

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.2.2019

CORAM

THE HONOURABLE Mr.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE Mr.JUSTICE SUBRAMONIUM PRASAD

W.P.No.4091 of 2019

D.A.V. Boys Senior Secondary
School, Gopalapuram,
Administered & run by
Tamil Nadu Arya Samaj Educational
Society, Rep. by its Secretary
Smt.Parmila Gauhar
213, Lloyds Road, Gopalapuram,
Chennai - 600 086 Petitioner

Vs.

- 1.State of Tamil Nadu
Rep. by the Addl. Chief Secretary to Government
Department of School Education
Secretariat, Chennai - 600 009
- 2.Director of School Education
Government of Tamil Nadu
DPI Campus, College Road
Chennai - 600 006
- 3.The Chief State Nodal Officer
Director of Matriculation Schools
DPI Campus, College Road
Chennai - 600 006 ... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus calling for the entire records leading to the issue of G.O. (Ms) No.173 dated 8.11.2011 issued by the 1st respondent holding Rule 9 of the TN RTE Rules as arbitrary, unscientific, burdensome and having been issued in contravention to the Right of Children to Free and Compulsory Education Act, 2009 and to direct the 1st respondent to frame guidelines for swift and early disbursement of reimbursement for admissions provided by schools as under Section 12(1)(c) and consequently, direct the

1st respondent to take all necessary steps required to reimburse pending reimbursements.

For Petitioner : Mr.R.Venkatavaradhan
for M/s.Chandramouli Prabhakar

O R D E R

(Order of the Court was made by Subramonium Prasad, J.)

Instant writ petition raises a challenge to G.O. (Ms) No.173 dated 8.11.2011 passed by School Education (C2) Department and Rule 9 of the Right of Children to Free and Compulsory Education Rules, 2010. The petitioner is D.A.V. Boys Senior Secondary School, Gopalapuram, which is administered by Tamil Nadu Arya Samaj Educational Society. The school is affiliated to the Central Board of Secondary Education.

2. Article 21-A was inserted in the Constitution by the Constitution (Eighty-Sixth Amendment) Act, 2002. Under Article 21-A of the Constitution, it is the duty of the State to provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. In compliance with the mandate of Article 21-A, the Right of Children to Free and Compulsory Education Act, 2009, was enacted. The statement of objects and reasons of the said Act, reads as under:

The crucial role of universal elementary education for strengthening the social fabric of democracy through provision of equal opportunities to all has been accepted since inception of our Republic. The Directive Principles of State Policy enumerated in our Constitution lays down that the State shall provide free and compulsory education to all children up to the age of fourteen years. Over the years there has been significant spatial and numerical expansion of elementary schools in the country, yet the goal of universal elementary education continues to elude us. The number of children, particularly children from disadvantaged groups and weaker sections, who drop out of school before completing elementary education, remains very large. Moreover, the quality of learning achievement is not always entirely satisfactory even in the case of children who complete elementary education.

2. Article 21A, as inserted by the Constitution (Eighty-sixth Amendment) Act, 2002, provides for free and compulsory education of all children in the age group of six to fourteen years

as a Fundamental Right in such manner as the State may, by law, determine.

3. Consequently, the Right of Children to Free and Compulsory Education Bill, 2008, is proposed to be enacted which seeks to provide, -

(a) that every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards;

(b) 'compulsory education' casts an obligation on the appropriate Government to provide and ensure admission, attendance and completion of elementary education;

(c) 'free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education;

(d) the duties and responsibilities of the appropriate Governments, local authorities, parents, schools and teachers in providing free and compulsory education; and

(e) a system for protection of the right of children and a decentralized grievance redressal mechanism.

4. The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.

5. It is, therefore, expedient and necessary to enact a suitable legislation as envisaged in Article 21-A of the Constitution.

6. The Bill seeks to achieve this objective.

3. Section 38 of the Right of Children to Free and Compulsory Education Act, 2009, gives power to the State Governments to issue notification, make rules for carrying out

the provisions of this Act. Section 38 of the Act reads thus:

38. Power of appropriate Government to make rules.—(1) The appropriate Government may, by notification, make rules, for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:—

(a) the manner of giving special training and the time-limit thereof, under first proviso to section 4;

(b) the area or limits for establishment of a neighbourhood school, under section 6;

(c) the manner of maintenance of records of children up to the age of fourteen years, under clause (d) of section 9;

(d) the manner and extent of reimbursement of expenditure, under sub-section (2) of section 12;

(e) any other document for determining the age of child under sub-section (1) of section 14;

(f) the extended period for admission and the manner of completing study if admitted after the extended period, under section 15;

(g) the authority, the form and manner of making application for certificate of recognition, under sub-section (1) of section 18;

(h) the form, the period, the manner and the conditions for issuing certificate of recognition, under sub-section (2) of section 18;

(i) the manner of giving opportunity of hearing under second proviso to sub-section (3) of section 18;

(j) the Other functions to be performed by School Management Committee under clause (d) of sub-section (2) of section 21;

(k) the manner of preparing School Development Plan under sub-section (1) of section 22;

(l) the salary and allowances payable to, and the terms and conditions of service of, teacher, under sub-section (3) of section 23;

(m) the duties to be performed by the teacher under clause (f) of sub-section (1) of section 24;

(n) the manner of redressing grievances of teachers under sub-section (3) of section 24;

(o) the form and manner of awarding certificate for completion of elementary education

under sub-section (2) of section 30;

(p) the authority, the manner of its constitution and the terms and conditions therefor, under sub-section (3) of section 31;

(q) the allowances and other terms and conditions of appointment of Members of the National Advisory Council under sub-section (3) of section 33;

(r) the allowances and other terms and conditions of appointment of Members of the State Advisory Council under sub-section (3) of section 34.

(3) Every rule made under this Act and every notification issued under sections 20 and 23 by the Central Government shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or notification or both Houses agree that the rule or notification should not be made, the rule or notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification.

(4) Every rule or notification made by the State Government under this Act shall be laid, as soon as may be after it is made; before the State Legislatures.

4. In accordance with the mandate of Right of Children to Free and Compulsory Education Act, 2009 and in particular to Section 38, the Government of Tamil Nadu, brought out Tamil Nadu Right of Children to Free and Compulsory Education Rules, 2011 by bringing out G.O. (Ms) No.173 dated 8.11.2011. Rule 9 of the said rules provides for reimbursement of per-child expenditure by the State Government. This rule has been brought for implementation of the mandate section 12 of the Act. Section 12 of the Right of Children to Free and Compulsory Education Act, 2009, reads thus:

12. Extent of school's responsibility for free and compulsory education.—(1) For the purposes of this Act, a school,—

(a) specified in sub-clause (i) of clause (n) of section 2 shall provide free and compulsory elementary education to all children admitted therein;

(b) specified in sub-clause (ii) of clause (n) of section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent.;

(c) specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent. of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion:

Provided further that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.

(2) The school specified in sub-clause (iv) of clause (n) of section 2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed:

Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (i) of clause (n) of section 2:

Provided further that where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation.

(3) Every school shall provide such information as may be required by the appropriate Government or the local authority, as the case may be.

5. Rule 9 of the Tamil Nadu Right of Children to Free and Compulsory Education Rules, 2011, reads thus:

9. Reimbursement of per-child expenditure by the State Government for the purpose of sub-section (2) of Section 12: (1) The per-child expenditure shall be the expenditure incurred by the State Government for a child in the Government School or the fee fixed by the Committee constituted under the Tamil Nadu Schools (Regulation of Collection of Fee) Act, 2009 (Tamil Nadu Act 22 of 2009) in respect of the school where the child is admitted whichever is less.

(2)(a) The school specified in sub-clause (iv) of clause (n) of section 2 shall, in the month of July, submit to the local authority, a list of students admitted in the school, who are provided free and compulsory elementary education for reimbursement of per-child expenditure by the State Government.

(b) If any child leaves or absents himself for a period exceeding thirty days or leaves the school in the middle of the academic year, the same has to be intimated to the local authority and claim has to be made accordingly.

(3) The local authority shall sanction the reimbursement amount for each academic year in two installments, namely in the months of September and March after verifying or cause to be verified the enrollment of those students in the school.

(4) Every school referred to in sub-clause (iv) of clause (n) of section 2 shall maintain a separate bank account in respect of the amount received by it as reimbursement under sub-section (2) of section 12.

(5) Subject to the provisions contained in the proviso to clause (a) of section 8 and clause (a) of section 9, the reimbursement shall be made through electronic clearance system in the separate bank account maintained by the school for the purpose.

6. The petitioner states that under Rule 9 of Tamil Nadu Right of Children to Free and Compulsory Education Rules, 2011, reimbursement for each academic year is made in two installments, namely in the month of September and March. The petitioner has filed the instant writ petition challenging this rule on the ground that it affects their rights guaranteed under Article 19(1)(g) of the Constitution of India. The petitioner has contended that Tamil Nadu Arya Samaj Educational Society is the registered society under the Societies Registration Act, 1860 and has established several educational institutions including schools in Tamil Nadu. The schools run by Tamil Nadu

Arya Samaj Educational Society, are run on non-profit basis and is managed by a Managing Committee of the honorary members of Tamil Nadu Arya Samaj Educational Society. It is stated that the schools do not take donations for admission of any student in the class. The school building and land over which the school has been constructed have been purchased out of the funds donated by well-known philanthropists without any support by the Government.

7. According to the petitioner, the fact that the rule provides that reimbursement can be made only twice i.e. one in September and another in March, puts the school into lots of difficulties inasmuch as the school is obliged to provide all the infrastructure without getting any money. This puts the school into a lot of financial stress. According to the petitioner, the rule is directly in violation of the Act which does not provide as to how the amount has to be collected from the Government. According to the petitioner school, the impugned rule is leading to backlogs in repayment of dues, salaries and other incentives. It is contended that during the commencement of the academic year, the educational institution faces issues, regarding managing their finances as purchase of stationery, expenses on electronic media devices including E-boards, related consoles etc. and if they are not reimbursed, the fees from the socially backward students, it is impossible for the school to survive. The petitioner would contend that the school will be then forced to put more pressure on other children, which is not correct.

8. Petitioner states that this rule affects the financial stability of the school. The petitioner is therefore challenging Rule 9 of Tamil Nadu Right of Children to Free and Compulsory Education Rules, 2011.

9. Heard the counsel for the parties and perused the documents available on record.

10. Apart from making bald averments that there is severe financial crunch to the school, the petitioner has not given any details about the financial liability, which the school has to face. The petitioner school has also not placed on record as to when the students who do not come within the ambit of Right of Children to Free and Compulsory Education Act, 2009, pay the fees. Rule 9 provides reimbursement of fee expenditure and that the same is paid in two installments, namely September and March after verifying the enrollment of those students in the school. Under the Right of Children to Free and Compulsory Education Act, 2009, it is the duty to admit in Class 1 of the school 25% of that class, children belonging to weaker section under the age group of six to fourteen. The first tranche is paid for

those 25% students is paid in the month of September. Therefore half of the fees is received in September. The petitioner has not informed us as to how the other students pay the fees and as to how many installments, and the fees is paid. The entire fees is collected in two installments, this cannot be said to be violative of Article 14 of the Constitution of India and that too, in complete absence of any material by the petitioner showing the total financial liability of these students and the amount collected from the students by the school.

11. The Hon'ble Supreme Court in *Pramati Educational and Cultural Trust (Registered) and Others vs. Union of India and Others* reported in 2014 (8) SCC 1, while dealing with an argument that Section 12(1)(c) read with Section 2(n)(iv) of the Act, are violative of Article 19(1)(g), observed as under:

53. When we examine the 2009 Act, we find that under Section 12(1)(c) read with Section 2(n)(iv) of the Act, an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority is required to admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion. We further find that under Section 12(2) of the 2009 Act such a school shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed. Thus, ultimately it is the State which is funding the expenses of free and compulsory education of the children belonging to weaker sections and several groups in the neighbourhood, which are admitted to a private unaided school. These provisions of the 2009 Act, in our view, are for the purpose of providing free and compulsory education to children between the age group of 6 to 14 years and are consistent with the right under Article 19(1)(g) of the Constitution, as interpreted by this Court in *T.M.A. Pai Foundation [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481]* and are meant to achieve the constitutional goals of equality of opportunity in elementary education to children of weaker sections and disadvantaged groups in our society. We, therefore, do not find any merit in the submissions made on behalf of the non-minority private schools that Article 21-A of the Constitution and the 2009

Act violate their right under Article 19(1)(g) of the Constitution.

55. When we look at the 2009 Act, we find that Section 12(1)(b) read with Section 2(n)(ii) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. We also find that under Section 12(1)(c) read with Section 2(n)(iv), an unaided school has to admit into twenty-five per cent of the strength of Class I children belonging to weaker sections and disadvantaged groups in the neighbourhood. Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. While discussing the validity of clause (5) of Article 15 of the Constitution, we have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan v. Union of India* [(2012) 6 SCC 1] insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct.

Since it is the state which is bearing the entire expenditure and that the expenditure is paid in two installments, it cannot be said that Rule 9 of Right of Children to Free and Compulsory Education Rules, 2011, is arbitrary or that the said rule violates Article 19(1)(g) of Constitution of India. There is no

merit in the writ petition and thus deserves to be dismissed.

12. Accordingly, the writ petition is dismissed. However, there shall be no order as to cost.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

Asr

To

- 1.State of Tamil Nadu
Rep. by the Principal Secretary to Government
Department of School Education
Secretariat, Chennai - 600 009
- 2.Director of School Education
Government of Tamil Nadu
DPI Campus, College Road
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W.P.No.4091 of 2019

SKV(CO)
GN(08/05/2019)

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