Specialist teacher namely Music Teacher or Physical Education Teacher or Drawing Teacher or Sewing Teacher as decided by the District Educational Officer concerned during the staff fixation in the case of departmental schools and as required by the manager in the case of aided schools will be sanctioned in each Upper Primary School or Upper Primary Section of a High School having an effective strength of 500 pupils and above in the complete Upper Primary Sections on the 6th working day of each academic year.

(b) No posts of Specialist teacher shall be sanctioned teacher shall be sanctioned in any category under clause (a) if a Specialist teacher is already working in the Upper Primary School or Upper Primary Section of the High School.

(c) A post of Sewing Teacher shall be sanctioned only subject of the following conditions also;

(i) that there are not less than 200 girl pupils in the complete Upper Primary Section and

(ii) that there is no post of Craft Teacher under Needle work in the Upper Primary School or Upper Primary Section of High Schools."

R.6B clearly stipulates that notwithstanding anything contained in any other rules in that Chapter no posts of specialist teacher or craft teacher shall be created in any Upper Primary School or Upper Primary Sections of High Schools for a period of 6 years from the school year 1969-70. The proviso says that the posts sanctioned before 1969-70 against which specialist teachers and craft teacher are appointed and approved and such teachers who are qualified according to the rules then in force may however continue as such. Underlined portion of the proviso needs emphasis.

11. We are of the view there is material difference between the proviso to R.6B as well as to R.2(3). As held by the Apex Court R.2(3) says no posts for specialist teacher shall be created. The bar is therefore against creation of post and no filling up of existing post. The proviso further proceeds to clarify that the post already sanctioned against which specialist teachers are appointed and approved may continue as such. That would mean that even posts already sanctioned but not filled would not continue. While dealing with R.2(3) the Apex Court held that two conditions are to be satisfied, (i) that it must be a post already sanctioned and (ii) at the relevant point of time it should be occupied by a specialist teacher. If these two condition are satisfied the embargo against creation of post in R.2(3) would not apply to those number of posts already sanctioned and occupied. Further on the question whether such a post in existence at the relevant point of time ceases to exist on the incumbent occupying it vacating office the court held that the embargo is against creation of a post with the proviso making an exception in regard to already sanctioned and occupied posts. Therefore, the emphasis made by the Apex Court on R.2(3) proviso is that the post already sanctioned in which teacher are appointed and approved may continue as such. In other word, the post would continue as such. Therefore, even if the incumbent retires or vacates the office as held by the Apex Court post would continue on the basis of the proviso to R.2(3).

12. We are of the view the position is different with regard to the proviso to R.6B is concerned. The proviso postulates only continuance of a teacher and not continuance of the post. If a teacher is appointed to a post which was sanctioned prior to 6.9.1970 and that appointment was approved such teacher who have qualified according to the rules then in force may continue as such. In other

words, there is no continuance of post as such unlike the proviso to R.2(3). This is the essential difference between the proviso to R.2(3) as well as R.6B. In fact this was the interpretation given by a learned Judge of this Court in *Saroja v. A.E.O. Pattambi* ILR 1987 Kerala 10. Learned Judge held that the conjoint effect of these provision seems to be that a post of Specialist Teacher sanctioned prior to 1969-70 and the incumbent in that post may continue till that incumbent validity hold that post and not thereafter. This interpretation given by the learned Judge was confirmed by the Judge Bench in *Krishnankutty's* case. While so, the Bench held as follows:

"R.6B beginning with the usual non-obstante clause "Notwithstanding anything contained in any other rules in this Chapter". R.69(1) states that no post of specialist teacher shall be created in any Upper Primary Schools or Upper Primary Sections of High Schools for a period of 6 years from the school year 1969-70. But under the proviso teacher who were qualified and who were holding sanctioned posts before 1969-70 were allowed to continue as such. The short question, therefore, is whether the proviso under R.6B gives protection to the post sanctioned before 1969-70 or to teacher who were appointed to those posts. We do not think that there is any conflict between R.2(3) and R.6B. A harmonious construction will give life and meaning to both the provisions. Even if there is any conflict between the two provisions, R.6B will have to prevail in view of the non-obstante clause. The protection under R.2(3) is only to continue a sanctioned post when there is a teacher appointed and approved for the post. The post does not continue when the teacher leaves the post. Similarly under the proviso to R.6B, the protection is to the teachers who were holding the posts of specialist teacher sanctioned before 1969-70 and not to the posts which they were occupying. Our learned brother Justice Sivaraman Nair in *Saroja v. A.E.O. Pattambi* ILR 1987 Ker. 10 has, in construing this proviso, succinctly held thus:-

"The conjoint effect of these provision seems to be that a post of Specialist Teacher sanctioned prior to 1969-70 and the incumbent in that post may continue till that incumbent validity holds that post and not thereafter.

We are in entire agreement with this view expressed by the learned Judge. In the present case, therefore, as the 5th respondent was not a teacher who was holding a post sanctioned before 1969-70 but was sought to be appointed for the first time in 1986, the proviso can have no application.

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There is no case that condition prescribed under R.6B(2) were satisfied in this case. Thus no needle teacher could be appointed either under R.2(3) or under R.6B(2) or even under the proviso to R.6B(1). R.6B applies to the posts of specialist teachers for a period of six years from 1969-70. The proviso also can apply only to those posts and for those periods. The Manager's claim is for appointing a teacher in 1986 for a period not covered by R.6B."

We have indicated that the above mentioned decision in *Krishnankutty's* case

was later taken up before the Apex Court and the Court dismissed Special Leave to Appeal (Civil) Nos. 10999 & 12073 of 1988.

13. We have indicated that proviso to R.6B postulates continuance of teacher and the moment the teacher vacates office the post ceases to exist. Unlike, proviso to R.2(3) which says that even if a teacher vacates the office post would continue. Emphasis is on the post and not the teacher. However, in proviso to R.6B emphasis is on the teacher and not the post. What is allowed to continue by the proviso is the continuance of the teacher. We may also notice rule 6B(2) says that notwithstanding anything contained in any other rules in that chapter no post of specialist teacher or craft teacher shall be created in any Upper Primary School or Upper Primary Section of High School except as specified therein. R.6B(2) says that one post of specialist teacher namely Music Teacher or Physical Education Teacher or Drawing Teacher or Sewing Teacher as decided by the District Educational Officer concerned during staff fixation in the case of departmental schools and as required by the manager in the case of aided schools will be sanctioned in each Upper Primary School or Upper Primary Section of a High School having an effective strength of 500 pupils and above in the complete Upper Primary Sections on the 6th working day of each academic year. Therefore on vacating the office a teacher who was occupying the post which was created prior to the year 1969-70 would cease to exist. A post of specialist teacher would be created only in accordance with R.6B(2)(a), i.e., only if the effective strength of the pupil is more than 500. In the instance case, admittedly, pupils strength is only 381 and therefore no post of specialist teacher would be created after retirement of Sumathi. We are of the view since Sumathi retired in 1998 the post of specialist teacher which was created prior to 6.9.1970 ceased to exist. Consequently, Manager was not justified in appointing the petitioner. The departmental authorities are right in their stand that the appointment effected cannot be approved.

14. It is true that observation of the Apex Court reads as follows:

"The decision on which reliance has been placed turned on the interpretation of R.6B which, if we may say so, was very much in pari materia to R.2(3). Therefore, the distinction sought to be drawn by the learned counsel for the appellants in regard to the applicability of the judgment relied on by the High Court may not stand. But the question is whether on a true interpretation of R.2(3) the High Court was right in the view it took."

The Apex Court was essentially considering the interpretation of R.2(3) in C.A. 10409/1995 and not interpretation of R.6B. Since the scope of proviso to R.6B is directly in issue in this case we have examined the same at length. We are of the view that the above quoted observation of the Supreme Court is not a law declared under Art. 141 of the Constitution of India.

15. Supreme Court under Art. 141 is enjoined to declare law. As held by the Supreme Court in *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress* and

Others, , the expression "declared" is wider than the words "found" or "made". To declare is to announce opinion. Indeed latter involves a process, while the former expresses result, Interpretation, ascertainment and evolution are part of process, while that interpreted, ascertained or evolved is declared as law. Law declared by the Supreme court is a law of the land. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as it contemplated by Art. 141 of the Constitution of India. In *State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another*, , the Supreme Court held:

"Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limit is inimical to the growth of law. Law declared is not that can be culled out, but that which is stated as law to be accepted and applied. A conclusion without reference to relevant provisions of law is weaker than even casual observation."

16. In the above mentioned decision in a concurring judgment, Sahai, J. has dealt with in detail the scope of Art. 141 of the Constitution of India. The dispute centered round the levy of purchase tax on industrial alcohol. The High Court held that the State Legislature was competent to enact a law imposing purchase tax on it, in exercise of power under Entry 54 of List II. However, it struck down the levy as it would disturb price structure regulated by Central Government. It was held that control of alcohol industry having been taken over by the Parliament, for purpose of regulation and development the State stood denuded of its taxing power under Entry 54 of List II to the extent the field of price fixation was covered by the price control order issued by the Government. And the purchase price being component of price fixation, which squarely fell within the power of Central Government, the imposition of purchase tax amounted to intrusion into the forbidden area of price fixation by Central Government. Support for this was drawn from the two Constitution Bench decision in *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, , and *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, .

17. Supreme Court noted that the problem has arisen due to the conclusion in the case of *Synthetic and Chemicals*. Question that arose in that case was as to whether State Legislature could levy vend fee or excise duty on industrial alcohol. The Bench answered the question in the negative as industrial alcohol being unfit for human consumption, the State legislation was incompetent to levy and duty of excise either under Entry 51 or Entry 8 of List II of the Seventh Schedule. While doing so, it was not preceded by any discussion. No reason or rationale could be found in the order. This gave arise to an important question, if the conclusion is law declared under Art. 141 of the Constitution, or it is per incuriam and is liable to be ignored. Supreme Court explained the meaning of the

words "per incuriam" and dealt with the rule of sub-silentio. Supreme Court in the above mentioned decision held:

"incuriam" literally means "carelessness". In practice per incuriam appears to mean per ignoratium. English courts have developed this principles in relaxation of the rule of state decisis. The "quotable in law" is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding "authority. *Yound v. Bristol Aeroplane Co. Ltd.* (1994) 1 KB 718. Same has been accepted, approved and adopted by this Court while interpreting Art. 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

After examining various principles, the Supreme Court concluded:

"The Bench further was not appraised of earlier Constitution Bench decisions in *Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others*, , and *Ganga Sugar Corporation Ltd. and Others Vs. State of Uttar Pradesh and Others*, , which specifically dealt with the legislative competence of levying sales tax in respect of any industry which had been declared to be of public importance. Therefore the conclusion of law by the Constitution Bench that no sales or purchase tax could be levied on industrial alcohol with utmost respect fell in both the exceptions, namely, rule of subsilentio and being in per incuriam, to the binding authority of the precedents."

18. It is therefore well settled that what is the essence of a decision is its ratio and not every observation, nor what logically follows from various observation made in it. In this connection it is profitable to refer to the dictum laid down by Lord Halbury, L.C. in *Quinn v. Leathem* (1901) AC 495 :

".....there are two observation of a general character which I wish to make and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer may acknowledge that the law is not always logical at all."

The above dictum was quoted with approval by the Supreme Court in *M/s. Orient Paper and Industries Ltd. and another Vs. State of Orissa and others*, . As held by the Supreme Court any conclusion without any reference to the relevant provision of law is weaker than even casual observation. It is also held by the Supreme Court that any declaration made or conclusion arrived at without application of mind or preceded without any reason cannot be a declaration of law, or authority, as a binding precedent. In *State of Punjab Vs. Baldev Singh*, the Apex Court held that it is a well settled proposition of law that a decision is an authority for what it decides and not that everything said therein constitutes a

precedent. The courts are obliged to employ an intelligent technique in the use of precedents bearing in mind that a decision of the Court takes its colour from the question involved in the case in which it was rendered. The scope of the proviso to R.6B(1) was not an issue raised in Civil Appeal No. 10409/95 and therefore not a law declared under Art. 141 so as to have a binding precedent.

In the above mentioned reasons we confirms the judgment of the learned Single Judge and dismiss the appeal.