

(1973) 03 KL CK 0028

High Court Of Kerala

Case No: O.P. No. 4819 of 1971

K.K. Moidu

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision: March 28, 1973**Acts Referred:**

- Constitution of India, 1950 - Article 14

Citation: (1973) KLJ 591**Hon'ble Judges:** V. Balakrishna Eradi, J**Bench:** Single Bench**Advocate:** U.K. Ramakrishnan, for the Appellant; V. Sivaraman Nair, T.V. Ramkrishnan, P.C. Joseph, M.V. Bose and Government Pleader, for the Respondent**Final Decision:** Allowed

Judgement

V. Balakrishna Eradi, J.

The petitioner was appointed as a part time menial with effect from 21-2-1970 in an aided school managed by the 2nd respondent. The said appointment of the petitioner was approved as probationary with effect from 21-2-1970 by the District Educational Officer, Badagara (3rd respondent). During the academic year 1969-70 one permanent post of peon and two permanent posts of part time menials had been sanctioned for the school. The 6th respondent and the petitioner were holding the two posts of part time menials, the former being the senior of the two. In the staff fixation for 1970-71 an additional post of peon was sanctioned for the school. The Manager thereupon appointed the 5th respondent to that post and moved the District Educational Officer for approval of the said action. The said request was refused by the 3rd respondent on the ground that the new post of peon had to be filled up by promoting the senior hand in the lower category of part time menials A and that the appointment of the 5th respondent who was an outsider, was in contravention of R. 43 of Chap.14(A) of the Kerala Education Rules, 1959. Against the said order passed by the 3rd respondent the Manager preferred an appeal before

the Regional Deputy Director of Public Instruction, Kozhikode (4th respondent). The 4th respondent agreed with the view expressed by the District Educational Officer and rejected the appeal. Thereupon the Manager preferred a revision petition before the State Government under R. 92 of Chap.14(A) of the Kerala Education Rules. That was disposed of by the Government as per the order Ex. P2 dated 6-9-1971 which reads as follows:

In the circumstances reported by the Manager, sanction is accorded under R. 3(1) Chap.1 of the K.E.R. for the approval of appointment of Sri U.K. Kassim, peon, No chat Secondary School, No chat with effect from 3-8-1970. Government however order that the Manager of the school will promote as Peon in the next arising vacancy, the senior most qualified menial from among the non teaching staff in the school.

In the meantime, the academic year 1971-72 had commenced and in the staff fixation made for the school for that year the two posts of part time menials were abolished and in their place only one post of full time menial was sanctioned. The additional post of peon that was sanctioned during 1970-71 was allowed to be continued in 1971-72 also. The direct effect of implementation of the Government order Ex. P2 was that the 5th respondent became entitled to be appointed in the additional post of peon sanctioned for the year 1970-71 and the petitioner became liable to be thrown out of service since in the place of the two posts of part time menials that originally existed in the school, only one post of full time menial was available in 1971-72 and the 6th respondent had to be absorbed in that post. The Manager of the school accordingly terminated the petitioner's service in the school as per his proceedings evidenced by Ex. P1 dated 18-10-1971. The petitioner has come up with this writ petition seeking to quash Exs. P1 and P2.

It is contended on behalf of the petitioner that as per the mandatory provision contained in R. 43 of Chap.14(A) of the Kerala Education Rules the new post of peon sanctioned during 1970-71 had to be filled up only by promoting the 6th respondent who was the senior amongst the two part time menials working in the school and when in the place of the part time menials posts a full time post was substituted in 1971-72 the petitioner, who was working as part time menial, was entitled to be promoted to the full time post. It is submitted on behalf of the petitioner that the orders passed by the 2nd and 3rd respondents declining to grant approval for the Manager's action in appointing the 5th respondent to the post of peon were perfectly in accordance with law and the Government acted illegally in interfering with those orders as per its proceedings evidenced by Ex. P2. In support of the challenge made by the petitioner against Ex. P2 it is contended that R. 3 of Chapter of the Kerala Education Rules does not empower the Government to pass an order in direct contravention of the mandatory provision contained in R. 43 and that resort to the power conferred by R. 3 cannot be made except in cases where on account of special facts and circumstances a valid classification of the said case for the purpose

of Art. 14 of the Constitution is permissible. Reliance was placed in support of this argument on the observations contained in the Full Bench decision of this Court reported in T.C. Sreedharan Pillai v. State of Kerala and Others 1973 KLJ 187, Lastly, it is submitted on behalf of the petitioner that, in any event, the Government ought not to have proceeded to pass the order Ex. P2 which adversely affected the petitioner as well as the 6th respondent without giving them any notice or opportunity to make their representations concerning the matter and that the impugned order is violative of the principles of natural justice.

2. R. 43 of Chap.14(A) is in the following terms:

Subject to R. 44 and 45 and considerations of efficiency and any general order that may be issued by the Government, vacancies in any higher grade of pay shall be filled up by promotion of qualified hands in the lower grade according to seniority, if such hands are available.

Note:-- A teacher in a lower grade of pay in one category of post is eligible for promotion to a higher grade of pay in another category of post provided:

(i) he has the prescribed qualifications; and

(ii) there is no teacher with the prescribed qualifications in the lower grade of pay of the category of post to which promotions are to be made.

The provisions of the said rule are made applicable mutatis mutandis to the non teaching staff of aided schools also by R. 7 of Chap.24(B) of the Kerala Education Rules. There cannot be any doubt that in relation to the post of peon the post of part time menial is one in a lower grade. That being so, under R. 43 a vacancy arising in the higher grade post of peon should be filled up by promotion of qualified hands in the lower grade of part time menial (during the relevant time, that is, 1970-71, there was no full time menial post in the school and hence the immediate lower post in relation to the post of peon was that of part time menial). It is not disputed that the 6th respondent, who was the senior amongst the two part time menials working in the school, was fully qualified for appointment to the post of peon. It was in these circumstances that the District Educational Officer held that the legitimate claimant for the additional post of peon newly sanctioned for the school during 1970-71 was the senior part time menial, namely, the 6th respondent and that the action of the Manager in appointing an outsider, the 5th respondent, to the said post was not legal and could not be approved. The order so passed by the District Educational Officer and which was subsequently confirmed by the 2nd respondent was in perfect conformity with the provisions of the Kerala Education Rules. If the said order passed by the District Educational Officer had been implemented by the Manager the result would have been that the 6th respondent would have been absorbed in the additional post of peon and the petitioner being the only remaining part time menial working in the school would automatically have got promoted to the full time menial's post which was created during 1971-72 in replacement of the

two posts of part time menials which previously existed. Now, as a consequence of the order Ex. P2 passed by the Government the petitioner has been ousted from service since the 6th respondent had to be provided in the post of full time A menial which alone was sanctioned for the year 1971-72.

3. On a perusal of Ex. P2 it is seen that the Government have not differed from the view taken by the subordinate officers regarding the applicability of R. 43 to the case in question. What has been done under Ex. P2 is to sanction the appointment of the 5th respondent as a peon, notwithstanding the fact that it is opposed to the mandatory provision contained in R. 43, by purporting to invoke the Government's power under R. 3 of Chap.1 of the Kerala Education Rules. That rule reads:

Where the Government are satisfied that the operation of any rule under these Rules causes undue hardship in any particular case, the Government may dispense with or relax the requirements of that rule to such extent and subject to such conditions as they may consider necessary for dealing with the case in a just and equitable manner.

In my opinion, it is not possible to construe the above rule as conferring a naked and arbitrary power on the State Government to mete out special treatment to any individual case according to its whim or fancy in a manner directly opposed to the provisions contained in the Rules. Such an interpretation would render the rule open to attack on the ground that it is violative of Art. 14 of the Constitution. It is obvious that the purpose of R. 3 is only to reserve power with the Government to grant a relaxation of the rigour of any of the provisions contained in the Kerala Education Rules in special cases where the circumstances are such as would warrant a valid classification of the said case for purposes of Art. 14 of the Constitution and where manifest injustice and inequity would otherwise result. In *T.C. Sreedharan Pillai v. State of Kerala and Others*, 1973 KLJ 187, a Full Bench of this Court had occasion to consider and explain the scope of R. 39 of Part 2 of the Kerala State and Subordinate Services Rules which is a provision substantially similar to R. 3 with which we are now concerned and the observations contained in the said judgment are fully relevant and applicable in the present case.

4. Judged in the light of the principles laid down in the said judgment it has to be held that the order Ex. P2 cannot be sustained as a proper exercise of the power vested in the Government under R. 3 of Chap.1 of the (Kerala Education Rules. Ex. P2 does not make mention of any special facts or circumstances pertaining to the present case for justifying the deviation from the mandatory principles laid down in R. 43 of Chap.14(A) of the Kerala Education Rules. The Government file leading up to the passing of the order Ex. P2 was produced in Court by the Government Pleader. There is nothing therein to indicate that the Government was satisfied about the existence of any special circumstances warranting a classification of the present case on the ground of hardship or inequity. Hence there was no justification at all for invoking the Government's power under R. 3 and the order Ex. P2 is clearly

illegal.

5. In the light of the above conclusion it becomes unnecessary to consider the further contention put forward by the petitioner that Ex. P2 has been passed in contravention of the principles of natural justice.

6. In the result, Ex. P2 as well as the consequential action taken by the Manager for terminating the petitioner's service as per the order Ex. P1 are quashed. The order passed by the District Educational Officer refusing to grant approval for the appointment of the 5th respondent on the ground that the additional post of peon sanctioned for 1970-71 should be filled up by promoting the senior part time menial will stand restored. The Manager will take necessary action forthwith to implement the said order of the District Educational Officer by appointing the 6th respondent as peon in the additional post sanctioned for 1970-71 and the subsequent years and to promote the writ petitioner to the post of full time menial sanctioned for 1971-72. The petitioner will be forthwith reinstated into service in the said capacity. The original petition is allowed as above. The parties will bear their respective costs.