

(2022) 07 KL CK 0126

In the High Court Of Kerala

Case No : Writ Petition (C) No. 17406 Of 2022

Manager, Kpm Higher Secondary School,

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 13-07-2022

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(a)
Kerala Education Act, 1958 — Section 10, 11, 12, 36
Right of Children to Free and Compulsory Education Act, 2009 — Section 9, 24, 25, 26
Kerala Education Rules, 1959 — Rule 15, 15(iii)
Kerala Education (Amendment) Rules, 2022 — Rule 2(2)(a)(i), 2(3), 2(4)(a), 2(4)(b)
(ii)(a), 2(7)(a)(i)

Citation : (2022) 07 KL CK 0126

Hon'ble Judges : Raja Vijayaraghavan V, J

Bench : Single Bench

Advocate : V.A.Muhammed, M.Sajjad, M.Chcrian, Vishnu Jayapalan, Manu S

Final Decision : Dismissed

Judgement

Raja Vijayaraghavan V, J

1. These writ petitions have been filed by Managers of a few Aided Schools and some aided school teachers challenging SRO No.375/2022 dated 18.4.22 as per which, the Government of Kerala, in the exercise of powers conferred by Section 36 of the Kerala Education Act, 1958 (Act 6 of 1959), framed Rules to amend the Kerala Education Rules, 1959 as Kerala Education (Amendment) Rules, 2022. The petitioners have mounted the challenge on the ground that the provisions are inconsistent with the Right of Children to Free and Compulsory Education Act, 2009 ("Act 35 of 2009") for the sake of brevity) and the Rules framed thereunder and also the various provisions of Act 6 of 1959, and the Rules framed thereunder.

2. The contentions raised by the petitioners in these writ petitions can be briefly summarized as under:

a) Chapter VI of the Kerala Education Rules, 1959 deals with admission, transfer, and removal of pupils. Rule 15 provides the circumstances under which pupils can be removed from the rolls. Rule 15(iii) in essence says that a pupil can be removed from the rolls if he has been absent without leave for 15 working days consecutively or has been continuously absent for 5 working days from the reopening date. After Rule 15(iii), a Note has been inserted as Rule 2(2)(a)(i) of the Amendment Rules, 2022 which reads as follows:

"Note:- The teacher in charge of a class in Standard IX and X shall report the details of such absentees to the Headmaster or Headmistress or Vice-Principal, as the case may be, so as to remove them from the rolls under these rules."

In addition, Rule 15A has been inserted after Rule 15, which reads as follows:

15A. The teacher in charge of a class in standard I to VIII shall report the details of pupils who has been absent without leave for fifteen working days consecutively or who has been continuously absent for five working days from the reopening day to the Headmaster or Headmistress or Vice-Principals, as the case may be. The Headmaster or Headmistress or Vice-Principal, as the case may be, shall take immediate follow-up actions in consultation with the local authority in terms of Section 9 of the Right of Children to Free and Compulsory Education Act, 2009 (Central Act 35 of 2009)."

According to the petitioners, the Headmaster/Vice-Principal is the custodian of the Attendance Register and in that view of the matter, there is no justification in asking the teacher to report the details of absentees to the Headmaster. It is also not mentioned how and the manner in which the report had to be submitted. It is further stated that in terms of Rule 9(e) of Act 35 of 2009, it is the duty and responsibility of the local authority to ensure and monitor admission, attendance and completion of elementary education by every child residing within its jurisdiction and in that view of the matter, fastening responsibility on the Headmaster would amount to infringement of the provisions of the Central Act.

b) Chapter VII of the KER, 1959 deals with Attendance, Holidays, and Vacation. Rule 6(1) provides for the maintenance of an Attendance Register in Form 6 for each division of every standard. The petitioners assert that a Note has been inserted as per Rule 2(3) of the Amendment Rules, which reads as follows:

"Note:- The teacher in charge of a class shall mark the attendance of the physically present pupils properly. If forged attendance is detected, the teacher in charge of that class shall be held personally responsible."

It is contended that imposing a personal responsibility on the teacher in charge of a class without notification in terms of Act 35 of 2009 and the Rules framed thereunder cannot be sustained.

c) Chapter XIVA of the KER, 1959 deals with Conditions of Service of Aided School teachers. Rule 1 provides that the Managers of private schools shall appoint only candidates who possess the prescribed qualification. As far as High

School classes are concerned, the appointment has to be made with due regard to the requirement of subjects as determined by the Director of Public Instructions with reference to the curricula of studies. Whenever a vacancy occurs, the Manager is required to follow the directions issued by the Government from time to time for reporting the vacancies to the Government for ascertaining the availability of qualified hands and for filling up of vacancies notified by the Government. In the last line above, by way of Rule 2(4)(a) of the Amendment Rules, 2022, the portion "for reporting the vacancies to the Government, for ascertaining the availability of qualified hand and for filling up vacancy notified by the Government" has been substituted with "for ascertaining the availability of qualified hands and for filling up vacancy". The petitioners contend that by judgment dated 17.12.2015 in W.P.(C) No.19008 of 2013, this Court had interfered with the earlier amendment brought out by the Government. By bringing out the new amendment as above, an attempt is being made to revalidate certain words of the rule which have already been interfered with by this Court.

d) Rule 8 of Chapter XIVA of the KER provides for the forwarding of the appointment order signed by the Manager and the teacher, to the Educational Officer for approval. Sub Rule (1) has been substituted as per Rule 2(4)(b)(i) of the Amendment Rules which reads as under:

"The appointment order signed by the Manager and the teacher along with other documents, as required by the Director, from time to time, shall be submitted by the Manager to the Educational Officer for approval through 'SAMANWAYA', the web portal provided by the Department of General Education for the purposes of approval of appointments and fixation of the staff strength in the schools, within fifteen days from the date of joining duty of the appointee in the manner prescribed by the Director."

According to the petitioners, the present practice of physically submitting the originally signed appointment order along with the documents has been done away with. Instead, the management has been directed to submit the documents through the 'SAMANWAYA' portal. This may create issues as in the event of a dispute, it would be next to impossible to adjudicate disputes with regard to signature. Access to the portal may be delayed or denied for various reasons, thereby preventing the statutory right of the Manager to submit the proposals in time. It is further stated that the upgradation of the software is not yet complete in respect of certain schools and in that view of the matter, the respondents ought to have provided for a provision to submit the proposal manually.

e) As per Rule 2(4)(b)(ii)(a) of the Amendment Rules 2022, Rule 8(2) of the KER stands amended to the extent that it has been insisted that the Manager is to submit the proposals for approval of appointments through 'SAMANWAYA'. According to the petitioners, the staff strength of the school depends upon the student strength available in terms of Act 35 of 2009, and whether teachers are appointed or not, the staff fixation order has to occur based on the pupil's

strength.

f) Chapter XXIII of the KER deals with the fixation of the strength of teachers in departmental and Aided Schools. Rule 2(7)(a)(i) of the Amendment Rules, 2022 says that the strength of teaching staff in each school shall be fixed and orders shall be issued by the Educational Officer subject to the availability of accommodation. According to the petitioner, the Government cannot bring about such a rule as it would be against the provisions of the Central Act as well as Ext.P4 judgment. This Court in Ext.P4 had held that clause (i) of Rule 12(1) of Chapter XXIII of the KER 1959, is arbitrary and illegal. This Court had also directed the Government to ensure that the provisions of Rule 12 of Chapter XXIII of the KER are implemented in its letter and spirit by starting the enumeration from June 2022 and also to make appointments so as to satisfy the requirements of the Rules as well as Act 39 of 2009.

g) The petitioners contend that as per Rule 2(7)(a) of the Amendment Rules, the effective date of the staff fixation is made as 15th of July of each year. It is contended that the commencement of the academic year is the reopening day in June. If the provisions as amended are implemented, it may lead to a situation wherein there would be a dearth of teachers as prescribed in the Central Act from June 1 to the 14th of July. Furthermore, for pupils in additional divisions, no teachers would be available till the 1st of October. It is also stated that as per the amendment brought out by Rule 2(7)(a), the number of divisions would be based on student strength in that standard in a school. The petitioners assert that without sanctioning an additional division, finalizing the number of students in each class based on the strength of pupils would offend the Central Act.

h) As per Rule 2(7)(a)(iii) of the Amendment Rules, after sub-rule (2), Rules 3 to 8 have been inserted.

(i) As per the Amended sub-rule (3) to Rule 12 of Chapter XXIII, an additional division or additional post shall take effect which has been sanctioned shall be the 1st of October of the year. According to the petitioner, such a stipulation would go against the RTE Act, 2009 as it would infringe the right of the students for having required number of teachers till October. It is also asserted that in the event of upgradation or downgradation of a language teacher post, it may lead to termination of service of such a teacher despite the fact that there is sufficient workload in the school.

(ii) As per the Amended sub-rule (4) to Rule 12 of Chapter XXIII, where additional divisions of additional posts are found necessary, the Educational Officer is required to visit the school and conduct a preliminary verification to ascertain the genuineness of the pupils' strength. It is also stated that on such verification if the requirement for additional division or additional post is found on valid grounds, the details shall be submitted to the Director through 'SAMANWAYA' before the 15th of July. The petitioner contends that the said provision cannot be sustained as the Educational Authorities cannot insist upon

sanction for the additional division after issuing staff fixation orders based on student strength. It is further stated that physical verification of students on the date of the visit of the Educational Officer ignoring those absentees, who were admitted on the basis of UID is illegal and would go against the provisions of the Central Act. According to the petitioners, the details of the students would be available to the local authority, and in view of the above, doubting the genuineness of the students without referring the issue to the local authority would clearly be illegal.

(iii) It is also stated that the amended sub-rule (5) to Rule 12 of Chapter XXIII provides for an affidavit to be submitted by the Director but no form is prescribed and therefore, the same is unworkable.

(iv) As per the Amended sub-rule (6) to Rule 12 of Chapter XXIII, the Government is required to pass orders regarding additional division by the 30th of September. This would go against 12(3) of the Rules which provides that the effective date of additional division would be the 1st of October. As there is no sufficient time gap between the order of the Government and the revision of the staff fixation order by the Educational Officer, the amendment brought out will only be unworkable.

(v) The Amended sub-rule (7) to Rule 12 of Chapter XXIII, provides for review by the Government on the application filed by the affected parties challenging the order of the Government. However, the order under Rule (6) would only be passed by the 30th of September each year. At the same time, there is a clear restriction on sanctioning additional divisions till the 1st of October. According to the petitioner, the amendment has been drafted in a casual manner without understanding how the implementation would pan out.

(vi) As per the Amended sub-rule (8) to Rule 12 of Chapter XXIII, if there is a fall in the pupil's strength on the rolls of a school till the 31st of January of the year, which is found sufficient to affect the number of divisions of posts sanctioned, the Headmaster or Headmistress or Vice-Principal is required to report the fact to the Educational Officer through 'SAMANWAYA' and if the Educational Officer, after verifying the same, concludes that it is required to reduce the class, division or post, he/she shall revise the staff fixation order within 20 days from the date of receipt of a report. It is contended that staff fixation orders are passed based on student strength as on the 6th working day and the same is reckoned for sanctioning divisions and posts in that particular school. The Rule as newly introduced insists on the reduction of class divisions when the students leave after the 6th working day. However, there is no corresponding increase in staff strength in a school based on the enhancement of student strength after the 6th working day. This, the petitioners contend, is arbitrary.

i) As per Rule 2 (7) (f) of Exhibit P1, Rule 17 was inserted as per which liability is fastened on the teacher in charge in the event bogus admission is detected on verification by the Educational Officer or Deputy Director, Education or Super

Check Cell Officer or Director or any other officer authenticated by the Government. According to the petitioner, additional division and additional posts are sanctioned only after verification by the Educational Officer, Super Check Cell Officer, Director, or such other authorized officer and on submitting an affidavit by the Director himself. According to the petitioner, there is, therefore, no justification in fixing liability upon the teacher in charge of the concerned class with no action against the Director, Super Check Cell Officer, and other officers concerned. The petitioners assert that the Government has introduced UID, after realizing that inspection by the super check cell is not fault-free. As per the amendment, the Super Check Cell officers can conduct an inspection and can thereafter term the absentees on the day of the visit as bogus without verifying their genuineness. This is plainly illegal, according to the petitioner.

3. It is on these assertions and contentions that these writ petitions were filed seeking a declaration that the Amendment Rules, 2022 is inconsistent with Act 39 of 2009 and the Rules framed thereunder and also the provisions of the Kerala Education Act and the Rules.

4. When these writ petitions came up for consideration, this Court after hearing the contentions advanced by the learned counsel appearing for the petitioners and the learned Additional Advocate General, as an interim measure had interdicted the respondents from enforcing or giving effect to Ext.P1 Rules.

5. In the counter affidavit filed by the 2nd respondent, it is stated that the Government, taking note of the contention of the petitioners that the commencement of the academic year being on the 1st of June, the provisions of the amendment, if given effect to, may lead to a situation of a dearth of teachers from the 1st of June to 14th of July, has come out with Ext.R1(a) order dated 08/06/2022. As per the said order, it has been ordered that daily wage teachers can be appointed from the beginning of the academic year in the Government schools and Aided schools till additional batches and posts are created. Responding to the contention of the petitioner that if the provisions are implemented, it would be difficult to provide the minimum number of working days/instructional hours in an academic year, it is stated that Ext.R1(a) would resolve the issue and there would not be any dearth of teachers as contended.

6. It is further stated that the contentions raised by the petitioners that in view of the insertion of Rule 15A in Chapter VI, the mere absence of a student on the date of the visit of the Educational Officers would result in the admission being regarded as bogus cannot be sustained as the amendment is brought in to extend support by the school authority to the local authority and thereby to implement the provisions of Act 39 of 2009 and the Rules. It is stated that the Amendment does not require the class teachers to remove the pupils from the rolls. It is the class teacher who is primarily responsible for marking the attendance of pupils who are physically present, and it is their duty to report to the Headmaster or Vice Principal the details of absentees. The admission and removal of pupils are still vested with the HM/Principal. The duty of the local

authority is to monitor admission and removal and this right has not been interfered with.

7. It is further stated that the amendment to Chapter XXIII was brought in only to prevent the appointment of teachers in created posts. It is stated that there is an enormous drain from the State exchequer due to the appointment of teachers in additional posts before sanctioning the post. In all Departments, including Aided Higher Secondary Schools and Colleges, posts are created and appointments are done thereafter. The Government has taken a decision to sanction additional divisions and posts only after thorough verification. According to the respondents, in view of Ext.R1(a) Government Order, there will not be any hindrance to providing education to pupils. The amendment was brought in with a good intention to curb malpractices and thereby to curb the drain from the State Exchequer. None of the provisions would infringe the provisions of Act 39 of 2009.

8. It is further stated that as per the Note inserted in Rule 15(iii) of Chapter VI of the KER, the teacher in charge of a class in Standard IX and X is required to report details of such absentees to the HM/Vice-Principal, as the case may be, so as to remove them from the rolls. As per the prevailing rules, Rule 6(1) of Chapter VII of the KER provides that every school shall maintain an Attendance Register in Form 6 for every division of every standard. Though the HM/Vice-Principal is the custodian of the Attendance Register, the teacher in charge of a class is the person who maintains the Register and marks the attendance of pupils physically present in the class, and as such, it is the primary responsibility of the class teacher to identify the absentees and to report the same to the HM. The teacher in charge of a class is the person who would be aware of the economic, social, and cultural background of each pupil in the class for mentoring them and to help the parents. The HM/Vice-Principal and the local authority is required to ensure that pupils are physically present in the classroom and avoid dropouts. This is what is contemplated under Section 24 of Act 39 of 2009. It is stated that Ext.P1 amendment to the KER is not inconsistent with Act 39 of 2009 or the Kerala Education Act and the Rules framed thereunder.

9. Sri. V.A.Muhammed, the learned counsel appearing for the petitioners in some of the writ petitions, reiterated the contentions raised in the writ petition filed by him. According to the learned counsel, if the Rules as amended are given effect, it may lead to a situation wherein the students are denied the required number of teaching hours and working days. The learned counsel would point out that though the Government has permitted the appointment of teachers on a daily wage basis from the reopening day by bringing out G.O.(MS) No.102/2022/G.Edn. dated 8.6.2022, the same may not resolve the issue as the said order would be inconsistent with Rule 12(3) in Chapter XXIII of the KER. The learned counsel points out that no appointment can be made even on a daily wage basis without a post. He would further urge that the said order will also come in the way of the Rights of the claimants under Rule 43, Rule 51A, Rule 51B, and also

the claims of protected teachers who have been included in the Teachers' Bank in terms of Rule 7 of Chapter XXI of the KER. To substantiate the said contention, the learned counsel would place reliance on the law laid down by this Court in *Ciji P. Jose v. State of Kerala and Ors* [2011(4) KLT 365] wherein the pre-eminence of Rule 51A claimants over protected hands was laid down by this Court.

10. The learned counsel would further submit that much importance has been granted to the surprise visit of the Educational officer for the grant of additional posts and if the provisions of the amendment are given effect to, students, who are absent on the date of the visit of the Educational Officer would be excluded for the purpose of finalizing the staff fixation order. Reliance is placed on the provisions of the RTE Act and it is submitted that the respondents cannot come to the conclusion that the admission of the student is bogus without referring the matter to the local authority.

11. Referring to the newly introduced Rule 12(8) in Chapter XXIII of the KER, it is submitted that there would be no finality for the staff fixation order till the 31st of January every year, and according to the learned counsel, those students who secured admission after the 6th working day would miss out on all the benefits which a child is entitled to in terms of the provisions of the RTE Act.

12. The learned counsel would also point out that by introducing Rule 17 in Chapter XXIII of the KER, a liability is fixed upon the Manager and teachers in charge of the school for making bogus admission. According to the learned counsel, the Manager has no control over the admission or removal of students, and not being a Government servant, no disciplinary action can be initiated against him. Reliance is also placed on the law laid down in *Kishore V.G. v. State of Kerala* [2019 (4) KLT 153] to bring home the point that the person authorized to admit, to remove or to issue a transfer certificate to a student being the Headmaster of the School, a teacher cannot be attributed with any role in the matter of bogus admissions recorded in the admission register.

13. The learned counsel would then point out that an amendment has been brought in Rule 12(1) in Chapter XXIII of the KER to the effect that fixation of staff would be subject to the availability of the accommodation. However, Sections 25 and 26 of Act 35 of 2009 provide for fixation of pupil-teacher ratio and the filling up of vacancies of teachers. A Division Bench of this Court in the judgment dated 16.3.2022 in W.P.(C) No. 15913/2021 had occasion to consider the conflict between two provisions and had disposed of the writ petition recording the submission of the learned Government Pleader that the rider under Rule 12(1) of Chapter XXIII of KER that fixation of the strength of teaching staff would be subject to the availability of accommodation had become redundant and inconsequential and directions were issued to the State Government to ensure that the provisions of Rule 12 satisfy the requirements of the Central Act.

14. Sri. K. Mohanakannan, the learned counsel appearing for the petitioner in W.P.(C) No. 17542/2022 adopted the contentions advanced by Sri. V.A.

Mohammed. The learned counsel would further point out that Rule 6 in Chapter VII is clearly unworkable. According to the learned counsel, a responsibility is cast on the teacher to mark the attendance of the pupils who are personally present and if forged attendance is detected, the teacher would be held personally responsible. The learned counsel would point out that a mentally retarded or a physically handicapped student cannot be personally present in class and they are given attendance while they are being taught at their residences by trained teachers from the BRC. By marking those students as bogus, gross injustice would be caused.

15. Sri. Asok M. Cheriyan, the learned Additional Advocate General, appeared for the State and it was urged that the contentions raised by the petitioners that the provisions of the Rules as amended are inconsistent with the Act 35 of 2009 or the parent Act is without appreciating the aspects in its proper perspective. It was urged by the Additional Advocate General that in the State of Kerala, the power of recruitment of teachers in aided schools is conferred on Managers of such schools under Section 11 of the Kerala Education Act, 1958. The salary and other benefits are however borne by the State Government under Section 9 of the Act. He would invite the attention of this Court to the observations made by the Apex Court in *State of Kerala v. Sneha Cheriyan* [2013 (1) KLT 775] and it is submitted that it is judicially recognized that the management, as well as the teachers, have, at times, misused the statutory provisions for furthering their interests, but at the expenses of the Government. Such practices have led to the creation of anticipatory vacancies and multiple claimants causing a drain on the state exchequer. The Government has, in the course of time, issued various orders to check such practices. It was also noticed that some of the provisions of the Rules conflict with that of the Central Act, namely Act 35 of 2009. The intention of the Government by bringing in the amendment is to ensure that the Kerala Education Act and the Rules framed thereunder do not conflict with the provisions of Act 35 of 2009 and at the same time, to protect the interest of the student, teachers, and other stakeholders. By relying on the experience gained by the working of the institutions, the Government wanted to ensure that a flawless procedure is achieved for confirming the genuineness of increased student strength while sanctioning the additional posts in schools. The Government wanted to cast the responsibility on each and every person who had a role in the institutional setup and streamline its functioning. The bringing of the amendment by the proceedings under challenge is only to attain the said objective.

16. The learned Additional Advocate General would further submit that the Kerala Education (Amendment) Rules, 2022 is promulgated in exercise of the rule-making powers of the Government of Kerala conferred by Section 36 of the Kerala Education Act, 1958. Relying on the law laid down in *Cellular Operators Assn. of India v. TRAI* [(2016) 7 SCC 703], it is submitted that there is a presumption in favor of constitutionality or validity of subordinate legislation and a burden is upon the petitioners to show that it is invalid. Furthermore, the

subordinate legislation can be challenged only on the grounds available for challenge against plenary legislation.

17. The learned Additional Advocate General would take pains to point out that the amendments were brought in to remove the repugnancies, which the Rules had with Act 35 of 2019. Rule 15 in Chapter VI of KER was amended by the 2022 Rules to prohibit the removal of pupils who are governed by the RTE Act from the rolls of the schools. As per the Amended Rules, a foolproof method has been put in place and the school authorities are prohibited from removing pupils aged between 6 and 14 years from the rolls of the school. If there are continuous absentees, the school authorities are required to refer the matter to the local authority so that the case can be dealt with as provided in Section 9 of the RTE Act. Insofar as pupils studying in Standard IX and X are concerned, the teacher of the class concerned is required to report the details of such absentees to the Headmaster/ Vice-Principal so as to remove them from the rolls.

18. It is further submitted that insofar as Rule 23A in Chapter VI is concerned, as per the existing provision the maximum strength of student strength in a Class division was 45 and excess admission up to 50 could be allowed. This was applicable to all classes from Standard I to X. As the said provision was not in tune with the provisions of the RTE Act, Rule 23A was inserted to the effect that the teacher-pupil ratio for Standard I to VIII shall be as specified in the Schedule to Act 35 of 2009.

19. The learned Additional Advocate General would further submit that the objections raised by the petitioners with regard to the submission of documents online through the 'SAMANWAYA' portal cannot be sustained under law. The amendments to Chapter XIVA were inserted to facilitate e-governance. A comprehensive web portal has been developed for the purpose of approval of appointments and fixation of the staff strength in the schools and this would streamline the process.

20. It is further submitted that Rule 3 to 8 in Chapter XXIII were inserted to curb the practice of creating additional divisions and posts with bogus admissions and forged attendance. It is submitted that it has come to the notice of the Government that Aided school Managers, with a view to get additional class divisions /additional vacancies of teachers, adopt the practice of recording names of students who are not actually admitted to the school in the admission register. Though a scientific method has been formulated by assigning UID Numbers to each of the students, the fact remains that it has not become possible to bring all the students in the State under UID. There are instances wherein, the Managers of the Aided Schools are themselves running certain unrecognized private schools and by manipulating/misusing the UID Numbers, sanctions are secured to appoint additional teachers. It is in order to curtail the said practice that Rules 3 to 8 were inserted to the effect that orders of staff fixation except in the case of additional divisions or additional posts shall take effect on the 15th of July every year. Insofar as additional divisions or additional posts are concerned, the same

shall be sanctioned only after thorough inspections conducted by Educational Authorities. This exercise can be completed only by the 31st of August. The Government after much deliberation has arrived at the 1st of October as the date on which additional divisions or posts would be sanctioned if the student strength of the school genuinely warrants sanctioning of the same.

21. It was argued that Sub Rule (8) has been incorporated to confer responsibility on the HM/Vice-Principal to report the reduction of student strength below the strength which led to the sanctioning of additional division or posts, to the concerned Educational Officer, who is required to take steps to revise the staff fixation order. Rule 17 in Chapter XXIII of the KER, provides for initiating appropriate action against the persons responsible for furnishing incorrect information for getting sanction of additional divisions or posts. Responsibility has also been fixed on the teacher in charge to ensure that attendance of bogus students is not marked and if in violation of the said provision, some act is done, the concerned teacher in charge is liable for action. These steps are to be taken to ensure that the state exchequer is not drained by unholy practices. It is further submitted that after notifying the Amendment Rules, the Government noticed that there may be genuine cases where the management may require additional divisions or posts to cater to the students and in the said circumstances, the Government has come out with G.O.(MS) No.102/2022/G.Edn. dated 8.6.2022 permitting the Managers of such schools to engage qualified teachers on daily wages till additional divisions or posts are sanctioned by the 1st of October. It is submitted that the contention of the petitioners that the engagement of such teachers would infringe the rights of statutory claimants under Rule 43, Rule 51A, 51B, and protected teachers cannot be sustained as the right of claimants would arise only on the occurrence of the vacancy. According to the learned Additional Advocate General, the amendments were brought in, in the public interest and to ensure that the rules are in tune with the provisions of the RTE Act.

22. I have carefully considered the submissions advanced and have gone through the entire materials. As the staff fixation order in Schools where there is no increase in students' strength is to be finalised on July 15th, this writ petition is taken up for final disposal with the consent of both sides.

23. Before considering the contentions advanced before this Court, it would be apposite to bear in mind the parameters that are to be borne in mind while exercising judicial review of subordinate legislation.

24. The Court considering the validity of subordinate legislation, will have to consider the nature, object, and scheme of the enabling Act, and also the area over which power has been delegated under the Act, and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific

provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity. (See *State of T.N. v. P. Krishnamurthy* (2006) 4 SCC 517)

25. In *Cellular Operators Assn. of India v. TRAI* [(2016) 7 SCC 703], the Apex Court, while reiterating the principles laid down in *Krishnamurthy*(supra) had observed thus in paragraph 34 of the judgment.

26. In *State of T.N. v. P. Krishnamurthy* (2006) 4 SCC 517], this Court after adverting to the relevant case law on the subject, laid down the parameters of judicial review of subordinate legislation generally thus:

"15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:

- (a) Lack of legislative competence to make the subordinate legislation.
- (b) Violation of fundamental rights guaranteed under the Constitution of India.
- (c) Violation of any provision of the Constitution of India.
- (d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
- (e) Repugnancy to the laws of the land, that is, any enactment.
- (f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

27. In *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, (1985) 1 SCC 641 it was held by the Apex Court that a challenge can be raised against a piece of subordinate legislation on the ground of unreasonableness and arbitrariness.

75. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock, L.J. in *Mixnam's Properties Ltd. v. Chertsey Urban District Council* [(1964) 1 QB 214] thus:

"The various special grounds on which subordinate legislation has sometimes

been said to be void ... can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus, the kind of unreasonableness which invalidates a bye-law is not the antonym of 'reasonableness' in the sense in which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires'...if the courts can declare subordinate legislation to be invalid for 'uncertainty' as distinct from unenforceable...this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain."

76. Prof. Alan Wharam in his article entitled "Judicial Control of Delegated Legislation: The Test of Reasonableness" in 36 *Modern Law Review* 611 at pp. 622-23 has summarised the present position in England as follows:

(i) It is possible that the courts might invalidate a statutory instrument on the grounds of unreasonableness or uncertainty, vagueness or arbitrariness; but the writer's view is that for all practical purposes such instruments must be read as forming part of the parent statute, subject only to the ultra vires test.

(ii) The courts are prepared to invalidate bye laws, or any other form of legislation, emanating from an elected, representative authority, on the grounds of unreasonableness, uncertainty or repugnance to the ordinary law: but they are reluctant to do so and will exercise their power only in clear cases.

(iii) The courts may be readier to invalidate bye-laws passed by commercial undertakings under statutory power, although cases reported during the present century suggest that the distinction between elected authorities and commercial undertakings, as explained in *Kruse v. Johnson* [(1898) 2 QB 91] might not now be applied so stringently.

(iv) As far as subordinate legislation of non-statutory origin is concerned, this is virtually obsolete, but it is clear from *In re French Protestant Hospital* [1951 Ch 567] that it would be subject to strict control. [See also H.W.R. Wade: *Administrative Law* (5th Edn.) pp. 747-748.]

77. In India arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. In India any enquiry into the vires of delegated legislation must be confined to the grounds on which plenary legislation may be questioned, to the ground that it is contrary to the statute under which it is made, to the ground that it is contrary to other statutory provisions or that it is so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution.

78. That subordinate legislation cannot be questioned on the ground of violation of principles of natural justice on which administrative action may be questioned has been held by this Court in *Tulsipur Sugar Co. Ltd. v. Notified Area*

Committee, Tulsipur [AIR 1980 SC 882], Rameshchandra Kachardas Porwal v. State of Maharashtra [(1981) 2 SCC 722] and in Bates v. Lord Hailsham of St. Marylebone [(1972) 1 WLR 1373)]. A distinction must be made between delegation of a legislative function in the case of which the question of reasonableness cannot be enquired into and the investment by statute to exercise particular discretionary powers. In the latter case the question may be considered on all grounds on which administrative action may be questioned, such as, non-application of mind, taking irrelevant matters into consideration, failure to take relevant matters into consideration, etc, etc. On the facts and circumstances of a case, a subordinate legislation may be struck down as arbitrary or contrary to statute if it fails to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution. This can only be done on the ground that it does not conform to the statutory or constitutional requirements or that it offends Article 14 or Article 19(1)(a) of the Constitution. It cannot, no doubt, be done merely on the ground that it is not reasonable or that it has not taken into account relevant circumstances which the Court considers relevant.

28. In the case on hand, the plea raised by the petitioners is that the amendment Rules, 2022 is inconsistent with the provisions of Act 35 of 2009 and also the parent Act, namely, the Kerala Education Act and the Rules framed thereunder. In that view of the matter, the plea raised can only fall under paragraph No.15(d) and (e) of the principles laid down by the Apex Court in Krishnamurthy (supra).

29. Before advertng to the contentions, it would be apposite to refer to the Explanatory Note to the impugned Rules, which reads as follows:

Explanatory Note:

(This does not form part of the notification but is intended to indicate its general purport)

Government have decided to process and issue orders on staff fixation in the schools and the approval of appointments in the aided schools through online web portal, "SAMANWAYA". It is necessary to take measures to curb the practice of creating additional divisions and posts with bogus admissions and forged attendance. Government have decided to sanction additional divisions and posts only after a thorough verification in the manner decided by the Government. It has been decided to sanction additional divisions and posts only with effect from 1st October of the year and to reduce the divisions and posts whenever already sanctioned staff strength is affected by the fall in the pupil strength on rolls without sufficient reason at any time during the academic year up to 31st January.

Besides, the Hon'ble High Court of Kerala, in its Judgment dated 17th December 2015, in W.P. (C) No. 19008/13, has set aside certain amendments made to the Kerala Education Rules, 1959 vide notification issued under GO. (P) No. 154/14/

G Edn. dated 11th August, 2014 and published as S.R.O. No. 485/2014.

Government has therefore, decided to amend the Kerala Education Rules, 1959 to give effect to the aforementioned changes.

The notification is intended to achieve the above objects.

30. After the filing of the writ petition, the Government has issued G.O.(MS) No.102/2022/G.Edn. dated 8.6.2022 whereby it has been ordered that teachers can be appointed on a daily wage basis from the beginning of the academic year in Government schools and Aided schools till additional batches and posts are created.

31. From the Amendment Rules issued by the Government in exercise of its powers under section 36 of the Kerala Education Act and the Explanatory Note, it is evident that the object is to take appropriate measures to curb the practice of creating additional divisions and posts with bogus admissions and forged attendance.

32. The main grievance of the petitioner is that by sanctioning additional divisions and posts only with effect from 1st October of the academic year, the students would be deprived of requisite teaching hours and working days as mandated in the schedule annexed to Act 35 of 2009. As stated earlier, after the filing of the writ petition, the Government has come up with Ext.R1(a) as per which permission has been granted to the management to appoint teachers on a daily wage basis. The grievance of the petitioners is somewhat redressed in view of the above turn of events. However, post-Ext.R1(a), the present grievance is that engagement of teachers on a daily wage basis till the sanctioning of additional divisions or additional posts would infringe the right of claimants under Rule 43 or Rule 51A of the KER.

33. Section 11 of the Kerala Education Act provides for appointment of teachers in Aided Schools. It states that subject to the rules and conditions laid down by the Government, teachers of Aided Schools shall be appointed by the Managers of such schools from among persons who possesses the qualifications prescribed under Section 10. In other words, appointments can be made by the Managers only subject to the rules and conditions laid down by the Government. Section 12 of the Act deals with conditions of service of Aided school teachers. The said Rule provides that the conditions of service of teachers in aided schools including conditions relating to pay, pension, provident fund, insurance, and age of retirement shall be such as may be prescribed by the Government. The Government by amending the Rule has taken a decision not to create posts and sanction divisions till the 1st of October. It needs to be immediately noticed at this juncture that in those cases where there is no increase in student strength, the staff fixation order will be finalized on July 15th itself as the posts that are to be sanctioned have arisen on account of retirement, promotion, death, resignation, etc.

34. As per the Schedule to the Right to Education Act, the maximum number of students who can be accommodated in Standard I to V is 30 and for Standard VI to VIII is 35. Thus, an increase of even one student in any of the classes would entail sanctioning of a class/division. This would mean that one teacher post will also have to be sanctioned. Experience has shown that at least some managements have indulged in creating additional posts by indulging in bogus admissions. It is with a view to curtail this unholy practice that amendment has been brought in, to the effect that additional posts/additional divisions can be sanctioned only after the 1st of October. The Rule has been amended taking note of the previous experience that for cross-checking the student strength, the Government requires time till the 1st of October. Chapter XXIII of the Kerala Education Rules deals with the fixation of the strength of teachers in Departmental and Aided schools. Rule 14 of Chapter XXIII says that notwithstanding anything contained in the Rules, if it is found necessary, the Government may, by issuing orders, extend any ban on the creation of posts, retrenchment of staff etc. affected by them in Government Schools to Aided Schools. In other words, nothing prevents the Government from taking a conscious decision not to fill up the vacancies till they are satisfied that the creation of additional posts/additional divisions is warranted based on increased student strength. By permitting the appointment of teachers on a daily wage basis by Ext.R1(a) order, any conflict that the rule may have with regard to the provisions of the Central Act in so far as it concerns the maintenance of requisite teaching hours and working days no longer subsists. Furthermore, this embargo of waiting till the 1st of October for finalization of staff fixation is applicable only to those schools where due to an increase in student strength, additional divisions or additional posts are to be sanctioned.

35. The contention advanced by the learned counsel that by appointing teachers on daily wage basis, the rights of the statutory claimants would be affected, has no basis. Statutory claimants will be entitled to claim appointments in the vacancy only after the post is sanctioned and the Government decides to fill up the posts. Until and unless the post is created, a statutory claimant under Rule 43 will not acquire any vested right for promotion or a statutory claimant under Rule 51A, for appointment. Furthermore, in the majority of schools where there is no increase in student strength, the staff fixation order can be finalized on July 15th itself since there will only be regular posts arising out of retirement, promotion, death, etc. to be sanctioned. In those posts, statutory claimants can be appointed.

36. The next grievance of the petitioners is that sanctioning of additional posts as per Rule 12(4) of Chapter XXIII of the KER is dependent on a surprise visit of the Educational Officer. If a particular student or a few students are absent on the date of visit, those students would be excluded even though they were admitted based on their UID numbers. As stated earlier, the amendment has been brought in to curb bogus admissions. I am inclined to agree with the learned Additional Advocate General that there would be a huge drain in the financial resources of

the Government if the practice of making bogus admissions to get additional divisions/posts are not curtailed. It is in order to curb such a menace that scientific methods have been introduced by the Government as per the amendment. Before the impugned amendment, student verification used to be carried out on the 6th working day and on the 15th of July, based on the verification conducted on the 6th working day, staff fixation order would be issued and regular as well as additional posts are sanctioned. After the amendment, on the 15th of July, based on the verification conducted on the 6th working day, the staff fixation order will be issued and regular posts arising out of retirement, promotion, death etc. would be sanctioned. However, insofar as additional posts are concerned, the same would be sanctioned only on the 1st of October, after confirmation of student strength and in terms of the procedure prescribed under the amended rules. The same exercise is to be followed in Aided as well as Government Schools. I am informed that there are a total number of 4696 Government Schools and 7214 Aided Schools in the State of Kerala. If for a flawless evaluation of student strength and for sanctioning of additional divisions/ posts time till October 1st is necessary, the same cannot be said to be arbitrary or unreasonable.

37. Now to the contention advanced by the learned counsel appearing for the petitioners that as per the amendment, the student would be considered as bogus solely for the reason that he/she was not available on the date of the visit of the Educational Officer/super check cell officer and without even referring to the matter to the local authority. A careful perusal of the Rules would reveal that the said assertion is meritless. Note to Rule 15 of Chapter VI deals with the action to be taken by a teacher in charge of a class in Standard IX and X. The said teacher is required to report the details of such absentees to the Headmaster of Headmistress or the Vice Principal so as to remove them from the rolls. Rule 15A prescribes the role of a teacher in charge of a class in Standard I to VIII. The said teacher is required to report the details of pupils who have been absent without leave for 15 working days consecutively or who have been continuously absent for five working days from the reopening day to the HM/Vice-Principal. The HM/Vice-Principal is required to take immediate follow-up action in consultation with the local authority in terms of Section 9 of Act 35 of 2009. This is clearly in tune with the provisions of the Central Act as the Rules as earlier stood did not have any corresponding provision.

38. Rule 12(4) of Chapter XXIII as amended states that the Educational Officer while conducting a surprise visit to the school for conducting preliminary verification to ascertain the genuineness of the pupils strength is required to check the entire details of both the pupils present and absent on that day with their UID and other school records. The mere absence of the pupil on a particular day will not lead to them being treated as bogus. The officer will have to make a genuine endeavor to verify the genuineness or otherwise of the student with all the documents which are presented before the said officer. Only thereafter, is he required to take a decision as to whether the admission is bogus and whether

there is a requirement for additional posts. If the student is pursuing his/her education in Standard I to VIII, the matter will also have to be informed to the local authority in terms of Section 9 of the RTE Act. There appears to be considerable merit in the submission of the learned Additional Advocate General that there are quite a number of institutions in the State which are unrecognized/affiliated to other Boards where the UID Numbers of the students are not insisted with. Unless the entire student community pursuing education from Class I to XII is mapped and issued with UIDs, it would not be possible to act merely on the basis of the UID shown to the Officer. I also take note of the fact that there have been several instances wherein bogus admissions of students, which have led to sanctioning of additional divisions were noticed later during super check cell inspections. In that view of the matter, I am unable to accept the contention of the learned counsel appearing for the petitioner that the procedure prescribed in the Amended Rules is arbitrary or discriminatory.

39. Yet another contention raised by the petitioners pertains to Chapter XXIII of the KER. It is contended that in view of Rule 12A of Chapter XXIII of the KER, there would be no finality for the staff fixation order till the 31st of January every year. It was also argued that though there would be reduction of posts from a particular school due to reduction of student strength on the 6th working day, there is no corresponding provision for increase of staff strength on the basis of increase in student strength. It was also contended that the students who secured admission after the 6th working day would miss out on the benefits in terms of the Right to Education Act. As per Chapter XXIII Rule 12(8), the staff fixation order can be revised till the 31st of January of every year. If during the inspection, the student strength is found to be less warranting reduction of staff strength, the teacher can be removed by the Educational Authority. This amendment has been brought in to ensure that drain of public money is prevented by retaining a teacher who has been rendered excess. The grievance of the petitioner that the student who joined after the 6th day would not obtain the benefits which he/she is entitled to as per the RTE Act cannot be sustained as the Government has come out with the "SAMPOORNA" portal where the entire details of students are uploaded. As and when the student joins after the 6th day, the details can be uploaded and the benefits due can be disbursed.

40. Yet another contention advanced by the petitioners concerns Rule 17 of Chapter XXIII of the KER as per which, liability is fixed upon the Manager and the teacher in charge of the class for the bogus admissions which are detected on verification conducted by the Educational Officer. The contention is that since the Manager is not a Government Employee and since he/she has no control over the admission or removal of students, no liability can be fixed as per the provision. It is also contended that since the teachers are not responsible for the admission and removal of students, no responsibility can be cast upon them. Much reliance is also placed on the law laid down by this Court in *Kishore V.G. v. State of Kerala and Ors.* [2019 (4) KLT 153]. As per the newly inserted Rule 17 to Chapter XXIII of the KER, any pecuniary loss caused to the Government on account of the

creation on holding of such posts is to be recovered from the teacher in charge of the class, HM/ Vice-Principal as the case may be and the Manager or the Educational Officer concerned. As per the scheme of the Act, the Manager is the appointing authority and the Government is the paymaster. If any loss is caused to the public exchequer by a malafide or any intentional act or omission of the Manager, the HM/Vice Principal, the teacher, or the Educational Officer, they are to be made accountable. Though it may be true that the Headmaster/Vice-Principal is the custodian of the Attendance Register, it is the teacher in charge of the class maintains the Register and marks the attendance of pupils who are physically present in the class. For securing an additional division/additional posts, at the instance of the Manager, if the teacher-in-charge marks the attendance of a student, who is not physically present in the class, the said teacher has to be made accountable. The RTE Act also casts a serious responsibility on the teacher to influence the formation of the student and to ensure that he attends classes regularly and does not drop out. There are enough provisions in the Act and Rules for initiating action against the Manager for defying the directions of the Educational Authorities. The Rules as amended would enable the respondents to initiate appropriate action against the person responsible and the same cannot be termed as arbitrary or unreasonable.

41. Much argument was advanced by the learned counsel appearing for the petitioner that the amendment insofar as it insists the Management to submit the documents through the 'SAMANWAYA' portal would lead to unforeseen issues. I am unable to agree. The State of Kerala, with a view to facilitate e-governance has developed comprehensive information management and service portals like the 'SAMANWAYA' and 'SAMPOORNA' with a view to streamline the process. Approval of appointments and fixation of the staff strength is proposed to be carried out exclusively through 'SAMANWAYA'. By reducing the movement of papers to a minimum, transactions through the portal would ensure accountability, swift decision making, free flow of information about decisions and actions and thereby good governance.

42. The next contention advanced by the petitioners is that Rule 12(1) of Chapter XXIII of the KER, which states that fixation of staff strength would be subject to the availability of accommodation is repugnant to the RTE Act. It is also pointed out that this Court by judgment dated 16.3.2022 in W.P.(C) No. 15913/2021 has directed the State Government to ensure that the provisions of Rule 12 of Chapter XXIII of the KER satisfy the requirements of the provisions of the Rules of 1959 as well as Act 35 of 2009. No doubt, if directions have been issued by this Court, the same has to be complied with in its letter and spirit. However, that is no reason to interfere with the Amendment Rules 2022.

43. The question of whether a particular piece of delegated legislation - whether a rule or regulation or other type of statutory instrument - is in excess of the power of subordinate legislation conferred on the delegate has to be determined with reference only to the specific provisions contained in the relevant statute

conferring the power to make the rule, regulation, etc. and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the Court to substitute its own opinion for that of the Legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provisions of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question of whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the statute. The Court cannot sit in judgment over the wisdom of the policy evolved by the Legislature and the subordinate regulation-making body. It may be a wise policy that will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act. The Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the Court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution. It is not within the legitimate domain of the Court to determine whether the purpose of a statute can be served better by adopting any policy different from what has been laid down by the Legislature or its delegate and to strike down as unreasonable a rule merely on the ground that the policy enunciated therein does not meet with the approval of the Court in regard to its efficaciousness for implementation of the object and purposes of the Act. [See Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkumar Sheth [(1984) 4 SCC 27]].

44. Having considered the relevant provisions of the Rules as amended, in the light of the relevant provisions of Act 35 of 2009 and the Rules framed

thereunder and Act 6 of 1959 and the Rules framed thereunder, the object and intent of the parent enactment, the purpose to be achieved by the amendment, I am of the considered opinion that the petitioners have not been able to bring out any vitiating factors for setting at naught any of the provisions of the Kerala Education (Amendment) Rules 2022. The challenge is negatived.

These writ petitions will stand dismissed. No costs.