

(2022) 11 KL CK 0282

In the High Court Of Kerala

Case No : Writ Appeal Nos. 851, 860, 908, 1097, 1131 Of 2022

K B Ashraf

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 24-11-2022

Acts Referred:

Kerala Education Act, 1958 — Section 7(6)

Kerala Education Rules, 1958 — Rule 24, 24(1), 24(2)

Kerala Right of Children to Free and Compulsory Education Rules, 2011 — Rule 6(10)

Citation : (2022) 11 KL CK 0282

Hon'ble Judges : P.B.Suresh Kumar, J;C.S.Sudha, J

Bench : Division Bench

Advocate : M.A.Asif, K.M.Muhammed Hussain, K.V.Sree Vinayakan, Colin Alex, A.J.Varghese

Final Decision : Allowed

Judgement

P.B.Suresh Kumar, J.

1. Among these appeals, W.A.Nos.860 of 2022 and 1131 of 2022 are preferred against the judgment in W.P.(C) No.8094 of 2022 and W.A.Nos.908 of 2022 and 1097 of 2022 are preferred against the judgment in W.P.(C) No.8212 of 2022. W.A.No.851 of 2022 is preferred against the judgment in W.P. (C) No.16323 of 2022.

2. The writ petitions from which the above appeals arise were disposed of by a common judgment and as such, the appeals are also disposed of by this common judgment. Parties and documents are referred to in this judgment for convenience, as they appear in W.P.(C) No.8094 of 2022.

3. The petitioner in the writ petition is the Manager of Haji Essa Haji Moosa Memorial High School, an aided school (the School), having classes from standard I to X. The school is established and run by a trust namely Himayathul Islam Trust (the Trust). The writ petitions relate to the right of the Trust to close

down the school.

4. The School is one established in the year 1948. It is stated by the petitioner that although about 1,000 children were pursuing studies in the School during late eighties, of late, the strength of the students came down heavily and there are only a very few students now in all the classes together. According to the petitioner, the Trust is one constituted with the object of imparting education to children and as the Trust is not able to achieve its object by running the School in this fashion, it has decided to close down the School and addressed a representation to respondents 2 to 4 seeking permission to close down the High School section of the School from the academic year 2022-23 onwards. Ext.P1 is the representation submitted by the petitioner in this regard. A representation similar to Ext.P1 was addressed by the petitioner to respondents 2 to 4 seeking permission to close down the Lower Primary section of the School also. No orders have been passed on the said representations either by the second respondent or the fourth respondent. The third respondent, however, rejected the representations by a common order stating that there are 138 students and 23 staff in the School and since alternative arrangements cannot be made by the Government for taking care of the interests of the students and staff, the permission sought for cannot be granted. Ext.P3 is the order issued by the third respondent in this regard. Ext.P3 was under challenge in the writ petition preferred in respect of the request made by the petitioner for closure of the High School section of the School. W.P.(C) No.8212 of 2022 was one instituted by the petitioner challenging Ext.P3 order separately in respect of the claim made for closure of the Lower Primary school section of the School.

5. W.P.(C) No.16323 of 2022 was one instituted by the sixth respondent in the writ petition. The sixth respondent is the President of the Parent Teacher Association of the School. He filed the said writ petition seeking directions to the Government to consider Ext.P1 representation preferred by him and others before the Government to take over the School in public interest.

6. The writ petitions were taken up together. In the light of the provision contained in Section 7(6) of the Kerala Education Act (the Act) and Rule 24 of Chapter V of the Kerala Education Rules (the KER), and having regard to the fact that the provision contained in Rule 6(10) of the Kerala Right of Children to Free and Compulsory Education Rules, 2011, framed under the Right of Children to Free and Compulsory Education Act, 2009, the learned Single Judge took the view that the petitioner is entitled to close down the School and consequently allowed W.P.(C) Nos.8094 of 2022 and 8212 of 2022, set aside Ext.P3 communication and disposed of the writ petitions directing the State Government to undertake the task of accommodating the students in the neighbouring schools. In the light of the decision in the aforesaid writ petitions, W.P.(C) No.16323 of 2022 was dismissed. The official respondents and the Parent Teacher Association of the School are aggrieved by the said decision of the learned Single Judge and hence, these appeals.

7. The learned counsel for the sixth respondent as also the learned Government Pleader submitted that in terms of the provisions contained in Section 7(6) of the Act and Rule 24 of Chapter V of the KER, it was obligatory for the petitioner to give notice of closure of the School to the fifth respondent, the Director of General Education, and in the absence of any notice to the Director of General Education as provided for in the Statute, the learned Single Judge ought not have allowed the writ petition and directed the State Government to undertake the task of accommodating the students in the neighbouring schools. In addition, the learned Government Pleader submitted, placing reliance on the provisions contained in the Right of Children to Free and Compulsory Education Act and the Rules framed by the State Government thereunder, that permission of the authorities under the said Statute is required for closure of the School. There was a specific provision in Rule 6(10) of the Kerala Right of Children to Free and Compulsory Education Rules, 2011 to the effect that no school shall be closed down without the recommendation of the concerned Assistant Educational Officer and the local authority and without the prior sanction of the State Government. But, the said Rule was held to be ultra vires the Statute by a Division Bench of this Court in *State of Kerala v. Manager, Aided Upper Primary School, Kozhikode* 2016(2) KHC 629. The learned Government Pleader, referring to the various provisions contained in the Right of Children to Free and Compulsory Education Act submitted that the said judgment needs reconsideration. The attempt of the learned Government Pleader was also that even if the petitioner gives notice of closure to the Director of General Education in terms of Section 7(6) of the Act and Rule 24 of Chapter V of the KER, the petitioner cannot close down the School unless the petitioner obtains permission of the statutory authority in terms of Rule 6(10) of the Rules framed under the Right of Children to Free and Compulsory Education Act.

8. Per contra, the learned Senior Counsel for the petitioner submitted that what is required in terms of Section 7(6) of the Act is only one year's notice expiring with the 31st May of any year of the intention to close down the School and the permission of the authority to whom the notice is issued, is not contemplated by the Statute to enable the Manager to close down the school. The learned Senior Counsel conceded that the competent authority to whom notice has to be given in terms of Section 7(6) of the Act is the officer authorised by the Government in this behalf and that notice has not been given to him by the petitioner. It was, however, contended by the learned Senior Counsel persuasively that since notice has been given to the Secretary to the Government, an officer superior to the officer authorised by the Government in this behalf, it cannot be contended that there is no compliance of the statutory provision.

9. We have examined the arguments advanced by the learned counsel for the parties.

10. Section 7(6) of the Act dealing with duties and responsibilities of Managers reads thus:

"No manager shall close down any school unless one year's notice, expiring with the 31st May of any year, of his intention so to do, has been given to the officer authorised by the Government in this behalf."

As evident from the extracted provision, it proceeds on the premise that the Manager of a school is entitled to close down the school, if notice is given to the officer authorised by the Government in this behalf in the manner indicated in the provision. Rule 24 of Chapter V of the KER reads thus:

Closure of Private Schools:- (1) No Private school shall be closed down without giving the Director one year's notice expiring with the 31st May of any year of the intention to do so.

(2) The Director may, after considering all aspects of the question, grant permission for the closure of the school and recognition of such school shall lapse. No application for withdrawal of the notice after the issue of permission shall be entertained unless adequate reasons are adduced to the satisfaction of the Director. The order of the Director in the matter shall be final.

It is evident from sub-rule (1) of Rule 24 that the Director is the officer authorised by the Government to receive notice concerning closure of the schools in terms of Section 7(6) of the Act. Sub-rule (2) of Rule 24 which empowers the Director to grant permission for closure of the school has been held by this Court to be inconsistent with Section 7(6) of the Act and beyond the rule making power of the Government, in *Krishna Kumar v. State of Kerala*, 1972 KLT 496. In *Subramanian v. State of Kerala*, 1986 KLT 359, this Court has clarified that Section 7 and Rule 24(1) do not speak of any permission from any one, and the obligation of the Manager is only to give one year's notice of his intention to close down the school. As noted, Rule 6(10) of the Kerala Right of Children to Free and Compulsory Education Rules, 2011 framed under the Right of Children to Free and Compulsory Education Act, 2009 contained a provision to the effect that no school shall be closed down without the recommendation of the Assistant Educational Officer and the local authority and without prior sanction of the Government. As mentioned, in *Manager, Aided Upper Primary School, Kozhikode*, a Division Bench of this court held that Rule 6(10) aforesaid is beyond the rule making authority of the State Government and therefore ultra vires the Right of Children to Free and Compulsory Education Act, 2009. It was also clarified in the said case that the said provision will not be an impediment for a Manager to close down a school on satisfying the condition specified in Section 7(6) of the Act and Rule 24(1) of Chapter V of the KER. We have gone through meticulously the decision of this Court in *Manager, Aided Upper Primary School, Kozhikode* and we are in complete agreement with the proposition laid down therein.

11. The surviving question is whether compliance of the requirement under Section 7(6) of the Act is mandatory. As noted, in terms of the said provision, notice of closure is one to be given to the officer authorised by the Government in this behalf. The officer authorised in his behalf is the Director. The Director,

going by the definition contained in Rule 2(4) of Chapter I of KER is the Director of Public Instruction, presently re-designated as 'Director of General Education', or such other officer or officers who may from time to time be appointed by the Government to exercise all or any of the powers of the Director of General Education. The petitioner has no case that the third respondent is an officer authorised and empowered by the Government to receive notice of closure of schools on behalf of the Director. If that be so, notice of closure of school should have been given to the Director. In the case on hand, the notice of closure has not been given to the Director. Instead notice has been given to the third respondent, the Deputy Director of Education. As noted, the argument advanced by the learned Senior Counsel for the petitioner is that notice to the Secretary to Government, an officer superior to the Director is sufficient for compliance of the requirement under Section 7(6) of the Act. The pointed question, therefore is whether notice to an officer superior to the officer who is authorised by the Government in this behalf is sufficient compliance of the requirement under Section 7(6) of the Act.

12. It is now trite that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden [See *Taylor v. Taylor* (1875) LR 1 Ch D 426, *Nazir Ahmad v. King-Emperor*, AIR 1936 PC 253(1) and *Noor Mohammed v. Khurram Pasha*, 2022(9) SCC 23]. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted at all. In the case on hand, going by the provision contained in Section 7(6) of the Act, the Manager is empowered to close down the school after giving notice in the manner indicated in the provision to the officer authorised by the Government in this behalf. Since the dispute pertains to the exercise of power by the Manager, we are of the view that the Manager should have given the notice of closure to the officer authorised by the Government in this behalf and not to anyone else, for if it is held that notice of closure can be given to a person not authorised by the Government, the same will have the effect of defeating not only the statutory provision, but also the object and purpose behind it.

In the light of discussion aforesaid, according to us, the impugned common judgment in W.P.(C) Nos.8094 of 2022 and 8212 of 2022 is liable to be set aside and we do so. It is, however, made clear that this judgment will not preclude the petitioner from closing down the school after giving a fresh notice in terms of the requirement under Section 7(6) of the Act. Insofar as W.P.(C) No.16323 of 2022 was dismissed in the light of the decision in the remaining writ petitions, the petitioner therein is granted liberty to file a fresh writ petition on the same cause of action, if so advised.