
(1959) 08 KL CK 0025
In the High Court Of Kerala
Case No : O.P. No. 753 of 1958

K.C. John and Another

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 27-08-1959

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1960 Ker 145 : (1960) 1 LLJ 73

Hon'ble Judges : S. Velu Pillai, J

Bench : Single Bench

Advocate : Govt. Pleader, K.K. Mathew and George Vadakkal, for the Appellant;
D. Narayanan Potti and N.K. Varkey, for the Respondent

Final Decision : Dismissed

Judgement

S. Velu Pillai, J.—This is a petition for a writ of certiorari, or other appropriate direction or order under Article 226 of the Constitution quashing Ext. P-5, a memorandum, said to have been passed by the second respondent, the Director of Upper and Lower Primary Schools, Trivandrum, calling upon the first petitioner who is the manager of an Upper Primary School concluded under the Private Secondary School Scheme or the P. S. S. Scheme to relieve the second petitioner who had been appointed by him as the headmaster of the school, and to appoint the fourth respondent in his place. The Director of Public Instruction was afterwards impleaded as the fifth respondent, respondents 1 and 3 being respectively the State of Kerala and the Assistant Educational Officer, Kottayam West.

The office of the headmaster in the school fell vacant at the commencement of the midsummer recess in the year 1958, on the 29th March. After the school reopened the first petitioner appointed the second petitioner a "trained graduate, meaning a graduate who has passed the B. T. Examination, as headmaster on 7-7-1958, apparently on the basis of a Government Order dated 10-6-1958, Ext. P, which prescribed that from the commencement of the academic year 1958-59,

i.e., from about June, 1958, only "trained graduates" could be so appointed.

The fourth respondent had passed the M. A. degree examination and also had experience in training as a teacher, or had passed the T.T.C., as it is called, out is not a "trained graduate"; he had been working as a teacher and his preferential claim for appointment, strictly promotion, as headmaster was recognised by Ext. P-5 on the strength of a Government Order. Ext. P-4, dated 10-7-1957, which was declared to be in force at the material time.

The petitioners' contention is that Ext. P-4 does not prescribe the qualification for appointment as headmaster and has nothing to do with it. The learned Government Pleader who appeared for respondents 1 to 3 and 5, and the learned counsel who appeared for the fourth respondent, did not support Ext. P-5 on the ground on which it was based by the department, but attempted to maintain it on other grounds. In my opinion, it is not necessary to deal with the question raised, as this petition must fail on a preliminary ground.

3. The learned counsel for the fourth respondent has taken the objection, that Ext. P-5 is but an executive or administrative order, and is not therefore amenable to judicial review. It was not disputed, that no certiorari can issue to quash an administrative order; but the learned counsel for the petitioners contended that it is quasi-judicial in nature, and that in any event, a direction or order under Article 226, could issue, in respect of an administrative order.

4. The tests to distinguish quasi-judicial from administrative orders have been formulated by the Supreme Court in *Province of Bombay Vs. Kusaldas S. Advani and Others*, and *Radeshyam Khare and Another Vs. The State of Madhya Pradesh and Others*. They are founded upon a rule evolved by *Atkin L. J.*, as he then was in *Rex v. Electricity Commissioners (1924) 1 KB 171*, which, as stated by His Lordship *S.K. Das, G. J.* in *Radeshyam Khare and Another Vs. The State of Madhya Pradesh and Others*, "now holds the field". The rule has been restated in the same language, but with an analysis, by *Slesser, L. J.* in *Rex v. London County Council (1931) 2 KB 215* in the following terms :

"*Atkin, L. J.* (as he then was) in (1924) 1 KB 171 lays down four conditions, under which a rule for a certiorari may issue. He says "wherever any body of persons" (first) "having legal authority (secondly) "to determine question affecting the rights of subjects and" (thirdly) "having the duty to act judicially" (fourthly) "act in excess of their legal authority".....the sub-divisions are my ownthey are subject to the controlling jurisdiction of the King's Bench Division exercised in those writs."

The learned counsel for the petitioners contended that Ext. P-5 does affect the rights of the petitioners; but this is not material. As observed by *S. R. Das, J.* as he then was in *In re Banwarilal Roy 48 Cal WN 766* "the first, second and fourth conditions in the above analysis by *Slesser, L. J.* may equally apply to a purely administrative or executive act, as distinguished from a judicial or a quasi-judicial act". Even an administrative act to be valid must be by competent

authority; the decision of the executive, in most cases, may affect the rights of someone or other, and acting in excess of legal authority may vitiate it. The real test then, as held by the Supreme Court in the two cases, is the duty of the authority to act judicially, and must distinguish the two categories.

5. In *Rex v. Manchester Legal Aid Committee* (1952) 1 All ER 480, Parker J. said ".....the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively". Cases which have dealt with this concept are more illustrative than definitive, and have evolved formulae, by no means exhaustive to test how it works in individual cases. A few of them, such as the existence of a *lis inter partes* or of a proposition and an opposition, or the need to take evidence and hear parties, and the need to consider proposals, objections and evidence on a matter depending on questions of policy or expediency, have been classified by His Lordship S.K. Das, J. in *Radeshyam Khare and Another Vs. The State of Madhya Pradesh and Others*, ; these may be taken to be some of the distinguishing features of a judicial or quasi-judicial proceeding.

I am of the view, that none of the tests adverted to above by me can furnish any assistance in deciding, whether in passing Ext. P-5, a duty was cast on the department to act judicially. The department might well have acted *suo motu* in taking the view that the 4th respondent had a preferential claim, or might have been moved by him to consider his claim. In either case, there was no *lis* in the true sense; nor was my attention invited to any (specific provision or rule, which, either expressly or by necessary implication, made it obligatory on the department to initiate, and to conform, to what, at least simulated judicial procedure though was not quite equivalent to it. On the other hand, the present case seems to me to fall squarely *Tinder class* (v) of the classification which was made by S.K. Das, J., and which was stated in greater detail by Parker, J., in the case cited above as follows :

"If.....an administrative body in arriving at its decision, at no stage has before it any form of *lis* and throughout has to consider the question from the point of view of policy and expediency, it cannot be said, that it is under a duty at any stage to act judicially".

On the above considerations, the present seems to-me to- be an obvious case, of nothing but an executive or administrative order.

6. It may also be pointed out at this stage, that this Court has held in *Clery George v. State of Travancore-Cochin*, in Original Petition No. 162 of 1956, reported in 1957 KLT 4, that Rules under the P. S. S. Scheme are administrative in character, a violation of which, is not justiciable under Article 226. A similar view was taken of the provisions in the Education Code and orders passed thereunder from time to time by Government, in *Govindan Potti v. State of Travancore-Cochin*. 1958 KLT 124, and *Dasins v. State* 1956 KLT 238 : (AIR 1957 Trav Co 214). It is unnecessary to refer to the line of cases, also of this court and

of the Travancore-Cochin High Court, which have consistently held, that orders and rules relating to service conditions, are purely administrative.

7. It was then contended that under Article 226 the court can issue, other appropriate direction or order in relation to administrative orders. If_ the case of Radeshyam Khare and Another Vs. The State of Madhya Pradesh and Others, the learned Chief Justice had observed in passing, that to say that the action taken by Government u/s 53 (A) of the C. P. and Berar Municipalities Act, Act II of 1922, which was impugned in that case, was administrative, was not to say that the State Government has not to observe the ordinary rules of fair play". Earlier the same learned Judge, sitting as a judge of the Calcutta High Court has expressed the view, in 48 Cal WN 766 that even an administrative act when committed in excess of legal authority would be bad, as a judicial or quasi-judicial act would be.

My attention was invited to Rameshwar Prasad Kedarnath Vs. The District Magistrate and Others, in which, an administrative order was quashed under Article 226, on the footing, as Mootham C. I. put it that it constituted an infringement of a fundamental right. It was also held in Dr. J.R. Bhatia Vs. Smt. Victoria Rani Sahiba and Others, , that an administrative order can be quashed, when it is plainly without jurisdiction, or is arbitrary, or mala fide, or is: based on considerations which are outside the ambit of the relevant statutory provision; the finding there was that the order of eviction passed, was outside the scope of Section 3 of the U. P. Temporary Control of Rent and" Eviction Act III of 1947.

It is needless to elaborate the point so far as it pertains to the present case; as I view it, the argument of the learned counsel for the petitioners amounts only to this, that in passing Ext. P-5, the department misapplied or misinterpreted the relevant Government Orders. This may be a patent error, but viewed as an administrative order. I hold, that Ext. P-5 is not subject to such defect or infirmity, as would warrant the exercise of the extraordinary jurisdiction under Article 226.

8. In the result, I dismiss this petition; no costs.