

(1981) 11 KL CK 0024

In the High Court Of Kerala

Case No : O.P. No's. 684 and 1913 of 1980

K.K. Prabhakaran and Another

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 09-11-1981

Acts Referred:

Constitution of India, 1950 — Article 14

Kerala Education Rules, 1959 — Rule 3, 44A

Kerala State and Subordinate Services Rules, 1958 — Rule 39

Citation : (1981) 11 KL CK 0024

Hon'ble Judges : K.K. Narendran, J

Bench : Single Bench

**Advocate : M.V. Bose, V. Vyasani Poti and N. Sugathan, for the Appellant;
Government Pleader for Respondents 1 to 3, S. Easwara Iyer and E. Subramoni
for 5th Respondent, for the Respondent**

Judgement

Narendran, J.—The Petitioner in O.P. No. 684 of 1980 is a High School Assistant who has got qualified service in schools under the S.N.D.P. Yogam Corporate Management from 10th June 1957. The S.N.D.P. High School, Adimali was taken over by the S.N.D.P. Yogam Corporate Management with effect from 4th February 1976. In 1973 the post of Headmaster of the S.N.D.P. High School, Adimali fell vacant. The 5th Respondent, who was working as a High School Assistant in another school, applied for the post. He was appointed on intermanagement transfer. The Petitioner's case is that he also applied for the post and that he was fully qualified for the post of Headmaster of a High School at that time. The 3rd Respondent-District Educational Officer, Idikki "provisionally approved" the appointment of the 5th Respondent as Headmaster. The 5th Respondent was working as a High School Assistant from 1962. He passed B.Ed. in 1965. He was test qualified at the time of the intermanagement transfer. The 3rd Respondent-District Educational Officer later cancelled the provisional approval of the appointment of the 5th Respondent. The 5th Respondent challenged that order in O.P. No. 190 of 1976. By an interim order this Court allowed the 5th Respondent

to continue in the service of the school though not as a Headmaster. The then Manager of the S.N.D.P. High School, Adimali filed an appeal against the cancellation order of the District Educational Officer before the 2nd Respondent-Director of Public Instruction. The 2nd Respondent-Director of Public Instruction allowed the 5th Respondent to continue as teacher-in-charge till he completed 12 years of service. Subsequently the Government cancelled that order. This was challenged by the 5th Respondent in O.P. No. 2620 of 1976. Both the Original Petitions were disposed of by this Court on 4th February 1977 with a direction to the Government to pass fresh orders. Before this, the school was taken over by the S.N.D.P. Yogam Corporate Management on 4th February 1976. In pursuance of the direction of this Court the Government passed an order on 30th June 1977 directing the approval of the 5th Respondent as under-qualified Headmaster with effect from 14th July 1975 and as a qualified Headmaster from the date when he completed 12 years of graduate service. The Petitioner challenged the above order before this Court in O.P. No. 3517 of 1977. This Court by Ext. P-1 judgment dated 23rd October 1978 set aside that order with a direction to the Government to pass fresh orders with notice to all interested parties. The 5th Respondent challenged Ext. P-1 judgment in a writ appeal. The writ appeal was dismissed. It was thereafter that the 1st Respondent-State passed Ext. P-2 order impugned in this Original Petition directing the approval of the appointment of the 5th Respondent as teacher-in-charge till he completed 12 years of graduate service and thereafter as Headmaster in relaxation of the rules in exercise of their powers under Rule 3, Chapter I of the Kerala Education Rules. The Petitioner challenge the above order Ext. P-2 in this Original Petition.

2. A counter-affidavit has been filed on behalf of the 1st Respondent-State. In the counter-affidavit it is stated: The intermanagement transfer of the 5th Respondent was allowed by the 3rd Respondent-District Educational Officer after obtaining a declaration from him to the effect that he would not raise any complaint in the event of the transfer and posting being found untenable and if he is ordered to be relieved. The transfer was provisionally approved at the risk of the teacher. The Petitioner has got service from 10th June 1957. The declaration submitted by the 5th Respondent cannot be said to be valid since there is no provision to approve the appointment of an aided school teacher after obtaining such a declaration. If the 5th Respondent is retained as an High School Assistant in the S.N.D.P. Yogam High School from 14th July 1975 another High School Assistant will have to be retrenched from service and that will cause undue hardship to that teacher. In this case, the Government exercised the powers vested in them under Rule 3, Chapter I, Kerala Education Rules. The Petitioner had no preferential claim over the 5th Respondent on 14th July 1975.

3. The 5th Respondent has also filed a counter-affidavit. Along with the counter-affidavit Exts. R-1 to R-4 were also produced. In the counter-affidavit it is stated: Ext. P-2 order is not at all liable to be quashed by this Court on any of the grounds raised by the Petitioner. Even today the Petitioner has not acquired the Account Test qualification. By Ext. R-1 order dated 3rd July 1975 the 3rd

Respondent-District Educational Officer accorded sanction for the 5th Respondent's appointment as Headmaster on a provisional basis and on 14th July 1975 the 5th Respondent joined duty in pursuance of Ext. R-1. The 5th Respondent's appointment was "rejected with effect from the date of joining the post" by the 3rd Respondent-District Educational Officer as per Ext. R-2 order dated 18th December 1975. O.P. Nos. 190 and 2620 of 1976 were disposed of by this Court by Ext. R-3 judgment dated 4th February 1977 and it was in pursuance of the directions in Ext. R-3 judgment that the 1st Respondent-State issued proceedings dated 30th June 1977 approving the appointment of the 5th Respondent as an under-qualified Headmaster in relaxation of the rules. That order was challenged by the petitioner in O.P. No. 3517 of 1977 and this Court by Ext. P-1 judgment set aside that order and directed the 1st Respondent to consider the matter afresh and pass orders. The 5th Respondent also submitted Ext. R-4 representation before the 1st Respondent. It was thereafter that the impugned order Ext. P-2 was passed by the 1st Respondent. On 4th February 1976 when the Adimali High School merged with the S.N.D.P. Yogam Corporate Management the Petitioner was not at all qualified for being considered as Headmaster of the school.

4. O.P. No. 1953 of 1980 has been filed by another High School Assistant in one of the schools under the S.N.D.P. Yogam Corporate Management. He has got qualified service as High School Assistant from 1961. He is also fully qualified for the post of Headmaster. The challenge in this Original Petition is also against the same order Ext. P-2 which is challenged in the other Original Petition. A counter-affidavit has been filed by the 1st Respondent-State. The 5th Respondent in O.P. No. 684 of 1980 who is the 3rd Respondent in this Original Petition has not filed any counter-affidavit in this case.

5. The learned Counsel for the Petitioners pointed out that at the time when the 1st Respondent passed Ext. P-2 order directing the approval of the 5th Respondent as Headmaster of the school, the school was one of the schools under the Corporate Management. It was further pointed out that at the time when the school was taken over by the Corporate Management the post of Headmaster of the school has to be considered as lying vacant as the same was not validly filled up by appointing a qualified hand. The learned Counsel contended that no question of relaxing the rules under Rule 3, Chapter I, Kerala Education Rules arises in the case of the 5th Respondent who got an intermanagement transfer at his risk. As the 5th Respondent was not qualified for the post of Headmaster the 5th Respondent could be only appointed as an High School Assistant. According to the learned Counsel, relaxation of the rules regarding qualification cannot be made if it results in the denial of claims of qualified teachers on the staff. The learned Government Pleader contended that at the time when the 5th Respondent was transferred to the Adimali High School as its Headmaster the Petitioners had no right to claim that post and hence they cannot complain against the relaxation of the rules under Rule 3, Chapter I, Kerala Education Rules to prevent the hardship caused to the 5th Respondent.

The learned Counsel for the 5th Respondent contended that even today the Petitioner in O.P. No. 684 of 1980 has not acquired the Account Test qualification and hence he is not entitled to claim the post of Headmaster of a High School. Hence, according to the learned Counsel, the above Petitioner is not entitled to challenge Ext. P-2 order of the 1st Respondent relaxing the qualifications in favour of the 5th Respondent. The learned Counsel also contended that in O.P. No. 684 of 1980 the exercise of the power under Rule 3, Chapter I, Kerala Education Rules, of the 1st Respondent-State is not challenged. It was also pointed out that O.P. No. 1953 of 1980 was filed more than 6 months after Ext. P-2 order and hence the same is to be dismissed as belated.

6. Rule 3, Chapter I of the Kerala Education Rules reads:

3. Where the Government are satisfied that the operation of any rule under these Rules causes undue hardship in any particular case, the Government may dispense with or relax the requirements of that rule to such extent and subject to such conditions as they may consider necessary for dealing with the case in a just and equitable manner.

In *Sreedharan Pillai v. State of Kerala* 1973 K.L.T.151 a Full Bench of this Court construing Rule 39 of the Kerala State and Subordinate Services Rules, 1958 has said:

Ordinarily, therefore, it is not expected that the power under Rule 39 should be resorted to merely for the purpose of getting round the provision contained in any of the general rules or special rules. 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. (Para 20)

In the above case, the Full Bench has said:

The possibility of the proposed order having an adverse effect on the rights of other employees is, however, a matter vitally relevant for determining whether the course of action proposed would be "just and equitable". It is mandatory on the part of the authority exercising the power under Rule 39 to apply its mind to this important aspect also before taking a final decision to invoke Rule 39 in each specific case, because it will not be "just or equitable" if for the purpose of relieving some genuine hardship that may exist in the case of an individual officer, undue prejudice or hardship is caused to others." (Para 25)

The Full Bench has further said:

In the counter-affidavit filed on behalf of the State Government it has been submitted that the impugned orders of exemption have been passed in the exercise of the power conferred by Rule 39 of the Kerala State and Subordinate Services Rules. We have already held that the said rule does not warrant the

passing of such general orders of exemption as has been done under Ext. P-3. We have also expressed our conclusion that it will not be a proper or valid exercise of the power under Rule 39 to exempt any particular person or persons from the operation of a rule merely on the ground that the application of the particular rule will cause some hardship or inconvenience to them. The reason given in Ext. P-4 for invoking the power under Rule 39 is that "a strict application of Rule 30 (b) will therefore be prejudicial to their interests". It is manifest that the grant of the exemption on the aforesaid ground is illegal and unsustainable. (Para 43)

In K.K. Moidu. State of Kerala 1973 K.L.J. 591 Eradi, J., (as he then was) had occasion to consider the validity of an order passed by the State in exercise of their powers under Rule 3, Chapter I of the Kerala Education Rules. The facts of the case are: The Petitioner and the 6th Respondent were working as part-time menials with approved appointments. Then an additional post of peon was sanctioned. The Manager appointed the 5th Respondent, a fresh hand and filled up that vacancy. The District Educational Officer declined approval to the appointment on the ground that the same was against Rule 43, Chapter XIV (B) of the Kerala Education Rules as the post of peon ought to have been filled up by the promotion of the senior part-time menial. An appeal from that order was dismissed by the Regional Deputy Director. The Manager took up the matter in revision before the Government. The Government in exercise of its powers under Rule 3, Chapter I, Kerala Education Rules relaxed the rules and directed the approval of the appointment of the 5th Respondent from 3rd August 1970, the date of his appointment. The order Ext. P-2 was passed by the Government on 6th September 1971. The direct effect of implementation of the Government order Ext. P-2 was that the 5th Respondent became entitled to be appointed in the additional post of peon sanctioned for the year 1970-71 and the Petitioner became liable to be thrown out of service since in the place of the two posts of part-time menials that originally existed in the school, only one post of full-time menial was available in 1971-72 and the 6th Respondent had to be absorbed in that post. The Manager of the school accordingly terminated the Petitioner's service in the school as per his proceedings evidenced by Ext. P-1, dated 18th October 1971. Setting aside Ext. P-2 order of the Government the learned Judge has held:

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. (Para 4)

Hereinafter in this judgment the Respondents will be referred to as they are in O.P. No. 684 of 1980. It was by Ext. R-1 proceedings dated 3rd July 1975 that the 3rd Respondent-District Educational Officer accorded the "provisional" sanction for intermanagement transfer of the 5th Respondent as Headmaster of the S.N.D.P. High School Adimali. First of all, how an intermanagement transfer can be ordered provisionally, only the District Educational Officer who passed the order, knows. Once an intermanagement transfer is ordered and the teacher is relieved from his parent school thereafter he cannot be sent back to that school even if the transfer order is cancelled. Then there cannot be anything like a provisional approval of appointment of an aided school teacher. The Kerala Education Rules do not provide for that and hence the Educational Officer cannot have the power. So, a provisional accord of sanction for an intermanagement transfer is as good as no sanction. Admittedly, the 5th Respondent was only an High School Assistant at the time of the transfer. His transfer to the S.N.D.P. High School, Adimali was as Headmaster. As per the proviso to Rule 13, Chapter XIVA, Kerala Education Rules transfer to a higher scale can only be if the person transferred is qualified for the post in that higher scale. In this case, the 5th Respondent was not qualified for the post in which he was transferred. So, for that reason also the transfer cannot be sustained. Ext.R-1 transfer order was passed on 3rd July 1975. At that time, the explanation defining "Graduate Service" added to Rule 44A, Chapter XIV (A) Kerala Education Rule by notification dated 30th May 1975 was already there. So, as per the provisions of the Kerala Education Rules as it stood on 3rd July 1975 when Ext. R-1 sanction for the transfer was given, the 5th Respondent was not at all qualified for appointment as Headmaster of a High School as he had not 12 years of graduate service. That must be the reason why as stated in para 2 of Ext. R-1 the 5th Respondent gave a declaration that he will not have any complaint if he was relieved in case the transfer was found irregular. So, this is a case where the 5th Respondent who was a High School Assistant took a deliberate risk in his anxiety to become the Headmaster of a High School.

7. The S.N.D.P. High School, Adimali, to which the 5th Respondent was transferred, was taken over by the S.N.D.P. Yogam Corporate Management on 4th February 1976. Before that, the 3rd Respondent by Ext.R-2 dated, 18th December 1975 "rejected" the 5th Respondent's appointment as Headmaster with effect from this date of joining the post. Though the G.O. dated 30th May 1975 by which the explanation was inserted in Rule 44A, Chapter XIV (A) of the Kerala Education Rules is given as the reason, this G.O. was there even when the provisional sanction was accorded to the 5th Respondent's transfer as per Ext. R-1 order dated 3rd July 1975. As it cannot be said that 5th Respondent was validly transferred and posted as Headmaster by Ext. R-1, legally the post of Headmaster of the S.N.D.P. High School, Adimali has to be considered as lying vacant on 4th February 1976 when the school merged with the S.N.D.P. Yogam Corporate Management. In that case, it goes without saying that the seniormost

High School Assistant qualified to be appointed as Headmaster as per the rules as they stood on 4th February 1976 was the rightful claimant for the post of Headmaster in the S.N.D.P. High School, Adimali. The 5th Respondent who was not qualified either at the time of his so called transfer or at the time when the school was taken over by the S.N.D.P. Yogam Corporate Management cannot have any claim to the post of Headmaster which was lying vacant.

8. Then the question is whether, in the above facts and circumstances, this is a fit case where the 1st Respondent State could relax the rules in the Kerala Education Rules and order that the 5th Respondent be appointed as Headmaster with effect from 14th July 1975 invoking its powers under Rule 3 in Chapter I. It has to be remembered that because of the relaxation made, the rights of the qualified High School Assistants on the staff of the schools under the S.N.D.P. Yogam Corporate Management to become the Headmaster of the S.N.D.P. High School, Adimali were lost. As the post was lying vacant on 4th February 1976 when the school was taken over, they could have legitimately claimed the same. They are deprived of this valid and valuable right by the relaxation made. What was the undue hardship caused to the 5th Respondent. The 5th Respondent was not qualified for the post of Headmaster as per the rules as they stood on 1st June 1975 the date on which he applied for the post. By no stretch of imagination it can be said that 5th Respondent was misled by Rule 44A, Chapter XIVA of the Kerala Education Rules as it stood on 1st June 1975 when he applied for the post. At least when he was asked to give the declaration mentioned in Ext.R-1 the 5th Respondent ought to have ascertained whether he was qualified as per the rules as they stood then. He obtained a transfer order by giving a declaration that he will not complain in case he was relieved if the transfer was found to be irregular in any way. So, this is a case where a teacher deliberately took a risk in his anxiety to become a Headmaster. It cannot be said that any injustice would have been caused to the 5th Respondent if he was not made the Headmaster in contravention of the rules. The post that will fall vacant when the seniormost qualified High School Assistant is promoted as Headmaster will be there and the 5th Respondent can be provided in that post. He will get his increments and all other monetary benefits he would have got in his parent school from which he came on transfer. This being the real state of affairs, it cannot be said that by leaving his parent school any undue hardship was caused to the 5th Respondent. The denial of some benefit, which one has no right to claim cannot create any hardship. Not only that, by the impugned order an unqualified teacher gets promotion as Headmaster while qualified teachers admittedly senior to him are denied that promotion. Rule 3, Chapter I is not meant to mete out such injustice. It cannot be used as a weapon for hostile discrimination against rightful claimants.

9. Before parting with this case, I have to point out another aspect of the matter. The whole trouble was created by the third Respondent-District Educational Officer who accorded "provisional sanction" for the 5th Respondent's transfer by Ext.R-1. As per Rule 44A, Chapter XIV (A), of the Kerala Education Rules as it

stood after the amendment by the G.O. dated, 30th May 1975 the 5th Respondent could not be appointed as the Headmaster of a High School. Even then the 3rd Respondent by Ext.R-1 order dated, 3rd July 1975 accorded sanction by taking a declaration from the 5th Respondent. The 3rd Respondent had no business to pass such an order. It cannot also be ruled out that the 3rd Respondent was not aware of the amendment to Rule 44(A) by the G. O. dated 30th May 1975. Otherwise, why should he take a declaration from the 5th Respondent. Why should he accord "provisional sanction" which is not contemplated by the rules. Ext.P-2 order passed by the 1st Respondent-State is not in any way better. Not only the reasoning is wrong, the order contains a number of misstatements of facts. In para 5 of Ext. P-2 it is stated that on the date of application the 5th Respondent was fully qualified for the post of Headmaster and the amendment to Rule 44A was subsequent to this. The first paper read in Ext. R-1 is the 5th Respondent's application dated, 1st June 1975 and as per the amendment by the G.O. dated, 30th May 1975 it became clear that the 5th Respondent was not qualified. The 6th reason given in para 7 of Ext.P-2 also cannot hold good because as already pointed out, the 5th Respondent can be accommodated in the post of High School Assistant that will fall vacant when the rightful claimant is promoted as Headmaster.

10. Hence, I set aside Ext. P-2 order. The senior-most High School Assistant on the staff of the schools under the Corporate Management will be the rightful claimant for the post of Headmaster of the S.N.D.P. High School, Adimali which was vacant on 4th February 1976. In case that teacher has any further qualification to be acquired, if he does not acquire the same within time allowed by the rules and if he does not get exemption as per the rules, the next senior teacher will have to be posted as Headmaster. The 5th Respondent has to be given the post of High School Assistant that falls vacant by the promotion.

11. The Original Petitions are disposed of as above. No costs.