

PETITIONER:
M.M. DOLICHAN & ORS.

Vs.

RESPONDENT:
STATE OF KERALA & ORS.

DATE OF JUDGMENT: 14/11/2000

BENCH:
G.B. Pattanaik, & B N Agarawal.

JUDGMENT:

PATTANAIAK, J.
L...I...T.....T.....T.....T.....T.....T.....T...J

These batch of cases, some of which are appeals against the judgment of the Kerala High Court, and some others are Writ Petitions directly filed under Article 32 of the Constitution in this Court relate to the same problem, namely, appointment of teachers for teaching class XI and XII and the procedure to be adopted for the same. The Kerala Education Act, 1958 (hereinafter referred to as The Act), was passed by the Kerala Legislature to provide for better organisation of general education in the State of Kerala. The said Act has been amended from time to time to meet the needs of the situation. The Act made provisions for the aided school, the existing school as well for minority schools. Under the Act, qualification for appointment of teachers have been provided for and mode of appointment of teachers in aided school also has been provided for together with the condition of service of such teachers. Section 36 of the Act confers power on the State Government to make Rules and all such Rules made is required to be laid before the Legislative Assembly for not less than fourteen days, as provided under Section 37. In exercise of the powers under Section 36 the Kerala Education Rules have been framed (hereinafter referred to as The Rules). There are different chapters in the said Rule and each chapter contains a number of Rules. The schools for General Education are of two grades, called Primary and Secondary. Standard 1 to 7 are collectively known as the Primary Grade and the same again is sub-divided into Lower Primary and Upper Primary. Standard 8 to 10 are collectively known as Secondary Grade but when standard 11 is added to 8 to 10 then they are collectively known as Higher Secondary Grade. Such Rules were framed keeping in view the courses of education available in the general line at the relevant point of time. Rule 43 in Chapter XIV provided for the manner in which vacancies in any higher grade of pay should be filled up by promotion of qualified hands in the lower grade according to the seniority. The aforesaid Rule is subject to the Rules 44 and 45, which Rules deal with the appointment of Head Master. It is to be noted that until National Educational Policy envisaging a common educational structure in the country to have 10+2+3 year structure in the State of Kerala the schools used to impart education till class 10 and a 2 year course used to be imparted thereafter, called pre-degree and then the degree courses

used to be 3 years course. The level in between the secondary and degree, which is of 2 years duration and is commonly called Higher Secondary and the persons to be appointed for imparting education in those two standards are the subject matter of challenge in these group of cases. There are different sets of appellants/applicants before us, namely, the Teachers of Private Schools for these two classes, the Teachers of Government Schools, the Management of the Schools, the Private Managers of non-minority schools, the Managers of Minority schools, as well as some un-employed qualified persons seeking employment to the schools. The State of Kerala issued a Government Order on 13.5.1998 indicating the Government permission for opening up of Higher Secondary grade during the academic year 1998-99 in the schools appended to the order. It also provided for a method for appointment of the teachers who would be required to teach in the Higher Secondary grade. As the method indicated thereunder was substantially varying from the method earlier adopted, Writ Petitions were filed before the High Court. It may be stated at this stage that in accordance with the National Educational Policy the system of 10+2+3 course were adopted in the State of Kerala in the year 1992 and since then till the Government letter dated 13.5.1998 emanated, the prescribed mode of appointment of teachers to teach in the Higher Secondary grade was same as the mode of appointment of teachers provided under the Rules in Rule 43 and thus existing qualified teachers were being appointed on the basis of their seniority and qualification and direct recruitment was being resorted to only when sufficient qualified teachers were not available in the schools concerned. The Government Order dated 13.5.1998, however, changed the mode of recruitment inasmuch as it provided for 25% of the vacancies to be reserved for appointment from qualified High School Assistants and Primary School Teachers whereas remaining 75% of posts in Government Schools would be filled up by direct recruitment through the Public Service Commission. In Private Schools also 75% of vacancies were required to be filled up by direct recruitment to be done by the Management. Detailed procedure had also been indicated in the said Government Order dated 13.5.1998. The aforesaid Government order is extracted hereinbelow in extenso:-

Higher Secondary Education opening of Higher Secondary Schools for 1998 Sanctioned Orders issued GENERAL EDUCATION (T) DEPARTMENT G.O.(MS) No. 162/98/G.Edn. Dated Thiruvananthapuram, dated 13.5.98

Read: 1. Notification No. 11042/T/97/G.Edn. dated 2.4.1997
2. G.O.(MS) No. 204/97/G.Edn. dated 12.6.1997.

ORDER

As per the G.O. read as second above, Government have published a provisional list of Government and aided schools in which Higher Secondary courses are proposed to be started in the year 1998-99. It was also ordered that the facilities available in the above schools will be verified. It was further ordered that after scrutinising the verification reports and satisfying the infrastructure available in each school, Government will notify the final list of schools and courses to be offered in each school from 1998-99 onwards. Accordingly as authorised in G.O. (RT) No. 631/98/GE dated 13.2.1998 the Deputy Directors, Education, verified the facilities available in these

schools and submitted their reports. Government after considering the reports of the Deputy Directors, are pleased to sanction Higher Secondary courses in 95 Government Schools and 178 Aided Schools as detailed in the annexure to this order. The above schools are sanctioned Higher Secondary courses on the subjects noted against the name of each school subject to the following conditions.

i. The schools will be permitted to open Standard XI during the academic year 1998-99.

ii. The last date for students to submit their application form will be 30th June 1998.

2. The posts of Higher Secondary school teachers in Government Higher Secondary Schools and Aided Higher Secondary schools will be filled up as follows.

i. 25% vacancies will be reserved for appointment from qualified High School Assistants and Primary School Teachers.

ii. The remaining 75% of posts in Government schools will be filled up by direct recruitment through the Public Service Commission. In the absence of select list with the Public Service Commission the vacancies will be filled up by candidates from Employment Exchange. Should there be shortage of suitable candidates from the Employment Exchange, Guest Lecturers may be appointed as is done in colleges. The selection of Employment Exchange candidates will be done by Director of Higher Secondary Education and that of the Guest Lecturers will be done by the concerned Deputy Director, Education by constituting a selection committee consisting of the Principal, Deputy Director/and President of the concerned PTA.

iii. Appointments to the 75% vacancies earmarked for direct recruitment in the Aided Higher Secondary Schools will be done by the management. If qualified teachers are not available for appointment as mentioned in item (i) above, the management will fill up such vacancies also by direct recruitment. Selection of candidates for direct recruitment in Aided Higher Secondary schools will be done by a staff selection committee consisting of the Manager or his representative, the Principal of the school and a Government nominee from the panel of officers consisting of Deputy Director, Education, D.E.O. of the area and DIET Principal of the district. The management can select a nominee from among the above officers. The above officers are permitted to attend the staff selection committee meeting without further sanction.

3. While making appointments the Manager will see that only Part-time teachers are appointed when the periods to be taught are less than 15 in a week. This procedure will be followed in Government schools also when direct recruitment is resorted to through Employment Exchange. But the teachers appointed from General Education Subordinate Service will be treated as appointment by promotion and they will be full-time teachers irrespective of the periods to be taught.

In the schools where the course of Humanities is sanctioned for the year 1998-99, the subject of Sociology will be offered as an optional subject in place of

Geography."

This Order of the Government had been assailed in the High Court of Kerala and by the impugned judgment the High Court having upheld the validity of the aforesaid Government Order the present appeals by grant of Special Leave as well as Writ Petitions have been filed.

The contention of Mr. Gopal Subramaniam, learned Senior Counsel, appearing for the teachers of the Private Schools essentially is that standard 11 and 12 pertain to Higher Secondary grade, and as such, the institution continues to remain as a school and, that being the position, the method of recruitment of teachers for teaching the Higher Secondary grade is required to be in accordance with the Act and the Rules made thereunder and the impugned Order dated 13.5.1998 contravenes the statutory Rules, more particularly, Rule 43 in Chapter XIV and, therefore, the Order must be struck down. The contention of Mr. P.P. Rao, learned senior counsel, appearing for the State of Kerala as well as Mr. Vaidyanathan, learned senior counsel appearing for the Management of the Non-Minority Institutions are to some stage is similar but divergent at the later stage. According to Mr. Rao the Act and the Rules had been enacted at a point of time when Higher Secondary grade consisting of standard 11 and 12 were not in existence and, therefore, even if in the common parlance the institution could be called school, but in legal parlance the Act, as well as the Rules will have no application and necessarily therefore the mode of recruitment as well as service conditions of such employees could be determined and governed by the Administrative Order. According to Mr. Rao until issuance of Order dated 13.5.1998, it is no doubt true that the Government by issuance of similar Administrative Order had followed the practice as provided in Rule 43, namely, by appointing teachers by way of promotion of the qualified personnel available in the schools but since that method was found to be not in the interest of the students the Government issued the Administrative Order dated 13.5.1998 and the said Order cannot be held to be discriminatory or violative of any provisions of the Act and Rules, as contended by Mr. Subramaniam. Mr. Vaidyanathan, on the other hand though fully supports the contention of Mr. Rao so far as the power of State Government to issue orders pertaining to the method of recruitment of teachers for the Higher Secondary Grade, but he vehemently contended that reservation to the extent of 25% to be filled up by promotion from amongst the teachers of the schools provided they have necessary qualification, is grossly detrimental to the interest of the students and since their interest is of paramount consideration that part of the Government Order providing for reservation to the extent of 25% should be struck down.

We are not proposing to examine in detail the submissions made by counsel of different parties in the light of the documents available on record, in view of the order we are proposing to pass in these batch of cases. Suffice it to say that the State Government has the power to issue Administrative Order governing the service conditions of its employees in the absence of any statutory provisions governing the field. In the case in hand the Government appears to have issued the impugned order in exercise of such power as in its opinion the provisions of the Act and the Rules will have no application to the institution

imparting education to standard 11 and 12 which is a concept subsequent to the enactment of rules on account of the National Education Policy. In course of hearing Mr. Rao appearing for the State of Kerala produced before us a set of draft Rules called Special Rules for Kerala Higher Secondary School Education Services framed in exercise of powers conferred under sub-section (1) of Section 2 of the Kerala Public Service Act and it was submitted also that the said set of Rules are now being examined by the Kerala Public Service Commission. It is, therefore, undisputed that Statutory Rules are in the offing and such Statutory Rules once having been notified the so-called Administrative Orders will have no force in relation to the matters provided under the Statutory Rules. It was also pointed out to us in course of hearing of these batch of cases that by the interim order of this Court dated 7.12.1999, in case of Private Aided Schools this Court permitted the schools to appoint from amongst the existing teachers of the school if suitably qualified candidates are available after they are selected and recommended by a Selection Committee constituted by the Manager or his Representative of the school, but that appointment would be purely on ad hoc basis as stop-gap arrangement. It was also stipulated that if suitable candidates will not be available then appointment could be made from the open market, but that also should be on ad hoc basis. So far as the Government Schools are concerned, the Order dated 1.2.1999 passed by this Court was to the effect that the ad hoc appointments could be made from the list already said to have been prepared for the year 1997, but if qualified and suitable candidates are not available in the list then it would be open to the government to appoint persons through Employment Exchange. Mr. Vaidyanathan in course of his submission had also urged that several teachers have already been appointed in accordance with the procedure prescribed in the Government Order dated 13.5.1998.

In the aforesaid premises, and keeping in view the fact that the Statutory Rules are in the process of being notified we would dispose of these batch of cases with the following direction :-

(1) All the teachers in the Private Schools who have been appointed during the pendency of these cases pursuance to the interim order dated 7.12.1999 would be held to be duly appointed to the post and their services will not be annulled.

(2) All the teachers who have been appointed also in the Government Schools pursuance to the order dated 1.2.1999 shall also be held to be duly appointed and those appointments will not be annulled.

(3) If there has been any appointment made pursuance to the Government Order of 13.5.1998 as on today those appointments also would continue and will not be annulled.

(4) There will be no further appointment from any source either in the Private School or in the Government Schools from today for a period of 3 months.

(5) The State Government is directed to bring into force the Statutory Recruitment Rules within the aforesaid period of 3 months where after recruitment to the vacancies in the Higher Secondary Grade could be dealt with in accordance

with the said Statutory Rule.

(6) If for any unforeseen circumstances the Statutory Rule cannot be notified and brought in force within the aforesaid period of 3 months and on such event there exists any necessity for immediate recruitment of teachers then it would be open for the parties to move this Court for appropriate direction.

JUDIS