
(1997) 08 KL CK 0041

In the High Court Of Kerala

Case No : O.P. No's. 1564 and 2575 of 1990

Vasudevan Namboodiri

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 27-08-1997

Acts Referred:

Kerala Education Rules, 1959 — Rule 12, 123, 12C, 12D, 16

Citation : (1997) 08 KL CK 0041

Hon'ble Judges : S. Sankarasubban, J

Bench : Single Bench

Advocate : E. Subramoni, in O.P. No. 1564/90 J and T.M. Abdul Latiff, in O.P. No. 2575/90 F, for the Appellant; P.K. Ravikrishnan, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

S. Sankarasubban, J.—These two Original Petitions are concerned with the same matter and hence they are heard and disposed of together. O.P. No. 1564 of 1990 is filed by the Manager of Ayamkudy High School, Ayamkudi, Palai, while O.P. No. 2575 of 1990 is filed by the Headmaster of Ayamkudi High School. Ayamkudi High School is an aided school within the jurisdiction of the District Educational Officer, Palai. In 1987-88, the District Educational Officer, Palai conducted an inspection of the school for fixation of the staff strength under Rule 12 of Chapter XXIII of the Kerala Education Rules. In this case, we are only concerned with the fixation of staff strength for standard VI. There were three divisions for standard VI. By order dated 15th July 1987, the D.E.O. held that three divisions for standard VI will be retained in view of the effective students strength of standard VI. Thus the existing three divisions were allowed to continue.

2. There were certain allegations of misconduct against the Headmaster. The allegations included irregularities in the admission and removal of pupils. The D.E.O., Palai was directed to conduct an enquiry into the matter and submit a

report. Accordingly, the enquiry was conducted on 3rd March 1988 and he submitted a report on 7th March 1988. On the basis of the report, the Deputy Director (Education), Kottayam directed the Manager to take disciplinary proceedings against the Headmaster. This is evidenced by Ext. P-1 Pursuant to Ext. P-1, disciplinary proceedings were initiated against the Headmaster. The Manager proposed a punishment of compulsory retirement. This is awaiting the approval of the Director of Public Instruction. One of the allegations against the Headmaster was that he had manipulated admission of pupils for standard VI for the year 1987-88 in order to see that the three divisions in standard VI are retained.

3. A record cheque was conducted invoking the provisions of Rule 12E(3) of Chapter XXIII of the K.E.R. with regard to the staff strength for the year 1987-88. Thereafter, the Director of Public Instruction passed Ext. P-2 order dated 5th March 1989. The Director found that the third division of standard VI of High School, Ayamkudi has been got sanctioned by illegal means and by the same order, the sanction of the third division was cancelled. Further, the Director held as follows:

The financial loss sustained by the Government will be recovered from the District Educational Officer, Palai, Headmaster, H.S., Ayamkudi and the Manager, H.S., Ayamkudi.

Against Ext. P-2 order, both the Manager and the Headmaster filed revision petitions before the Government. These were dismissed by Ext. P-3 order dated 29th November 1989. Exts. P-2 and P-3 produced in O.P. No. 1564 of 1990 are produced as Exts. P-1, and P-2 in O.P. No. 2575 of 1990. In O.P. No. 1564/90, the Manager has prayed for quashing Exts. P-2 and P-3 insofar as it directs the recovery of financial loss of the Government. In O.P. No. 2575 of 1990, the prayer is against the recovery of the financial loss from the Headmaster. It was submitted on behalf of the Headmaster that he had challenged the disciplinary proceedings before this Court and it is pending by way of another petition.

4. In the counter affidavit-filed on behalf of the State, the contention taken is that the Manager is liable for the loss. Rule 7(4) of Chapter III is relied on. Further, it was contended that the Manager had colluded with the Headmaster. In the counter-affidavit filed in the O.P. filed by the Headmaster, in paragraph 5 it is stated as follows:

The Petitioner was given notice before passing Ext. P-1 and this fact is mentioned in Ext P-1. Recovery of loss sustained by the Government is not a matter governed by the rules in Chapter XXIII K.E.R. and so a hearing about the recovery is not necessary as per Rules. Moreover, the recovery is not a punishment.

5. Learned Counsel for the Petitioners contended that they are not challenging the cancellation of the Division. It is submitted that their contention is that the Department has no power to recover the financial loss sustained by the

Government on account of the cancellation. Further, it is submitted that in the notice issued to them before cancellation, there was no mention about the recovery of the loss sustained by the Government. On the other hand, it was contended on behalf of the Government that the power of cancellation included the power to order recovery of loss from the Manager and Headmaster. I make it clear that I am not considering the question whether the order of cancellation of the third division of standard VI passed by Ext. P-2 and confirmed by Ext. P-3 is correct or not and whether the Manager and the Headmaster acted in collusion. I am considering the question in issue on the basis that the order of cancellation is legal and the Manager and the Headmaster misled the authorities in retaining the third division of standard VI. The question is, on the above facts, whether the authorities have got the power to recover the loss incurred by the Government from the Manager and the Headmaster.

6. The learned Government Pleader submitted that the power to recover the loss is incidental to the power of cancellation. According to him, the staff strength is fixed on the basis of the records of the school. Further, on the basis of the staff strength, a division in a class may be allowed to be retained or a new division allowed to be formed. The salary of the teachers is paid by the Government. If it is found that the strength of the pupils was boosted up due to the manipulation of the concerned persons, there is nothing wrong in recovering from such persons the loss suffered by the Government. There is no dispute to this proposition. But the question is when the exercise of the power is limited by the statutes and the rules whether the authorities can act beyond the powers conferred on them.

7. Chapter XXIII of K.E.R. deals with the fixation of strength of teachers in departmental and aided schools. Rule 12 deals with the procedure for fixation of staff strength. The strength is verified by the Educational Officer by paying surprise visit to the school. Under Rule 123 the orders of staff fixation shall take effect on the 15th of July every year. Rule 12C empowers the superior officers to scrutinise the orders of staff fixation passed by the subordinate officers and may pass revised orders. The final orders are to be passed before the end of September every year. The power under Rule 12C is only to revise the order. The power of the appellate authority under Rule 12D shows that it only deals with creation of posts. In the present case, the power is exercised under Rule 12E(3) of the K.E.R. It reads as follows:

The Director may on his own motion or on the basis of the report of the authorised officer under Rule 16 including the evidence and other details, if any, collected by him or otherwise call for the records of the orders relating to fixation of staff strength issued by Subordinate Officers and revise the same:

Provided that an order affecting the interest of a person shall not be passed under these rules unless the person concerned has been given an opportunity of making any representation which he may wish to make against such orders.

This also shows that the power is given only to revise the order of staff strength. No other power is given. It is no doubt true that when a power is given to the authorities it clothes him with all the incidental powers to exercise it. The question is whether the right to recover the loss is incidental to the power to revise the order of fixation of staff strength. To me it appears that such a power is not given under Rule 12E(3). What the authority is concerned is only to find out whether the order passed by the subordinate officers is proper or not. Here he considers whether the principles regarding the fixation of staff strength are followed or not. Further he has to consider the effective student strength. In assessing the student strength he has to consider the genuineness of the admissions and if he is convinced that the fixation is not proper he can cancel the same. This may result in the termination of service of a teacher. But this power does not clothe him with the right to recover the salary paid to the teacher on the ground that the Headmaster or Manager were responsible for misleading the authorities. According to me, the loss occasioned is a consequence of the power exercised by the authorities and is not incidental to the power exercised by them.

8. The Supreme Court had occasion to deal with the nature of incidental power in *The Sub-divisional Officer, Sadar, Faizabad Vs. Shambhoo Narain Singh*, . In that case, the question was whether a Pradhan of a Grama Sabha can be suspended in exercise of the power u/s 95(1)(g) of the U.P. Panchayat Raj Act. The Supreme Court found that the Pradhan cannot be said to be a servant of the Government. u/s 95(1)(g) of the Act, the Government was competent to impose a punishment of suspension, if a misconduct was proved in an enquiry. But it was not an explicit power given to the Government to suspend the Pradhan during the pendency of an enquiry. Dealing with the contention, the Supreme Court held as follows:

It is well recognised that where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts or employing such means as are essentially necessary to its execution. But before implying the existence of such a power the Court must be satisfied that the existence of that power is absolutely essential for the discharge of the power conferred and not merely that it is convenient to have such a power. We are not satisfied that the power to place under suspension an officer is absolutely essential for the proper exercise of the power conferred u/s 95(1)(g). It cannot be said that the power in question cannot be properly exercised without the power to suspend pending enquiry.

9. A similar question came before the Supreme Court for consideration in *Naraindas Indurkhya Vs. The State of Madhya Pradesh and Others*, . The question was whether the Board had the power to prescribe text books. The contention was that since it had the power to prescribe the curriculum, it had the power to prescribe text books also. Negating this contention, the Supreme Court held as follows:

This contention is not well founded and cannot be sustained. The Board has undoubtedly the power to prescribe courses of instruction in languages, but it

does not include, as necessarily incidental to it, the power to prescribe text books on languages. It is not correct to say that the course of instruction in language cannot be laid down except by reference to text books prescribed for the purpose.

The Supreme Court further went on to hold that that was not an incidental power. Thus going by the provisions of Chapter XXIII, it cannot be said that exercising that power, viz., the power to fix staff strength, the authorities have got any power to recover the loss suffered by them.

10. Now, I have to consider whether this power is available to the authorities under any other provisions of the Act. So far as the Headmaster is concerned, Rule 65 of Chapter XIVA, K.E.R. enables disciplinary action to be taken against the Headmaster. The same rule stipulates the penalty that can be imposed on the Headmaster. This includes recovery from pay of the whole or part of any pecuniary loss caused to the State Government by negligence or breach of orders. Thus, if in a disciplinary proceeding it is found that it was due to the negligence or breach of the Headmaster that the original order of staff strength was fixed by the D.E.O. then any such loss can be recovered from the Headmaster in such a proceedings. This further strengthens the view I have taken earlier. So far as the Manager is concerned, even though there are many provisions under the K.E.R. compelling the Manager to obey the directions of the Government and also the consequences in cases of disobedience, no provision has been brought to my notice which enables the Government to recover the loss from the Manager suffered by it on account of the wrong staff fixation. The only relevant rule is Sub-rule (4) of Rule 7 of Chapter XII. It mentions the contingencies when the loss occasioned by the Government can be recovered, which are as follows:

(4) In the case of a Manager who commits serious irregularities causing monetary loss to teachers/Government, the loss sustained by teachers/Government shall be recoverable from the Manager under the provisions of the Revenue Recovery Act for the time being in force as if it is an arrear of public revenue due on land, in the following cases, namely:

(a) Denial of appointment to a qualified thrown out teacher who has a rightful claim for re-appointment by virtue of his/her holding the post earlier under Rule 51A, Chapter XIVA.

(b) Denial of promotion to a teacher to any higher grade of pay under Rules 43, 43B or 43C as the case may be, of Chapter XIVA, or denial of promotion to the seniormost rightful claimant to the post of Headmaster under Rules 44 or 45 or 45A, as the case may be, of Chapter XIVA, when the post becomes vacant disobeying the directions from the department and/or Government causing denial of all monetary benefits which he/she would have got, had the promotion been effected as per rules in time.

(c) Suspension of teachers, framing cooked up and/or frivolous charges, keeping

them out of service beyond fifteen days disobeying the orders of reinstatement of such incumbents passed by the Deputy Director (Education) or by the Educational Officer concerned, as the case may be, after a preliminary investigation into the grounds of suspension under Sub-rule (8) of Rule 67, Chapter XIVA, depriving such incumbents of their salary for which they would have been entitled to had they been reinstated by the Manager in compliance of the orders issued by the officer concerned.

(d) Making of irregular appointments and getting them approved by the Educational Officers concerned by furnishing false information/declaration by the Managers regarding the claimants, under Rule 51A, Chapter XIV A.

Thus, no other circumstances are prescribed in the rules, enabling the Government to recover the loss suffered by the Government.

In the above view of the matter, I quash Exts. P-2 and P-3 in O.P. No. 1564 of 1990 and Exts. P-1 and P-2 O.P. No. 2575 of 1990, insofar as it imposes a liability on the Petitioners in the O.Ps. to pay the loss incurred by the Government on account of the wrong fixation of the staff strength. Original Petitions are allowed to the above extent.