

(1970) 09 KL CK 0006
In the High Court Of Kerala
Case No : O.P. 4255/67

Rev. Father Xavier and another	Vs	APPELLANT
State of Kerala and others		RESPONDENT

Date of Decision : 04-09-1970

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 30
Kerala Education Act, 1958 — Section 10, 11, 12

Citation : (1970) KLJ 1001

Hon'ble Judges : P. Govindan Nair, J; Balakrishna Eradi, J

Bench : Division Bench

Advocate : K. Velayudhan Nair and K.J. Joseph, for the Appellant; C.K. Sivasankara Panicker, D.N. Potti and Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Balakrishna Eradi, J.—The first petitioner in this writ petition is the Manager of an aided upper primary school. He appointed the 2nd petitioner as a teacher in the school in a vacancy which arose during the school year 1967-68 and reported the matter to the Assistant Educational Officer, Shertallai (2nd respondent) seeking his approval under Rule 8 of Chapter XIV (A) of the Kerala Education Rules, 1959 (hereinafter referred to as the Rules). The 2nd respondent by his order Ex. P-1 dated 26-9-1967 informed the first petitioner that approval could not be granted to the appointment of the 2nd petitioner since complaints had been received from persons who had previous service in the school alleging that the appointment in question had been made overlooking their legitimate claims. In Ex. P-1 the 2nd respondent has also given a direction that the 2nd petitioner should be forthwith relieved from the post of teacher. The petitioners have brought this writ petition seeking to quash the order Ex. P-1. The 3rd respondent had put in previous service in the school as an unqualified teacher and she has been impleaded in the writ petition on the ground that it was on the basis of a complaint petition put in by her before the 2nd respondent that the latter has passed the impugned order Ex. P-1.

2. The petitioners contend that the 3rd respondent had not acquired any right or claim for preferential reappointment in the school by virtue of the temporary service put in by her in the school as an unqualified teacher during the school year 1962-63. It is the petitioners' case that in passing the order Ex. P-1 the 2nd respondent has erroneously assumed that Rule 5 of Chapter XIV (A) of the Rules which came into force only on 2-2-1965 is applicable to the case of the 3rd respondent and that it has conferred on her a right to preference for appointment in the vacancy which arose during the year 1967-68. It is contended on behalf of the petitioners that there was no such rule in force in 1962-63 when the 3rd respondent has appointed temporarily as an unqualified teacher and such appointments were at that time governed by the express provision contained in Rule 2 of Chapter XXI of the Rules. That rule lays down that unqualified teachers appointed temporarily in an aided school under the provisions of the said rule shall have no preferential claim for future appointment by reason merely of the temporary service so put in by them. It is argued that the provision in Rule 5 cannot be regarded as applicable even to unqualified teachers who were temporarily appointed and were also relieved from service prior to the date of its introduction since it will be giving retrospective operation to Rule 5 which is not legally permissible. The petitioners also challenge Rule 5 as ultra vires on the ground that the framing of such a rule is not authorised by any of the provisions contained in the Kerala Education Act, 1958 (hereinafter referred to as the Act.)

3. Petitioners' counsel laid stress on the fact that Section 11 of the Act has expressly preserved the right or freedom of the Manager to appoint teachers in his school subject only to the condition that the persons so appointed should possess the qualifications prescribed u/s 10 of the Act and that the appointment must be in conformity with the rules and conditions that may be laid down by the Government. According to the petitioners the "rules and conditions" referred to in Section 11 can relate only to, matters of procedure regarding the submission of reports to, and the taking of approval from, the concerned educational authorities and other similar incidental processual steps. It is submitted on behalf of the petitioners that the provision incorporated in Rule 5 of Chapter XIV (A) of the Rules is neither the prescription of a qualification u/s 10 of the Act nor a valid rule or condition laid down by the Government u/s 11 of the Act. It is further contended that Rule 5 cannot also be sustained as one made u/s 12 of the Act since it does not evidence the prescription of conditions of service of teachers in aided schools.

4. On behalf of the respondents, the order Ex. P-1 is sought to be sustained only on the strength of the provision contained in Rule 5 of Chapter XIV (A) of the Rules. The petitioners' contention that Rule 5 will not operate to confer any benefit on teachers who had put in temporary qualified service prior to the date of introduction of the said rule and were not in service on that date is refuted by the respondents. It is contended on their behalf that the effect of R. 5 is to confer a right for preferential appointment in future vacancies on persons who

satisfy two condition, namely (a) that they must have already put in unqualified service in the school prior to the date of the occurrence of the vacancy and (b) that subsequent to their temporary appointment as unqualified teacher they should have acquired the prescribed qualifications. It is argued that in applying the provisions of Rule 5 and giving the benefit of preference to persons who satisfy both the requisite conditions in filling up a vacancy arising subsequent to the coming into force of Rule 5 retrospective operation is not being given to the rule. With respect to the contentions raised by the petitioners challenging the validity of R. 5 the respondents state that the Government had full competence to make such a rule u/s 11 of the Act by imposing conditions on the Manager's power to appoint teachers in aided schools and also u/s 12 as a prescription of the terms and conditions of service of an unqualified teacher appointed under Rule 2 of Chapter XIV (A) read with Rule 2 of Chapter XXI of the Rules. In support of the above contentions the respondents strongly relied on the decision of this court reported in K.V. Poulose v. Assistant Educational Officer, 1967 KLT 1021, where the validity of Rule 5, has been upheld by a learned single Judge on the ground that the making of such a rule was within the scope of the power conferred on the Government under Sections 10, 11 and 12 of the Act and that the benefit under the rule can be availed of even by persons who had put in service as unqualified teachers prior to its introduction.

5. Our learned brother Mathew J. before whom this writ petition originally came up for hearing referred the case to a Division Bench since the learned Judge entertained some doubt regarding the correctness of the decision reported in K.V. Poulose v. Assistant Educational Officer, 1967 KLT 1021.

6. We have already summarised the contentions put forward by the petitioners in attacking the validity of Rule 5 and by the respondents for sustaining the rule and also regarding its scope and applicability. We shall now proceed to discuss the merits of those contentions and state our conclusions.

7. Rule 5 of Chapter XIV (A) of the Rules is in these terms:

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.

This rule was introduced only on 2-2-1965. Rule 2 referred to therein also came into force on the same date and it reads:

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

Chapter XXI of the Rules contains the rules relating to recruitment of teachers to aided schools. Rule 2(1) thereof, which is made mention of in Rule 2 of Chapter XIV (A) extracted above, runs thus:

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 previous 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.

The above rule (Rule 2(1) of Chapter XXI) has been in force in its present form from 1-7-1961 excepting for the slight change effected by substituting the words "with the previous approval" now occurring in the rule for the pre-existing word "with the approval" by a notification dated 10-10-1967, which modification is of no significance so far as the present case is concerned.

8. Prior to 2-2-1965--the date on which Rule 5 was introduced in Chapter XIV(A) of the Rules--the subject of temporary appointments of unqualified teachers was governed only by Rule 2 of Chapter XXI wherein it is categorically provided that such temporary appointees will not acquire any right to preferential reappointment by reason of their temporary service. Strangely enough, even after the introduction of Rule 5 in Chapter XIV (A) conferring on such personnel a right to preference in the matter of appointment to future vacancies, Rule 2 of Chapter XXI is left to remain in its old form and it continues to lay down that the temporary service of an unqualified teacher will not be a ground for preference for subsequent reappointment.

9. We have given our anxious consideration to the arguments advanced by counsel appearing on both sides on the question of the validity of Rule 5. In our opinion, it is not possible to accept the contention of the respondents that what has been done under Rule 5 is to prescribe "the qualifications to be possessed by persons for appointment as teachers in Government and private schools" in the exercise of the power conferred by Section 10 of the Act. In as much as Section 11 lays down that only persons who possess the qualifications prescribed u/s 10 can be appointed as teachers, it is manifest that the power vested in the Government u/s 10 is to prescribe the minimal academic or other qualifications without which a person will not be eligible for appointment as a teacher. Since Rule 5 of Chapter XIV (A) does not purport to lay down any such qualification, it cannot be regarded as a rule framed in the exercise of the power conferred by Section 10 of the Act.

10. We shall now examine the contention put forward by the respondents based

on Section 11 of the Act. That Section 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 possess the qualifications prescribed u/s 10." In our opinion, "the rules and conditions" which Government are empowered to lay down u/s 11 of the Act can only be in respect of procedural and incidental matters like the necessity for submission reports to the educational officer and seeking his approval whenever appointments are made, the fixation of staff strength and the maintenance of pupil-teacher ratio subject to which alone new appointments can be made, the circumstances in which appointments are to be made either temporarily or regularly on probation etc. etc. It has to be noted that the conditions mentioned in the section may be laid down not only by rules but even by executive orders. We are not inclined to construe the section as conferring an unbridled power on Government to impose by executive orders any condition that they deem fit restricting the ordinary right of the Manager to appoint as teachers in his institution persons chosen by him from amongst candidates who possess the requisite qualifications prescribed u/s 10 of the Act. Such an interpretation would lay the section open to justifiable criticism on the ground that it confers an uncanalised and arbitrary power on the executive Government to interfere with the right of the Manager to administer his educational institution so as to be violative of Articles 14 and 19 of the Constitution and also of Article 30 of the Constitution in respect of educational institutions established by minority communities. Moreover since the topic of prescription of conditions of service of aided school teachers has been distinctly dealt with by the legislature in Section 12 of the Act, it is only reasonable to limit the scope and meaning of the expression "conditions" occurring in Section 11 of the Act as taking in only conditions relating to matters other than those regulating the terms of service of teachers. We do not, therefore, find it possible to accept the contention put forward by the respondents that Rule 5 of chapter XIV (A) of the Rules is a rule framed in the exercise of the power conferred on the State Government by Section 11 of the Act to lay down "rules and conditions" pertaining to the appointment of teachers in aided schools. To the extent to which the decision in *K.V. Poulose v. Assistant Educational Officer* 1967 KLT 1021, has laid down that Rule 5 of Chapter XIV(A) of the Rules is sustainable as a valid exercise of the rule making power conferred on the Government by Sections 10 and 11 of the Act we respectfully record our dissent from that view.

11. The validity of Rule 5 of Chapter XIV (A) of the Rules has been upheld in *K.V. Poulose v. Assistant Educational Officer*, 1967 KLT 1021, also on the ground that it is a provision validity framed u/s 12 of the Act which empowers the Government to lay down the conditions of service of teachers in aided schools and with this conclusion we are in full agreement. By making provision under Rule 5 for conferring on unqualified teachers appointed temporarily Rule 2 a right to preference in the matter of appointment to future vacancies on their getting qualified what has really been done by the Government is to prescribe a condition of service of such teachers who are temporarily appointed under Rule 2

at a time when they are unqualified. One of us sitting singly had occasion to consider the question of the validity of Rule 5 of Chapter XIV (A) in O.P. 3389 of 1969 and it was upheld on the ground that it is a rule framed u/s 12 of the Act laying down a condition of service. Though an appeal was taken against that decision it was dismissed by a Division Bench of this court--vide Writ Appeal No. 107 of 1970. We hold that Rule 5 is intra vires as it embodies the prescription of a condition of service made by the Government in exercise of the power conferred by Section 12 of the Act.

12. That takes us to the question whether the benefit conferred by Rule 5 of Chapter XIV (A) of the Rules can be claimed by persons who had put in temporary service as unqualified teachers during some period prior to the date of the introduction of the rule and were not in service in the schools concerned on such date. In this context it becomes very material to remember that until Rule 5 came into force on 2-2-1965 temporary appointments of unqualified teachers were governed exclusively by the express stipulation contained in Rule 2 of Chapter XXI of the Rules that such persons shall have no preferential claim for future appointment by reason of such temporary service. In making temporary appointments of unqualified teachers during the period prior to the introduction of Rule 5 both the Manager as well as the teacher concerned must be deemed to have entered into the arrangement on the basis of the specific condition contained in Rule 2 of Chapter XXI, namely that such teacher would have no right to preference in the matter of future appointment in the school. In respect of cases where the temporary appointments which were so made had already terminated and the teachers concerned had left the service of the respective schools prior to the introduction of Rule 5, the terms and conditions of their past service cannot be subsequently laid down by any rule framed u/s 12 because that would clearly amount to giving retrospective effect to such rule so as to disrupt and rip open transactions which are past and closed.

13. The wording used in Rule 5 also indicates that the benefit of its provisions is intended to be applied only to unqualified teachers who are appointed subsequent to its commencement. Rules 1 to 6 of Chapter XIV (A) as they now stand were brought into force by a notification dated 2-2-1965. When Rule 5 speaks of "unqualified teachers appointed under Rule 2" the reference can only be to persons who are appointed subsequent to 2-2-1965 on which date alone Rule 2 came into force. Rule 2 of Chapter XIV (A) in the form in which it originally stood prior to its substitution by the present rule, did not deal with the topic of unqualified teachers at all and hence the reference in Rule 5 can only be to the provisions of the new Rule 2 as substituted on 2-2-1965. It is, therefore, obvious that the intention of the rule-making authority in enacting Rule 5 could only have been to confer the benefit of a preference for reappointment on persons appointed temporarily as unqualified teachers subsequent to 2-2-1965 on which date Rules 1 to 6 of Chapter XIV (A) were brought into force. That was rightly so done because the law does not permit the making of rules with retrospect effect, particularly when the statute has not specifically conferred any

such power. We are therefore constrained to differ from the view expressed in the decision in *K.V. Poullose v. Assistant Educational Officer*, 1967 K.L.I. 1021, that the benefit conferred under Rule 5 of the Rules is applicable to unqualified teachers who were appointed before 2-2-1965 and were not in service on that date.

14. In the present case, the 3rd respondent had put in unqualified service in the school for a snort period during 1962-63 and had been relieved at the end of that school-year. She was not in the service of the school at the time when Rule 5 of the Rules came into force. The position as it obtained in the academic year 1962-63 during which the 3rd respondent was appointed temporarily as an unqualified teacher and served as such in the school for about 8 months, was that such appointment was governed only by the provision contained in Rule 2(1) of Chapter XXI which specifically laid down that such appointees shall have no preferential claim for future appointment by reason of the temporary unqualified service. This was the term of condition of service under which the 3rd respondent served in the school for the span of about 8 months. On the interpretation placed by us on Rule 5 it must follow that the 3rd respondent is not entitled to claim the benefit conferred by that rule. The 2nd respondent was therefore in error in holding that the 3rd respondent is entitled to preference in the matter of appointment to the vacancy in question and rejecting the request made by the Manager for approval of the appointment of the 2nd petitioner on that ground.

15. We quash Ex. P-1 and direct the 2nd respondent to pass fresh order in the matter in accordance with law and in the light of the observations contained in this judgment within a period not exceeding six weeks from to-day. The original petition is allowed as above. There will be no direction regarding costs.