
(1967) 05 KL CK 0003
In the High Court Of Kerala

Poulose (K.V.)

APPELLANT

Vs

Assistant Educational Officer and Others

RESPONDENT

Date of Decision : 29-05-1967

Acts Referred:

Constitution of India, 1950 — Article 168, 356

Citation : (1969) 1 LLJ 632

Hon'ble Judges : M.U. Isaac, J

Bench : Single Bench

Judgement

M.U. Isaac, J.—This original petition raises the question relating to the validity and applicability of Rule 5 in Chap. XIV-A of the Kerala Education Rules, 1959 (hereinafter referred to as the rules), made by the Government in exercise of the powers u/s 36 of the Kerala Education Act, 1958 (hereinafter referred to as the Act).

2. The petitioner is the manager of an upper primary school. Respondent 4, who was an untrained candidate, was appointed by the petitioner as a teacher in the school during the year 1962-63, after advertising the vacancy and establishing the non-availability of trained hands. Her appointment was approved by respondent 1; and on the basis of this service, she was selected for Teachers' Training course in the department quota. Accordingly, she was relieved from service at the end of the year; and she joined the Teachers' Training course. She completed the course, which is for two years, and passed in the examination held in April 1965. A vacancy arose in the school during the year 1965-66. The petitioner advertised the vacancy in the Malayalam daily, "Deepika," on 17 June 1965. It is stated by respondent 4 that immediately after the school reopened in 1965, she approached the petitioner for appointment, and that the advertisement was made ignoring the same. This is denied by the petitioner. It is also averred by respondent 4 that, on seeing the advertisement, she applied to the petitioner putting forth her claim for the post. Exhibit R. 1 is produced as a true copy of her application ; and it is dated 22 June 1965. She also sent a

petition to respondent 1 on 21 June 1966, claiming that she was entitled to the appointment, and complaining against the petitioner's refusal to appoint her, even though she approached him for that purpose. A copy of this petition was also forwarded to the petitioner. However, the petitioner appointed respondent 3 in the vacancy from 2 August 1965, and sought the approval of the department for the appointment. The approval was rejected by respondent 1 as per letter, Ex. P. 1, dated 8 November 1965, on the ground that the appointment of respondent 3 was in violation of Rule 5 in Chap. XIV-A of the rules, and that respondent 4 had preferential right to the post under the said rule. The petitioner filed an appeal before respondent 2, who dismissed it as per order, Ex. P. 2, dated 20 February 1966. This original petition has been filed to quash Exs. P. 1 and P. 2, and for a writ of mandamus directing respondents 1 and 2 to approve the appointment of respondent 3.

3. Chapter XIV-A of the rules deals with the conditions of service of aided school teachers. Rules 1 to 6 in this chapter were substituted by Notification G.R.O. No. 43 of 1965 published in the Kerala Gazette No. 5, dated 2 February 1965. These rules read as follows:

1. Subject to the qualifications laid down by Government from time to time in respect of teachers of Government and aided schools and subject to the following restrictions, teachers of aided schools may be appointed as:

- (a) permanent,
- (b) acting, or
- (c) temporary.

2. Appointment of unqualified teachers made under Rule 2(1) of Chap. XXI shall be deemed temporary. Appointments of qualified teachers shall be deemed as acting till they are confirmed.

3. Initial appointment of qualified teachers shall be on probation:

Provided that for the purpose of this rule qualified teachers in service on the date on which this rule comes into force and who have a satisfactory continuous service of not less than one year, shall be deemed to have completed their probation.

4. Permanent appointment of teachers shall be made from among the qualified teachers who have completed their probation satisfactorily.

5. Unqualified teachers appointed under Rule 2 and who acquire the prescribed qualifications subsequently shall have preference for appointments to future vacancies in schools under the same educational agency.

6. (a) Teachers appointed under Rule 3 shall be on probation for a total period of one year on duty within a continuous period of two years. At the end of the period of probation the manager may issue an order declaring him to have satisfactorily

completed his probation ;

(The remaining clauses of Rule 6 are not extracted here, as they are not relevant to the controversy arising in this case.)

4. There can be no doubt that, if Rule 6 applies to the case and that the said rule is valid, the petitioner was bound to appoint respondent 4 in preference to respondent 3. The petitioner's learned counsel contended first, that Rule 5 does not apply to the case, and secondly, that this rule is invalid,

5. The learned counsel submitted that Rule 5 does not apply to the case for three reasons. In the first place, he contended that Rule 5 applies only to "unqualified teachers appointed under Rule 2," that Rule 2 came into force on 2 March 1965, and that respondent 4 is not a person appointed under Rule 2, but one appointed before this rule came into force. This contention, though apparently justified on the language used in Rule 5, cannot in my view stand closer scrutiny. Rule 5, among many other provisions of the rules, was made for the protection of unqualified teachers from exploitation by the managers of aided schools. It is a notorious fact that the managers of the aided schools traffic in the appointment of teachers. They try to create as many vacancies as possible by making temporary and short-term appointments, and receive large amounts of money from the candidates for making the appointment. For this purpose they always look for a new victim. The purpose of Rule 5 is obviously to remedy this evil, as far as possible. It gives a right for preferential appointment to a person, who was once an unqualified teacher and who subsequently acquired the prescribed qualifications. In other words, if a person has once secured an appointment in an aided school, he could subsequently claim it as a matter of right, provided there is a vacancy and he has acquired the prescribed qualifications. The manager is thus prevented from having a second opportunity from making an illegal profit; in respect of such a vacancy, either from the teacher or from a fresh candidate. This rule must be read, as far as its language permits, in such a way as to give effect to the above object. If I accept the contention of the petitioner's learned counsel, the result would be that Rule 5 would begin to operate only two years after it was made; because the minimum period required for an unqualified teacher to become qualified by undergoing the Teachers' Training course and passing the examination in two years. It must have been the intention of the Government in making Rule 5 to remedy the above evil forthwith, and not to postpone its operation by two years.

6. Now I shall examine the language of Rule 5. The words "unqualified teachers appointed under Rule 2" appearing in Rule 5 do not convey any intelligible idea, if read literally; because Rule 2 does not deal with the appointment of teachers, and hence there can be no "unqualified teachers appointed under Rule 2." This rule deals with unqualified teachers appointed under Rule 2(1) of Chap. XXI of the rules and qualified teachers appointed in the school. And it says that unqualified teachers thus appointed shall be deemed to be temporary, and that qualified teachers shall be deemed to be acting¹ till they are confirmed. The

provision relating to appointment of unqualified teachers is contained in Rule 2(1) of Chap. XXI, and not Rule 2 of Chap. XIV-A. So the words " unqualified teachers appointed under Rule 2" can have an intelligible meaning only, if the words " appointed under Rule 2 " are treated as superfluous, as they convey no meaning, or if we understand the words " unqualified teachers appointed under Rule 2 " as meaning unqualified teachers who will be deemed temporary under Rule 2. I am disinclined to treat the words used in a statutory rule as superfluous, if it can be avoided by construing the rule in any other reasonable manner. I am, therefore, inclined to put the other interpretation to the aforesaid words used in Rule 5, namely, that they mean unqualified teachers, who under Rule 2 would be deemed temporary. Such an interpretation does not do any violence to the language of Rule 5. It makes the rule intelligible; and it also serves the object, for which the rule was made. The petitioner's contention that Rule 5 of the rules does not apply to unqualified teachers appointed before 2 February 1965, i.e., before the Rule 2 came into force, therefore, fails.

7. The second reason submitted by the petitioner's learned counsel was that Rule 5 cannot have any retrospective effect, and that it could apply only to teachers appointed after this rule came into force. This contention has no substance. Rule 5 deals with unqualified teachers, who acquired the prescribed qualifications subsequently. The only considerations which arise for its application are

(1) that the person concerned is an unqualified teacher, and

(2) that he has acquired subsequently the prescribed qualifications.

If he satisfies these two conditions, when Rule 5 came into force, or at the time when the benefit under Rule 5 is sought, he comes within the ambit of the rule. There is no dispute in this case that at the time when Rule 5 came into force and when respondent 4 invoked its benefit, she had satisfied both the above requirements.

8. The third reason advanced for contending that Rule 5 does not apply to the case was that the appointment of unqualified teachers is governed by Rule 2(1) of Chap. XXI of the rules, and that under this rule an unqualified teacher has no preferential claim for appointment in a future vacancy. Rule 2(1) of Chap. XXI reads as follows:

Whenever a vacancy occurs, the manager, shall follow the directions issued by Government from time to time for ascertaining the availability of qualified hands. In case candidates with required qualifications are not available, the manager, may, with the approval of the District Educational Officer concerned, provisionally appoint from among the applicants, candidates whose qualifications conform to the greatest possible extent to the prescribed qualifications and who are proficient to teach the subject/language till qualified hands become available. The duration of the appointment of an unqualified hand shall in no case go beyond the school year in which the appointment is made and availability of

qualified hands shall be ascertained again and the approval of the District Educational Officer obtained before the candidate is appointed again in the next school year. Candidates appointed as per this rule have no preferential claim for future appointment on this ground. However, in case qualified hands are not available, candidates who do not possess the prescribed qualifications and who are appointed under this rule shall be appointed in future vacancies in the school.

I do not find anything inconsistent in the above rule and Rule 5 in Chap. XIV-A. The former deals with an ex-unqualified teacher, who has not subsequently acquired the prescribed qualifications; and this rule states that such a person has no preferential claim for future appointment except when qualified hands are not available. The latter deals with an ex-unqualified teacher, who has subsequently acquired the prescribed qualifications ; and it provides that such a person shall be entitled to preferential appointment against other candidates, whether qualified or unqualified. Both rules deal with different situations, The language employed in Rule 2(1) of Chap. XXI is not very precise. Many of the provisions in the rules suffer from this infirmity ; and it has given rise to lot of confusion and disputes regarding the respective rights and duties of the department, managers and teachers in respect of aided schools. The Government will do well, If they revise the rules, and cure these defects. However, on a closer scrutiny of Rule 2(1) of Chap. XXI, the contention put forward by the petitioner's learned counsel cannot stand, as the rule has no application to the case.

9. I now proceed to consider the second point raised by the learned counsel, viz., that Rule 5 is invalid. He submitted that Rule 5 is invalid, firstly, on the ground that it is ultra vires of Sections 10, 11 and 12 of the Act, and secondly, for the reason that Rules 1 to 6 inserted into Chap. XIV-A of the rules by Notification G.R.O. No. 43 of 1965 published in the Kerala Gazette dated 2 February 1965 have not been laid before the Legislative Assembly, as required by Section 37 of the Act. I shall first deal with vires of Rule 5. Sections 10, 11 and 12 may be extracted hereunder for the sake of convenient reference:

10. Qualifications for appointment as teachers.?The Government shall prescribe the qualifications to be possessed by persons for appointment as teachers in Government and private schools.

11. Appointment of teachers in aided schools.?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 possess the qualifications prescribed u/s 10.

12. Conditions of service of aided school teachers.?

(1) 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.

(2) No teacher of an aided school shall be dismissed, removed or reduced in rank

by the manager without the previous sanction of the officer authorised by the Government in this behalf, or placed under suspension by the manager for a continuous period exceeding fifteen days without such previous sanction.

The petitioner's learned counsel submitted that the power to appoint a teacher in an aided school is vested in the manager, and that all restrictions and checks introduced by the Act in the exercise of this power are contained in the above three sections. It was submitted that Section 10 empowers the Government only to prescribe qualifications for appointment as teachers, which meant educational qualifications, that Rule 5 of Chap. XIV-A, which states that an unqualified teacher, who has subsequently acquired the prescribed qualifications, shall be entitled to preferential appointment, does not prescribe any qualification for appointment. It was, therefore, contended that this rule does not fall within the ambit of Section 10. Regarding the application of Section 11, it was submitted that the rules and conditions contemplated to be laid down by the Government by this section must refer to the qualifications prescribed in Section 10. With regard to Section 12, it was submitted that "the conditions of service of teachers in aided schools" which the Government are empowered to prescribe under this section, mean post-appointment conditions, and that Rule 5 which deals with the right for the preferential appointment is not a condition of service.

10. It is not possible to accept any of the above contentions of the learned counsel. The preamble of the Act states that this is a measure enacted for the better organization and development of educational institutions in the State. Several provisions of the Act and the circumstances under which it was enacted show that one of the main objects of the Act was to curb and regulate the powers of managers of aided schools in matters relating to appointment of teachers and to provide for their conditions of service. Section 36(1) of the Act expressly empowers the Government to make rules for the purpose of carrying into effect the provisions of the Act. I do not see any reason why the expression "qualifications" used in Section 10 of the Act can mean educational qualifications only, as contended for by the learned counsel. The fact that a person was formerly employed in a school can very well be a qualification for a preferential appointment for him, as against the other candidates. If so, Rule 5 falls squarely within the ambit of Section 10. Section 11 of the Act provides that teachers in aided schools shall be appointed by the managers from among persons who possess the qualification prescribed in Section 10, "subject to the rules and conditions laid down by the Government" in the matter. Thus, this section contemplates in express terms the power of the Government to lay down rules and conditions in the matter of appointment of teachers. Assuming that Rule 6 does not contain a Qualification within the meaning of Section 10, there can be no doubt that the said rule contains a condition regarding appointment of teachers, and it falls u/s 11. I am also inclined to take the view that the provision contained in Rule 5 falls within the power of the Government to prescribe "conditions of service of teachers" u/s 12 of the Act. A condition that an unqualified teacher appointed temporarily shall be entitled to preferential

appointment in a future vacancy arising after he has acquired the prescribed qualifications, is certainly a condition of service. In any view of the matter I have no doubt that Rule 5 of the rules is within the rule-making power of the Government.

11. I now come to the last contention of the petitioner's learned counsel that Rule 5 is bad, as it was not placed before the Legislative Assembly as required by Section 37 of the Act. This contention deserves a careful examination. Section 37 of the Act reads as follows:

All rules made under this Act shall be laid for not less than fourteen days before the Legislative Assembly as soon as possible after they are made and shall be subject to such modifications as the Legislative Assembly may make during the session in which they are so laid.

On 10 September 1964, the President of India issued a Proclamation In exercise of the powers conferred by Article 356 of the Constitution, assuming to himself all the functions of the Government of Kerala, and declaring that the powers of the Legislature of the said State shall be exercisable by or under the authority of the Parliament. The Legislative Assembly of the State was also dissolved by this Proclamation. It is published as Notification G. S. R. 1360 in the Gazette of India Extraordinary dated 10 September 1964 in Part II?Section 3(1). In February 1965, an election was conducted to the Legislative Assembly of the State. After the election, the President issued a Proclamation dated 24 March 1965, revoking his Proclamation issued on 10 September 1964. But on 24 March 1965, the President issued another Proclamation under Article 356 of the Constitution, again assuming to himself all the functions of the Government of Kerala, dissolving the Legislative Assembly, and declaring that all powers of the Legislature of the State shall be exercisable by or under the authority of the Parliament. This Proclamation was issued before the Legislative Assembly was summoned. The above two Proclamations are published in the Kerala Gezette Extraordinary dated 26 March 1965. Another election was conducted in February 1967, and the Legislative Assembly was constituted. The Proclamation of 14 March 1965 issued under Article 356 of the Constitution was cancelled by the President by another Proclamation dated 6 March 1967, In due course, a Council of Ministers was appointed by the Governor; and the Legislative Assembly was also summoned. Thus there has been no Legislative Assembly in this State from September 1964 till March 1967; and during this period the powers of the legislature were exercised by the Parliament.

12. According to Article 168 of the Constitution, the Legislature of a State, in which there is no Legislative Council, consists of the Governor and the Legislative Assembly. Therefore, the legislature is not the same thing as the Legislative Assembly, Legislative Assembly is only a component of the legislature. However, during the above period, the powers of the Legislative Assembly of the State were conferred on the Parliament. Rules 1 to 6 of the rules were made by the Government on 2 February 1965, at a time when there was no Legislative

Assembly in the State. So it was impossible to place these rules before the Legislative Assembly as required by Section 37 of the Act. Admittedly, they have not been laid before the Parliament also. It is, therefore, contended that these rules are invalid, and that, at any rate, they do not come into force, until they are placed in the Parliament or Legislative Assembly of the State, as the case may be.

13. There is a very learned discussion of this question in the Indian Law Institute Study Ho. 10 on "Delegated Legislation in India " at pp. 153 to 161. This treatise has referred to the eminent authorities on the subject, such as Allen on " Law and Order," Griffith & Street on " Principles of Administrative Law." The question also arose for consideration in the decision of the Supreme Court in *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, ; *In Re Kerala Education Bill AIR 1958 SC 956* and *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, . These decisions have also been considered in the above treatise. It will be seen from the above decisions that the Supreme Court took the view, that when the statute provides that the rules shall be placed before the legislature as soon as possible, after they are made, and that they shall be subject to such modifications as the legislature may make, the rules become operative only, after they are so placed before the legislature. After referring to the above decisions, it is observed in this treatise that the attitude of the Supreme Court in respect of laying requirement is rather strict, and suggested that the said requirement should be regarded as merely directory. And it stated (at p. 160):

The reasoning of South African case, *B. v. Beniels* 1936 CPD 331 and of the West Indian case, *Springer v. Doorly*-Unreported but discussed in 28 Can. Bar. Rev. (1950), 791; that the consequence of holding such requirement to be mandatory would unnecessarily bring uncertainty into law sounds to be strong. If certain statutory rules, which have already come into force, cease to be effective for want of laying within an uncertain period described as " as soon as possible," there might be hardship to the general public. The object of the provision to lay is to provide for parliamentary control and the Government's failure to comply with the provision does, no doubt, defeat that object, but ineffectiveness of parliamentary control in stray cases where Government may fail to lay rules may not be so great an evil as the uncertainty of law that results from holding the requirements to be mandatory

14. "Delegated Legislation in India" was published in 1964. The Supreme Court had again occasion to consider the effect of the failure to lay rules before the legislature as required by a statute in *Jan Mohammad Noor Mohammad Begban Vs. State of Gujarat and Another*, , Section 26(5) of the Bombay Agricultural Produce Markets Act, 1939, provided that the rules made u/s 26(1) shall be laid before each of the Houses of the Provincial Legislature at the session thereof next following, and shall be liable to be modified or rescinded by a resolution in which both Houses concur, and such rules shall, after notification in the official

gazette, be deemed to have been modified or rescinded accordingly. It was contended in the above case that the rules made under this Act were invalid, as they were not laid before any of the Houses of the legislature as required by the above section. These rules were made in 1941. At that time, there was no legislature in session, the legislature having been suspended during the emergency arising out of World War II. The session of the Bombay Legislative Assembly was convened for the first time after 20 May 1946, and the session was prorogued on 24 May 1946. The second session of the Legislative Assembly was convened on 15 July 1946, and the Legislative Council on 3 September 1946. Rules were placed before the Legislative Assembly and the Legislative Council during the last session. Rejecting the contention against the validity of the rules, the Supreme Court stated:

Section 26(5) of the Bombay Act 22 of 1939 does not prescribe that the rules acquired validity only from the date on which they were placed before the Houses of Legislature. The rules are valid from the date on which they are made u/s 26(1). It is true that the legislature has prescribed that the rules shall be placed before the Houses of Legislature, but failure to place the rules before the Houses of Legislature does not affect the validity of the rules, merely because they have not been placed before the Houses of the Legislature. Granting that the provisions of Sub-sec (5) of Section 26, by reason of the failure to place the rules before the Houses of Legislature, were violated we are of the view that Sub-section (5) of Section 26, having regard to the purposes for which it is made, and in the context in which it occurs, cannot be regarded as mandatory. The rules have been in operation since the year 1941, and by virtue of Section 64 of the Gujarat Act 20 of 1964, they continue to remain in operation." The earlier decisions of the Supreme Court were not referred to in the above case. It cannot be assumed that the learned Judges of the Full Bench, which rendered the above decision, were not aware of their earlier decisions. This latest decision of the Supreme Court has, therefore, to be taken as laying down the law on the subject.

16. It may also be stated that the above decision of the Supreme Court is in agreement with the view expressed in " Delegated Legislation in India" of the Indian Law Institute. The same view was taken by a Division Bench of this Court in Muthuswami Koundan v. State of Kerala and Anr. 1960 KLJ 1319. The question arose in that case with regard to the validity of a notification issued by the Government under 8.17(2) of the Travancore-Cochin Requisitioning and Acquisition of Property Act, 1955. This section reads as follows:

17, (i) The Government may, by notification in the gazette, direct that any power conferred on them by or under this Act shall, in such circumstances and under such conditions, if any, as may be specified in the notification, be exercisable also by an officer or authority subordinate to the Government.

(2) AH notifications issued under Sub-section (1) shall be laid, as soon as may be possible, before the Legislative Assembly.

The impugned notification was not laid before the Legislative Assembly as required by Section 17(2); and it was contended that it was invalid for non-compliance with this statutory provision. Their lordships said that the answer to this controversy depends on whether the provision embodied in Section 17(2) is directory or imperative in character, and quoted the following passage from Allen on " Law and Order " as stating the correct legal position:

If a provision is held to be imperative, failure to comply with it wholly invalidates the action which purports to have been taken under it. It is " of the essence, of the legislative purpose, and if it is disregarded, it cuts away the foundation from the attempted proceedingIf, on the other hand, the provision is held to be directory only, failure to comply with it, though it may expose the responsible person to a penalty, does not invalidate the whole proceeding or transaction, not even if there is no known penalty which can be applied to the person in fault, nor any remedy for a person aggrieved,

17. The Court held that the statutory provision like the one contained in Section 17(2) is only directory in character, and that the failure to lay the notification before the Legislative Assembly did not affect its validity. The same view was taken by a Division Bench of the Andhra High Court in Krishnan v. Secretary, Regional Transport Authority, Chittoor AIR 1956 AP 129. There is a very learned discussion of this question by Subba Rao, C.J. This decision has been followed by this Court in Muthuswami Koundan v. State of Kerala and Anr. 1960 K.L.J. 1319 (vide supra).

18. The question whether the rules made under the Act are invalid for not laying them before the Legislative Assembly as required by Section 37 of the Act arose for consideration before a learned Judge of this Court in Original Petitions Nos. 1688 and 1903 of 1965. The learned Judge has elaborately dealt with this question; but his discussion does not go beyond what has been contained in the " Delegated Legislation in India " published by the Indian Law Institute. Unfortunately, the latest decision of the Supreme Court in Vithal Yeshwant Jathar Vs. Shikandarkhan Makhtumkhan Sardesai, was not placed before him. The earlier view of the Supreme Court, as I have pointed out above, was contrary to the view taken by this Court in the decision above referred to, and by other Indian High Courts, as well as the view generally held by some of the learned authors on the subject. Under these circumstances, the learned single Judge left the question open. But in view of the latest pronouncement of the Supreme Court, there can be little doubt that the decision of this Court in Muthuswami Koundan v. State of Kerala and Anr. 1960 K.L.J. 1319 (vide supra) laid down the correct law; and I respectfully follow the same. The contention of the petitioner's learned counsel against the validity of Rule 5 of the rules on the above ground cannot, therefore, stand.

19. Before I leave this question, I desire to point out one more aspect of the matter. To my mind, it appears that Section 37 of the Act and similar statutory provisions requiring that a statutory rule or notification should be laid before the

Legislative Assembly as soon as possible is based on the assumption that the Legislative Assembly is in existence. If the Legislative Assembly is not in existence, Section 37 of the Act becomes incapable of compliance and is not in operation. There is no warranty in the language of this section to construe it as requiring that, in the absence of the Legislative Assembly, the rules made by the Government should be laid before the Parliament. If that was the legislative intention, the State Legislature could have stated so in Section 37 of the Act in clear terms. I cannot read Section 37 by substituting therein the word "Parliament" for the words " Legislative Assembly " wherever they occur in the section. There is also another difficulty. Section 37 contains a directive or command by the legislature to the State Government. The State Legislature has no power to make any directive or command to the President, in whom the functions of the Government vest by virtue of the Proclamation issued by him under Article 356 of the Constitution. The section has to be construed consistent with the legislative power of the State to enact the said section. In any view, Section 37 has no operation in the absence of the Legislative Assembly in the State. In the result this original petition fails and it is accordingly dismissed. I make no order as to costs.