
(1972) 05 KL CK 0007

In the High Court Of Kerala

Case No : Original Petition No. 876 of 1972

P. Krishnakumar

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 31-05-1972

Acts Referred:

Kerala Education Act, 1958 — Section 36, 7(6)
Kerala Education Rules, 1959 — Rule 24(2)

Citation : AIR 1973 Ker 14 : (1972) 2 LLJ 576

Hon'ble Judges : V. Balakrishna Eradi, J

Bench : Single Bench

Advocate : K.K. Narendran, for the Appellant; Govt. Pleader, for the Respondent

Judgement

V. Balakrishna Eradi, J.—The petitioner is the manager of an aided upper primary school at Shoranur. The school was originally started by the petitioner's grandfather more than 60 years ago. After the death of the founder the petitioner's father succeeded him as the manager of the school. He died in June, 1966 when the petitioner was only 19 years old. In spite of his young age the petitioner had to take up the responsibility of administering the school as its manager and he took over the said burden. It would appear that the petitioner found it difficult to properly look after the management of the school, especially in view of the fact that he was not keeping normal health and was unable to move out freely on account of some defect in his knee joints. Hence on 27-5-1971 he addressed a letter Ext. P-1 to the Director of Public Instruction, Trivandrum (2nd respondent) intimating the latter about the petitioner's intention to close down this school with effect from the academic year 1972-73. It was expressly mentioned in Ex. P-1 that the notice was being given by him as per Rule 24 of Chapter V of the Kerala Education Rules. The petitioner's case is that he did not receive any reply from the 2nd respondent for several months and hence he addressed a reminder petition to the 2nd respondent on 29-11-1971. Thereafter on 31-12-1971 the Assistant Education Officer, Shoranur sent the letter Ext. P-3 to the petitioner informing him that permission for the

closure of the school had been declined by the Director of Public Instruction and as an enclosure to the said letter the petitioner was furnished with a copy of the proceedings of the Director which purports to have been passed on 31-7-1971. The petitioner has produced a copy of the said order and it has been marked as Ext. P-4. By this writ petition the petitioner seeks to quash Ext. P-4 and he has also prayed for the issuance of a writ of mandamus or other appropriate writ compelling the 3rd respondent-the Assistant Educational Officer, Shoranur-to receive from the petitioner and the Headmistress of the school all the records and accounts maintained in the school on the date of closing or immediately after the closing down of the school on 31-5-1972. The petitioner has challenged the validity of Rule 24 (2) of Chapter V of the Kerala Education Rules on the ground that it is ultra vires Section 7(6) of the Kerala Education Act, 1958.

2. In the counter-affidavit filed on behalf of the respondents it is contended that the manager has no legal right to close down an aided school without the permission of the competent authority and that in the present case such permission has been validly refused by the Director. The plea of the petitioner that Rule 24 (2) of Chapter V of the Kerala Education Rules is ultra vires has been strongly refuted by the respondents.

3. The petitioner is admittedly the owner of the school. Ordinarily, it is a right inherent in the owner of any institution or establishment to close it down if he finds it impossible or even inconvenient for him to continue to run it. This right is an essential ingredient of the fundamental rights guaranteed under Article 19(1) (f) and (g) of the Constitution. Reasonable restrictions can however be imposed on the exercise of the said right in the manner authorised by Clauses (5) and (6) of Article 19 of the Constitution but that can be done only by the legislature by enacting a suitable statutory provision in that regard. The only provision in the Kerala Education Act which purports to impose a restriction on the right of the manager of a school to close down the institution is that contained in Section 7(6). That provision reads:

"(6) 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."

Under the said section the only restriction placed on the manager's right to close down a school is that he should give one year's previous notice expiring with the 31st day of May of the ensuing year, to the officer authorised by the Government in that behalf intimating his intention to close down the institution. Subject to compliance with the said requirement of giving one year's notice the statute has reserved freedom to the manager to close down his school. Clause (2) of Rule 24 of Chapter V of the Kerala Education Rules has however imposed additional trammels on the manager's right to close down the school. Rule 24 as it originally stood contained only the clause which now stands numbered as Clause (1) and its terms are in perfect conformity with the provision enacted in Section 7(6) of the Act. It was by a notification published in the Kerala Gazette dated

11-5-1965 that Clause (2) was added to the rule. That clause reads:

"(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."

By the introduction of the said new clause in Rule 24 the rule making authority has proceeded to vest the Director of Public Instruction with a discretion either to grant or refuse permission to the manager for the closure of his school and the manager's right to close the school is made dependent upon the grant of permission by the Director. It is also declared that the order passed by the Director shall be final.

4. The learned advocate for the petitioner contends that Clause (2) of Rule 24 is inconsistent with the provision contained in Section 7(6) of the parent enactment and that it is ultra vires for that reason. It is further urged that what has really been done by the State Government by the introduction of Clause (2) in purported exercise of its power to frame rules is to amend the provisions of Section 7(6) and thereby to arrogate to themselves the primary legislative function. Another contention that is taken on behalf of the petitioner is that under the impugned rule the Director has been conferred uncanalised and arbitrary powers either to grant or refuse permission according to his fancy without any guiding principles being laid down in the rule as to how the discretion is to be exercised by him. In this connection it is also pointed out that the affected party is left without any remedy since the order of the Director is declared to be final.

5. After hearing both sides and giving the matter my anxious consideration I am constrained to hold that Rule 24 (2) is inconsistent with Section 7(6) of the Act and is also beyond the rule-making power of the State Government. When the Legislature while enacting the parent Statute has thought it fit to impose only a limited restriction on the right of the manager to close down his school, it is not open to the rule-making authority to impose additional restrictions on the said right because that would amount to an usurpation of the function of substantive law making which only the Legislature is competent to perform. Under the terms of Section 7(6) of the Act the manager's right to close down his school is preserved subject to his complying with the condition laid down in the said section insisting on one year's prior notice. What has been done under Rule 24 (2) is to further abridge the freedom of the manager beyond what the parent enactment has authorised to be done by subjecting the right of the manager to close down the institution to a further condition that it will be dependent Upon the grant of permission by the Director of Public Instruction. Section 36 (2) of the Kerala Education Act enumerates the various matters with respect to which provision may be made by the State Government by framing rules under the Act. The impugned rule will not come within the scope of the power conferred by any

of the Clauses (a) to (m) of Section 36(2). Nor can the said rule be regarded as having been validly made in exercise of the general power conferred by Section 36(1) to make rules to carry into effect the provisions of the Act. As per Section 7(6) of the Act the manager is entitled to close down a school provided he has given the requisite notice under the said section. The making of a rule imposing an additional restriction on the manager's right cannot be regarded as a step taken by the Government for carrying into effect the provisions of Section 7(6) of the Act. On the other hand the said pro-Vision in so far as it abridges a right which is preserved by Section 7(6) of the Act is inconsistent with the said section.

6. As pointed out by Griffith, C. J. in *Ferrier v. Wilson* (1906) 4 CLR 785 at p. 791 (Aus.), if the legislature deals with a particular act, and prescribes the conditions under which it will be lawful and those under which it will be unlawful, the subordinate authority cannot, under the pretence of making a rule alter the law as so declared by the Legislature. The principle is well established that if a rule framed under the statute is in contravention of or inconsistent with any provision contained in the parent act the rule must be regarded as ultra vires and cannot be given effect to. Judged in the light of the said principle Rule 24 (2) must be held to be beyond the rule-making power of the State Government and hence ultra vires and void.

7. I find also considerable force in the contention advanced on behalf of the petitioner that under Rule 24 (2) a naked and arbitrary power has been conferred on the Director to grant or refuse permission according to his unfettered discretion without any guiding principles being laid down by the rule-making authority and that on this ground the impugned rule has to be regarded as violative of Article 14 of the Constitution. It is however unnecessary to go into this question in greater detail in View of my having come to the conclusion that the rule is even otherwise ultra vires and void.

8. Admittedly, the petitioner has complied with the provisions of Section 7(6) by giving due notice as per Ext. P-1 of his intention to close down the school. The 2nd respondent has purported to decline permission only on the basis of the provision contained in Rule 24 (2) which I have held to be ultra vires. Ext P-4 will therefore stand quashed.

9. There will be a direction to the 3rd respondent to take over from the petitioner the records, accounts etc. relating to the school as expeditiously as possible in view of the fact that the school is being closed down by the petitioner with effect from the academic year 1972-73.

" 10. The Original Petition is allowed as above. The parties will bear their respective costs.

11. A carbon copy of this judgment will be furnished to the counsel appearing for the petitioner on payment of the requisite charges.