
(2014) 01 KL CK 0037
In the High Court Of Kerala
Case No : W.A. No. 448 of 2013

Roopa

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 23-01-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34 37
Constitution of India, 1950 — Article 13 13(3)(a) 136
Contract Act, 1872 — Section 23
Income Tax Act, 1961 — Section 119 52(2)
Kerala Education Act, 1958 — Section 6 7 7(2) 8
Transfer of Property Act, 1882 — Section 40 54

Citation : (2014) 1 ILR 509 : (2014) 1 KLJ 539 : (2014) 1 KLT 483

Hon'ble Judges : K.M. Joseph, J;A. Hariprasad, J

Bench : Division Bench

Advocate : P.K. Suresh Kumar and R.K. Muraleedharan, for the Appellant; V.A. Muhammed, K.E. Hamza, Dr. George Abraham and Sr. Government Pleader (C.R. Syamkumar), for the Respondent

Judgement

A. Hariprasad, J.—The fundamental questions raised in this Writ Appeal are the following:

i. Whether Manager of an aided school, functioning under the Kerala Education Act, 1958 and Kerala Education Rules, 1959 (hereinafter "K.E. Act and K.E.R." respectively), can contract out his powers and duties under the K.E. Act and K.E.R. to an intending purchaser of the management and ownership of the school?

ii. If such an agreement is executed by the Manager with another, whether the terms therein can override the provisions of K.E. Act and K.E.R.?

Of course, there are other issues raised in this case. But they are only ancillary to the above mentioned questions.

Prayers made in the amended Writ Petition are the following:

i) issue a Writ of Certiorari or any other appropriate writ order or direction quashing Ext. P9 order dated 26.9.2011 of the 1st respondent and Ext. P6 order of the 4th respondent to the extent of granting transfer of management of E.V.U.P. School Tuneri with effect from 24.3.2008 onwards instead of 24.9.2009 onwards; And

ii) issue a Writ of Mandamus or any other appropriate writ, order or direction directing the 4th respondent to approve the appointment of the petitioner as peon in E.V.U.P. School, Tuneri with effect from 24.3.2008 with all consequential benefits; And

iii) issue such other orders as this Hon"ble Court may deem fit to grant.

iv) Issue a Writ of Certiorari or any other appropriate order or direction quashing Ext. P21 order issued by the 1st respondent dated 10.01.2013.

2. Relevant facts, in brief, are the following: Appellant, despite having M.A. (English) and B.Ed. as educational qualifications., had to seek an appointment as Peon in E.V.U.P. School, Tuneri. Ext. P1 is the appointment order dated 27.7.2009 issued by the Manager of the school. Previously the appellant had worked as Teacher in the same school during leave vacancies. Appellant was appointed as Peon in the vacancy of one Sujith Kunhiparambath, who had been promoted as Assistant Teacher with effect from 27.7.2009. And at that time, Meenakshy, the previous Manager, was the approved Manager of the school. 4th respondent rejected the proposal to appoint the appellant as Peon for the reason that Meenakshy herself requested not to approve the appointments made by her. 5th respondent (present Manager) also informed the 4th respondent not to approve the appointments made by Meenakshy. Appellant understood that the 4th respondent rejected the proposal to appoint her on the basis of an agreement executed between Meenakshy and 5th respondent for change of management involving change of ownership of the school. Appellant would contend that the reason stated by the 4th respondent for rejecting the proposal for approval of her appointment is illegal. An appeal was preferred before the 3rd respondent against that order and it was disposed by two orders, Exts. P3 and P4. Meanwhile, 5th respondent took steps to terminate the services of the appellant. She approached this Court by filing W.P. (C) No. 6648 of 2010, which culminated in Ext. P7 judgment. This Court directed the appellant that she should approach the Government in revision and till the disposal of the revision, she was permitted to continue in service. Thereafter, Ext. P8 revision was filed by her before the Government. Consistent contention raised by the appellant is that Meenakshy functioned as Manager till Ext. P6 order passed by the 4th respondent All her actions as approved Manager have been ratified by the 4th respondent it is the further contention of the appellant that Meenakshy, the approved Manager, after seeking prior permission of the authority for the change of management involving change of ownership by letter dated 24.03.2008, promoted K.P. Kamalam as Headmistress, and Sujith Kunhiparambath as Teacher and appointed Teachers, viz., Minija P.K., Deepa P.P., Bindhu K., and Sheeja C.M.

These facts are evident from Ext. P8 series letters of appointment. All these appointments by the previous Manager have been approved by the authorities.

3. 1st respondent as per Ext. P9 order rejected the revision filed by the appellant stating that Meenakshy, as per letter dated 24.03.2008, had requested for transfer of management and the Director of Public Instruction had granted approval from 24.3.2008 onwards. Hence the appellant has challenged Ext. P9 order also. 6th respondent is the person appointed as Peon in the school with effect from 5.3.2010. 6th respondent was over aged for appointment as Peon, since he crossed 35 years on 5.3.2010, which is the maximum age for appointment of a non-teaching staff under Rule 5 Chapter XXIV B of the K.E.R.. Unjustifiably, the 1st respondent as per Ext. P21 order granted age relaxation and directed to approve 6th respondent's appointment as Peon. Ext. P22 circular issued by the Government as early as in 1986 deprecated the practice of Managers appointing over aged persons as non-teaching staff and then requesting for relaxation of age. Ext. P21 order was passed by the Government ignoring Ext. P22 and that too, without hearing the appellant. Therefore, Ext. P21 order is illegal.

4. 3rd respondent filed a counter affidavit with following contentions: Meenakshy, former Manager, was not competent to appoint the appellant as Peon because the appointment was made after the transfer of the management and ownership of the school to the 5th respondent Meenakshy agreed to transfer management of the school with ownership to the 5th respondent and an agreement in this regard was executed. The proposal for transfer of management involving change of ownership of the school was submitted by Meenakshy to the Department on 24.03.2008. 2nd respondent accorded permission to transfer management of the school including change of ownership to the 5th respondent by Ext. P5 order dated 24.09.2009. After the order, 4th respondent approved the transfer of management of the school effected by Meenakshy in favour of the 5th respondent with effect from 24.03.2008. In Ext. P9 order the Secretary to Government has clearly mentioned that prior permission of the 2nd respondent was not compulsory for transfer of management involving change of ownership. As per that order, Government have directed the 2nd respondent to dispose of the back log of such cases expeditiously and permitted the Officers to grant ex post facto sanction in such cases. The former Manager was incompetent to appoint the appellant. Writ Petition is liable to be dismissed.

5. 5th respondent filed counter statement raising the following contentions: He had executed an agreement with Meenakshy, the former Manager, to purchase the school with property on 18.1.2005. Ext. R5(a) is the agreement executed between the 5th respondent and Meenakshy. Terms and conditions in Ext. R5(a) are binding on her. As per Ext. R5(a), Meenakshy had no right to appoint the appellant as Peon. As agreed between the parties in Ext. R5(a), 5th respondent spent huge amounts for running and up-keeping the school. As per Ext. R5(b), the former Manager forwarded to the 2nd respondent the proposal for transfer of

management of the school to the 5th respondent on 24.3.2008. In violation of the terms and conditions in Ext. R5(a), the former Manager Meenakshy appointed the appellant as Peon on 27.7.2009. The former Manager was only authorised to sign papers for the functioning of the school till the completion of the transaction. She had no authority to appoint any person in the school. The former Manager herself informed the 4th respondent that the appointment made by her need not be approved, since the school with properties were agreed to be transferred to the 5th respondent. This fact is specifically mentioned by the 4th respondent in Ext. P2 order. 5th respondent informed the 4th respondent that the appointment made by Meenakshy was against the stipulations in the agreement executed between her and himself. Therefore, 4th respondent rejected the appointment of the appellant for valid reasons. Appointment of the appellant as Peon was not approved. Hence, she cannot claim any right in this matter. 5th respondent issued instructions to the Headmaster to relieve the appellant, who was working in the school without any legal right. In the meantime, she approached this Court and obtained orders enabling her to continue in the post. There is no management dispute between the 5th respondent and the former Manager, 5th respondent submitted that Kamalamma and Sujith Kunhiparambath were appointed as per the direction of this Court. In the case of other appointees referred to by the appellant, 5th respondent would contend that three Teachers were appointed by Meenakshy with his consent and in terms of Ext. R5(a) agreement. 5th respondent contended that the appellant was appointed by an unauthorised Manager on 27.07.2009. 5th respondent is the authorised Manager from 24.03.2008.

6. After receipt of Ext. P9 order, 5th respondent re-appointed 6th respondent as Peon on 28.10.2011. This was informed to the 4th respondent on the same day. 5th respondent prayed for dismissal of the Writ Petition.

7. 6th respondent also contended that the appellant has no legal right to maintain this action.

8. Heard learned Senior Advocate Sri P.K. Suresh Kumar appearing for the appellant. Advocate K.E. Hamza appearing for 5th respondent, Advocate Dr. George Abraham appearing for 6th respondent and the learned Senior Government Pleader Sri C.R. Syamkumar appearing for respondents 1 to 4.

9. Sustainability of appellant's claim is directly dependant on the determination of the authority of former Manager Meenakshy to make appointment after Ext. R5(a) agreement to assign the management and ownership of the school. Ext. R5(a) is dated 18.01.2005. Ext. P1 appointment order was issued by Meenakshy to the appellant on 27.07.2009. Sri P.K. Suresh Kumar, learned Senior Counsel for the appellant submitted that the learned Single Judge erred in placing undue reliance on Ext. R5(a). According to him, relevant provisions in the K.E. Act and K.E.R. prescribe the rights, duties and obligations of Manager of an aided school. Our attention was drawn to Section 7 of the K.E. Act. It deals with the rights and duties of the Manager in the matters of administration of an aided school. It

reads as follows:

7. Managers of Schools - (1) Any educational agency may appoint any person to be the manager of an aided School under this Act, subject to the approval of such officer as may be authorised by the Government in this behalf.

Explanation:--All the existing managers of aided school shall be deemed to have been appointed under this Act.

(2) The manager shall be responsible for the conduct of the school in accordance with the provisions of this Act and the rules thereunder.

(3) The properties of the school shall be in the possession and control of the manager who shall be responsible to maintain them in proper and good condition.

(4) It shall be the duty of the manager to maintain such records and accounts of the school and in such manner as may be prescribed.

(5) The manager shall be bound to afford all assistance and facilities as may be necessary or reasonably required for the inspection of the school and its records and accounts by such officer as may be authorised by the Government in this behalf.

(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.

(7) In the event of the school being closed down or discontinued or its recognition being withdrawn the manager shall make over to the officer authorised by the Government in this behalf all the records and accounts of the school maintained under sub-section (4).

(8) If any manager contravenes the provisions of sub-section (6) or wilfully contravenes the provisions of sub-section (7), he shall, on conviction, be liable to fine which may extend to two hundred rupees.

(9) No court shall take cognizance of an offence punishable under sub-section (8) except with the previous sanction of the Government.

Scrutiny of this Section would show that the Manager is made responsible for the conduct of the school in accordance with the provisions of the K.E. Act and K.E.R. (see Section 7(2) of the K.E. Act). It is contended on behalf of the appellant that the terms in Ext. R5(a) agreement, entered into between Meenakshy and 5th respondent, created fetters in the powers, rights and duties of the approved Manager.

10. It is contended on behalf of the respondents that Ext. P1 appointment order issued by Meenakshy in favour of the appellant was not approved by the Department. In Ext. P2, the 4th respondent categorically stated that on 24.3.2008, former Manager Meenakshy had forwarded a proposal to effect change of management involving change of ownership in favour of the 5th

respondent. It is also mentioned in Ext. P2 that Meenakshy informed the authorities that appointments made by her need not be approved in the light of the proposal to effect change of management involving change of ownership. Further, it is mentioned in Ext. P2 that the 5th respondent on 28.7.2009 requested the authorities not to approve the appointments made by Meenakshy after 24.3.2008. Considering all these reasons, request for appointment of the appellant as per Ext. P1 was rejected. An appeal was filed by the appellant against Ext. P2 order before the 3rd respondent. That appeal was dismissed as per Ext. P3 order for the aforementioned reasons. Ext. P4 is another communication by the 3rd respondent to the appellant in respect of the same matter. Request made by the former Manager to effect transfer of management involving change of ownership of the school was approved by the 2nd respondent as per Ext. P5 order dated 24.9.2009. 4th respondent effectuated the said order as per Ext. P6 proceedings dated 23.11.2009. According to the learned Senior Counsel for the appellant, Exts. P5 and P6 orders will not take away the right of the former Manager to appoint the appellant as per Ext. P1, which is dated 27.7.2009. It is also contended that the decision to effect transfer of management with effect from 24.3.2008 is not sustainable.

11. Against the order passed by the 3rd respondent, the appellant approached this Court with W.P. (C) No. 6648 of 2010. Judgment in that matter is Ext. P7. As per Ext. P7, the appellant was directed to challenge the orders in dispute before the appropriate authority. Appellant was permitted to continue as Peon in the school till the revision is disposed by the Government. As per Ext. P9 order Revision Petition filed by the appellant was disposed by the 1st respondent.

12. Appellant contended that the learned Single Judge did not consider the legal effect of various provisions in the K.E. Act and K.E.R. dealing with the powers and functions of Manager in an aided school. It is argued by the learned Senior Counsel for the appellant that the approved Manager cannot abdicate or contract out his powers and obligations as Manager of an aided school as there shall not be any vacuum in the administration and management of a school. Therefore, until the authorities approved the change of management involving change of ownership, the right of administration of the school will remain vested with the approved Manager. Any condition or stipulation in Ext. R5(a) restraining the power of the Manager is unsustainable and void.

13. Stipulations in Ext. R5(a) clearly show that former Manager Meenakshy and the 5th respondent agreed to transfer the management of the school involving change of ownership. Learned Senior Counsel relies heavily on Section 6 of the K.E. Act to advance the contentions of the appellant. It reads as follows:

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 authorized 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.

Another relevant provision relating to change of management involving change of ownership is Rule 5A of Chapter III of the K.E.R. It states as under:

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 XIV A 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.

14. Learned Single Judge of this court in P.V. John v. Director of Public Instruction & Anr. (ILR 1975 (2) Ker. 604) considered the scope and effect of Section 6 of the K.E. Act and Rule 5A of Chapter III of the K.E.R. and held as follows:

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.....

Again in Thankamma Kumjamma and Others Vs. Krishnan Unnithan and Others, this Court considered the scope of Section 6 of the K.E. Act and held as follows:

Section 6 of the K.E. Act restricts only sale, mortgage, pledge, charge or transfer of possession in respect of any property of a school. In section 6 there is no restriction for the transfer of any school. Section 6 restricts alienation of the property of a school because in such a case the working of the school will be adversely affected if the property of the school goes into the hands of the third parties. When a school is transferred as a going school, this difficulty will not arise and hence the restriction cannot apply to such a transfer.

15. In Kesava Kurup and Others Vs. State of Kerala and Others this Court reiterated the view expressed in P.V. John's case (supra). That judgment was challenged in Writ Appeal before a Division Bench. The Division Bench affirmed the view of the learned Single Judge (see Kesava Kurup and Others Vs. State of Kerala and Others

16. Even thereafter, this Court took the same consistent view in the matter of interpretation of the above provisions of law. Now it is settled that when a running school as such with all its properties and right of management is transferred, Section 6 of the K.E. Act will not be attracted. For such a valid transfer to be effected, the change of management can only to be made with the previous permission of the Director of Public Instructions.

17. Respondents relied on the decision of a learned Single Judge in Koyyode Madrassa U.P. School Vs. Director of Public Instructions, which reads thus:

(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 under S. 6 of the Kerala Education Act. Therefore, previous permission in writing as required under S. 6 is not necessary for making the transfer.

(iv) Previous permission mentioned in R.5A of Chap. 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 the Director under R.5A of Chap. III K.E.R. can be made even after the transfer of a running school together with its management and properties is made." We are of the considered view that the learned Single Judge did not lay down the correct proposition of law in the light of the provisions

contained in Section 6 of the K.E. Act and Rule 5A of Chapter III of the K.E.R. read together. It is incorrect to say in general terms that previous permission of the 2nd respondent is not required before making transfer of an aided school, if the transfer is of a running school with its management. Rule 5A of Chapter III of the K.E.R. definitely says that no change of management of any aided school involving change of ownership shall be effected except with the previous permission of the 2nd respondent. In view of the above provision, the law stated by the learned Single Judge cannot be said to be legally sound. This decision was taken in appeal before a Division Bench of this Court and its judgment is Ext. R5(n). The Division Bench, after considering the matters, did not favour the view of the learned Single Judge, albeit for other reasons the appeal was dismissed. The point decided is the following:

Even though we agree with the contention that prior permission is required before transfer, we have not been told as to how the transfer has adversely affected the interest of anyone concerned or of the Government. Obviously, no qualification is prescribed under the K.E.R. for the manager of the school. However, if transfer of management affects the student community or the teachers or staff, certainly it is for the D.P.I. to decline transfer and take appropriate steps permissible under the Act. In this case the State or its agencies have not told us as to how the second respondent is not eligible to manage the school or whether he has any disqualification to the knowledge of the appellant. All what is said is that the approval could be considered for transfer by the D.P.I. after the first respondent effected the transfer in favour of the second respondent. We do not think anything illegal in the judgment because, since transfer has taken place three years back and the school continues to be an aided school, it is for the D.P.I. to consider whether transfer could be approved after the first respondent physically transferred the management of the school. However, if does not approve the transfer for valid reasons, it is for him to take appropriate action against the past or present management or other remedial measures provided under the K.E.R.

Decision of the Division Bench was challenged before the Supreme Court and while disposing the Special Leave Petition, Apex Court held as follows in Ext. R5(o):

We find that the Division Bench of the High Court has agreed with the contention of the petitioner that prior permission is in fact required before approval but for reasons given, it has chosen not to interfere. In these peculiar circumstances, we consider that this is not a fit case for exercise of jurisdiction under Article 136 of the Constitution of India. The SLP is dismissed.

(underline supplied)

Therefore, it is evident that the Apex Court approved the observation of the Division Bench in Koyyode Madrassa U.P. School's case (supra), but the Supreme Court thought it fit not to interfere in the matter in exercise of jurisdiction under

Article 136 of the Constitution of India. Therefore, the law stated by the learned Single Judge in the above case cannot be said to be good..

18. There is no dispute that the parties proceeded further in accordance with the terms of the contract and later they completed the transaction. The terms in Ext. R5(a) would show that initially the time fixed for performance as per Clause (2) was one year from the date of execution of the agreement, i.e., 18.1.2005. It is evident from Ext. R5(a) that the last payment made by the 5th respondent to Meenakshy was only on 4.1.2007. However, there was no dispute between the parties in regard to the delay occurred in completing the transaction beyond the stipulated period.

19. Paragraphs 3 and 4 in Ext. R5(a) reads as follows:

The terms in paragraph 4 of Ext. R5(a) is the epicenter of the controversy. It is agreed between the parties that from 18.01.2005 onwards the approved Manager Meenakshy will have no right to make appointments in the school. She agreed not to create any document by which a claim or a lien could be made by anyone in the school. In Clause (3), it is mentioned that Meenakshy would discharge the duties as approved Manager and sign all official documents for the effective management of the school. 5th respondent undertook to meet all the expenses for running the school from 18.1.2005 onwards. Further, approved manager Meenakshy had to collect the amounts due to the school and hand over the same to the 5th respondent. Learned Senior Counsel for the appellant contended that the approved Manager is bound to discharge her duties as per the provisions in the K.E. Act and K.E.R.. Our attention is drawn to Rule 9 of Chapter III of the K.E.R. which reads as follows:

9. Duties and powers of the managers of Aided Schools--(1) The Manager shall be responsible for the conduct of the school strictly in accordance with the provisions of the Kerala Education Act and the Rules issued thereunder. He shall also abide by the orders that may be issued from time to time by the Government and the Department in conformity with the provisions of the Act and the rules issued thereunder.

(2) The manager shall sign all the bills relating to the maintenance and other grants specifically granted to the Management. All other bills relating to the school shall be signed by the Headmaster.

(3) The Manager shall provide site, building, staff, equipments, furniture, etc. as per Rules issued under the Education Act and as per orders that may be issued from time to time by the Government and the Department in conformity with the provisions of the Act and the rules issued thereunder.

(4) The Manager shall not interfere with the academic work of schools which should be attended to by the Headmaster.

(5) The Manager shall verify the staff position of the school in conformity with the number of class divisions sanctioned by the Department.

To reinforce his contention, learned Senior Counsel relied on a decision rendered by Division Bench of this Court in *Manager, M.M. High School Vs. Deputy Director of Education and Others*, Point decided therein is the following:

.....So, a legal duty is cast upon the Manager to provide the staff for the school as per the Rules and the orders that may be issued by departmental authorities.....

As per the provisions contained in this Chapter and the Rules, each school should have the staff fixed by the educational authorities. The staff so fixed by the educational authorities is required for the academic work in the school. If the staff so fixed by the educational authorities are not provided by the Manager, it will adversely affect the working of the school. The persons adversely affected thereby are the students of the school. Manager cannot be allowed to contend that he has got the authority to make the appointment of teachers and that according to him no appointment is to be made for there are sufficient number of teachers in the staff. The provisions of the Act and Rules referred to above show that permission is granted to the Manager to establish and maintain the schools in furtherance of the duty of the State to provide facilities for education. When the educational authorities have come to the conclusion that a particular number of teachers are required to impart proper education to the pupils, the Manager cannot be allowed to take a stand that appointment is his prerogative and that he cannot be compelled to make appointment. If such a right is given to the Manager, it will certainly affect the students and the academic work of the school. When the Manager is duty bound to provide the staff required for the school and the Government had taken upon itself the liability to pay the salary of all the teachers in aided schools, according to us, it is the duty of the Manager to fill up all the posts in accordance with the orders of the educational authorities fixing the staff strength.....

20. Learned counsel for the appellant contended based on Rule 7 of Chapter XXIV(B) of K.E.R. that the rules regarding appointment, probation, increment, transfer, discipline, maintenance of service records etc. contained in Chapter XIV(A) and the Conduct Rules in chapter XIV(C), which are applicable to teachers of aided schools, shall mutatis mutandis apply to the non-teaching staff in aided schools. There cannot be any doubt that the Manager is duty bound to discharge his obligations under the K.E. Act and K.E.R. Only question arising for decision is whether the stipulations in Ext. R5(a) created any embargo in discharging the duties by the approved Manager.

21. There is an ocean of difference in legal parlance between the sale of an ordinary immovable property and an immovable property with an aided school thereon, governed by the K.E. Act and K.E.R. Ext. R5(a) is an agreement whereby the parties agreed to transfer the immovable property belonging to the school along with all improvements thereon and the right of management. The parties ultimately performed their obligations under the contract and the seller (Manager) transferred the properties of the school with management, respecting

the terms in Ext. R5(a). Ext. R5 (a), though by itself did not create any interest in or charge on such property, created an obligation annexed to the ownership of immovable property, not amounting to an interest in the property. This principle is well known to law. In the context of a claim for specific performance of a contract under the provisions of the Specific Relief Act, 1963, the concept of creation of an obligation annexed to ownership of immovable property was considered by this Court in *Ali Rowther v. Kochupennu* (1986 KLT 718).

22. The Supreme Court in *Bai Dosabai Vs. Mathurdas Govinddas and Others*, interpreted the terms in a lease deed, wherein the lessor was in an obligation to sell the land to the lessee, if latter so decided within a period of seven years and paid the purchase price. While interpreting that lease deed, the law laid down is in the following words:

We do not wish to go in any detail into the question whether the English Equitable doctrine of conversion of reality into personality is applicable in India. However, we do wish to say that the English doctrine of conversion of reality into personality cannot be bodily lifted from its native English soil and transplanted in statute-bound Indian law. But, we have to notice that many of the principles of English Equity have taken statutory form in India and have been incorporated in occasional provisions of various Indian statutes such as the Indian Trusts Act, the Specific Relief Act, Transfer of Property Act etc. and where a question of interpretation of such Equity based statutory provisions arises we will be well justified in seeking aid from the Equity source. The concept and creation of duality of ownership, legal and equitable, on the exception of an agreement to convey immovable property, as understood in England is alien to Indian Law which recognises one owner i.e. the legal owner: vide *Rambaran Prosad Vs. Ram Mohit Hazra and Others*, and *Narandas Karsondas Vs. S.A. Kamtam and Another*, . The ultimate paragraph of Section 54 of the Transfer of Property Act, expressly enunciates that a contract for the sale of immovable property does not, of itself, create any interest in or charge of such property. But the ultimate and penultimate paragraphs of Section 40 of the Transfer of Property Act make it clear that such a contract creates an obligation annexed to the ownership of immovable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property recognised by Equity in England is translated into Indian law as an obligation annexed to the ownership of property, not amounting to an interest in the property, but an obligation which may be enforced against a transferee with notice or a gratuitous transferee.

23. The facts in the above mentioned decisions are different from those in this case. The legal principle, that a contract for sale of an immovable property, though falls short of creating any interest in or charge on such property, creates an obligation annexed to the ownership of the immovable property, not amounting to an interest in the property, may not be fully applicable to this case. It is trite that the vendor is bound to take care of the interests of the purchaser

during the currency of the contract for sale. It goes without saying that no action of the seller shall cause any prejudice to the interests of the purchaser, as he is legally entitled to enjoy the property with full rights after the completion of sale. It has to be borne in mind that the above said principles are applicable only in the case of transfer of an immovable property. In this case, the dispute is not relating to the transfer of an immovable property. The right of management of an aided school situated in the property is involved in this case. Therefore, the equitable doctrine stated above cannot be bodily lifted and applied in this case. The provisions of the K.E. Act and K.E.R. will have to be regarded and respected especially when they have a direct and definite impact in the matter of transfer of an aided school.

24. Learned Senior Counsel for the appellant argued that the terms and conditions in Ext. R5(a) are of such a nature that, if permitted they would defeat the provisions of the K.E. Act and K.E.R. Appellant's contention is that the approved Manager has statutory power to do all the necessary things for the proper functioning of the school. He has a statutory duty to fill up vacancies. The principles of law enunciated in *Shobhana, A. Vs. Manager and Others*, and *Rajesh, R. Vs. Secretary to Government and Others* have been pressed into service to support the above contention. In *Shobhana's* case (*supra*) following is the dictum:

The manager is duty bound to provide the staff required for the school and the Government had taken upon itself the liability to pay the salary to the teachers. It is the duty of the manager to fill up all the posts in accordance with the orders of the educational authorities fixing the staff strength. The failure of the manager in not appointing a teacher against a vacancy which was duly sanctioned would cause loss to the teacher and such a loss caused to the teacher can be recovered from the manager as provided by the rule.

It is noteworthy that *Shobhana's* case (*supra*) related to a dispute regarding appointment of a teacher. But the facts in *Rajesh's* case (*supra*) are different. A person entered service in an aided school as part time menial staff died in harness. His son, the writ petitioner was a minor at the time of his father's death. On attaining majority, the writ petitioner promptly applied for appointment on compassionate grounds. The District Educational Officer rejected his claim on the ground that dependants of part time menials are not entitled to appointment on compassionate grounds. In that context, the scope of Section 7(2) of the K.E. Act and the provisions in K.E.R. was examined by a learned Single Judge of this Court and it reads as follows:

As per S. 7(2) of the Kerala Education Act, 1958, hereinafter referred to as the "Act", for short, the Manager shall be responsible for the conduct of the school in accordance with the provisions of the Act and the K.E.R. In terms of R.3(1) of Chapter III K.E.R. the Manager is responsible to the Department for the management of the institution. Failure on the part of the Manager to obey the instructions issued by the Department may result in withdrawal of aid, grant,

recognition, etc. in terms of R.7(2) in Chapter III. S. 8 provides for recovery of amounts due from the Manager by the provisions of the Revenue Recovery Act. R. 7(1) in Chapter III of K.E.R. provides for declaring the Manager unfit to hold such office after following the procedure prescribed therein. Such a notice has been issued to the Manager. If monetary loss is caused to teachers by denial of appointment for statutory claims and on account of denial of due promotions, the Manager can be proceeded for recovery in terms of sub-r.4 of R.7 of Chapter III. The aforesaid provisions will show that the Manager is duty bound to give effect to the orders of superior statutory authorities, including the Government and failure, in appropriate cases, may visit the Manager with consequences, including recovery.

Learned counsel for the contesting respondents argued that the duties of a Manager enumerated in Section 7(2) of the K.E. Act apply in relation to teachers only and it cannot be extended to the appointments of non-teaching staff. According to him, the relevant provisions relating to non-teaching staff are provided in the K.E.R. only. We are unable to accept this contention of the respondents. We are of the view that a conjoint reading of Section 7(2) of the K.E. Act and Rule 9 of Chapter III and Rule 7 of the Chapter XXIV(B) of K.E.R. will show that the Manager shall be responsible for the conduct of the school in accordance with the provisions of the K.E. Act and the K.E.R. thereunder. If such a view is not adopted, it will certainly result in absurdities. Learned Senior Counsel drew our attention to the first sentence in paragraph 3 of Ext. R5(a) which says that from 18.1.2005 onwards the approved Manager (2nd party to the agreement) agreed to part with the right of management of the school to the 1st party. Subsequent stipulations are sequel to this term. Aforementioned provisions of the K.E. Act and K.E.R. coupled with judicial pronouncements would show that the transfer of management attempted to be effectuated by Ext. R5(a) is diametrically opposite to the various statutory provisions, especially that in Rule 5A of Chapter III of the K.E.R. Therefore the same is legally unsustainable.

25. We shall examine the next contention of the appellant that the terms in Ext. R5(a) are in clear violation of Section 23 of the Contract Act. Section 23 of the Contract Act reads as follows:

What consideration and objects are lawful, and what not- The consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

It was argued on behalf of the appellant that the manager cannot abdicate his responsibilities and any such contract is violative of Section 23 of the Contract

Act.

26. Learned counsel for the respondents 5 and 6 contended on the basis of a decision rendered by the Supreme court in Union of India (UOI) Vs. Col. L.S.N. Murthy and Another, that the word "law" in the expression "defeat the provisions of any law" in Section 23 of the Contract Act is limited to the express terms of an Act of a legislature. Learned counsel for respondents 5 and 6 raised this contention to drive at a point that terms in Ext. R5(a), even if found to be violative of Rule 5A of Chapter III of K.E.R., cannot be said to defeat the provision of a law, as Rules will not come within the term "law" in Section 23 of Contract Act. Per contra, learned Senior Counsel for the appellant contended that the principles stated in Colonel L.S.N. Murthy's case (supra) runs contrary to the ratio in St. Johns Teachers Training Institute Vs. Regional Director, National Council for Teacher Education and Another, Latter decision is by a Bench of three learned Judges of the Supreme Court. Learned Senior Counsel for the appellant, therefore, contended that the principles mentioned in the latter decision should be followed.

27. It is axiomatic that to understand the law laid down in a decision correctly, it is essential to know the facts of the case. In plethora of decisions, the Apex Court clearly spelt out that courts should guard against the danger of mechanical application of observations in a judgment without ascertaining the context in which they were made. Supreme Court in Bharat Petroleum Corporation Ltd. and Another Vs. N.R. Vairamani and Another, clearly laid down that a decision cannot be relied on without disclosing the factual situation. Relevant portion reads as follows:

9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of statute and that too taken out of context. These observations must be read in the context in which they appear to have been stated.

28. Supreme Court in Bihar School Examination Board Vs. Suresh Prasad Sinha, considered the danger of applying a precedent without regard to the relevance of facts and the context in which it has been laid down. Words of Lord Denning, in the matter of applying the precedents, which have become locus classicus, have been quoted with approval in the above decision. The passage reads as follows:

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

29. In the light of the above legal principles, we shall consider the facts in Colonel L.S.N. Murthy's case (supra) to understand whether it is a binding

precedent to hold that the term "law" in Section 23 of the Contract Act is limited to the express terms of an Act of the legislature. In August, 1999, the appellant in the above case invited tenders for supply of fresh fruits from 1.10.1999 to 30.9.2000 for the troops. 2nd respondent among others submitted tenders. Tender submitted by the 2nd respondent was accepted. Although he started supply of fresh fruits on the agreed rate, he stopped the supply on 06.06.2000. A notice was issued by the appellant to the 2nd respondent to show cause why action should not be initiated for stoppage of supply. 2nd respondent replied saying that the prices of all varieties of fruits gone up increased and it was impossible for him to perform the contract. There was an arbitration clause in the contract and, so, parties took recourse to an arbitration. Arbitrator ruled that the contract was ab initio void and, therefore, it was not enforceable. The matter was taken before the District Court u/s 34 of the Arbitration and Conciliation Act, 1996. The application filed by the appellant was dismissed by the District Court. Hence an appeal was filed u/s 37 of the Arbitration and Conciliation Act before the High Court. High Court also dismissed the appeal. Then the appellant approached the Supreme Court. Apex Court noted that the arbitrator found two reasons for holding that the contract was void ab initio. He noticed that the Government of India, Ministry of Defence issued certain instructions relating to such contracts by a letter dated 31.08.1990. One of the cardinal instructions therein was that if the rate quoted by a tenderer was lower than 20% of a reasonable rate, then the rate should be treated as fictitious and the tender should be rejected. On facts, the arbitrator found that the rates quoted by the 2nd respondent were below 20% of the reasonable rates and, therefore, the agreement entered into between the parties was against the letter referred to above. According to the arbitrator, the instructions in the letter amounted to "law" within Article 13(3)(a) of the Constitution of India. Secondly, he found that Section 23 of the Contract Act was also violated.

30. Supreme Court found that Clause (3)(a) of Article 13 of the Constitution becomes relevant only where the order or notification of the Government attempted to take away or abridge the fundamental rights conferred by Part III of the Constitution. Supreme Court also found that Part III of the Constitution has no relevance in deciding a question whether the agreement is void or not and, hence, the reasoning of the arbitrator was found to be legally incorrect.

31. Supreme Court considered the scope of Section 23 of the Contract Act and relied on a passage from the seminal work of Pollock & Mulla on Indian Contract and Specific Relief Acts. It is evident from the passage relied on by the Supreme Court that the learned authors expressed their opinion regarding the phrase "defeat the provisions of any law". It must be taken as limited to defeat the intention which the legislature has expressed, or which is necessarily implied from the express terms of the Act. It further shows that an agreement will not be void merely because it tends to defeat some purpose ascribed to the legislature by conjecture, or as a matter of history, from extraneous evidence such as legislative debates, preliminary memoranda, not forming part of the enactment.

There is no observation made by the learned authors that the subordinate legislation made drawing power from a statute, cannot be termed as law, nor the Supreme Court considered such a situation as is evident from the facts narrated above. In fact Rule 9 of Chapter III of K.E.R., which has been quoted above, was considered by this Court in Manager, M.M. High School's case (supra). The Division Bench, though no doubt was dealing with the case of a teacher, did touch upon the aspect of the academic work being affected if the Manager did not provide adequate staff. We would think that the term "staff would undoubtedly include the non-teaching staff also. Therefore, we are of the view that the said decision cannot be relied on as a proposition to find that violation of provisions in the K.E.R. will not attract the embargo in Section 23 of the Contract Act. So much so, we find that the dictum in Colonel L.S.N. Murthy 's case (supra) has no application to the case.

32. For the reasons stated above, we find that the terms in Ext. R5 (a) are against the provisions of the K.E. Act and K.E.R. and they directly impinge upon the powers and duties of the Manager in the matter of administration of an aided school. Therefore, the finding of the learned Single Judge that the approved Manager is bound by the terms of Ext. R5 (a) is legally unsustainable.

33. Learned counsel for the contesting respondents argued that no challenge is raised against Ext. R5(a) in this proceedings. In reply to this argument, learned Senior Counsel for the appellant submitted that she, being a third party to Ext. R5(a), cannot challenge the terms of the agreement, but only the legality of the same. This contention is legally justifiable, more so in the light of the fact that the agreement does not get support of law.

34. Our attention was drawn to Ext. P8 series appointment letters issued by the former Manager Meenakshy in favour of certain teachers. Those appointment letters were issued after execution of Ext. R5(a). Learned counsel for the 5th respondent submitted that those appointments were made by the former Manager with the knowledge and consent of 5th respondent. None of the documents would show that the appointments were made by the erstwhile Manager only in accordance with the consent or knowledge of the 5th respondent. Learned Senior Counsel for the appellant further argued that if we accept the contention of the 5th respondent that the erstwhile Manager was acting according to the dictates of 5th respondent, then we will have to find that at a time two Managers, viz., de jure and defacto, functioned in the school. Certainly, this is not a situation visualised by the K.E. Act or K.E.R.

35. Learned Senior Government Pleader submitted that the Writ Petition is not maintainable for the simple reason that Ext. P5 order issued by the 2nd respondent on 24.9.2009 has not been challenged. As per Ext. P5, the 2nd respondent, invoking power under Rule 5A of Chapter III of K.E.R., accorded permission to transfer of management involving change of ownership of the school. Although Ext. P6 issued by 4th respondent and Ext. P9 issued by the 1st respondent have been challenged, the basis of these orders, viz; Ext. P5 should

have been challenged, contended the learned Senior Government Pleader. It is also contended that whenever an adverse Order is passed against a person, unless that is challenged before an appropriate forum within the prescribed time limit, the said order becomes final and the person affected by it will be bound by it. In order to fortify this submission learned Senior Government Pleader relied on Pavithran Vs. State of Kerala, It may be true that Ext. P5 order passed by the 2nd respondent is the basis for Exts. P6 and P9, which are under challenge herein. Exts. P6 and P9 directly affect the interests of the appellant. That is why they are challenged. Merely for the reason that Ext. P5 is not separately challenged, we do not find any infirmity in the proceedings.

36. By Ext. P5 proceedings of the 2nd respondent, dated 24.09.2009, the officer accorded permission to transfer the management of the school involving change of ownership by invoking powers conferred under Rule 5A of Chapter III of the K.E.R. it is pertinent to note that this order does not speak about any retrospectivity in the matter of grant of sanction. Ext. 6 order dated 23.11.2009 issued by the 4th respondent would show that the transfer was allowed with effect from 24.03.2008. This is seriously challenged by the appellant. Contesting respondents rely on Ext. P2 to contend that from 24.3.2008 onwards the former Manager had no right to fill up any post in the school. It is also contended that the former Manager herself requested the authorities not to approve the appointments made by her after 24.3.2008. This is a disputed fact. Ext. P10 is a letter purported to be written by the former Manager to 4th respondent on 14.8.2009 mentioning that she remained to be the approved Manager until orders were passed approving the change of management involving change of ownership. It is also mentioned in Ext. P10 that she submitted a letter prior to 14.8.2009 under a mistaken impression that after the agreement to assign the school, she had lost right to function as Manager. It is her definite assertion in Ext. P10 that the earlier letter sent to the authorities under a mistaken notion stood withdrawn by Ext. P10. Learned counsel for respondents contended that Ext. P10 is a fabricated document. Even if we discard it, the law does not allow an approved Manager to abdicate his powers and duties. Apart from the factual assertion made by the appellant regarding the actual exercise of power by Meenakshy (approved manager) till 24.9.2009 (date of Ext. P5), legally also the respondents cannot contend that the sanction granted with effect from 24.3.2008 as mentioned in Ext. P6 was proper.

37. Learned Senior Counsel for the appellant contended that Ext. P9 is legally unsustainable. According to him, the foundation of the reasonings in Ext. P9 is completely erroneous. From Ext. P9, it is clear that though the school was transferred with effect from 24.3.2008, the order approving transfer was issued by the 2nd respondent only on 23.11.2009. In Ext. P9, it is observed that a recent Supreme Court decision has clarified that no prior sanction of the 2nd respondent is required for transferring the ownership of a school involving change of management. Learned Senior Counsel for the appellant submitted that this observation is totally incorrect and opposed to law. According to him, no

such decision has been rendered by the Supreme Court. It is true that in Ext. R5(o), the Supreme Court confirmed the view taken by the Division Bench in Koyyode Madrassa U.P. School's case (supra), wherein it was held that the view taken by the learned Single Judge is not correct. However, in the facts of that case neither the Division Bench of this Court nor the Supreme Court interfered with the decision of the learned Single Judge. Learned Senior Counsel for the appellant argued that the decision rendered by the Supreme Court in Ext. R5(o) has been wrongly quoted and misinterpreted by the authorities in Ext. P9. It is true that the 1st respondent without understanding the implication of the decision in Ext. R5(o) and also disregarding the provisions in the K.E. Act and K.E.R. made the observation in Ext. P9 that even without prior sanction, as required under the law, the management and assets of the school could be transferred. We are unable to accept this statement in Ext. P9. That unsustainable reasoning is the foundation for the conclusions in Exts. P6 and P9. We are of the firm view that both Exts. P6 and P9 are contrary to the mandates of K.E. Act and K.E.R.

38. Learned counsel for the 6th respondent contended that in the realm of Administrative Law, while interpreting not only a statute, but also a subsidiary rule the principle of "contemporanea expositio" is applicable. He submitted that while disposing the revision filed by the appellant, the first respondent in Ext. P9 order clarified the statutory provisions and legal principles in connection with the change of management involving change of ownership of the school. The term "contemporanea expositio" as per Black's Law Dictionary means the doctrine that the best meaning of a Statute or document is the one given by those who enacted it or signed it, and that the meaning publicly given by contemporary or long professional usage is presumed to be the correct one, even if the language may have a popular or an etymological meaning that is very different. Generally it can be stated that the principle of contemporanea expositio is not applicable to a modern Statute (see - The Senior Electric Inspector and Others Vs. Laxmi Narayan Chopra and Others, ; Raja Ram Jaiswal Vs. State of Bihar, and J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors,

39. Apex court in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, applied the rule of "contemporanea expositio" for construing the circulars issued by the Central Board Direct Taxes. The Supreme Court held as follows:--

The rule of construction by reference to contemporanea expositio is a well established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous. Therefore, where the Central Board of Direct Taxes has issued circulars by way of explaining the amended provisions of Section 52(2), apart from their binding nature in view of Section 119 of the I.T. Act, they are clearly in the nature of contemporanea expositio furnishing legitimate aid in the construction of sub-section(2).

40. Learned counsel for the 6th respondent relied on a decision pronounced by

the Supreme Court in Tamil Nadu Electricity Board and Another Vs. Status Spinning Mills Ltd. and Another, to contend that the orders issued by the State, if it is clarificatory in nature, could be given a retrospective operation. In paragraph 29 the following principles are stated:--

The clarification issued by the State during pendency of the appeals should have, therefore, been considered by the High Court in its proper perspective. If it is clarificatory in nature, it could be given a retrospective operation. Such a question, however, should have been posed and answered. Furthermore, the letter dated 1-8-1997 was issued as some confusion arose. When a subordinate legislation is made by the State Government, it must be done in terms of the constitutional provision. An executive order is also issued keeping in view the rules and executive business. It may not have the force of law but the same may come within the purview of the well-known principle of *contemporanea expositio*. Rules of executive construction are also relevant.

However, we have already found that Ext. P9 order is legally incorrect. The reasonings mentioned in Ext. P9 are based on wrong legal premises. Therefore, the rule of *contemporaneo exposito* has no application to this case.

41. Learned counsel for the contesting respondents contended that non-impleadment of former Manager, who is a relative of the appellant is an omission with ulterior motives. Even if one holds an opinion that her presence, as an *eo nomine* party, would have been a good thing in this litigation, we are of the view that non-impleadment of the former Manager is not a serious infirmity to the proceedings.

42. On an anxious consideration of the fact situations revealed from the records as well as the legal provisions and precedents applicable to the questions arising for adjudication, we find that the appellant has made out a case requiring interference in the administrative action taken by respondents 1 to 4. It is settled law that judicial review is permissible if the decision making authority exceeded its powers and committed an error of law. The scope of judicial review is limited to the decision making process and not the decision itself (see *Tata Cellular Vs. Union of India*, . We are of the firm view that the entire decision making process was based on completely wrong interpretations of law and incorrect premises. Therefore, we are constrained to interfere in this matter for the advancement of the cause of justice. We are of the definite view that the appellant has a legal right to claim approval of appointment as peon as per Ext. P1 since it was issued by the approved Manager during her tenure in office. The law laid down by the learned Single Judge in *Koyyode Madrassa U.P. School's case* (*supra*) is not correct and the authorities cannot take shelter under the above decision to deny appointment to the appellant. The terms and conditions in Ext. R5(a) restricting the powers and duties of the approved Manager is against the provisions of the K.E. Act and K.E.R. and, therefore, they cannot interdict the approved Manager from functioning in accordance with the provisions of the K.E. Act and K.E.R. It is also seen that the challenge against Ext. P21 is sustainable for the reason that

the appointment of 6th respondent is in a vacancy in which the appellant should have been accommodated. There is force in the contention of the appellant that Ext. P21 is in conflict with Ext. P22 Circular and no legally justifiable reason is stated for deviating from the terms in Ext. P22 Circular. We therefore, allow the appeal and set aside the judgment of the learned Single Judge as follows:

In the result, the Writ Appeal is allowed. Judgment of the learned Single Judge is set aside. Exts. P6, P9 and P21 orders are hereby quashed. 4th respondent shall approve the appointment of the appellant as peon in EVUP School, Tuneri with effect from 27.7.2009. There is no order as to costs.