

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

WEDNESDAY, THE 22ND DAY OF JULY 2015/31ST ASHADHA, 1937

WA.No. 1115 of 2015 () IN WP(C).13933/2015

AGAINST THE ORDER IN WP(C) 13933/2015 of HIGH COURT OF KERALA
DATED 01-06-2015

APPELLANT(S)/RESPONDENTS IN THE WPC:

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1. THE STATE OF KERALA
REPRESENTED BY ITS SECRETARY TO GOVERNMENT
GENERAL EDUCATION DEPARTMENT, GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM-695 001.
 2. THE DIRECTOR OF PUBLIC INSTRUCTIONS, JAGATHY,
THIRUVANANTHAPURAM-695 014.
 3. THE DEPUTY DIRECTOR OF EDUCATION,
KOZHIKODE-673 004.
 4. THE ASSISTANT EDUCATIONAL OFFICER
KOZHIKODE CITY-673 004.

BY SR GOVERNMENT PLEADER SRI.T.T.MUHAMOOD

RESPONDENT(S)/PETITIONER IN WPC:

THE MANAGER, AIDED UPPER PRIMARY SCHOOL
PALAT, THIRUVANNUR, KOZHIKODE DISTRICT-673 004.

R1 BY ADV. SRI.KURIAN GEORGE KANNANTHANAM (SR.)
R1 BY ADV. SRI.PAUL MATHEW (PERUMPILLIL)

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 22-07-2015,
ALONG WITH WA. 1118/2015 AND CONNECTED CASES, THE COURT ON THE SAME
DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

W.A.Nos.1115, 1118, 1243, 1262 & 1583 of 2015
and W.P(C).No.13933 of 2015

Dated this the 22nd day of July, 2015

JUDGMENT

Antony Dominic, J.

1.W.A.Nos.1115/15 and 1118/15 are filed by the respondents in W.P(C).Nos.13933/15 and 4254/13 respectively. W.A.No.1583/15 is filed by the Parent Teachers Association of Thiruvannur Palat Aided Upper Primary School, Kozhikode, after obtaining leave from this Court, challenging the judgment of the learned single Judge in W.P(C).4254/13. W.A.No.1243/15 is filed by the petitioners in W.P(C).12205/15 and W.A.1262/15 is filed by the third respondent in W.P(C).12873/15. W.P(C).13933/15 is filed by the Manager, AUP School, Palat. Interim orders in that writ petition are challenged by the State in W.A.1115/15 mentioned above.

2.W.A.Nos.1115/15, 1118/15 and 1583/15 and W.P(C).13933/15 are in relation to the issue of closure of the AUP School, palat, Thiruvannur, Kozhikode district. The issue raised in W.A.Nos.1243/15 and

1262/15 is in relation to the closure of PMLP School, Kiralur, Velur, Thrissur district.

3. The facts of the case in W.A.Nos.1115/15, 1118/15 and 1583/15 and W.P(C).13933/15 are as follows: AUP School, Palat is an Aided UP School which was established in the year 1954. It is stated that the present Manager purchased the school in the year 2006 and the change of management was approved by the Assistant Educational officer (AEO) by his order dated 10.9.2007. It is also stated that on 19.10.2007, the Manager issued notice under section 7 (6) of the Kerala Education Act, conveying his intention to close down the school.

4. Subsequently, the Manager filed W.P(C).16060/11 before this Court, which was disposed of directing the Director of Public Instructions (DPI) to communicate the decision to the Manager, on the application made by him. Accordingly, the DPI issued order dated 3.2.2012, rejecting the request of the Manager for closure of the school. Revision filed by the Manager before the Government against the

order of the DPI was also rejected by order dated 29.12.2012. Thereupon, the Manager filed W.P(C). 4254/13 before this Court and that writ petition was disposed of by judgment dated 19.1.2015.

5. In the judgment W.P(C).4254/13, following the judgments of this Court in Gopinathan v. State of Kerala [2001 (3) KLT 472], Balakrishnan v. Ramaeshan [1993 (1) KLT 519], Krishnakumar v. State of Kerala [1972 KLT 496], Subramanian v. State of Kerala [1986 KLT 359] and the Full Bench judgment in W.A.No.653/11 (State of Kerala v. T.P.Muneera), the learned single Judge declared that the Manager has every right to close down the school in view of the notice issued by him on 19.10.2007. It was also ordered that the respondents therein (appellants in W.A.1118/15) shall do the needful to enable the Manager to close down the school.

6. Though the judgment W.P(C).4254/13 was rendered as early as on 19.1.2015, the appellants in W.A.1118/15 did not take any further action and in such circumstances, the Manager again approached this

Court by filing W.P(C).13933/15, where, he prayed for directing the AEO to comply with the provisions of Chapter V Rule 25 of Kerala Education Rules, 1959 (KER) to take over all assets, records etc related to the management of the school on proper acknowledgement in terms of section 7(7) of the Kerala Education Act, 1958 (KE Act) and to comply with the directions in the judgment in W.P(C). 4254/13.

7. When W.P(C).13933/15 came up for consideration on 8.5.2015, while admitting the case, this Court passed an interim order directing the AEO to accept the records and accounts of the school. The case again came up before this Court on 28.5.2015, when the 4th respondent AEO was ordered to be present before this Court on 1.6.2015. This was on account of the complaint that the order dated 8.5.2015 mentioned above was not complied with. Accordingly, the 4th respondent appeared before this Court on 1.6.2015 when the following order was passed:

"Pursuant to my order dated 28.05.2015, the officer holding charge as the 4th respondent is present in Court today. When queried on the date on which she would be in her office so as to facilitate the taking over of the records from the petitioner in compliance with the earlier order of this Court dated 08.05.2015, it is submitted that if the petitioner hands over the records of the School at the office of the 4th respondent at 11 am on 03.06.2015, the same would be accepted, and a receipt given to the petitioner in token of having received the records of the School. This submission of the 4th respondent is recorded and the petitioner is directed to appear at the office of the 4th respondent at 11 am on 03.06.2015 with all the necessary records pertaining to the School so as to handover the same to the 4th respondent, and obtain a receipt of the same in connection with the closing of the School. The Headmistress of the School is also directed to co-operate with the petitioner and the 4th respondent in ensuring that the closure of the School, as directed by the interim order of this Court, is effected on 03.06.2015.

2. The learned Government Pleader would submit, on instructions, that the State Government is ready to takeover the management of the above school, if appropriate directions are issued to the Government, by this Court. This Court is of the view that, if the State Government was desirous of taking over the management of the School, in

accordance with the provisions of the KER, it was for the State Government to have independently taken such a decision and implemented the same at the relevant time. In as much as that was not done in the instant case, this Court is not inclined to issue any direction as is now sought for by the Government."

8. In W.A.1118/15, the challenge is against the judgment in W.P(C).4254/13 and in W.A.1115/15, the challenge is against the interim orders dated 8.5.2015 and 1.6.2015 in W.P(C).13933/15.

9. As we have already stated, W.A.1583/15 is filed by the Parent Teachers Association of AUP School, the closure of which is the subject matter of the writ appeals filed by the State and the writ petition filed by the Manager.

10. W.A.1243/15 is filed against the judgment in W.P (C).12205/15, which was filed by the appellants herein. The first prayer sought for in the writ petition is to quash Ext.P15 communication issued by the Manager requiring the Headmistress to make available the records and accounts of the school for

handing over to the AEO in terms of the provisions contained in Chapter V Rule 25 of the KER. The second prayer was to direct respondents 1 and 2, the State of Kerala and the DPI, to take over or acquire Parasurama Iyer Memorial LP School, Kiralur, Thrissur district. That case was heard along with W.P(C). 12873/15 filed by the Manager of the school, where, in the background of the notice issued by him under section 7(6) of the KE Act for the closure of the school, he prayed for a direction commanding the AEO to comply with the provisions of Chapter V Rule 25 of the KER and to direct the Headmistress in charge of the school to make available the records and accounts for handing them over to the AEO.

11. These two cases were heard together and by a common judgment rendered by the learned single Judge, W.P (C).12205/15 filed by the Headmistress and others was dismissed and W.P(C).12873/15 filed by the Manager was allowed. This common judgment is challenged by the petitioners in W.P(C).12205/15 and the third respondent in W.P(C).12873/15 in W.A.Nos.1243/15 and 1262/15 respectively, filed by them.

12. Reading of the judgments under appeal shows that the learned single Judge has decided the case mainly in view of the provisions contained in the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act, for short), the Kerala Right of Children to Free and Compulsory Education Rules, 2011 (Kerala Rules, 2011, for short) and the judgment of this Court in Principal, Jawahar English Medicum School, Tvm v. Simi A.C. [2014 (4) KHC 733 (DB)].

13. We heard the learned Advocate General appearing for the appellants in W.A.Nos.1115/15 and 1118/15, learned counsel for the appellants in W.A.1243/15 and 1262/15, learned counsel for the appellant in W.A.1583/15 and learned senior counsel appearing for the Managers who are contesting these matters and has filed W.P(C).13933/15.

14. Impugning the judgment of the learned single Judge, the main contention raised by the learned Advocate General, which was supported by the other learned counsel also, is that the Manager's right to close down an aided school, recognised under the provisions

of the Kerala Education Act and Rules, is now circumscribed by the provisions of Rule 6 (10) of the Kerala Rules, 2011. According to the learned Advocate General, learned single Judge has decided these matters without advertting to these statutory requirements and only in the light of the provisions of the KE Act and KER and that therefore, the judgment cannot be sustained.

15. Learned counsel for the appellants in W.A.Nos.1243/15 and 1262/15 contended that the Manager therein gave notice under section 7(6) of the KE Act on 18.3.2010. It is stated that his request was rejected by the DPI, which order was challenged before this Court in W.P(C).13702/12. This writ petition was disposed of by a Full Bench of this Court setting aside the order of the DPI and directing re-consideration of the request. It is also stated that the DPI has not, so far, taken any decision in the matter and it was in such circumstances that the Manager filed W.P(C).12873/15 and obtained a judgment enabling him to close down the school, which is challenged in W.A.1262/15.

According to him, the writ petition was premature and should have been dismissed. Counsel contended that the learned single Judge has not considered the prayers of the appellants for a direction to the Government to take over or acquire the school so that the educational need of the locality would be catered.

16. We have considered the submissions made. Section 7 (6) of the Kerala Education Act provides that no Manager shall close down any school unless one year's notice, expiring with the 31st May of any year, of his intention to do so, has been given to the officer authorised by the Government in this behalf. Sub-section 7 provides that in the event of the school being closed down or discontinued or its recognition being withdrawn, the manager shall make over to the officer authorised by the Government in this behalf all the records and accounts of the school maintained under section 7(4).

17. Chapter V Rule 24 of the KER also provides that no private school shall be closed down without giving

the Director one year's notice expiring with the 31st May of any year of his intention to do so. Sub rule 2 further provides that the Director may, after considering all aspects of the question, grant permission for closure of the school and recognition of such school shall lapse. Rule 25 provides that in the event of closure, records shall be handed over to the AEO for the area in the case of the Primary Schools and to the DEO for the area in the case of all other schools. Various judgments have been rendered in the context of these provisions and the law seems to be settled that once the requirement of notice is complied with, it is the Manager's right to close down the school and that his obligation is only to give notice of his intention to do so in the manner as provided in section 7(6).

18. While the statutory provisions of the KE Act and KER remained as above, the RTE Act was implemented with effect from 1.4.2010. This Act does not contain any provision imposing any restriction on the right of the Manager of an aided school to close down the school. However, in the Kerala Rules, 2011 made by

the State Government in exercise of its powers under section 38 of the Act, Rule 6(10) has been incorporated, which reads thus:

"6(10) The Government or local authority shall ensure that access of children to the school is not hindered on account of social and cultural factors, on account of closure of a Government or aided school and that no school is closed down without the recommendation of the Assistant Educational officer and the local authority and prior sanction of the Government."

19. It is relying on Rule 6(10), which, inter alia, provides that the Government or local authority shall ensure that no school is closed down without the recommendation of the AEO and the local authority and prior sanction of the Government, that the learned Advocate General and the other counsel argued that in the absence of compliance of Rule 6(10), learned single Judge could not have allowed the Managers to close down the schools in question. Before we answer this contention raised by the learned Advocate General, we would like to refer to sections 18 and 19 of the RTE Act.

20. Section 18(1) provides that no school, other than a school established, owned or controlled by the appropriate Government or the local authority, shall, after the commencement of this Act, be established or function, without obtaining a certificate of recognition from such authority, by making an application in such form and manner, as may be prescribed. Non-compliance of this provision will invite penalty as provided under sub section (5).

21. Section 19 (1) provides that no school shall be established, or recognised, under section 18, unless it fulfils the norms and standards specified in the schedule to the Act. Under sub section (2) thereof, where a school established before the commencement of the Act does not fulfil the norms and standards specified in the schedule, it shall take steps to fulfil the norms and standards at its own expenses, within a period of three years from the date of such commencement. Sub section (3) provides for withdrawal of recognition and sub section (5) provides that any person who continues to run a school even after withdrawal of recognition shall be

liable to fine the amount of which is also specified in the section. Sections 18 and 19 of the RTE Act read as follows:

"18.(1) No school, other than a school established, owned or controlled by the appropriate Government or the local authority, shall, after the commencement of this Act, be established or function, without obtaining a certificate of recognition from such authority, by making an application in such form and manner, as may be prescribed.

(2) The authority prescribed under sub-section (1) shall issue the certificate of recognition in such form, within such period, in such manner, and subject to such conditions, as may be prescribed
Provided that no such recognition shall be granted to a school unless it fulfils norms and standards specified under section 19.

(3) On the contravention of a conditions of recognition, the prescribed authority shall, by an order in writing, withdraw recognition:

Provided that such order shall contain a direction as to which of the neighbourhood school, the children studying in the derecognised school, shall be admitted:

Provided further that no recognition shall be so withdrawn without giving an opportunity of being heard to such school, in such manner, as may be prescribed.

(4) With effect from the date of withdrawal of the recognition under sub-section (3), no such school shall continue to function.

(5) Any person who establishes or runs a school without obtaining certificate of recognition, or continues to run a school after withdrawal of recognition, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues.

19. (1) No school shall be established, or recognised, under section 18, unless it fulfils the norms and standards specified in the Schedule.

(2) Where a school established before the commencement of this Act does not fulfil the norms and standards specified in the Schedule, it shall take steps to fulfil such norms and standards at its own expenses, within a period of three years from the date of such commencement.

(3) Where a school fails to fulfil the norms and standards within the period specified under sub-section (2), the authority prescribed under

sub-section (1) of section 18 shall withdraw recognition granted to such school in the manner specified under sub-section (3) thereof.

(4) With effect from the date of withdrawal of recognition under sub-section (3), no school shall continue to function.

(5) Any person who continues to run a school after the recognition is withdrawn, shall be liable to fine which may extend to one lakh rupees and in case of continuing contraventions, to a fine of ten thousand rupees for each day during which such contravention continues."

22. The expression 'School' has been defined in section 2(n) of the RTE Act and it includes a school established, owned or controlled by the appropriate Government or a local authority; an aided school; a school belonging to specified category and unaided school not receiving any amount of aid or grants. In so far as the case in question is concerned, we are concerned with aided schools and such schools, admittedly, are schools within the meaning of that expression incorporated in the Act.

23.As is evident from sections 18 and 19 of the RTE Act and Rules 14 and 15 of the Kerala Rules, 2011, when the Act was implemented with effect from 1.4.2010, as in the case of every other aided school, the schools in question should have satisfied the norms and standards specified in the Schedule to the Act within a period of three years and on that basis, should have obtained certificate of recognition as provided in section 18. Such schools which do not satisfy the said statutory requirement could not have functioned in the State and even if functioned, the same should have invited penalty as provided in the statutory provisions. As held by this Court in Principal, Jawahar English Medium School (supra), the State could not have allowed such schools to continue to function. In such a situation, even apart from any notice under the KE Act and the statutory entitlement of the Manager to close down the school, on the expiry of the three year period from 1.4.2010, the schools involved in these cases should have been closed down. Therefore, there is no question of these schools being allowed to function, either in accordance with the provisions of the KE Act or in

accordance with the RTE Act.

24. In so far as Rule 6(10) of the Kerala Rules, 2011 is concerned, it is true that under this Rule, no school shall be closed down without the recommendation of the AEO or local authority and prior sanction of the government. As we have already stated, there is no provision in the RTE Act dealing with the closure of the schools to which the Act is applicable. Rules framed by the Government are in exercise of its powers under section 38 of the Act. Section 38(1) provides that the appropriate government may, by notification, make rules "for carrying out the provisions of this Act". Subjects on which the rules can be framed are enumerated in clauses (a) to (r) of section 38(2). Therefore, in view of the provisions contained in section 38(1), only for the purpose of carrying out the provisions of the Act and not even for the purposes of the Act, can rules be framed. Law is settled that rules can be framed only on matters covered by the parent Act. This therefore means that the provisions in rule 6(10) providing that no school shall be closed down without the

recommendation of the AEO and the local authority and sanction of the Government are beyond the scope of the rule making authority of the Government.

25. Even otherwise, the Kerala Rules, 2011 is only a subordinate legislation. The subordinate legislation, it is trite, can be framed only within the four corners of the parent Act under which the same is made. Or else, it will be ultra vires the parent Act. As we have stated, rule 6(10) has travelled beyond the scope of the parent Act and therefore, is ultra vires. In that view of the matter, we cannot recognise the requirements of rule 6(10) and place restrictions on the Manager's rights recognised under the provisions of the KE Act, enabling them to close down the school on satisfying the conditions specified in section 7(6) and the provisions of Chapter V Rule 24.

26. In so far as W.A.Nos.1243/15 and 1262/15 are concerned, it may be true that in pursuance of the direction of this Court in the judgment in W.P(C). 13702/12, the claim of the Manager for closure is

pending consideration of the DPI. We do agree that in a normal situation, learned single Judge should not have entertained W.P(C).12873/15 filed during the pendency of the matter before the DPI. However, having regard to the provisions of the RTE Act, since the school is not a recognised one, we should not adopt such a course and thereby compel the Manager to commit an illegality by continuing to function the school.

27. The appellants in W.A.1243/15 have a case that their prayer to direct the Government to take over or acquire the school was not considered by the learned single Judge. Having gone through the judgment, we do find that the said prayer of the appellants was not considered. However, it essentially is a matter to be decided by the Government and therefore, though we cannot issue any binding direction to the Government, but can only clarify that the authorities before whom Exts.P17 and P18 representations in W.P (C).12205/15 are pending will bestow their attention to this claim and will take appropriate decision on the representations.

28. In the aforesaid circumstances, these writ appeals are dismissed. However, there will be a direction to the respondents concerned in W.A.1243/15 to consider and pass orders on Exts.P17 and P18 with notice to the appellants, as expeditiously as possible, at any rate, within three months from the date of receipt of a copy of this judgment. W.P(C).13933/15 filed by the Manager will stand allowed.

Considering the future of the students, though they are very few in number, we direct that the status quo as on today will be maintained for a period of six weeks and in the mean time, the concerned AEO will take appropriate action for shifting them to any other school in the neighbourhood.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
SHAJI P. CHALY, Judge.

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