

(2010) 11 KL CK 0069

In the High Court Of Kerala

Case No : Writ Petition (C) No. 28888 of 2010

Manager and Others

APPELLANT

Vs

D.P.I. and Another

RESPONDENT

Date of Decision : 10-11-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Kerala Education Act, 1958 — Section 6, 6(1), 6(2)
Kerala Education Rules, 1959 — Rule 1, 3, 4, 4(2A), 5

Citation : (2010) 11 KL CK 0069

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : George Poonthottam, for the Appellant; Nisha Bose, for the Respondent

Final Decision : Allowed

Judgement

K.T. Sankaran, J.—The questions arising for consideration in this Writ Petition are the following:

- (1) Whether prior permission of the Director of Public Instruction is necessary for transfer of a running school, so as to apply for approval for change of management involving change of ownership?
- (2) Whether transfer of a running school and the properties of the same without prior permission of the authority under the Kerala Education Act (hereinafter referred to as "KE Act") is null and void?
- (3) What is the distinction between Section 6 of the Kerala Education Act and Rule 5A of the Kerala Education Rules (hereinafter referred to as "KER")?
- (4) At what stage the previous permission of the Director of Public Instruction be sought for under Rule 5A of Chapter III of the Kerala Education Rules?

2. The first Petitioner, the Corporate Manager of Koyyode Madrassa U.P. School in

Kannur District, transferred the running school, its management and properties in favour of the second Petitioner as per a registered sale deed dated 14-9-2007. The transfer was made as per the decision taken by the Madrassa Committee, which is the educational agency. Consent of the teaching and non-teaching staff was also obtained before the transfer. It is stated that the transfer was for the purpose of running the school as an aided school. A joint application was made by the Petitioners to the Director of Public Instruction, routed through the Assistant Educational Officer, Kannur North, under Rule 5A of Chapter III of KER. It is stated that along with the application, all the relevant documents evidencing transfer, decision of the committee and other relevant documents were produced. Exhibits P-2 to P-7 are the application and some of the documents submitted along with the application. The Director of Public Instruction returned the application to the Assistant Educational Officer as per Exhibit P-8 communication, on the ground that for transferring the property of the school, previous permission of the Director of Public Instruction was not obtained and that it amounts to a violation of Rule 5A of Chapter III KER. The Assistant Educational Officer, in turn, returned the application to the Manager as per Exhibit P-9 communication. Exhibit P-8 is under challenge in this Writ Petition.

3. Sri George Poonthottam, the learned Counsel for the Petitioners submitted that Exhibit P-8 is contrary to the principles of law and particularly the decisions reported in *P.V. John v. Director of Public Instruction and Anr.* ILR 1975 Ker 604, *Kesava Kurup v. State of Kerala and Ors.* 1987 (2) KLT 801, *Kesava Kurup v. State of Kerala* 1988 (1) KLT 77 and *Vijayakumari Pillai v. State of Kerala* 2001 (1) KLT 25 Case No. 28. It is submitted that notwithstanding the right of appeal under Sub-rule 2 of Rule 5A of Chapter III KER, the Petitioners would be entitled to challenge Exhibit P-8 under Article 226 of the Constitution of India on two grounds, namely, (i) there is no order as such which could be challenged in appeal under Sub-rule 2 of Rule 5A(ii) Exhibit P-8 is contrary to the decisions referred to above.

4. The learned Government Pleader supported Exhibit P-8 order and also contended that the Petitioners have effective alternative remedy.

5. For the sake of convenience, Section 6 of the KE Act and Rule 5A of Chapter III KER are quoted below:

6. Restriction on alienation of property of aided school.--(1) Notwithstanding anything to the contrary contained in any law for the time being in force, no sale, mortgage, lease, pledge, charge or transfer of possession in respect of any property of an aided school shall be created or made except with the previous permission in writing of such officer not below the rank of a District Educational Officer, as may be authorised by the Government in this behalf. The officer shall grant such permission applied for unless the grant of such permission will, in his opinion adversely affect the working of the school.

(2) Any person aggrieved by an order of the officer refusing or granting

permission under Sub-section (1) may in such manner and within such time as may be prescribed, appeal to the Government.

(3) Any transaction made in contravention of Sub-section (1) or Sub-section (2) shall be null and void.

(4) If any educational agency or the manager of any school acts in contravention of Sub-section (1) or of an order passed under Sub-section (2) Government may withhold any grant to the school.

5A. Change of management involving change of ownership.--(1) Notwithstanding anything contained in these rules, no change of Management of any aided school involving change of ownership shall be effected except with the previous permission of the Director. The Director may grant such permission unless the grant of such permission will, in his opinion, adversely affect the working of the institution and the interests of the staff and the person to whom the Management is transferred.

(2) Any person aggrieved by an order under Sub-rule (1) may, within 30 days from the date of the receipt of the order, prefer an appeal to the Government.

(3) In the case of change of management of a school involving change of ownership the new Manager of a corporate or an individual educational agency, shall be bound to absorb any member who is a claimant under Rule 51A of Chapter XIVA or is eligible for protection belonging to teaching and non-teaching staff of any school of the transferor Manager against the vacancies that may arise in the school.

6. The Kerala Education Act was enacted to provide for the better organisation and development of educational institutions in the State providing a varied and comprehensive educational service through out the State. Private educational institutions are classified into two categories, namely,

(1) those under individual educational agency and

(2) those under corporate educational agency (vide Rule 1 of Chapter in, KER).

7. Rule 3 of Chapter III, KER provides that the management of every aided school may be vested by the educational agency in a person who shall be referred to as the Manager and who shall be responsible to the department for the management of the institution. Rule 4 of Chapter III provides for approval of appointment of Managers. The educational officers shall be competent to approve the appointment of Managers by educational agencies and to approve changes in the personnel of the Managers. Rule 5 of Chapter III provides that all changes in the personnel of the Managers of aided institutions shall be immediately reported to the educational officer and approval obtained. Sub-rule 2 of Rule 5 states that appointments and changes approved by the educational officer shall be reported to the Director. The note to Rule 5 of Chapter III provides that Rules 4 and 5 do not apply to change of management involving change of ownership.

8. In *P.V. John v. Director of Public Instruction and Anr.* ILR 1975 Ker 604, Justice Narendran considered the scope and ambit of Section 6 of the Act and Rule 5A of the Rules and it was held thus:

The prohibition in Section 6 of the Act is only against the alienation of any property of an aided school without previous sanction. When a running school as such with all its properties and right to management is transferred, Section 6 of the Act, will not be attracted. What is sought to be prevented by Section 6 is the alienation of any property of an aided school by an educational agency because, in that case, the working of the school will be adversely affected when any property or properties of the school go into the hands of third persons. When a school is transferred as a going concern, such a difficulty will not arise and hence the prohibition in Section 6 cannot apply to such a transfer. When such a valid transfer is effected, the change of management is to be effected with the previous permission of the Director of Public Instruction.

9. In *Kesava Kurup v. State of Kerala and Ors.* 1987 KLT 801 some of the teachers challenged the transfer of a school by an individual educational agency to a Corporate Educational Agency, on the ground that the transfer would affect their service conditions. It was contended that the transfer was hit by Section 6 of the Act. The learned Single Judge held thus:

The fourth Respondent transferred the school and its properties to the fifth Respondent. The school as a going concern was transferred. The transferee has applied for recognition as the Manager. The educational authorities granted recognition. There was no transfer of the property of the school by the fourth Respondent. Such a transfer will not fall within the mischief of Section 6 of the Education Act. This view is supported by the decision in *P.V. John v. Director of Public Instruction and Anr.* ILR 1975 Ker 604.

10. The judgment of the learned Single Judge was challenged in Writ Appeal, which was disposed of by the Division Bench in *Kesava Kurup v. State of Kerala* 1988 (1) KLT 77, confirming the judgment of the learned Single Judge.

11. In *Vijayakumari Pillai v. State of Kerala and Anr.* 2001 (1) KLT 25 Case No. 28, the learned Single Judge held that when a running school as such with all its properties and right to management is transferred, Section 6 of the Act will not be attracted. In *Kunjulekshmi v. Krishnan Unnithan* 1992 (1) KLT 14 Case No. 18, a similar view was taken.

12. There is a vast difference between Section 6 of the KE Act and Rule 5A of Chapter III of KER. Section 6 restricts sale, mortgage, lease, pledge, charge or transfer of possession in respect of any property of an aided school. No such sale, mortgage etc. "shall be created or made" except with the "previous permission in writing" of such officer not below the rank of the District Educational Officer. Grant of such permission shall be made by the officer unless in his opinion that it would adversely affect the working of the school. Section 6 also provides that any transaction made in contravention of Section 6 shall be

null and void. If a transaction is null and void u/s 6, no rights in the property of the school would pass to the transferee. Section 6 is intended to safeguard the proper working of the school. If the management proposes to transfer the property of a school, which would affect the working of the school, the authority would not grant permission as provided u/s 6. Section 6 is aimed at maintaining the proper conduct of the school and thereby to protect the interests of the students, teachers and non teaching staff. A person cannot get the transfer of the property of the school and claim that as owner of the property, he can do anything he likes as any other owner of property could do. Maintaining the school as such is aimed at by providing a restriction on transfer of the property of the school without previous permission in writing of the authority and making any such transaction in contravention of Section 6 as null and void.

13. Rule 5A and Chapter HI contemplates an entirely different situation. It contemplates the change of management of an aided school on account of the change of ownership. A change of management involving change of ownership arises when a running school with its management is transferred, in such a transfer, the transfer of property of the school also may be involved. If the transfer includes transfer of the school and its management, it means that the transfer is of a running school for the purpose of continuing the school as such. In such a case, the contingency of the transfer adversely affecting the working of the school, as in the case of a transfer which is hit by Section 6 of the KE Act, does not arise in the normal circumstances. In the case of the transfer of the running school, the safeguards to be taken are provided in Rule 5A itself. The Director may grant such permission as provided in Rule 5A unless the grant of permission will, in his opinion adversely affect the working of the institution and the interests of the staff and the person to whom the management is transferred. Sub-rule 3 of Rule 5A also makes provision for protecting the interests of the teachers and non teaching staff.

14. Rule 5A of Chapter III of KER does not contain any restriction on alienation as provided in Section 6 of the KE Act. The only restriction in Rule 5A is regarding the change of management involving change of ownership and for that purpose permission of the Director is required. Rule 5A of Chapter III contains the expression "no change of management...shall be effected" whereas Section 6 restricts alienation of the property of an aided school except with the previous permission in writing of the officer concerned. Section 6 contains non obstante Clause making it clear that it has the operation notwithstanding anything to the contrary contained in any law for the time being in force. That includes the Transfer of Property Act. Notwithstanding the right of a person to transfer his immovable property under the Transfer of Property Act, Section 6 of the Kerala Education Act provides for restriction on such transfer in the case of the property of an aided school. Section 6 even makes a transaction contrary to Sub-section (1) thereof, null and void. There is no such restriction, non obstante Clause or consequence of the transaction being void, under Rule 5A of Chapter III. The expression "shall be created or made" as provided in Section 6 is conspicuously

absent in Rule 5A of Chapter III. The expression "shall be effected" occurring in Rule 5A relates to change of management involving change of ownership.

15. Approval of appointment of Managers and changes in the personnel of the Managers shall be made by the authority as provided in Rule 4 of Chapter III. Sub-rule 2A of Rule 4 of Chapter III provides that approval of appointment of Managers and changes in the personnel of the Managers shall take effect from the date of actual assumption of charge of the management specified in the order of approval. Rule 5A of Chapter III does not provide for approval, but provides for previous permission of the Director before effecting change of management of aided school involving change of ownership. Rule 5 of Chapter III provides that all changes in the personnel of the Managers of aided institutions shall be immediately reported to the educational officer and approval obtained. The note to Rule 5 of Chapter III is to the effect that the Rules 4 and 5 do not apply to change of management involving change of ownership. A conjoint reading of Rules 4, 5 and 5A of Chapter III indicates that in the case of change of management involving change of ownership, approval thereof shall not be effected except with the previous permission of the Director. Though Rule 5A does not mention about approval, it has to be taken that previous permission under Rule 5A leads to approval.

16. At what point of time, the permission of the Director should be obtained, is the next question to be considered. When Section 6 provides for "previous permission in writing", Rule 5A of Chapter III provides only for previous permission for effecting change of management involving change of ownership. The prior permission of the Director as provided in Rule 5A need not necessarily be permission antecedent to the transfer. The prior permission is regarding change of management involving change of ownership. If the Director does not grant permission for change of management, then the transaction becomes a transfer which does not include change of management enabling the transferee to run the school and thus it would be hit by Section 6 of the Kerala Education Act. The Director can grant permission as provided in Rule 5A even after the transfer of the running school together with the management is made. Such transfer involving change of management would take effect only after permission is granted by the Director under Rule 5A of Chapter III. When such permission is granted, it becomes a transfer of a running school and not transfer of the property alone and hence, Section 6 of the Kerala Education Act will not have application.

17. The aforesaid discussions would lead to the following conclusions:

- (i) Previous permission of the Director is not required before making the transfer, if the transfer is of a running school with its management.
- (ii) Previous permission of the Director is required only for effecting change of management involving change of ownership on the basis of the transfer mentioned above.

(iii) Transfer of a running school together with its management and properties does not come u/s 6 of the Kerala Education Act. Therefore, previous permission in writing as required u/s 6 is not necessary for making the transfer.

(iv) Previous permission mentioned in Rule 5A of Chapter III relates only to the stage of change of management involving change of ownership and it does not relate to the stage of making a transfer of a running school with its management

(v) Permission of me Director under Rule 5A of Chapter III, KER can be made even after the transfer of a running school together with its management and properties is made.

18. I am not inclined to accept the contention raised by the learned Government Pleader that existence of alternative remedy makes the Writ Petition not maintainable. In *Kotnis Vs. State of Kerala*, , it was held:

It is trite that existence of an alternate remedy need not always result in the rejection of the Writ Petition under Article 226 of the Constitution of India. If the order impugned is completely without jurisdiction or opposed to any clear statutory provision or violative of the principles of natural justice or is against the settled principles of law as per a decision of the Supreme Court or jurisdictional High Court, I do not think that the existence of alternate remedy bars this Court from exercising the powers under Article 226 of the Constitution.

Exhibit P-8 by which the Director of Public Instruction returned the application submitted by the Petitioners holding that the application is not maintainable as prior permission under Rule 5A of Chapter III, KER was not obtained, is clearly against the decisions of this Court and against the principles of law mentioned above.

For the aforesaid reasons, Exhibit P-8 order dated 21 -7-2010 issued by the Director of Public Instruction is quashed. The Director of Public Instruction shall consider the matter afresh, after affording an opportunity of being heard to the Petitioners and any other affected party, as expeditiously as possible, and at any rate within a period of three months from the date of receipt of a copy of the judgment.