

(1982) 08 KL CK 0011

In the High Court Of Kerala

Case No : O.P. No's. 3808, 3998 and 4123 of 1982

N.P. Purushothaman and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 18-08-1982

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Kerala Education Rules, 1959 — Rule 2(4)

Citation : AIR 1983 Ker 31 : (1983) 1 ILR (Ker) 187

Hon'ble Judges : P. Subramonian Poti, Acting C.J.;U.L. Bhat, J

Bench : Division Bench

Advocate : C.P. Sudhakara Prasad, K.V. Prakash, P.K. Kesavan Nair, K.N. Narayana Pillai and P.G. Parameswara Panicker, for the Appellant; M.I. Joseph, Kurian Joseph, Jacob Murikan, Joseph Vithayathil and Joseph J. Thorattil, for the Respondent

Final Decision : Allowed

Judgement

Subramonian Poti, Ag. C.J.

1. Chapter V of the Kerala Education Rules, 1959 embodies rules for the regulation of opening and recognition of schools. New schools are to be opened and existing schools are to be upgraded only pursuant to orders on application made for that purpose under Rule 2A of Chap. V. That rule will arise for application only after the Director of public Instruction publishes a final list of areas where new schools are to be opened or existing schools are to be upgraded under sub-rule (4) of Rule 2 of Chap. V. The procedure for determining the areas where new schools are to be opened or existing schools upgraded is that laid down by Rule 2 of the rules. The Director is to prepare a report indicating the localities where new schools are to be so opened or the existing schools upgraded taking into account various matters such as the educational needs of the locality with reference to the habitation and backwardness of the area, the distance between the existing schools, the strength of the several standards and

other matters relevant and necessary in that connection. The preliminary list is published calling for objections and after receipt of such objections the Government determines the areas where new schools are to be opened or existing schools upgraded. Sub-rule (5) of Rule 2 as it stood prior to its amendment effective from 19th Aug., 1981 provided that no appeal or revision shall lie against the final list published by the Director under Sub-rule (4) of Rule 2 and that meant that the list became final when once it was published. There was no provision enabling Government to reopen such list suo motu or on application by any person. By the amendment of 19th Aug., 1981 two provisos were added which provisos read:

"Provided that the Government may either suo motu or on application by any person objecting to the list published by the Director under Sub-rule (4) made before the expiry of thirty days from the date of such publication, review then order finalising such list and make such modifications in that list as they deem fit by way of additions or omissions, if they are satisfied that any relevant ground has not been taken into consideration or any irrelevant ground has been taken into consideration or any relevant fact has not been taken into account while finalising the said list;

Provided further that no modification shall be made under the preceding proviso without giving any person likely to be affected thereby an opportunity to make representations against such modification."

The first proviso enables the Government to review their order finalising the list in order to make modifications in that list by way of additions or omissions the Government must be satisfied: (1) that any relevant ground has not been taken into consideration or (2) any irrelevant ground has been taken into consideration or (3) any relevant fact has not been taken into account while finalising the said list. The second proviso is a provision relating to the procedure for review, namely that no modification shall be made without the person likely to be affected being given an opportunity to make representations against such modification.

2. While the provision that there shall be no appeal or revision against the Government, merit Order continues to operate even after the amendment the provisos only provide for a right of review in the Government and that too to a limited right confined to cases where one or other of the three circumstances mentioned in the first proviso exists.

3. In the three cases before us we are concerned with the exercise of, the power of review by the Government after the amendment came into force in O.P.No.3998/82 the complaint by the petitioner who is the Manager of the A. B. Vilasom High School at Aryakkara within the Muhamma Panchayat concerns the sanction given to the 4th respondent for opening a new High School at Muhamma. That happened to be sanctioned under the following circumstances in the preliminary list published by the Director of Public instruction of the areas of

new schools for the year 1981-82 Aryakkara and Muhamma, both within the Muhamma Pan-chayat were shown. This preliminary list dated 1-6-1981 was objected to on the ground (hat Muhamma and Aryakkara are practically one and the same place. After considering such objections the Director of Public instruction, the 2nd respondent, on the basis of orders by the Government published a final list along with the notification dated 31st July, 1981 showing only Aryakkara as the place where a new school was to be opened/existing school upgraded. Pursuant to this when applications were invited the petitioner made his application whereupon a High School was sanctioned to the Aryakkara Bhagavathy Vilasom Shethra Yogam. The school is said to have started functioning from 1-6-1982 pursuant to that sanction. But it appears that in the meanwhile the 4th respondent had filed a petition for review of the notification dated 31-8-1981 inasmuch as Muhamma which was also a place included in the preliminary notification had been omitted in the final notification. This review petition was considered by the Government along with several other review applications in respect of several other places. We say so because we find a common order being passed by the Government, Ext. P5 dated 18-2-1982 being the copy of that order. This common order purported to deal with all the review applications at one stroke and as a consequence it listed a number of areas shown in Appendices I to III of that order as additions to the areas in the list published earlier by the Director of Public instruction. The Appendices show that various areas in the several districts of Kerala were notified as additions to the original list. It was not as if for such addition there was a consideration of the particular facts of each case. The body of the Government Order Ext. P5 is extracted below as it is quite relevant for the purpose of this case:

"in exercise of the powers conferred on him under Sub-rule (4) of Rule 2 of Chap. V. K. E. R. the Director of Public instruction in his notification read as third paper above, published, as Gazette Extraordinary No. 610 dated 31-7-1981, the final list of areas where new High Schools are to be opened or existing U. P. Schools are to be upgraded, new U. P. Schools are to be opened or existing L. P. Schools are to be upgraded and new L. P. Schools are to be opened in the year 1981-82. Government received applications for review of the final list under the proviso to Sub-rule (5) of Rule 2 of Chap. V. K. E. R. added as per the G. O. read as fourth paper above and published as Gazette Extraordinary No. 667 dated 19-8-1981.

2. Government considered the applications for review in detail and heard the parties wherever such hearing was considered necessary. Government are now pleased to order that the areas in Appendices I to III to this G. O. will be included in the final list of areas published by the Director of Public instruction. The Director of Public instruction will take action to notify the same." Pursuant to this order the Director of Public instruction published a list of areas mentioned therein as the additional places where Dew schools are to be opened or existing schools upgraded. Muhamma was one of such areas in the Alleppey District. Applications were invited pursuant to that order and the 4th respondent's

application was allowed enabling the 4th respondent to start a High School at Muhamma. According to the petitioner he came to know of the publication of the additional list by the Director of Public instruction only after the 4th respondent published a notice on 31-5-1982 that a High School has been sanctioned to him to be started at Muhamma. The challenge is evidently to the review which was passed without hearing him.

4. The State has filed a counter in O. P. 3998/82. It is submitted in the counter-affidavit that though the petitioner had filed his objection to the motion for review, when the parties were heard on the review petition the petitioner was not given notice as the Government missed to notice that the petitioner was one who had objected to the review. The Government submitted in the counter that they were prepared to give notice to the petitioner, hear the matter and decide afresh.

5. The 4th respondent's case as urged at the hearing is that Sub-rule (5) of Rule 2 of Chap. V only prohibited an appeal or revision prior to the amendment, that it did not prohibit review, that the power of review is available to any authority, that such power could be exercised to correct its own order and that the provision introduced by the amendment was only to regulate the power of review that is inherent in the Government. It was that power that Government exercised. It is also said that the petitioner can have no complaint that he has not been heard as he has no right to be heard. If the order Ext P5 is bad then of course all the further proceedings pursuant thereto including grant of sanction to the 4th respondent to open a school for the year 1981-82 must also be bad. Hence we are concerned here with the question of propriety of Ext. PS order.

6. Now we come to O. P. No. 3808/82. Ext. P5 already adverted to in O. P. No. 3998/82 is Ext. P3 in this petition in the preliminary notification Karampathur was) included as a locality for opening a new Upper Primary School or upgrading the existing Lower Primary School into an Upper Primary School. There is only one Lower Primary School at Karampathur which, according to the petitioner, is the feeder school for her Upper Primary School at Chempra and her Upper Primary School serves the upper primary education needs of Karampathur also in these circumstances, according to the petitioner, there was no need for upgrading the Lower Primary School in Karampathur into an Upper Primary School or opening a new Upper Primary School in that locality. Evidently the apprehension of the petitioner is that in that event the strength in her school will be affected and teachers appointed in her school will be thrown out. In the final list published along with the notification dated 31-7-1981 Karampathur was not included as a locality and naturally the petitioner felt that there was a quietus to the proposal. It is later that the petitioner seems to have come to know from newspapers that the Director of Public In-struction had published another final list of localities for opening new schools or up-grading existing schools and Karampathur was one of such areas. This was pursuant to the review made by the Government There is complaint by the petitioner also about the preliminary

list published for the next year, 1982-83, where Chembra is also shown as an area. This preliminary list is attacked on the ground that no new school in Chembra is necessary and further that the issue of a preliminary list soon after the publication of the final list for the year 1981-82 was uncalled for and was not warranted by the provisions of Chap. V of the Kerala Education Rules. The prayers in the Original Petition are therefore to quash Ext. P4 order published by the Director of Public instruction dated 24-2-1982 listing Karampathur as an additional area for opening a new school and also Ext. P5 dated 15-3-1982 that being the preliminary notification in regard to areas where new schools were to be opened or existing schools upgraded for the academic year 1982-83. In this case the State and the 5th respondent have filed counter, the 5th respondent being the Manager of the Karampathur Lower Primary School who seeks to support the order passed by the Government Ext. P3 on review. In the counter-affidavit it is mentioned that on receipt of the review applications from several persons in regard to the claim that Karampathur should be added in the list of areas, a report was called for from the Educational Authorities. A report from the Deputy Director of Education was obtained, Ext. R1 being a copy of the extract of that report and on that the Special Secretary to the Government General Education Department noted: "Schools are at a distance of 3 K. M. There is a case". The area was included in the final list and a fresh notification, which is impugned, was issued on 18-2-1982. It is further mentioned that the Government had arrived at a decision considering all the relevant factors necessary to be considered. The significant fact is that there is no averment in the counter-affidavit as to which of the circumstances indicated by the first proviso to Sub-rule (5) of Rule 2 of Chap. V of the Kerala Education Rules was found by the Government to exist in the case. As to the plea of impropriety of opening fresh schools during the year 1982-83 there is no specific answer by the Government as to how proceedings could be so commenced" within, a period of two years contrary to Rule 2 in Chap. V. The 5th respondent has attempted to support the order of the Government in review on the basis that the school was necessary, there must have been proper enquiry and the Government must have acted upon the basis of proper material.

7. Now we will come to the facts of O. P. 4123/82. The order of 18th Feb., 1982 impugned in the other cases is Ext. P1 in this case. The petitioner is an educational agency running several schools and among them the N. S. S. High School, Alakode is one which is a complete high school. When the preliminary notification for the year 1981-82 was published on 1st June, 1981, Alakode where the petitioner's school was situated was included in the list of areas where new High Schools were to be opened or existing schools upgraded. On behalf of the petitioner-society the General Manager and inspector of N. S. S. Schools who is the Manager of the N. S. S. High School at Alakode is said to have filed objection in so far as the preliminary list included Alakode as an area. The petitioner avers that the 4th respondent herein was then moving for getting sanction for a new High School and that it was at his instance that Alakode was

included in the preliminary list. It is said that there are two Government High Schools and two Upper Primary Schools near the petitioner's school at Alakode that the Government High School at Kaniyanchal is only about three kilometres away from the petitioner's school and the Government High School at Karthika is only about five kilometres away from the petitioner's school. It is further said the Government Upper Primary School, Rayarom and the Government Upper Primary School, Otophone are situated within three kilometres of the petitioner's school. These are mentioned to indicate that Alakode is a locality the educational needs of which are more than served by the existing educational institutions and the petitioner further avers that there has been a fall in the number of class divisions every year and this is illustrated by the statement that during the academic year 1979-80 there were 61 class divisions and this had to be reduced to 59 during 1980-81 and 54 during 1981-82. It is further averred by the petitioner that on the report of the District Educational Officer, Cannanore and the Director of Public instruction the Government found no need for a new school at Alakode and consequently in the final list published on 31st July, 1981 Alakode was not included as an area. In other words Alakode was dropped in the final list though it was in the preliminary list. It was later that the petitioner comes to know of a fresh order dated 18th Feb., 1982 which is the order on review impugned in this and other cases. On coming to know of that order the petitioner is said to have filed representation dated 4th March, 1982, Ext. P3 being the copy of the representation. But the Director of Public instruction invited applications for opening new schools at Alakode pursuant to the decision Ext. P1 and it is said that the 4th respondent who made an application pursuant thereto has obtained the order for opening such school. The complaint is that the 4th respondent is intending to open a school at a place which is only 400 metres away from the petitioner's school. Ext. P1 order and the orders pursuant thereto are attacked in this Original Petition. The State in its counter-affidavit submits that the 4th respondent had made a review application to the Government and the Government decided in review that Alakode also may be included. A new school at Alakode has not been sanctioned because of the stay order issued by the High Court. It is also submitted that no notice was given to the petitioner before the review application was allowed in fact the counter is very short. It does not seek to answer the challenge made in the Original Petition, The 4th respondent has filed a counter-affidavit. According to the 4th respondent there was absolute need for another school in Alakode, that therefore when Alakode was left out a review petition was filed, that the Government is not bound to hear any party before approving the list and therefore the order Ext. P1 was not liable to be challenged.

8. We will now go into the propriety of the review order which is Ext. P5 in O. P. No. 3998/82, Ext. P3 in O. P. No. 3808/82 and Ext. P1 in O. P. No. 4132/82. We will refer to the exhibits as in O. P. No. 3998/82, in O. P. No. 3808/82 there is a further contention by way of challenge to the preliminary list published for the year 1982-83. That we will deal with independently.

9. Appearing for the 5th respondent in O. P. No. 3998/82 learned counsel Sri M. I. Joseph referred to the proviso to Sub-rule (5) of Rule 2 in Chap. V as not introducing a new provision, but only restating the power which the Government had even apart from any such rule in other words according to the learned counsel a power of review is inherent in any authority and the provision made by the proviso was only to define that power in support of his case that any authority is competent to correct its own order the learned counsel made reference to various decisions which we do not think it is necessary for the purpose of this case to refer here. The power of correction of an order is different from the power of review. A power of review has been conferred on the Government by the proviso. The limits within which such power is to be exercised is defined by the proviso. There is no case that any power other than that conferred by the proviso was exercised in fact no such power could be exercised also. Therefore we are only concerned with the limited controversy as to whether in disposing of the review applications as the Government did by the order which has been extracted here the Government was exercising the power conferred by the first proviso adverted to and whether the order would be justifiable with reference to such power.

10. We have, already indicated that the rule itself defines that the power of review is limited to cases where the Government is satisfied of the existence of one or other of the three reasons mentioned in the first proviso. An argument was addressed before us that the Government being an administrative authority and the jurisdiction to review being exercisable on its own satisfaction there is no scope for examination of such satisfaction by this Court, It is the contention of the learned counsel appearing for the respondents in this case that if the satisfaction reached in order to arrive at a decision is that of an administrative authority no question of judicial review arises. This contention, according to us, is quite unsound. The answer to the contention of the respondents is to be found in the following passage in the decision in M.A. Rasheed and Others Vs. The State of Kerala,) at para 7. Chief Justice Ray speaking for the Court said:

"Where powers are conferred on public authorities to exercise the same when "they are satisfied" or when "it appears to them", or when "in their opinion" a certain state of affairs exists; or when powers enable public authorities to take "such action as they think fit" in relation to a subject matter, the Courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated." Again in para 9 of the same decision the Court said:

"Administrative decisions in exercise of powers even if conferred in subjective terms are to be made in good faith on relevant consideration. The Courts inquire whether a reasonable man could have come to the decision in question without misdirecting himself on the law or the facts in a material respect. The standard of reasonableness to which the administrative body is required to conform may range from the Courts own opinion of what is reasonable to the criterion of what

a reasonable body might have decided. The Courts will find out whether conditions precedent to the formation of the opinion have a factual basis."

The scope of examination of the grounds on which satisfaction of the Government is based is indicated in the decision in *Khudiram Das Vs. The State of West Bengal and Others*,). We are not going into the question in further detail in this case only because in two decisions of this Court there has been an exhaustive reference to this aspect (*Workmen of Cochin Chamber of Commerce V. State of Kerala* 1976 Ker LT 125 and *Balakrishnan Nair v. State of Kerala* 1980 Ker LT 264. The order impugned in these cases is subject to judicial review. Such review will be with a view to examine whether the Government was satisfied of the existence of one or the other of the grounds laid down in the relevant rule in the Kerala Education Rules to justify the modification of its order; whether the Government adverted to the existence of material that would be relevant in that context and further whether the order impugned shows that it was on the basis that it was on satisfaction of such ground or grounds that Government reviewed its earlier order.

11. in this background we will examine Ext. P5 order once again. That as we have said, refers to a series of review applications filed by different persons in regard to different areas of the State in several districts of Kerala. The ground for review is each of these cases, if there is ground urged, may Dot be identical. These grounds arising in each one of these cases will have to be considered independently. Maybe that it is satisfied in regard to a review application that in the omission of an area a relevant ground has not been taken into consideration or may be that in another an irrelevant ground has been taken into consideration and it is also possible that in a given case a relevant fact has not been taken into account while finalising the said list. It does not appear from the order impugned in these cases that there was any consideration of this question by the Government. The order does not also indicate that there was any material for the Government to arrive at the conclusion that one or other of these grounds could be found. in fact that will not be possible when such a common order it passed in respect of the area) in all the districts in the State. Merely by saying that the Government found reasons to include additional areas the Government will no1 be acting properly in exercise of its limited power conferred by the proviso. The order including a large number of areas in the State looks like the exercise of an original power of publishing a final list. in fact a reading of the counter-affidavit will show that the Government had not in view even the limitations on its power of review. It would appear that Government seems to think that just as it has passed the original order publishing the final list it can pan supplementary orders adding on to that list any number of areas in exercise of the power of review. Even in deciding on the final list of schools under Rule 2 (4) of Chap. V the Government has to exercise its mind on the inclusion of areas in that list despite objections or why similarly certain areas are to be excluded. in other words at every stage of these proceedings and particularly at the stage of the publication of the final list the Government is to act on the basis of assess ment of matters

relevant to its decision and not act mechanically or on the basis of the considerations which will not be relevant under the Kerala Education Act or Rules. The Government should be aware that the inclusion of new areas is not a measure of patronage, but an administrative measure intended to make the educational advancement of the State effective. In this view we are unable to sustain Ext. P5 order passed in review by the Government.

12. In two of these cases, namely O. P. No. 4123 of 1982 and O. P. 3808 of 1982 not even notice to the petitioner on the review was given. That would at any rate invalidate the order of review in cam where notice for hearing was given to some only of the parties, but not to all as in O. P. No. 3998 of 1982, even assuming that opportunity need only be given for representation and not for hearing, the order would be bad, for, the same rule of procedure must apply to all the parties and hence if notice for hearing is given to some and they are heard it cannot be said that the others need not be heard since no rule insists on hearing the parties.

13. Since the impugned order is bad for the reasons indicated it is not necessary to go into any other question. We quash the abovesaid order of 18th Feb., 1982 passed in review in so far as it concerns the petitioners in these cases.

14. Now we come to the further question raised in O. P. 3808 of 1982, namely the objection to the preliminary list published for the year 1982-83. Of course, under the scheme of the rules in Chap. V of the Kerala Education Rules, the forum for raising the objection on the merits must necessarily be the Government. The resort to this Court in that behalf would be premature. But there is an objection which has necessarily to be noticed by this Court now and that concerns the alleged contravention of Rule 2 of Chap. V of the Kerala Education Rules.

15. It is not as if as and when it pleases the Government, the Director of Public instruction is to send up reports of localities where new schools are to be opened or existing schools upgraded. The rule limits it to once in two years. This limitation is of significance. Excepting the few recognised schools the other schools the the State are either aided or Government schools. Opening of aided schools necessarily involves considerable financial commitment for the State. The salary of the staff teaching and non-teaching, is provided by the State. The maintenance grant is given to the management. The running expenses for the innumerable aided schools in this State are thus met from the State Treasury. The management enjoys the privilege of appointing teachers and admitting students. It is notorious that many of the schools receive huge sums of money from the teachers at the time of appointment either as donation or unaccounted and some schools do receive donations or capitation fees for admission of students. We need not be taken to have said this of all the aided schools in the State, but we cannot feign ignorance of what is happening around us every other day. The financial responsibility for running the institutions including the maintenance of the buildings having been taken over by the Government,

managements which are insensitive to rules of morals or ethics exploit the situation financially by enriching themselves on appointments or admissions. With no working expenses to meet, and with no risk to undertake they get the benefit which is normally that of a person running an industry or trade. The drain on the Treasury on account of Government's commitment is not inconsiderable. We are referring to these circumstances with a view to emphasise and alert the Government to the need, of proper attention when it deals with the question of granting sanction for opening new schools in the private sector. Such grant shall not be indiscriminate. As the rules stand sanction to open schools are granted even before school buildings are put up and even before the management is able to point out its own specific funds with which the school buildings could be put up, This gives an incentive to all and sundry to apply and more the applications the more the sanctions as it will not be easy to reject all the application en masse.

16. The financial impact on the Government arising by reason of sanction for new aided schools year after year in a State, the resources of which are hardly sufficient to meet the minimum social welfare measures any modern State must undertake, and the proliferation of applications that is likely by an indiscriminate grant of applications must be of sufficient persuasive force to compel the Government to define an open and rational policy concerning the grant of sanction for opening new schools or upgrading existing schools. Considering the rate of literacy in the State new schools will necessarily have to be sanctioned periodically but in granting sanction for aided schools, a scientific approach, an approach which will plainly proclaim that the one and the only consideration for the grant will be public need and no consideration other than public interest will weigh with the Government in making such grant must be adopted. It will be advisable to lay down more effective and elaborate criteria in the rules in place of Rule 2 of Chap. V of the Kerala Education Rules, so as to enable elimination of applications made mainly, if not solely, in self interest and for pecuniary gain, and restrict the grant to genuine applications from those who seek sanction more in a spirit of service to the public than in the promotion of their own interest. We are trying to impress on the Government the need for considerable restraint in the matter of limiting the number of new schools and the exercise of wise discretion in framing appropriate guidelines in the rules as also applying them so as to eliminate potential exploiters.

17. Rule 2 of Chapter V of the Kerala Education Rules is not exhaustive, as naturally any such rule could not be exhaustive of the circumstances warranting the sanction of a new school, but the predominant factor which must influence the Government in its decision must be the answer to the question how far educational needs of the locality demand inclusion of fresh areas for opening new schools. Objective assessment of public need uninfluenced by other considerations, a sense of reasonable restraint in selecting new areas and awareness of the need to eliminate elements which may abuse the very system of State support to Aided schools would, to a large extent, help in relieving the

Government of avoidable financial commitment while at the same time toning up the system of aid. We are tempted to say this in the wake of the objection raised in this petition that contrary to Rule 2 of Chapter V a preliminary notification has been issued for the year 1982-83 when there has already been a preliminary and final notification for the year 1981-82. Though we are not finally deciding the question here, when the Government is called upon to consider this or allied questions the Government will do well to remember that the provisions in the Rule are not intended as empty and inconsequential directions, but as meaningful mandates. We allow the petitioner to urge what he has to say in regard to the preliminary objection before the Government.

We allow the Original petitions and quash the impugned orders on review, namely, Exhibit P-5 in O. P. 3998 of 1982 in regard to the petitioners in the three cases. No costs.