
(1987) 09 KL CK 0011

In the High Court Of Kerala

Case No : W.A. No's. 350, 431, 462, 478, 520, 569, 715, 739, 740, 742, 743, 748 and 764 of 1987

P. Pankajakshy Amma and Another

APPELLANT

Vs

George Mathew and Others

RESPONDENT

Date of Decision : 30-09-1987

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)

Kerala Education Act, 1958 — Section 36

Kerala Education Rules, 1959 — Rule 45, 45A, 45B, 45B(1), 45B(3)

Citation : (1987) 09 KL CK 0011

Hon'ble Judges : V.S. Malimath, C.J; Bhaskaran Nambiar, J

Bench : Division Bench

Advocate : N. Dharmadan, Govinda Bharathan, P.N.K. Achan, P. Santhalingam, K.T. Sankaran, K. Ravindranathan, Abdul Razak, P.J. Mathew and K. Ravikumar, for the Appellant; Pirappancode V. Sreedharan Nair, C.P. Sudhakara Prasad, M.V. Bose, K.A. Abdul Gafoor and N.N. Ravindran and Government Pleader for State, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskaran Nambiar, J.—Chief Justice M.S. Menon speaking for the Full Bench, in his inimitable style, in *Rt. Rev. A.M. Patroni v. Kesavan* 1864 KLT 791, stated thus:

The post of the headmaster is of pivotal importance in the life of a school. Around him wheels the tone and temper of the institution; on him depends the continuity of its traditions, the maintenance of discipline and the efficiency of its teaching. The right to choose the headmaster is perhaps the most important facet of the right to Administer a school.

2. The Government prescribed the requisite qualifications for appointment to the post of Headmaster of Aided Lower Primary Schools as early as 1978. However, these essential qualifications remained a statutory dream for about ten years,

with exemption being granted for one, two or three years at a time, but extended periodically to continue uninterruptedly. The last amendment, the latest exemption for two years from 1st April 1986 to 31st March 1988 was effected to Rule 45B(3) of the Kerala Education Rules on 2nd September, 1986. Teachers fully qualified, claiming promotion as Headmasters therefore challenged the validity of this amendment as beyond the powers conferred under the Kerala Education Act and as violative of Article 14 of the Constitution. The relaxation of the minimum standards for an unusually long period of ten years possibly shocked the judicial conscience and a learned Single Judge upheld the challenge and struck down rule relating to relaxation from 1st April 1986 to 31st March 1988. Aggrieved, the teachers who, from 1978, did not acquire the minimum qualifications for the post of Headmasters, some of whom never even attempted to secure these qualifications, have filed these writ appeals against the judgment of the learned Single Judge. The State also challenged the decision by filing two appeals; but better sense prevailed and they withdrew those appeals and they have been dismissed. The Government Pleader appearing for the State submitted that the Government have accepted the decision of the learned Single Judge and have issued consequential orders in implementation of the judgment. Thus the author of the amendment, the Government itself does not support the amendment and the exemption from 1st April 1986 to 31st March 1988. It is in this background that we have to consider these appeals.

3. Rule 45B was inserted in Chapter XIV-A of the Kerala Education Rules (K.E.R. for short) by an amendment made on 3rd November, 1978. This Rule read thus:

45B. (1) Notwithstanding anything contained in Rules 45 and 45A, Account Test (Lower) conducted by the Kerala Public Service Commission shall be an obligatory qualification to the teachers for promotion as Headmasters of Lower Primary and Upper Primary Schools.

(2) Every person who is holding the post of headmaster in a lower primary school or an upper primary school on the date of these rules shall stand exempted from acquiring the qualifications specified in Sub-rule (1).

(3) In the case of teachers awaiting promotion as Headmaster, there shall be temporary exemption to them from acquiring the qualification specified in Sub-rule (1) till 31st day of March, 1986.

(4) Teachers who have attained the age of 50 years shall stand exempted permanently from acquiring the qualification specified in Sub-rule (1).

(5) During the period of exemption allowed under Sub-rule (3) promotions to the posts of Headmasters shall be made without insisting on the qualifications specified in Sub-rule (1) and those who fail to acquire the said qualification within the said period of exemption shall be reverted.

The explanatory note to this rule, not part of the notification "but intended to indicate the general purport of the amendment runs as follows:

In G.O. (Ms.) No. 54/86/G. Edn., dated 24th March 1986 Government have issued orders exempting all Aided Primary School Teachers from acquiring test qualification for promotion as Headmasters of Lower Primary and Upper Primary Schools for a further period of two years from 1st April 1986. This amendment to Rule 45(b)(3) is to give uninterrupted statutory validity to the above orders.

4. This rule thus prescribed the Account Test (Lower) as an "obligatory qualification to the teachers for promotion as Headmasters of Lower Primary and Upper Primary Schools". It saved two classes of persons permanently from acquiring these qualifications (a) teachers holding the post of Headmaster on the date of the amendment, i.e. 3rd November 1978, and (b) teachers who have attained the age of 50 years and who have completed 25 years of service. (This additional service requirement for teachers attaining 50 years has been given up subsequently in 1982. That is not relevant for our purpose). The rule also stated that there will be relaxation for a period of two years from the date of the rules in 1978 to teachers awaiting promotion. It then provided that during the exemption period of two years, promotions could be made without insisting on the obligatory test qualifications and that all those who failed to acquire the qualifications within the exemption period will be reverted. This two year exemption period which expired in 1980 was extended till 31st March 1981, then till 31st March 1984, then till 31st March 1986 and now till 31st March 1988 by an amendment dated 12th August, 1986 published on 2nd September, 1986.

5. It has to be borne in mind that the Rules are framed by virtue of the powers conferred u/s 36 of the Kerala Education Act. The grounds that are available for the challenge of a rule made by a delegated authority have to be outlined first, before the contentions advanced to challenge the rules are considered. Fortunately, there is at present, no problem on this score, because the Supreme Court has spoken in clear terms on this aspect on several occasions, and we need refer only to some of the later pronouncements.

6. In *State of U.P. and Others Vs. Hindustan Aluminium Corpn. and Others*, at Paragraph 41 it is stated thus:

The grounds of challenging the validity of subordinate legislation are well known. The challenge may be on the ground that the power to make the law could not have been exercised in the circumstances which were prevailing at the time when it was made, or that a condition precedent to the making of the legislation did not exist, or that the authority which made the order was not competent to do so, or that the order was not made according to the procedure prescribed by law, or that its provisions were outside the scope of the enabling power in the parent Act or were otherwise violative of its provisions or of any other existing statute.

7. In *Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others*, it is stated thus:

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 as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the statute.

8. There was some debate as to whether "unreasonableness" can be a ground to challenge the validity of a delegated legislation. This also is not *res integra*.

9. Lord Justice Diplock's forceful and clear analysis on the topic which found acceptance by the Supreme Court was in *Mixnam's Properties Ltd. v. Chertsey Urban District Council* 1964 (1) Q.B. 214 thus:

The various special grounds upon which subordinate legislation has sometimes been said to be void—for example, because it is unreasonable; because it is uncertain; because it is repugnant to the general law or to some other statute—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 by-law is not the antonym of "reasonableness" in the sense of 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*".

This judgment is discussed in a well written article in 1973 (36) MLR 611 which concluded, " ...even a statutory instrument, otherwise *intra vires*, can be invalidated (notwithstanding *Sparks v. Edward Ash Ltd.*) if it is unreasonable."

10. In the *Indian Express* case AIR 1986 S.C. 515 in paragraph 73 the Supreme Court stated thus:

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.

It was further stated thus:

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.

11. Regarding the grant of exemption, the Supreme Court referring to Lord Greene, M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 K.B. 223 said thus:

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington, L.J. in *Short v. Poole Corporation* (1926) 1 Ch. 66 gave the example of the red-haired teacher dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another.

12. Thus, the rule made under a statute by an authority delegated for the purpose can be challenged on the ground (1) that it is ultra vires of the Act; (2) it is opposed to the Fundamental rights; (3) it is opposed to other plenary laws. To ascertain whether a rule is ultra vires of the Act, the Court can go into the question (a) whether it contravenes expressly or impliedly any of the provisions of the statute; (b) whether it achieves the intent and object of the Act; and (c) whether it is "unreasonable" to be manifestly arbitrary, unjust or partial implying thereby want of authority to make such rules.

13. Bearing in mind the principles formulated by the Supreme Court, we shall consider the challenge to the rule in greater detail.

14. In Kerala we have Government schools under the control of the Government and aided and recognised schools covered by the Kerala Education Act and the Rules. The Headmasters in all these schools practically discharge the same duties. The Government was therefore right when it decided to fix uniform qualifications for the Headmasters of Lower Primary Schools, whether they be Government Schools or aided or recognised schools. An obligatory test, the Account Test (Lower) was prescribed for the Headmasters of Government L.P. Schools by an executive order, dated 4th August 1976. Two years thereafter, in 1978, it was held that the same obligatory test should be prescribed for Headmasters of aided and recognised schools. The amendment to Rule 45B in 1978 is thus not open to challenge and is not challenged. The teachers in Government schools were given exemption for two years. The same period of exemption was granted under Rule 45B(3) in 1978. That also cannot be in challenge and is not in challenge. Thereafter departing from the rules applicable to Headmasters of Government schools, the teachers in aided and recognised schools alone were given extension of exemption continuously from 1980, for eight years, a favoured treatment which has no rational nexus with the object sought to be achieved, namely, to assure competency, efficiency, and efficacy in headmasters, as the head of educational institutions. Proficiency of the headmasters of Lower Primary Schools should be the same, whether the school is Government or aided or recognised. Nobody has a case, and none can have any, that the headmasters of aided and recognised L.P. Schools need not be as efficient as the headmasters of Government L.P. Schools. If so, the dilution of the essential qualifications and the continuous extension granted from 1978, specially to the aided and recognised school Headmasters cannot have judicial approval as a reasonable classification. It is in fact, no classification at all, much less any reasonable classification. In this view, the impugned exemption from 1986 to 1988 is plainly violative of Article 14 of the Constitution.

15. We are also of the view that the impugned amendment is unreasonable and arbitrary and beyond the powers conferred under the Act itself. The Act is intended to meet the educational needs of the State effectively and to maintain uniform standards of discipline and teaching in all the educational institutions governed by the Act. It is to achieve this object that power has been conferred to

make rules. It is in pursuance of this power that Rule 45-B was made imposing certain obligatory tests for appointment as Headmasters. When these tests are later suspended for a sufficiently long time, the relaxation of the rules beyond the initial period of two years has to be annulled on the ground that it is unreasonable and arbitrary, not warranted by the provisions of the Act, and thus beyond the Act itself. The amendment challenged has to fail on both grounds; (1) beyond the powers conferred under the Act, and (2) violative of Article 14 of the Constitution.

16. In this context, the file reveals an unfortunately sad state of affairs, a total abdication of the function of the delegate, the Government, and a scant respect for the rule of law and an absolute mistrust of the officers of the Education Department. Several organisations pressed and opposed the claim for continuance of exemption of the test qualification. The Director, the head of the Education Department reported thus on 31st January 1986:

Since the Government have delegated more and more powers to the Headmasters of Primary schools and only qualified hands can exercise such powers effectively, the request for exemption from test qualification and extension of time for passing test cannot be entertained further.

17. When the Hon''ble Minister for Education received a memorandum on 12th February 1986 from the Kerala Private Primary Headmasters'' Association (K.P.P.H.A.), claiming that the exemption may be extended for two years, without any reference to his department, without waiting for any detailed examination by the Secretariat staff or any officer of the Department, without verifying whether the Director has already given his views or not, without even waiting for the representation of the Association to be registered in the Secretariat office, the Hon''ble Minister issued an order on 16th February 1986 directing that exemption is granted for one year and orders will issue accordingly. The representation of the Association is seen to have been received by the Secretariat only on 21st February 1986. It is clear that the then Hon''ble Minister for Education in order to pacify the memorialist has passed the orders in considerable haste without any application of the mind. The Commissioner and Secretary, General Education, rightly thought that the Hon''ble Minister should be apprised of the adverse report of the Director and therefore noted on 27th February 1986 that in view of the remarks of the Director of Public Instructions against the grant of further extension, Minister (Education) may once again see whether the earlier order passed by the Minister on 16th February 1986 should issue. The matter was discussed on 27th March 1986. After "discussion", the Hon''ble Minister directed that exemption be granted for two more years. Because the Commissioner and Secretary, brought to the notice of the Minister the remarks of the D.P.I., the Minister seems to have extended the period of 2 years instead of 1 year as decided by him earlier. No reasons were given why extension was granted, why it was granted for two years. It is also not stated why the views of the D.P.I., should be overruled. In other words, this "aggressive decision" of the Minister

seems to have been provoked because the Commissioner and Secretary, a senior I.A.S. officer invited the attention of the Minister to the objections of the D.P.I.

18. Thus the extension of the exemption from 1986 to 1988 is made arbitrarily, for no reason whatsoever, without referring to the scheme and provision of the Kerala Education Act and without realising the object and purpose for which the obligatory test was prescribed as early as 1978. The Act did not intend that the delegate, the Government should make rules against the tenor of the Act itself. The amendment is thus beyond the provisions of the Act itself and is thus ultra vires of the Act.

19. It was contended that the learned Single Judge was wrong in holding that the exemption for eight year was valid and that exemption for the next two years alone is invalid and that the question whether the exemption should be for 8 years or 10 years should be left to the Government itself and this Court cannot go into the question of the wisdom of fixing of 10 years as the limit of exemption. On our reasoning given above, we are inclined to hold that exemption given beyond the initial 2 years, an additional period of six years to the aided and recognised schools alone, cannot be supported. But in view of the fact that this exemption has stood for a long time, without being challenged and as there may be many persons who have obtained those benefits who are not parties before us, we thought that it was not advisable, at this stage, to strike down the entire exemption granted after 1980 behind the back of the aggrieved persons, whose number, we cannot even guess. We also need not go beyond the pleadings and beyond the relief claimed in the Original Petition to strike down the extension of exemption from 1980 onwards. We are thus in agreement with the conclusion of the learned Single Judge, though on slightly different reasons also.

20. It was contended that a striking down of the rule in part would affect the promotional chances of many teachers. The chances of promotion do not give rise to justiciable rights. This has been reiterated by the Supreme Court in several decisions. On that ground therefore, the impugned exemption which is the label for inefficiency cannot be sustained by this Court.

21. It was urged before us by one of the counsel for the Appellants that the exemption for two years ini(sic)ially and the subsequent extension applied only to teachers who were awaiting promotion in 1978 when Rule 45B was originally introduced. The acceptance of this contention is fatal to the cause of all the Appellants, for, there is no Appellant before us who was awaiting promotion in 1978. We are of the view that Rule 45(B)(3) applies to all teachers awaiting promotion even after 1978. When the amendment made in 1986 extending the period of exemption till 31st March 1988 is annulled as unconstitutional, Sub-clause (5) of Rule 45B is immediately attracted and the teachers who were appointed after 1978 as Headmasters, who have failed to acquire the qualifications before 1st April 1986 have to be reverted. Teachers who have attained the age of 50 years before 1st April 1986 are deemed to be qualified because of the permanent exemption. No fresh directions of the Government

evolving any principle of reversion in these cases are required as the statute, on its own force, operates. The educational authorities and the Managers competent to appoint and revert headmasters will have therefore to take action in accordance with Clause (5) of this Rule. In this view, it is unnecessary for us to consider the validity of the Government orders issued after the learned Single Judge quashed the amendment. Striking down the impugned amendment as unconstitutional effaces the same from the statute book from the date of its operation, namely 1st April 1986.

22. The amendment to Rule 45B(3) in Chapter IVA of the K.E.R. inserted by the amendment, dated 12th August 1986 in G.O.P. No. 139/86/G. Edn. is struck down as unconstitutional and beyond the rule making authority of the Government and the decision of the learned Single Judge is affirmed in these appeals. We direct that in respect of posts of headmasters in Lower Primary Schools governed by the Kerala Education Act, Clause (5) of Rule 45B in Chapter XIV-A shall be enforced without any other or further directive from the Government or any educational authority and in accordance with law and in the light of the observations contained in this judgment. We have considered only the constitutionality of the amendment to Rule 45B(3) and not referred to the facts of each case separately as they are unnecessary for the disposal of these appeals.

These Appeals are dismissed, but, in the circumstances of the case no costs.