

(1958) 02 KL CK 0003

In the High Court Of Kerala

Case No : O.P. No's. 432, 435 and 437 of 1957

Rev. Fr. Joseph Valamangalam and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 17-02-1958

Acts Referred:

Constitution of India, 1950 — Article 13, 14, 162, 19(1), 45
Contract Act, 1872 — Section 63, 69, 70
Evidence Act, 1872 — Section 115
Travancore Primary Education Rules — Rule 18

Citation : AIR 1958 Ker 290

Hon'ble Judges : Sankaran, Acting C.J.;Raman Nayar, J

Bench : Division Bench

Advocate : K.P. Abraham, K.K. Mathew and E.P. Varghese, in O.P. 432 of 1957, T.N. Subramonia Iyer, S. Subramonia Iyer, K.S. Sebastian and E.P. Varghese, in O.P. 435 of 1957, K.T. Thomas, Mathew Muricken, N.N. Narayana Pillai, K.M. Joseph and E.P. Varghese, in O.P. 437 of 1957, for the Appellant; K.V. Surianarayana Iyer, General, for the Respondent

Final Decision : Dismissed

Judgement

Kaman Nayar, J.—These petitions, under Article 226 of the Constitution by the managements of certain private schools, recognised and aided by the State Government, are directed against an order of Government Order Ed. (G. Spl.) 1-20599/57/EHD dated 112th October, 1957, by which, in effect, grants earmarked for the salaries of the teachers employed in such schools which were theretofore being drawn and disbursed by the manager of the school concerned are to be drawn and disbursed by the headmaster. This order was to take effect from 1st October, 1957; in other words the new system would come into operation on 1st November when the salaries for October became payable.

But the order notwithstanding, the managers of the schools with which we are now concerned prepared and submitted the bills for the salaries of the teachers of their schools for the month of October 1957 (as also for the arrears for some

previous months) to the respective Assistant Educational Officers, (who are the controlling officers) for being passed for payment at the treasury. These officers returned the bills without passing them and drew the attention of the managers concerned to the Government order in question.

Virtually they refused payment to the manager on the strength of the Government order and required that the bill be presented by the headmaster to whom alone payment would be made. The petitioners consider that this is an infringement of their rights and they have come to Court seeking appropriate writs or orders quashing the Government order in question and directing the Government and the controlling officers to sanction the bills for payment.

2. The Petitioner in O. P. 432 of 1957 is the manager of two schools, the St. Paul's Lower Primary School, and the St. Aloysius Lower Primary School, both of North Parur. These schools are governed by the provisions of the Travancore Primary Education Act (Act 8 of 1121) and the rules made thereunder and of the Travancore Education Code of 1909. The respondents are the State of Kerala and the Assistant Educational Officer, North Parur, the controlling officer who declined to pass the bills submitted by the petitioner.

3. The Petitioner in O. P. 435 of 1957 is the manager of the Kochukottaram Lower Primary School, Poovarani in Meenachil Taluk, a school governed by the provisions of the Travancore Education Code of 1900, The respondents are the State of Kerala and the Assistant Educational Officer, Palai, who is the controlling officer.

4. The petitioner in O. P. 437 of 1957 is the Proprietor and the President of the Managing Board of the Santa Cruz High School, Fort Cochin, formerly in the Malabar District of the Madras State. The elementary section of this school is governed by the Madras Elementary Education Act (Act 8 of 1920) and certain rules entitled "Rules relating to Elementary Schools", while the secondary section is governed by the Madras Grant-in-aid Code and certain rules called the Madras Educational Rules. The Respondents are the State of Kerala and the Assistant Educational Officer, Mattancherry who is the controlling officer.

5. The impugned order is reproduced below. It is to be noted that no statutory authority is claimed for the order. It is the case of the government that the order is an executive order passed by the Government in exercise of its administrative powers and that it is not referable to any statute or other law :

"Government of Kerala Education and Health Department (Education-C Special) Proceedings.

Dated, Trivandrum, 12th October, 1957; Payment of salary of teachers of aided Schools through headmasters.

Read:--Letter No. C 22249/57, dated 25-9-1957 from the Director of Public Instruction.

Order Ed (C. Spl) 1--20599/57/EHD.

In supersession of previous rules government are pleased to direct that with effect from 1st October, 1957 the salary of all teachers (including Headmasters) in private Lower Primary Schools in the State admitted to aid and in private Upper Primary, Secondary, and Training Schools in the Malabar and Kasargode areas admitted to aid will be disbursed through the Headmasters of the respective schools. The salary of the non-teaching staff in these schools also will be paid by Government from the same date.

(2) The salaries will provisionally be claimed at the rates as on 1-7-1957 subject to final fixation after verification of the original records, Excess if any drawn will be recovered by short drawals in succeeding bills. The teachers and the Headmasters and the non-teaching staff will give a declaration in the form appended (Appendix I) to the Controlling Officers. In the case of persons who entered service after 1-7-1957, the provisional salary will be that fixed at the time of appointment.

3. The pay bills of private school teachers will be passed by the respective Assistant Educational Officers for payment through the Headmasters as is now done in the case of Government Primary Schools. The bills in respect of secondary and Training Schools will be countersigned by the District Educational Officers. The same procedure will be adopted in the case of the non-teaching staff also. Separate bills will be presented in their case.

4. The tuition fees collected in schools to which the above orders apply will be credited to Government to the Budget Head " "XXVI Education B Secondary a Fees, Government Secondary Schools" in the case of Secondary Schools and to "XXVI Education D special a fees and other receipts, Government Special Schools"" in the case of Training Schools,

5. The procedure to be adopted in claiming the salary of teachers and the non-teaching staff and their disbursement will be as given in Appendix II.

6. The Comptroller is requested to issue necessary instructions in the matter to the Treasury Officers.

7. Orders regarding the maintenance grant to be paid to the Managers will be issued separately.

8. The forms required for claiming and disbursing the salaries will be furnished by the Director of Public Instruction to the Schools forthwith free of cost. The Superintendent of Government Presses will arrange to supply the Education Department with the required number of forms as per requisition from the Director of Public Instruction.

9. Orders regarding Schools under P. S. S. Scheme will issue separately.

By order of the Governor, P. K. Nambiar, Education Secretary."

6. We have had the benefit of very elaborate and learned arguments illumined by a wealth of authority both of the Indian and the English Courts and covering a wide array of subjects ranging from the history of education in Travancore and in British India to the theory of federal subventions, from law in primitive societies to the niceties of our Constitution, Fortunately it is unnecessary to travel all that ground in this judgment, for, it seems to us that the matters at issue are simple and are covered by the three main grounds of objection taken by the petitioners :

"i. that the order is opposed to law;

ii. that it is mala fide and beyond the powers of the State Government in that it amounts to an anticipatory enactment by the executive of the provisions of Clause 9 of the Kerala Education Bill, 1957, which having been passed by the Kerala Legislative Assembly on 2-9-1957 has been reserved for the consideration of the President and has to receive his assent before it can become law; and

iii. that it offends Articles 14, 19(1) (f) and (g) and 31 of the Constitution.

7. We shall first consider whether the impugned order contravenes any law or rule having the force of law. Under the rules previously in force, a grant-in-aid called a teaching grant was payable to recognised aided schools to meet the salary of the teaching staff. In the case of elementary schools the grant covered the entire salary of the teachers, and in the case of secondary schools of the former Malabar area, it covered a substantial portion though not the whole of the salary, and was designed to meet the deficiency in the income from fees.

The bills for the grant were prepared and encashed by the Manager, and the salaries were disbursed by him except in the case of elementary schools in the Malabar area where since 1953 the teachers were being paid direct by Government on bills submitted by the Manager. Although this is not expressly stated, it is implicit in the impugned order that the obligation undertaken by the Government of paying the salaries of all teachers (as also of the non-teaching staff) of the schools concerned is in lieu of the teaching grant hitherto payable.

This is how the order has been understood by everybody concerned and the argument before us has proceeded on that basis. A study of the order side by side with the forms prescribed for drawing the teaching grant, which are virtually consolidated pay bills for the several teachers of the schools giving full particulars for each teacher, little different from the pay bills drawn by the head of a Government office for the staff under him, makes it clear that what the order means is that the grant-in-aid hitherto paid to the manager for the salary of the teachers will hereafter be paid by the disbursement of the salary through the headmasters of the respective schools.

In the case of elementary schools no tuition fees are collected and the Government has to bear the entire expense. But, in the case of secondary schools, the management has to pay over to Government the tuition fees collected by it as a condition of this aid. The question is whether the previous

rules by which the grant was to the institution and not to the teachers direct, and was payable to the Manager as the representative of the institution, are rules having the force of law so as to make the impugned order, which is confessedly only an executive order, illegal.

8. As we have seen the schools run by the petitioner in O. P, 432 of 1957 are governed by the Travancore Primary Education Act and the rules made thereunder and by the Travancore Education Code. The Act makes no provision for the grant either of recognition or of aid, and although the rule-making power u/s 15 extends to the making of rules regulating the conditions of recognition, no mention whatsoever is made of grants-in-aid. Rules have been framed u/s 15 of the Act and they are called the Travancore Primary Education Rules.

Rule 18 thereof as amended by Notification No. Ed 4-9323/50/EHL dated 13th October, 1952, provides for the conditions of recognition, and one of the conditions mentioned is that the schools shall conform to the provisions of the Education Code as amended from time to time. There is no rule relating to grant-in-aid and provision in this behalf is made only by the Travancore Education Code of 1909. It is the case of the petitioners that this Code is a statute, or at any rate a body of rules framed u/s 15 of the Travancore Primary Education Act and therefore rules having the force of law.

If that be so it is not disputed that it cannot be varied by a mere executive order. For, if the Code was a law it doubtless continues in force by virtue of Section 3 of the Travancore-Cochin Administiation and Application of Laws Act, 6 of 1125 and Article 372 of the Constitution. But if, on the other hand, the Code was not a law but only a body of executive instructions as contended by the State, it is equally beyond dispute that it remains what it was and can be varied by an executive order -- see *The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another*, and *D. P. Krishna Das v. State of Travancore-Cochin* ILR 1955 Trav Co 404 (B).

9. In support of the argument that the Code is a law, it is urged that, it was made by the Maharaja of Travancore at a time when he was sovereign and the legislative authority of the State vested in him. Failing this it is said that, by reason of Rule 18 of the Travancore Primary Education Rules, the Code must be deemed to be part and parcel of those rules made u/s 15 of the Travancore Primary Education Act and can be amended only in like manner and not by an executive order.

10. Neither contention impresses us. Doubtless in 1909 the Maharaja could make law if he wanted to, but it seems to usually beyond doubt that in making the Education Code, if indeed he did make it, His Highness did not intend to make law. It is not every word uttered by a Sovereign that is law. A Sovereign has other capacities than that of a law-maker. He is for example the supreme executive and has to speak in that capacity as well. In primitive States it was no doubt often difficult to distinguish between the legislative and executive

pronouncements of a Sovereign, but long before 1909, the State of Travancore was advanced enough to distinguish between the two and used different forms to tell between the language of law-making and the language of executive directions.

The Travancore Government Gazette of 1909 tells us how exactly the Education Code was made. A draft Code was submitted to Government by the Director of Public Instruction. This Code was passed by the Government with some changes by G O. No. E. 2247 dated 19th November, 1909 which contains a critical appraisal of its provisions, and the Code in the form in which it was passed, was appended to that order. The G. O. is signed by the Chief Secretary "By order" and even assuming that the sanction of Government conveyed by the G. O. meant the sanction of His Highness, it is obvious from the form and language employed that the Code was only a body of executive instructions for the guidance of the department,

The legislative authority of his Highness was never exercised by the mere signification of the approval of Government by its Chief Secretary, and whenever his Highness set about making a law he invariably did it by the format promulgation of a Proclamation or regulation under his Sign Manual, although it would appear that such a form was sometimes employed for an executive order of importance or for a mere declaration of policy.

The contents of the Code itself indicate its executive nature, for, the rules therein merely lay down the conditions that have to be fulfilled before Government recognition and aid can be given to a private institution and are, in essence, instructions to the Education Department as to the way in which these matters are to be administered. They are not general rules affecting the rights of the subject although institutions seeking recognition and aid have to abide by them just as for instance persons seeking a contract with the Government have to abide by the concerned departmental rules.

11. We have been taken to the origin of the system of recognition and grant-in-aid; but that does not in any manner further the case of the petitioners. It is said at p. 700 of Volume III of the Travancore State Manual of 1940 that in 992 M. E. (1817 A. D.) the then Maharani Rani Gouri Parvathi Bayi issued a rescript directing, that:

"the State should defray the entire cost of the education of its people in order that there might be no backwardness in the spread of enlightenment among them, that by the diffusion of education they might become better subjects and public servants, and that the reputation of the State might be advanced thereby."

But notwithstanding that this is called a rescript, it is obvious that it is only a declaration of policy and is not a law conferring on persons running educational institutions a right to reimbursement by the State. By no stretch of imagination can it be said that the grant-in-aid system which the State Manual of 1906 tells us was first introduced in 1869 can trace legislative authority to the rescript of

1817 although no doubt it was in furtherance of the policy declared therein.

12. We are shown from the gazette of 1894 that the Travancore Educational Rules and the grant-in-aid notification of that year were issued under the sanction of His Highness the Maharaja. As we have already observed, it does not follow that the rules and notification of 1894 are legislative enactments, and in any case they are no longer in force. The rules now in force are those in the Code of 1909, and the fact that the rules which this Code replaced were issued under the sanction of his Highness does not advance the case of the Petitioners.

13. We might also point out that the Education Code has been, in the past, amended from time to time by executive orders and that it does not find place in the "Travancore Acts and Proclamations" in which all statutes are published. From the earliest times judicial derisions have uniformly held that the Education Code is not a law but is only a code of departmental instructions -- See *Surendran v. Chacko* 33 TLJ 765 (C) and *Govinda Pillai v. Kuriacko* 1950 DLR TC 228. *Thomakutty v. Francis* 1954 KLT 33: AIR 1954 Trav Co 104) (D) and *Dasius v. State* 1956 KLT 238: AIR 1957 Trav Co 214 (E), have pronounced that the analogous Cochin Education Code has no statutory authority but merely contains administrative rules and directions issuer! by the executive Government while *Krishna Pillai v. State*, ILH (1956) Trav Co 1339 (F), lays down that the Travancore Service Regulations, which were passed by "His Highness the Maharajah of Travancore, and stand on much the same footing as the Code which we are now considering, are not a law or provision having the force of law.

14. The argument based on the new Rule 18 of the Travancore Primary Education Rules need not detain us long. That rule runs as follows :

"18. It shall be open to private agencies to establish and maintain Primary Schools in a compulsory area with the previous permission of the Department. The Director may give recognition to such schools if they conform to

(1) the standard laid down by the Department from time to time;

(2) the provisions in the Education Code as amended from time to time, pertaining to primary schools, and

(3) the Act and the Rules made thereunder." What the rule says is that, as a condition of recognition, a private school shall conform to the provisions of the Education Code as amended from time to time. It is difficult to understand how by reason of this, the rules in the Education Code can be deemed to be rules made u/s 15 of the Act. The effect of the rule is not to incorporate the Education Code as part of the rules, but to require conformance with it as a condition of recognition, and the rule itself contemplates the amendment of the Code from time to time by some outside agency.

If the argument were correct, it would mean that the standards laid down by the Department from time to time would also be rules made under the Act and that the laying down of these standards would have to be in exercise of the rule-

making power. Supposing the rule had said that, as a condition of recognition the schools shall follow the directions given from time to time by the inspecting authorities, then, according to the argument, such directions would again be rules under the Act, and could be given only in exercise of the rule-making power.

15. We have no doubt that the Travancore Education Code is only a body of executive instructions having no statutory authority. The rules therein can be amended by the Government in exercise of its executive authority, and they do not have the force of Law.

16. We might perhaps mention with reference to Rule 5 of the Code which lays down that no alteration of the Code shall be valid unless it has been, sanctioned by Government and published in the Government Gazette, that the impugned order has been published in the Gazette of 5th November, 1957.

17. The school run by the petitioner in O. P. 435 of 1957 is governed solely by the provisions of the Travancore Education Code.

18. The elementary section of the school run by the petitioner in O. P. 437 of 1957 is as we have said, governed by the Madras Elementary Education Act, 8 of 1920, and certain rules called rules relating to Elementary Schools; while the secondary section is governed by the Madras Grant-in-aid Code and the Madras Educational Rules. For the Grant-in-aid Code and the Educational Rules no statutory origin is claimed, but it is said that the Rules relating to Elementary Schools which provide for recognition of, and aid to, such schools are statutory rules made u/s 56 of the Madras Elementary Education Act. Now these rules are in two parts.

Part I which is headed, "Rules framed under the Madras Elementary Education Act, 1920", are doubtless statutory rules made under that Act, but they say nothing about recognition or aid. These matters are dealt with in Part II which is headed, "Rules for the grant of recognition and aid to Elementary Schools", and which does not purport to have been made in exercise of any statutory power. The learned Advocate General contends that the rules in Part II are mere executive directions having no statutory basis, and we consider that this contention is correct.

19. To decide this question it is necessary to go into the history of the Act and of the rules made thereunder. For the petitioner it is argued that although the rules in Part II do not profess to be rules made under the Act, they must be rules made in exercise of the power conferred by Section 56 thereof. Clause (h) of Sub-section (2) of Section 56 expressly empowers the State Government to make rules declaring the conditions subject to which schools may be admitted to recognition or aid, and Part II of the rules which declare these conditions must therefore be rules made under this clause. Actually we find that when rules were first framed in 1922 u/s 56 of the Act those rules made provision for recognition and aid.

The rules for recognition referred to Section 41 (2) of the Act and those for aid to Section 42 (2). Under the Act as it then stood, recognition and aid were to be granted by the District Educational Councils constituted under Chapter II of the Act. These were autonomous bodies, and it was therefore necessary to frame statutory rules governing the conditions subject to which they were to grant recognition and aid, But the Act was amended in ,1939 and by the amending Act (Act 2 of 1939) these Councils were abolished and Chapters II, IV and VI of the Act pertaining to their constitution and powers repealed.

Then the rules originally framed were amended in exercise of the powers conferred by Section 56 of the Act by the repeal of all the rules relating to the Councils including the rules for recognition and aid. The rules for recognition and aid were re-issued without reference to the Act, and it is these rules that now form Part II of the Rules relating to Elementary Schools. The rules so reissued are to be found at page 556 of Part I (B) of the Fort St. George Gazette of 29th August, 1939, and it is clear from the notification therein that they were not issued under any statutory authority. (Admittedly there was not the previous publication required by Section 56 of the Act for making a rule thereunder).

Since the District Educational Councils were abolished, it must have been thought that, although Clause (h) of Sub-section (2) of Section 56 remained unrepealed, it was necessary to frame rules under that provision and that executive instructions would suffice since recognition and aid were thereafter to be administered, not by a statutory body, but by Government itself through its subordinates.

20. We do not think that any of the Schools in question can claim a statutory right either to recognition or to aid.

21. It is next argued that, even if the scheme of recognition and aid has no statutory basis, it nevertheless creates reciprocal rights and obligations and that the grant of recognition and aid is not something which the Government can withhold at its pleasure. The manager of a recognised aided school is the accredited representative of that institution and has a legal right to the grant which the rules allow. The grant is by no means to be regarded as an ex gratia payment which the Government can stop at its will. The effect of the impugned order is to deprive the institutions represented by their managers of the grant to which they are legally entitled, and it is no answer to say that an equivalent sum, or even a greater sum, will be paid to the teachers for the salaries which the institutions are under a contractual obligation to pay.

22. Custom, contract, quasi-contract, estoppel and quasi-estoppel have been put forward in turn as the legal principle imposing these so-called reciprocal rights and obligations. But before considering how far these principles apply, it might be profitable to inquire what precisely is the effect of the new scheme introduced by the impugned order as compared with the old scheme. The petitioners are undoubtedly right when they say that, under the old scheme the grant, although

variously described as a teaching grant or a grant-in-aid of payment of salaries of teachers, was to the institutions and not to the teachers themselves, and that they were to be billed for and, except in the case of the elementary schools of the Malabar area, drawn by the managers of the respective institutions. (It is hardly necessary to refer to the particular rules; nor to the rules which recognise the manager as the representative of the school in its dealings with the Government and cast on him the responsibility of managing the school).

The grant was intended to reimburse the institutions, either wholly or in part, of the expense incurred by them on the payment of salary to teachers. It would appear that in the Travancore area, the practice was for the managers to draw the grants and then disburse the salaries, while in the Malabar area so far as elementary schools were concerned, from 1-10-1953 onwards the grant was being disbursed by Government by direct payment of the salaries to the teachers in accordance with G. O. No. 2295/Ed/2S-9-1953 issued by the Madras Government. (In this connection reference may be made to Rule 13 of Chapter II of Part II of the Elementary Schools Rules which says that the teaching grant received by a school shall be paid to the teachers by way of salary and to Rule 23 which authorises the District Educational Officer to make direct payment to the teachers).

Even in the Travancore area, R, 146 (a) of the Grant-in-aid Code makes it abundantly clear that the grant is earmarked for the payment of the salary of the teachers, and it is not denied that, for about two years from 1943, the Travancore Government was, in fact, disbursing the grant by making direct payment of the salaries to the teachers by cheque, and although it is said that this was done with the consent of the managers, there is nothing to show that that was so.

23. With regard to elementary schools both in the Malabar and Travancore areas the grant previously payable was the equivalent of the aggregate of the salaries of the teachers so that the new system effects no diminution in the grant. With regard to the secondary schools of the Malabar area, the grant, which it would appear was drawn annually in reimbursement of expenditure already incurred by way of teachers' salaries, was a fraction ($\frac{2}{3}$ in the case of schools paying salaries in accordance with the revised scales of pay, and half in the case of other schools) of the excess of the approved recurring expenditure over the income from the tuition fees.

A complication is introduced by the circumstance that the approved recurring expenditure includes, apart from the expenditure on teaching staff (which of course must account for the bulk of the expenditure), other items of expenditure such as expenditure on servants, rents and taxes, repairs and upkeep, and a further complication is that while the schools are entitled to collect fees for ten months a year only eight such instalments are taken into account in reckoning the income from tuition fees. Moreover while the reckoning is on the basis of standard rates of fees, the management has the right, rarely if ever exercised in

practice, to levy higher fees than the standard fees.

Rule 32 (in) of the Grant-in-aid Code contemplates the possibility of a profit on account of income from tuition fees supplemented by the grant in that it requires that the profit should be spent on improvements to the school. All this notwithstanding, we think that, roughly speaking, the grant that was being previously paid represented more or less the difference between the fees collected and the salaries paid to teachers. Less, rather than more notwithstanding the possibility contemplated in Rule 32 (iii).

In any case, it is not alleged on behalf of the petitioner in O. P. 437 of 1957 that the grant payable under the old system was greater than the difference between the expenditure on account of the salary of teachers and the income from fees. What the new system means is that instead of paying the difference to the management in reimbursement of the excess of expenditure over income, Government will, in substance, effect the reimbursement by meeting the entire expenditure and taking the income from the management.

24. Our attention has been drawn to certain other items of grant designed to compensate loss in fee income on account of fee concessions, scholarships, and fee remissions, but it does not appear that these are in any way affected by the impugned order.

25. Altogether we are inclined to agree with the learned Advocate General that the only change effected by the new system is in the mode of payment and that there has been no reduction in the Quantum of aid available to the institutions.

26. This, of course, is no answer if indeed the manager as the authorised representative of the school is legally entitled to the grant, the salaries paid by him to the teachers being only a measure of the quantum of the grant and no indication of its true legal destination. Of the many legal concepts put forward as the foundation of this alleged title, the concept of a customary right can be rejected straightaway. For, by its very definition, a customary right cannot be the creature of a written instrument, and it is to the several written rules to which we have referred that the petitioners trace their title to recognition and consequent aid.

27. It is next said that the grant is not a gratuitous payment but is remuneration lawfully due to the institution for performing duties which properly devolve on the Government. It is one of the directive principles of State policy enshrined in Article 45 of the Constitution that the State shall endeavour to provide free and compulsory education for all children until they complete the age of 14, and it is the declared policy of the State Government that education up to and inclusive of the Fourth Form shall be free.

In imparting such education without the collection of any tuition fees, the schools under private management are, in fact, discharging an obligation of the State Government, and the grant paid by the State Government is only compensation

lawfully due to them. Although no specific provision of law has been cited before us, this argument apparently has in mind Sections 69 and 70 of the Indian Contract Act, But a mere perusal of those provisions is sufficient to show that they cannot apply. Notwithstanding the directive principles of the Constitution and the declared policy of the State Government, the State Government is under no legal obligation to impart free education, and they are not, in law, bound either to pay the teachers or to meet any of the expenses incurred by private schools.

Nor is there anything to show, either in the several rules, or in the declarations of policy by the Government, that private schools were established and are being run for the Government, or that Government has been enjoying the benefit thereof. All that is said is that with the object of extending and improving secular education a sum of money will be set apart every year to be expended as grants-in-aid to recognised private schools which" satisfy the specified conditions. And this is with due consideration to the needs of each locality and of each institution and the availability of funds. We do not think that the so-called obligation can be founded on quasi-contract.

28. The next argument is that the several rules laying down under what conditions and under what circumstances recognition and aid will be granted to private schools are standing offers which, on acceptance by the establishment of a school conforming to those conditions, become concluded contracts. Alternatively, it is said, these rules have made promises and held out expectations on the strength of which private managements have acted to their detriment in establishing and running schools at considerable expense. Therefore, once the conditions laid down by the rules are satisfied. Government are estopped from turning round and declining the grants thus belying the promises upon which the managements have acted.

It is urged that even if the strict view of estoppel laid down by the House of Lords in *Jorden v. Money*, (1854) 5 HLC 185 (G), that it may operate only upon a misrepresentation of existing fact and cannot be applied to a promise of future conduct were to be followed, there is still the equitable principle of what might be called quasi-estoppel traceable to the judgment of Lord Cairns in *Hughes v. Metropolitan Rly. Co.* (1877) 2 AC 439 (H), and applied by Denning, L. J. in *Central London Property Trust Ltd. v. High Trees House, Ltd.* (1947) KB 130 (I).

29. A perusal of these decisions and of decision in *Combe v. Combe* (1951) 2 KB 215 (J), will show that this principle of quasi-estoppel can never create a new jural relationship or give rise to an entirely new cause of action. It can only avail to modify pre-existing legal relations, by preventing a party from going back on a subsequent promise so as to enforce the terms of the original agreement. In England the doctrine was evolved by the exercise of a beneficent ingenuity in order to mitigate the grossness of the so-called rule in *Pinnel's case*, (1602 5 Co Rep 117) (K), the reluctant affirmance of which by the House of Lords in *Foakes v. Beer* (1884) 9 AC 605 (L), caused such dissatisfaction that legislative reform

was contemplated but never materialised. In fact the doctrine goes no farther than Section 63 of the Indian Contract Act, and therefore there is no occasion for us to borrow it.

30. It is not however necessary to go into this matter at length or to consider decisions like *Australian Etc. Mills Ltd. v. Commonwealth of Australia* (1955) 3 All ER 711 (M), cited by the learned Advocate General to show that the rules in question merely formulate an administrative scheme and cannot be regarded as standing offers since an examination of the rules is sufficient to show that they really make no offer or promise to pay the grants. And so the argument of an obligation based on contract or estoppel has no foundation in fact.

31. What exactly did Government offer or promise by the grant-in-aid system? We see in the rules and orders governing the system no invitation to private agencies to establish schools and no promise to pay them grants-in-aid. What the rules lay down are the conditions for eligibility for grants-in-aid which they say will be paid subject to the availability of funds. And, in particular, while Rule 146 (g) of the Travancore Education Code and Rule 2 of the Madras Grant-in-aid Code expressly state that anything in those rules notwithstanding, the Government reserve to themselves the right to refuse or withdraw any grant at their entire discretion, Rule 1 of Chapter I of Part II of the "Madras Rules relating to Elementary Schools" says that the power to grant or withdraw recognition and aid vests in the officers of the Education Department.

When private managements set about establishing schools in the hope or expectation of securing aid they knew full well that Government had reserved to themselves the right of withholding aid in their entire discretion, and any relations between themselves and the Government were subject to this condition. There can in the circumstances be no legal right to the aid, and there is little point in saying that the reservation authorises a naked and arbitrary exercise of power when no legal rights are affected thereby and when the claim to the grant is based on the very instrument that embodies this reservation.

32. All the rules expressly state that only institutions that have secured recognition are entitled to aid. If we turn to the order (No. E. 2247 dated 19-11-1909) by which the Travancore Grant-in-aid Code was approved and introduced, we find it declared that it should be the policy of the department to make it difficult for institutions to exist which do not either conform to the rules of the department or act in defiance of those rules. Both the Travancore and the Madras Rules make it clear that recognition and aid are dependent on obedience to the rules as modified from time to time, and all applications for recognition have to be accompanied by a declaration promising such obedience.

Whatever offer or promise there was of a grant was thus subject to the condition that the rules in that behalf were liable to change. The impugned G. O. effects such a change and since, as we have seen, the rules are not statutory rules it is within the competence of the executive Government to effect the change. When

the managements established their schools they knew very well that the rules were subject to change and they cannot now resist the change as affecting their legal rights. The utmost they can ask is that the change should not be given retrospective effect. That, the impugned order does not do.

33. We might also repeat what we have already observed namely, that Rule 146 (a) of the Travancore Education Code and Rule (6) read with Rule (13) of Chapter II of Part II of the Madras Rules relating to Elementary Schools make it abundantly clear that the grant paid is for the salary of the teachers and that the institution has no title whatsoever to the grant but is only a conduit through which the payment reaches the teacher. The payment is, in effect, to the teacher and this is in no way affected by the new system.

34. Neither under statute, nor under any principle of common law, have the institutions or their managers any title to, or properly in, grants-in-aid until they are actually paid. It seems to us that the position is correctly stated in Rule 145 (n) of the Travancore Education Code and Rule 14 of Chapter II of Part II of the Madras rules relating to Elementary Schools when they say that a sanctioned grant is not a debt enforceable by suit or other legal process and that until it is actually paid a grant does not become the managers property. Although a grant once paid cannot be recalled except under certain conditions it seems to us that Government have the full right to say how and to whom grants shall be paid, or whether they shall be paid at all.

35. We shall next consider whether the impugned order violates Articles 14, 19(1) (f) and (g), or 31 of the Constitution. We might here observe that, although the institutions now in question are under Christian management no objection based on Art, 30 of the Constitution has been advanced. The impugned order applies equally to all schools under private management irrespective of community, sect, religion or language.

36. We shall first consider the argument based on Article 19 of the Constitution which is an argument common to all the petitions. It is said that the impugned order infringes Article 19(1)(f) and (g), but it is rather difficult to understand how this can be so. There can be no doubt that money due is property; and that may be so even if no suit will lie for its recovery. But it must be money to which the person claiming is entitled and we have seen that the managements have no legal right to the grant.

Until it is actually paid, the money is the property of the Government and the institutions have no legal claim to the money even if in the budget it is set apart for the purpose of paying grants-in-aid. Obviously, the right guaranteed under Article 19(1)(f) is the right to hold one's own property, not somebody else's. Cases like Venkat Munga Bai v. Hyderabad State, (S) AIR 1955 Hyd 44 (N) and Veernath v. Hyd. State AIR 1957 AP 1034 (O), dealing with cash grants to which the grantee has legal title are hardly to the point.

37. As for Article 19(1)(g) no doubt the, managements have the fundamental

right to carry on the occupation or business of running schools, but there is nothing in the impugned order that prevents them from doing so. The right to run a school does not carry with it the right to secure recognition and aid from the Government. And Government are free to determine the manner in which they will, if they choose, give recognition and aid. As the learned Advocate General put it, no person can claim a fundamental right to run a recognised aided school.

38. It is said that the impugned order interferes with the petitioners' right of management in respect of the schools and that that right is property within the meaning of Article 19(1)(g) of the Constitution. Our attention has been drawn to various provisions of the several rules to show that under the rules the "Manager" of a school is held responsible for its management, shortly that he is its manager. But if the rules are the very root of the petitioners' title to management, in other words if the managers are the creatures of the rules, surely a lawful and authorised change in those rules can cause them no legal injury however much they may be opposed to the change.

If, on the other hand, the complaint is that their right of management springing from proprietorship has been abridged we might repeat that they voluntarily agreed to such abridgment when they sought and obtained recognition and aid.

Conformance with the rules as changed from time to time was one of the conditions of recognition and aid, and the petitioners are free to manage their schools as they please if they do not seek recognition and aid from the Government.

We might also observe that, under the rules as they stand, every aspect of management, from the qualifications of the teachers to be appointed, their terms and conditions of service and disciplinary action against them, to the number of pupils to be admitted to each class, their discipline, the courses of instructions and the text books to be followed, and even the fees to be collected, are strictly regulated and subjected to the control of the departmental officers. So much so that it would be right to say that a recognised aided school is a quasi-government institution. To all this the petitioners have cheerfully submitted.

Against it they have no complaint; and what have been altogether unable to understand is how the decision by the Government to pay directly to the teachers what they were previously paying through the managers can, in the least, affect the latter's right of management. It is not disputed that under the old scheme the managers were bound to pay the teachers in accordance with the scales fixed by the Government; and it is for this purpose that they were given the grants. They were bound to pay the salaries without any delay and without making any deductions except under certain conditions which were also strictly laid down by the rules.

The charge that the new system is calculated to undermine discipline by making the teacher independent of the manager in the matter of salary implies the

existence of the very abuses which the Government allege of delay and unauthorised deductions in the salary. As for authorised deductions, for example a fine imposed as a measure of discipline in exercise of the right of management (which exercise we might point out is strictly circumscribed by the existing rules against which there is no complaint) we have no doubt that, although the impugned order does not expressly state so, a deduction can and ought to be made in the bill submitted by the headmaster.

The managers are free, if they so wish, to pay the teachers over again from their own funds and there is no point in the contention that the impugned order interferes with the contractual relationship between the management and the teachers. The right or the duty of preparing a bill for drawing the money which the Government pays as a grant is hardly a right appertaining to the management of the school. And if the objection is that an outside agency like the Government should not pay the teachers employed by private schools and this imperils the subordination of the teachers to the management, the answer is obviously that the schools are not bound to join in the scheme of recognition and aid drawn up by that outside agency. Recognition and aid are not imposed by the Government but are sought by the institutions themselves.

39. The charge of discrimination in violation of Article 14 of the Constitution is brought in respect of the secondary section of the school run by the petitioner in O. P. 437 of 1957. It is that while under some scheme known as the P. S. S. Scheme, secondary schools in the Travancore-Cochin area can keep 20 per cent of their fee collection and are obliged to deposit only 80 per cent in the treasury and that in their own names, (to be later withdrawn for payment of salaries to teachers, Government making up the deficiency in the shape of grant) the impugned order requires such schools in the Malabar area to pay the entire collections into the treasury to the credit of Government.

But the rules governing grants-in-aid in the Malabar area, originally framed by the Madras Government, seem to be very different from the rules of the Travancore-Cochin area and, in particular, it would appear, although we must say that we have not examined the position carefully, the schools in Malabar get some other forms of aid which the Schools in Travancore do not. The differences between the P. S. S. Scheme and the impugned order, it would seem, based on a reasonable classification. That apart the impugned order itself says that orders regarding schools governed by the P. S. S. Scheme will issue separately, and we are told that the intention is to "evolve a uniform body of rules.

However that might be, on our finding that the rules, governing these matters (including of course the impugned order) are not laws there can be no question of offending Article 14 which speaks of equality before the law and the equal protection of the laws. That article can apply only if the rule complained against is a law within the meaning of Article 13. -- See the observations in paragraph 16 of the Judgment in *Joshi, D.P. Joshi Vs. The State of Madhya Bharat and Another*, although there the question whether the rule under attack was a law was left

undecided.

40. Article 31 of the Constitution is relied upon by the petitioner in O. P. 437 of 1957 and the contention advanced on his behalf is that the direction in paragraph 4 of the impugned order requiring that the fees collected in the secondary section of his school shall be credited to Government is an expropriatory order in violation of that article. The answer is obviously that the payment is enjoined only if he seeks the benefit of recognition and aid, and we are assured by the learned Advocate General that the petitioner is free to keep his fee collections if he does not look to Government for recognition or aid.

41. The only contention remaining to be considered is that based on clause 9 of the Kerala Education Bill and the circumstance that that Bill is awaiting the assent of the President to become law. Clause 9 of the Bill which was passed by the State Assembly on 2-9-1957 runs as follows :

"Salary of teachers, etc. and grants to aided schools ;

(1) The Government shall pay the salary of all teachers in aided schools direct or through the Headmaster of the school.

(2) The Government shall pay the salary of the non-teaching staff of the aided schools appointed before 31-5-1957 and continuing in office at the commencement of this section on the scales applicable to them immediately before 31-5-1957. It shall be competent for the Government to prescribe the number of persons to be appointed in the non-teaching establishment of aided schools, their salaries, qualifications and other conditions of service. The salary of the persons appointed in the non-teaching establishment in accordance with the rules so prescribed shall be paid by the Government.

(3) The Government may pay to the Manager a maintenance grant at such rates as may be prescribed.

(4) The Government may make grants-in-aid for the purchase, improvement and repairs of any land, building, or equipment of an aided school,"

42. It will be seen that the impugned order embodies the provisions of sub-Clause (1) of this clause. And it is argued that the order is mala fide and illegal encroachment on the legislative power of the State and the executive power of the Union and therefore beyond the executive power of the State.

43. It is said that the very fact that the State Government thought it necessary to introduce a provision like Clause 9 in the Bill is a confession that the matters covered by that provision are beyond its powers. We cannot agree. Every statute concerning governmental administration provides for matters theretofore solely within the ambit of the executive. It regulates and controls the manner in which this executive power is to be exercised with reference to that particular matter and is no confession that what was being previously done without its aid or control was illegal.

A sufficient answer to the entire argument based on Clause 9 of the Education Bill is to be - found in Clause 3 thereof which, among other things, says that the Government may regulate courses of instruction in Government schools and may, for the purpose of providing facilities for general education, establish and maintain schools. We pointedly asked learned counsel for the petitioners whether the argument advanced by them would not mean that, until the Bill became law, the executive government would have no power either to regulate courses of instruction in government schools or to establish and maintain schools. The answer had to be in the affirmative unless the argument were to be renounced, but the rider was added that Government could do these things if there was already in existence a statute empowering them to do so.

That there is not, and the result following the acceptance of the argument should suffice to prove its insoundness. The argument is moreover a self-defeating argument. The Bill purports to make comprehensive and exclusive provision for recognition and aid to private schools and Clause 9, as we have seen, provides for aid in the shape of payment of salaries to the teaching and non-teaching staff and grants-in-aid for other purposes. If the contention advanced on behalf of the petitioners were to be accented, it would mean that the Government could afford private schools neither recognition nor aid until the Bill became law.

44. It is hardly necessary to pursue the contention through its many ramifications. But we might briefly indicate one or two of the more important of these. It is said that the Education Bill, apart from being a confession of executive impotence in respect of the matters covered by it, limits the exercise of any executive power that might previously have existed in this way. No doubt under Article 162 of the Constitution read with Entry 11 in List II of the Seventh Schedule the executive power of the State extends to the subject of education.

But Article 162 expressly subjects that power to the provisions of the Constitution and, in any case, the executive power cannot transcend the legislative power of the State and cannot touch any matter in respect of which the legislature of the State has no power to make laws. Now, notwithstanding that the subject of education is within the State List, the Governor has thought fit to reserve the Education Bill for the consideration of the President. That Bill cannot become law until it has received the President's assent, and the exercise of the legislative power of the State in respect of the matters covered by the Bill being thus inhibited the exercise of its executive power in respect of those matters is likewise inhibited. By introducing the provisions of Clause 9 of the Bill in the shape of a mere executive order, the State Government is virtually encroaching on the power given to the President under Article 201 in direct violation of Article 257 which says that the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union.

45. So runs the argument. We do not think that Article 257 of the Constitution has anything to do with the matter, for, the President's power under Article 201

to assent to or withhold his assent from a Bill is not an executive power of the Union. Under Article 73 that power extends to the matters with respect to which Parliament has power to make laws and the President's power of assent is something provided by the Constitution itself and not something in respect of which Parliament can make laws, That the executive power of the Union vests in the President under Article 53 cannot mean that all the power vested in the President is trace-able to the executive power of the Union. But, of course, it goes without saying that, whether Article 257 applies or not, the State Government cannot do what it is for the President to do under the Constitution.

46. The question then is does the impugned order directly or indirectly seek to achieve the result of the Presidential assent by making a law of Clause 9 of the Bill? It does not. All that it does is to do what the State Government has the power to do even without such a law. The power of the State legislature to make laws on the subject of education remains altogether unaffected by the fact that a Bill it has passed on the subject is yet to become law. The fallacy lies in the assumption that when a legislature has passed a Bill its legislative competence in respect of the matters covered by the Bill is at an end. Obviously that is not so.

The legislative power is no whit expended by the making of the Bill and whether the Bill becomes law or not, remains undiminished and still extends to the very matters covered by the Bill. The executive power of the State therefore still extends to the whole subject of education, even to matters covered by the Education Bill, and until the Bill becomes law, unaffected by it. Of course, once the Bill becomes law, the power can be exercised only in accordance with its provisions for the executive power of a State can be exercised only in accordance with and in obedience to the law. But that does not mean that the power of the executive is confined to the execution of the laws.

As pointed" out in *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away and the executive powers of a State extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has already been passed. True the executive government can never go against the Constitution or against any law, but it does not follow that, in order to enable the executive to function, there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of those laws. Articles 73 and 162 of the Constitution do not mean that it is only when Parliament or the State Legislature has legislated on matters within their respective limits that the Union or the State executive as the case may be can proceed to function in respect of them.

47. That the State Legislature is in the process of making a law governing the matters covered by the impugned order does not in any manner affect the executive power of the State in respect of those matters until the law is actually made.

48. None of the objections taken to the impugned order seems to us well founded. And, leaving technicalities alone and going to the substance of the matter, we do not think that the petitioners have any grievance justifying an appeal to the powers of this Court under Article 226 of the Constitution. For, we agree with the learned Advocate "General that this is not even a case of he who pays the piper calling the tune, but only of his taking steps to ensure that the payment reaches the piper.

With the allegation that the impugned order is only the first step of a deep and sinister plot to liquidate the private manager and to see that all educational institutions in this State pipe but a single note we are not concerned so long as the order is within the law. But we might say that we see no reason to mistrust the statement in the affidavits filed on behalf of the Government that there were loud and insistent complaints, not without substance, that many managers (of course, nothing is said about the petitioners in particular) were habitually delaying the payment of salaries to teachers and were rarely paying them their full salary and that it was to avoid such abuses that the impugned order was passed.

We cannot agree with the argument that this statement in the affidavits must be ignored because it finds no place in the impugned order itself and the observations in paragraph 9 of the judgment in *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, which have obviously inspired this argument have no application to executive orders like the present.

49. We dismiss the petitions with costs. Advocate's fee Rs. 250/- (two hundred and fifty) in each.