

Anitha John Vs. Eldhose Mathew

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Court : Kerala

Decided On : Nov-16-2002

Reported in : 2003(3)KLT974

Judge : J.B. Koshy and; K. Thankappan, JJ.

Acts : Kerala Education Rules, 1959 - Rule 43; Kerala Education Act - Sections 10

Appeal No. : W.A. Nos. 2316 and 2383 etc. of 2002

Appellant : Anitha John

Respondent : Eldhose Mathew

Advocate for Def. : P.J. Mathew,; Thomas John Ambookan,; V.M. Kurian and

Advocate for Pet/Ap. : K. Jaju Babu, Adv.

Disposition : Appeals allowed

Judgement :

J.B. Koshy, J.

1. These Writ Appeals are filed against the common judgment in O.P. Nos. 14176,14470,16279,16870,17295 and 20560 of 2002. The question to be considered in allthese appeals is whether the Government Order, G.O. (MS) No. 11/2002/G. Edn.dated 7.1.2002 (Ext. PI in O.P. No. 16870 of 2002) which creates

a new cadre of H.S.A. (English) to teach English in the Government and Aided High Schools is correct or not.

2. The learned Single Judge in the judgment in O.P. No. 14176 of 2002 and connected cases (Suguna Prakash v. State of Kerala, 2002 (3) KLT 488) held that paragraphs 3(d) and 3(c) of Ext. P1 are not enforceable without corresponding amendment to the Rules. The learned Single Judge further held as follows:

'The claims of LPS A/UPSA under R. 43 for promotion to the post of HS A in core subjects shall be considered in accordance with the Rules/Orders/Circulars prevailing on the date of occurrence of vacancy. Consequential action by the concerned appointing authorities in the case of the petitioners and similarly placed persons shall be taken in accordance with the above declaration within one month from the date of receipt of a copy of the judgment. The benefit of this judgment will be available to those who are not parties to these Original Petitions also. The beneficiaries of this judgment may file suitable representations before the respective appointing authorities and controlling officers and in that event they shall pass appropriate orders thereon without delay, at any rate within one month from the date of receipt of such representations'.

In view, of the general directions, services of English teachers who got appointment in the light of Ext. P1 Government Order were sought to be terminated. Hence most of the appeals in this group are filed by persons who are not parties to the Original Petitions and who were given leave to file appeals as their rights were affected. The Government also filed an appeal against the very same judgment. It is also stated that as per the Government Order staff fixation was made in various schools by the educational authorities on the basis of which appointments were made and that the judgment of the learned Single Judge upsets the action done in pursuance of Ext. P1 order.

3. Teaching of English is compulsory in all the High Schools in the State of Kerala. From the 8th standard right upto the 10th standard, there are two papers for English. It is the admitted case that no separate category of H.S.A. (English) is included either in the Kerala Education Rules or in the Special Rules relating to Government Schools and no qualification is prescribed for the said post in the Act

or the Rules. The Public Service Commission had suggested a Degree in English language and Literature and B.Ed./B.T./L.T. with teaching of English as optional subject as the prescribed qualification for English teachers. National Policy on education and practice in Central Schools and Navodaya Vidyalaya are also in tune with the above. The Director of Public Instructions also informed the Government that the present method of teaching English in the High Schools in the absence of qualified teachers is ineffective and the standard of teaching English is going down. Paragraphs 1 and 2 of Ext. P1 order which details the reasons for issuing the order reads as follows:

'Separate Category of H.S.A. (English) is not included either in the Special Rules relating to Government Schools issued in G.O. (P) No. 76/80/G. Edn. or in the K.E.Rs. English language is taught by the teachers of core subjects who possess qualifications such as a Degree in the concerned subject and B.Ed./B.T./L.T. conferred or recognised by any Universities in Kerala'. To remedy the consequent deteriorating standard of English teaching/learning, Government had ordered some measures in the G.O. read as 1 st paper above for enabling the gradual creation of a separate cadre of H.S.A. (English). The G.O. had inter alia prescribed the qualification for direct recruitment of H.S.A. (English) as 'A degree in English language and Literature and B.Ed./B.T./ L.T. conferred or recognised by any University of Kerala.' The P.S.C. had suggested the following modification to the qualification prescribed for the post of H.S.A. (English) in the G.O. dated 7.12.1988.

(i) A degree in English language and Literature.

(ii) B. Ed./B.T./L.T. with teaching of English as optional subject.

In the absence of those with qualification in item (ii) above, candidates with B .Ed./B.T./L.T. in any other subject will be considered.

The P.S.C. had also advised to effect necessary amendment to the rules, to enable the selection process for the post of H.S.A. (English). However no such amendment was issued.

2. The Director of Public Instruction in his letter read as 3rd paper above has now informed Government that the present method of teaching of English followed in High Schools is ineffective in the absence of qualified H.S.As. in English language, leading to low percentage of pass in the subject. He has forwarded certain proposals considering the need for improving the standard of teaching the subject in the Schools.'

4. Therefore, the qualification to the post of H.S.A. (English) was fixed as a Degree in English language and Literature and B.Ed./B.T./L.T. with teaching of English as optional subject conferred or recognised by any of the Universities of Kerala. It was also specifically stated that the new cadre will be created by re-allocation of the periods of English now allocated to the core subjects in a phased manner without causing retrenchment of existing H.S.As. How the cadre is created is mentioned in paragraph 3(a) of Ext. P1 order which is as follows:

(a) A new cadre of HSA (English) will be created in the Aided and Government Schools by re-allocating the periods of English now allocated to the core subjects (Maths, Science and Social Studies) in a phased manner without causing retrenchment of existing H.S.As (core subjects). The new cadre will be created by appointing/promoting qualified hands against the vacancies caused by retirement/additional division/resignation/leave observing the minimum subject ratio requirement between Maths, Science and Social Studies with a view to achieve the object of distribution of posts envisaged in the table given in the appendix.

It was also stated that the scheme will be implemented from the academic year 2002-2003 and that formal amendment in the Kerala Education Rules and the Government Order, G.O. (P) No. 76/80/G.Edn. dated 6.6.1980 will be issued separately. Therefore, it is clear that a conscious decision has been taken by the Government for amending the rules and Ext. P1 was issued as a prelude to it. Paragraph 3(c) of the Government Order which was struck down by the learned Single Judge is as follows:

'The present order of subjects of Science, Maths and Social Studies followed for Staff fixation of H.S. A. (Core subjects) will be revised as Social Studies, General

Science and Maths as a temporary measure so as to achieve the creation of a separate cadre of the HSA (English) and the D.P.I, will be authorised to issue specific orders in this regard.'

The Director of Public Instructions was authorised to issue specific orders with regard to the claim of teachers coming under R. 43 of Chap. XIVA of the Kerala Education Rules. Paragraph 3(d) which was struck down by the learned Judge reads thus:

'(d) In order to implement the Orders at para 3(a) above, a temporary ban on promotion of claimants as per R. 43 of Chap. XIVA KER will be imposed, exempting those who have the prescribed qualification to be posted as HSA (English).'

The Director of Public Instructions issued consequential orders, copies of which were communicated to the Deputy Directors, District Educational Officers and Assistant Educational Officers with the following direction:

'The Educational Officers are directed to indicate specifically the classification of the posts of HSAs (Core Subjects) referred to in the Appendix to GO(MS) 11/2002/G.Edn. dated 7.1.2002 in the staff fixation order w.e.f. the year 2002-2003. This classification is to be taken into consideration while approving the appointments of HSAs (Core Subjects).'

5. The learned Single Judge held that an executive order cannot supersede a statutory provision and, therefore, in the absence of any amendment to the Rules to implement the policy in Ext. P1, the same cannot be enforced. The learned Judge also noticed that R. 2 of Chap. XXXI of the Kerala Education Rules which prescribes the various posts of Language teachers and qualifications for appointment to those posts mentions only about High School Assistants in Malayalam, Tamil, Sanskrit, Hindi, Arabic, Urdu, Kannada, Gajarathy and French and there is no post of H.S.A. (English), in the absence of amendment of the Rules, according to the learned Single Judge, paragraphs 3(c) and 3(d) of Ext. P1 are not enforceable.

6. The power of the Government to issue executive orders is mentioned under Art. 162 of the Constitution of India which reads as follows:

'162. Extent of executive power of State-Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.'

Section 3(1) of the Kerala Education Act (hereinafter referred to as 'the Act') also provides as follows:

'3. Establishment and recognition of Schools:-(1) The Government may regulate the primary and other stages of education and course of instructions in Government and private schools.'

S. 10 of the Act deals with the power of the Government for prescribing qualifications: The said Section reads as follows:

'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.'

Hence, under the provisions of the Act, it is for the Government to prescribe qualifications of teachers to be appointed in Government and Private Schools and it is the prerogative of the Government. The qualifications of H.S.A. (English) was prescribed for the first time. Section 36 of the Act provides power to the Government to make rules prospectively or retrospectively for the purpose of carrying into effect the provisions of the Act. It is trite law that if rules are made, there is no scope for issuing executive orders and rules will prevail over the executive orders. Executive orders can be issued to fill up the gap in the rules provided they are not inconsistent with the rules. The executive authority can

supplement the rules, but cannot supplant the rules as held in the decisions reported in *Bose William v. State of Kerala*, 2002,(2) KLT 34. and *Union of India v. Rakesh Kumar* (2001) 4 SCC 309. In the decision reported in *M.M. Dolichan v. State of Kerala* (2001) 1 SCC 151 it is held that the Government has got powers to issue administrative instructions in the absence of statutory rules.

7. Now, we may come to Rule 2 of Chap. XXXI of the Kerala Education Rules which provides qualification for Headmaster of High Schools, High School Assistant (Subjects) and High School Assistant (Languages) and as noticed by the learned Single Judge, the said rule prescribe qualifications only for High School Assistants in Malayalam, Tamil, Sanskrit, Hindi, Arabic, Urdu, Kannada, Gujarathy and French. Similarly, qualifications for High School Assistant (Subjects) as well as Specialist Teachers like Drawing Teachers, Physical Education Teachers, Music Teachers and Sewing Teachers have also been defined. With regard to H.S.A. (Subjects) and H.S.A. (Languages), a degree in the concerned subject/language and Training are made compulsory. But nowhere in the Rules qualification of H.S.A. (English) is prescribed. Therefore, there is a gap in the Rules which can be filled up by executive orders. As already stated, English is a compulsory subject in Kerala State and English teachers are necessary in every division. Prior to the issuance of the Government Order, teachers who were teaching Science, Mathematics and Social Studies were allowed to teach English. Since Section 10 authorises the Government to prescribe qualification for teachers and qualification for H.S.A. (English) was not fixed, it cannot be said that the executive order passed by the Government fixing the qualification is an incorrect or invalid order. It is true that executive orders are passed for filling up the lacuna in the Rules.

8. Apart from the above, we may also note that the Public Service Commission and the Director of Public Instructions had directed the Government to suggest qualification for H.S.A. (English) as the standard of English in the High School section is dwindling. The learned Single Judge has observed that Ext. P1 Government Order was passed with a laudable object. It is not proper for this Court to interfere with an object which is admittedly laudable on hyper technical reasons especially when Section 10 of the Act authorises the Government to fix

the qualifications.

9. It is argued by the contesting respondents that the ratio of teachers for the Core subjects has been fixed by the Director of Public Instructions in accordance with the powers conferred on him and the Government cannot interfere with the same. In the decision reported in *Cherian v. State of Kerala*, 1990 (2) KLT 481, a Division Bench of this Court held that when the Director issues orders relating to subject requirements in High Schools, that cannot be varied by Government invoking the power under Section 36 of the Act but only the Director of Public Instructions can vary the same. Ratio between the Core subjects, Mathematics, Science and Social Studies and the internal ratio are fixed by the Director of Public Instructions. These ratios between Core subjects are not changed. Teaching hours of these subjects are also not disturbed, but there will be change in the number of teachers in the Core subjects as now English will have to be taught by teachers who have degree and training in English. Consequent order in line with the Government Order was passed by the Director of Public Instructions also.

10. Further, it is seen from the Government Order that it was issued as part of the national education policy as well as on the recommendation of the Public Service Commission and the Director of Public Instructions. Copy of the Government Order was communicated to the educational authorities by the Director of Public Instructions with certain instructions which we have quoted earlier. In a number of decisions, it has been held that rules prescribing qualifications cannot be changed by executive orders. There is no dispute that qualifications prescribed in the rules can be changed only by amending the rules. But here, qualifications for H.S.A. (English) are not prescribed in the rules and the Government Order itself shows that it was issued as a prelude to the issuance of the Rules. Government has power to prescribe qualifications under Section 10 of the Act. It was also submitted that steps have been taken to frame the Rules and the same will be completed within three months' time. So, conscious effort is being made to settle the matter.

11. It was argued that the above Rule will affect large number of claimants under Rr. 43 and 51A of Chap. 14A of the Kerala Education Rules. R.43 deals with promotion of teachers who are working as U.P.S.A. and L.P.S.A. Note (2) of R.43

clearly states that promotion under this rule shall be made from persons possessing the prescribed qualifications at the time of occurrence of vacancy. Note (2) to R.43 of the Kerala Education Rules reads as follows:

'Promotion under this rule shall be made from persons possessing the prescribed qualifications at the time of occurrence of vacancy.'

The Apex Court in *Mary Oommen v. Manager*, 1987 KLT 686 held that the Note incorporated in the Rules has full effect. Therefore, it is well settled that R.43 is applicable only to persons having the prescribed qualifications. It is true that for promotion under R. 43, the minimum subject requirements alone need be satisfied. But at the same time, with regard to English teachers, those having the prescribed qualification alone can be promoted and the Government Order also protects their interests. Upper Primary School Assistants or Lower Primary School Assistants, if found having the prescribed qualification for H.S.A. (English), can also be promoted under Section 43 of the Kerala Education Rules. It is pertinent to note that the learned Judge did not specifically strike down Clauses 3 (a) and (b) of the Government Order creating new cadre or prescribing qualifications. Since only qualified candidates are entitled to promotion or re-employment, Clauses 3 (d) and (c) are only consequential. Even though the Director of Public Instructions has issued circular implementing the Government Order, the learned Judge only held that Clauses 3 (a) shall not be enforceable without issuance of corresponding circular by the Director of Public Instructions. That is also issued. Same is the case with regard to Rule 51A claimants. As per Rule 51A of the Rules, qualified teachers who are relieved on account of termination of vacancies shall have preference for appointment to future vacancies. This Rule was also explained by this Court and only teachers having the prescribed qualification will get the benefit of Rule 51 A. Therefore, any retrenched teacher having a Degree with English as the subject will get preference for appointment, if he is otherwise eligible, in the vacancy of English teacher. Therefore, teachers with the prescribed qualification in the concerned subject if found entitled for appointment, their rights will not be affected. We also refer to the decision of the Supreme Court in *Dr. K. Ramulu v. Dr. S. Suryaprakash Rao* (1997) 3 SCC 59 wherein it was held that a conscious decision of the Government not to make promotion till amendment of the existing

rules is perfectly valid.

12. We have already found that there are no Government Orders or provisions in the Kerala Education Rules which prescribe qualifications for H.S.A. (English). Instructions were issued by the Government for the first time for filling up the gap in the Rules and Section 10 of the Act empowers the Government to fix qualifications for teachers. The Director of Public Instructions also endorsed the same and issued directions to implement the Government Order. We are of the view that the policy decision of the Government cannot be interfered with by this Court after having held that it is a laudable object especially when conscious effort is made by the Government to make necessary rules and Government order was issued in that attempt to implement policy to avoid hardship as a temporary measure. We also record the submission made by the learned Government Pleader that the Rules in this regard will be framed within three months from today. Since we are upholding the validity of the Government Order challenged, those teachers who were appointed on the basis of the above Government Order and terminated or reverted on the basis of the impugned judgment shall be reinstated forthwith. Consequently if teachers are appointed in their place on the basis of the impugned judgment, they shall be reverted or retrenched as the case may be. However, if teachers have been appointed under Rules 43 and 51A of the Rules already on or before the date of this judgment, without implementing the Government Order at all, they should be protected by extending the protection of Clause 3 (a) without affecting the rights of the teachers already appointed on the basis of the Government Order whether, they are continuing or not are not.

In the light of the facts and circumstances discussed above, we set aside the judgment of the learned Single Judge and allow the Writ Appeals with the above directions.