

(1965) 07 KAR CK 0010

In the Karnataka High Court

Case No : Second Appeal No. 235 of 1960

St. Aloysius Higher Elementary School and Another

APPELLANT

Vs

Regina alias Rosy Menezes

RESPONDENT

Date of Decision : 23-07-1965

Acts Referred:

Madras Elementary Education Rules — Rule 13
Specific Relief Act, 1963 — Section 21 (b)

Citation : (1969) 2 LLJ 337 : (1966) 1 MysLJ 341

Hon'ble Judges : Chandrashekhar, J;B.M. Kalagate, J

Bench : Division Bench

Judgement

Kalagate, J.—Kumari Regina alias Rosy Menezes, a teacher instituted Original Suit No. 163 of 1957 in the Court of District Munsif, Mangalore, against the two appellants claiming certain reliefs against them. Appellant 1 is St. Aloysius Higher Elementary School, Urva (which will hereafter be referred to as the school), represented by manager and correspondent Rev. Fr. T.A. Lobo (who will hereafter be referred to as the manager). Appellant 2 is Rev. Fr. T.A. Lobo. The trial dismissed her suit in substance. She, therefore, preferred an appeal in the Court of the District Judge of South Kanara who allowed the same and decreed her suit. Hence this appeal by the two defendants.

2. The plaintiff-respondent was appointed as headmistress of the school on 10 April 1949 which post she continued to occupy till 1 June 1955, when the manager, by his order, reduced her to the position of an assistant teacher. She, therefor, preferred an appeal to the District Educational Officer, South Kanara, who rejected the same. Thereafter she preferred an appeal to the Divisional Inspector of Schools, Coimbatore, who, by his order dated 5 July 1956, accepted her appeal and directed the District Educational Officer to issue necessary instructions to the management of the school to restore the plaintiff as headmistress. However, no effect was given to the said order and, therefore, on 26 June 1957, she filed the present suit out of which this second appeal arises.

3. It is alleged by the plaintiff in her plaint that the school is receiving grant from Government and is subjected to the supervision and control of the Educational Department of Government of Madras, and since the reorganization of State of the Mysore Government. The said school is receiving a substantial portion of the teacher's salary as aid or grant from the Government. The affairs of the school have to be conducted according to the rules and regulations framed by the Government and embodied in the rules relating to the elementary schools framed under the Madras Elementary Education Act of 1920.

4. She further alleges that as a result of misunderstanding between herself and the manager, the later developed a prejudice against her and ultimately on 22 April 1955, framed charges against her and called for her explanation. She submitted her explanation. She submitted her explanation to those charges. However, the manager, passed an order, as already stated, on 1 June 1955, degrading her to the post of an assistant teacher. She; therefore, sought relief from the Education Department and ultimately succeeded in getting an order directing the manager to restore her as head mistress of the school. She states that as a result of the order passed by the Divisional Inspector of School the order passed by the manager, is no longer subsisting and stands vacated, and that the refusal of the manager by the rules framed under the Madras Elementary Education Act and that rules 13 and 14 thereof clearly make it obligatory on the management to obey the order passed by the Divisional Inspector of School on an appeal preferred by a teacher. She further states that as a result of that action taken by the manager, she has suffered loss in her reputation and also pecuniary loss.

5. On the allegations she claimed reliefs, viz, for a declaration that she is the headmistress of the school and for mandatory injunction directing the defendants to reinstate her as headmistress, and also for granting her certain amount by way of damages.

6. The defendants contested her claim and contended that her suit is not bona fide. They admitted that the plaintiff worked as headmistress till 3 June 1959 when she handed over charge of that post. They further contended that the removal of the plaintiff from the post of the headmistress was within their competence and that there was no provision in the Madras Elementary Education Act or the rules framed thereunder for appeals against such orders, to the educational authorities. It was further contended that though the manager is bound by the Madras Elementary Education Act and the rule framed thereunder, they do not admit that the relieving of the plaintiff from the work of the headmistress is within the ambit of the said rules. The manager is responsible for the efficiency, strength and progress of the school and for the internal discretion, and he cannot be compelled to reinstate the plaintiff as headmistress who does not command his confidence. They also contended that she has suffered no loss either in reputation or otherwise and, therefore, her suit is liable to be dismissed.

7. The trial Court, on these pleading, raised the necessary issues and found that

the plaintiff had been appointed as headmistress of the school and that the action of the management removing her from that post was not illegal and therefore she was not entitled to claim her reinstatement as headmistress. It also found that the orders passed by the educational authorities were not binding on the manager. It, however held that the action taken by the manager was too severe for the alleged acts of the plaintiff and, therefore, though it substantially dismissed her suit, awarded her only nominal damages.

8. On appeal, the learned District Judge decreed the plaintiff's suit and awarded her certain amount by way of damages and also issued a mandatory injunction directing the defendant to reinstate the plaintiff as head-mistress of the school. It is against this decree that the present second appeal has been presented to this Court by the appellants.

9. The Advocate-General appearing for the appellants contends that even assuming that the order reducing the plaintiff to the post of an assistant teachers is wrong, yet the relationship that exists between defendants and the plaintiff is that of an employer and employee and, therefore, that of a master and servant and that no mandatory injunction could be issued against the manager to reinstate the plaintiff as headmistress since it would amount to the enforcement of the specific performance of a contract which is prohibited by the provisions of S. 21(b) of the Specific Relief Act. He also contends that the rules for the grant of recognition and aid to the elementary schools are not statutory rules but are mere executive instructions. He next contended that when the domestic tribunal makes an order, the Court cannot go into the propriety or reasoning of that order unless it is shown that order unless it is shown that the said order is opposed to the principles of natural justice. In any event, he contends that the award of damages is wrong and must be set aside.

10. On the other hand, it is contended by Sri Karanth, appearing for the plaintiff-respondent, that the rules for the recognition and grant-in-aid to elementary schools form part of the service condition of the plaintiff and, therefore, both the parties are bound by those rules. He further contends that those rules are statutory rules and, therefor, the manager is bound to give effect to the decision of the educational authorities competent to pass orders under the said rules. He also submits that the decree passed by the Court below awarding damages to the plaintiff is a proper and correct decree and that it should be sustained.

11. Thus it could be seen that the question which we have got to decide in this appeal are whether the rules relating to recognition and grant-in-ad to the elementary schools are statutory rules or are mere executive instructions and whether the relationship that exists between the appellants and the respondent is that of a master and servant; and if so, whether it is permissible in law to enforce the contract of personal service, and also whether the Court below was justified in awarding damages against the appellants.

12. While deciding the question whether the rules in question are statutory rules

or are mere executive instructions, it is necessary to examine the provisions of the Madras Elementary Education Act, 1920 (8 of 1920), which was enacted to make better provision for the elementary education in the Presidency. This Act contains 7 Chapters and 56 sections. It has been amended from time to time, and by Act 11 of 1939, i.e., the Madras Elementary Education (Amendment) Act, 1939, major amendments were made to it by omitting Chaps. II, IV and VI and S. 55 from Chap. VII. Chapter II contained 31 sections and were divided under four headings. Sections 4 to 12 dealt with the constitution of the district educational councils; Ss. 13 to 23 dealt with the mode of transacting business; Ss. 24 to 27A dealt with the duties of the District Educational Councils whereas Ss. 28 to 31 dealt with the funds, budget and audit. Under Chap. IV there are only three sections, viz, Ss. 41, 42 and 43. Section 41 provides for the recognition of elementary schools, whereas S. 42 provides for the admission of private elementary schools to grants-in-aid. Provisions of Chap. VI which have been omitted are not material to be mentioned for the purpose of the Act nor is it necessary to refer to S. 55 appearing in Chap. VII of the Act.

13. Now S. 56 which appears in Chap. VII empowers the local Government, after previous publications, to make rules not inconsistent with the Act carry out all or any of the purpose of the Act. Clause (h) of Sub-section (2) of S. 56 provides for making rules declaring the conditions subject to which schools may be admitted to recognition or aid and the Government, it appears, framed rules in the year 1922 which are called "Rules relating to Elementary Schools". But, as I stated, by the amending Act of 1939, Ss. 41 and 42 appearing in Chap. IV which dealt with the recognition of elementary schools and admission of private elementary schools to aid and, Chap. II which provided for the constitution of the District Educational Councils, with necessary funds defining their duties in relation to the recognition of elementary schools and grants-in-aid to such schools, were omitted.

14. However, it is contended by Sri Karanth, for the respondent that though the provisions of Ss. 41 and 42 have been omitted by the amending Act of 1939, still the State Government has power under Clause (h) of Sub-section (2) of S. 56 to make rules declaring the conditions subject to which schools may be admitted to recognition and aid; and if there is power in the State, then merely because the provisions of Ss. 41 and 42 relating to recognition and grant-in-aid have been omitted, would not make the rules framed under Clause (h) of Sub-section (2) of S. 56 of the Act any the less statutory; in other words, they are statutory rules and, therefore, any action taken by the authority acting under those rules would be binding on the management of the school.

15. The rules relating to recognition and grant-in-aid of the schools framed under Cl.(h) of Sub-section (2) of S. 56 of the Act were framed to give effect to the provisions contained in Ss. 41 and 42 of the Act and when these two sections and Chap. II were omitted by the amending Act 2 of 1939, could it be said that the rules relating to the grant of said that the rules relating to the grant of

recognition and aid to elementary schools which are framed in 1922 continue to be which were framed in 1922 continue to be statutory rules in spite of such omission and republication ? The answers, in our view, must clearly be in the negative. The mere continuance of the rules cannot make them statutory rules especially when they were repealed and republished after the amendment, as pointed out by the Kerala High Court in their decision (to be referred to later), Therefore, these rules cannot be said to be statutory rules.

16. We further note that the rules relating to elementary schools are divided into two parts, and from the authentic copy of the rules supplied to us relating to elementary schools, we find that Part I consists of rules framed under the Madders Elementary Education Act, 1920 and the various rules framed thereunder are with reference to the relevant sections. When we go to Part II, we find that the rules known as "Rules for the grant of recognition and aid to elementary schools, "make no reference either to the Act or any of the sections. Thus we find that there is a marked distinction made between the rules relating to schools falling under Part I and the rules falling under Part II.

17. We further find that those rules were published on 29 August 1939, i.e., after the coming into force of the amending Act of 1939 which came into force on 1 June 1939. It could, therefore, be seen that the Government having omitted Ss. 41 and 42 relating to the recognition and aid to schools, and Chap. II and having thus abolished the District Educational Councils, treated those rules relating to recognition and aid merely as executive instructions. The rules relating to recognition and aid lay down the conditions under which recognition could be given and aid provided for. They also provide for the consequences of non-observance of any of the conditions in the rules falling under Part II. It would appear that the result of not obeying the rules or any order of the authority acting under the rules may entail the forfeiture of recognition or the withdrawal of the aid. If the management of the school chooses not to implement or give effect to the order of the authority acting under those rules, it will take the risk of losing recognition and aid but that would not make the order of that authority binding on the management of the school.

18. In *State of Assam and Another Vs. Ajit Kumar Sharma and Others*, , decided on 27 October 1964, it is held by their lordship of the Supreme Court that where the conditions of grant-in-aid are laid down by mere executive instructions, it is open to a private college to accept those instructions or not to accept them, that if it decides not to accept the instructions, it will naturally not get the grant-in-aid which is contingent on its accepting the conditions contained in the instructions but that, on the other hand, if the college accepts the conditions contained in the instructions, it receives the grant-in-aid. It is further observed that if however, having accepted the instructions containing the conditions and terms, the college does not carry out the instructions, the Government will naturally have the right to withhold the grant-in-aid, that it is however a matter between the Government, and the private college concerned and that such

conditions and instructions as to grant-in-aid confer no right on the teachers of the private college and they cannot ask that either a particular instruction or conditions should be enforced or should not be enforced.

19. This decision makes it clear that the conditions and instructions contained in the rules regarding the recognition and grant-in-aid confer no right on the teachers of a private institution and, therefore, the decision of an authority acting under those rules can have no binding force on the management of the private institution.

20. Therefore in the circumstances, it would be reasonable to hold the rules relating to recognition and aid falling under Part II, which were republished after the coming into force of the amending Act 2 of 1939, are merely executive instructions and are not statutory rules.

21. Whether these rules are statutory or otherwise came for consideration in *Rev. Fr. Joseph Valamangalam and Others Vs. State of Kerala*, . It was contended before their lordship that the rules relating to elementary schools which provide for the recognition and aid to such schools, are statutory rules made under S. 56 of the Madras Elementary Education Act, 1920. Their lordships, while examining the contention, pointed out that the rules for recognition referred to S. 41(2) of the Act and those for aid to S. 42(2), that under the Act, as it then stood, recognition and aid were to be granted by the District Educational Councils constituted under Chap. II of the Act, that those 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 (2) of 1939 those councils were abolished and Chaps. II, IV and VI of the Act pertaining to their constitution and powers repealed.

22. Their lordship further pointed out that the rules originally framed were amended in exercise of the powers conferred by S. 56 of the Act by the repeal of all the rules relating to the council including the rules for recognition and aid, that the rules recognition and aid were reissued without reference to the Act, and it was those rules that formed Part II of the rules relating to elementary schools. The rules so issued are to be found at P. 556 of Part I(B) of the Fort St. George Gazette of 29 August 1939 and it was clear from the notification therein that they were not issued under any statutory authority. (Admittedly there was not the previous publication required by S. 56 of the Act for making a rule thereunder.)

23. It was, therefore, held that these rules relating to recognition and grant falling under Part II of the rules are not statutory rules and do not create any right in the teachers which can be enforced against the management of the school.

24. This decision was subsequently approved by the Full Bench of the same High Court in *Chandrasekharan Nair and Others Vs. Secretary to Government of*

Kerala and Others, .

25. In *A. Ramaswami Ayyangar Vs. State of Madras (Education Department) and Others*, , the rules falling under Part II relating to the recognizing and aid of the schools came for consideration, as the services of a teachers had been dispensed with by the management of the St. Andrews Higher Elementary School. It was contended on behalf of the Government that the rules are not statutory rules but they were merely administrative in character. In support of that submission, the learned Additional Government Pleader relied upon the decision of that Court In Writ Petition No. 802 of 1958. It was pointed out by Anantanarayanan, J., that when the rules are administrative and not statutory in their effect, and when the management can dispense with the services of its employee (the teacher) after giving three months" notice in the usual course without assigning any special reasons therefor, he was unable to see how such an employee could invoke the aid of the Court in order to quash the proceeding of the management dispensing with his services. It was held :

"The terms of the contract between teacher-employee and the private institution-management-are those appearing in the service register. The relevant condition is the giving of three months" notice on either side for leaving the services in the case of the employee and for terminating the services of the employee in the case of the management.

* * * The terms of the contract between the teachers and the management cannot be enlarged by the rules framed under the Madras Elementary Education Act. As between the employer (management) and the employee (teacher) the implied or express terms of the contract will alone govern their mutual relationship. If the State steps into the picture at all, as an agency recognizing the institution and giving it financial aid, it may very well be that this aid is hedged around with certain conditions, which the management will have to observe, if it requires the continuance of the recognition or of the aid. A private individual who is an employee of the private institution cannot invoke those conditions in support of a redress claimed by him against his employer of a scope wider than the implied and express terms of the contract of employment. The management may have to pay the penalty of withdrawal of recognition or financial aid, if the management does not choose to abide by these administrative rules promulgated for its benefit."

26. Thus it would be seen that the view taken by us that these rules are administrative in character and are not statutory rules, receive support from the three decisions referred to above.

27. However, Sri Karanth for the respondent, in support of his contention that these rules are statutory rules relied upon *Jalli Venkataswamy Vs. The Correspondent, Kasturiba Gandhi Basic Senior School, Konetipuram and Others*, . Their lordships, while considering the procedure to be followed in terminating the services of a teachers under rule 13(2)(ii)(b) of the Madras Elementary Education

Act (7 of 1920), observed that where the statutory rules are disregarded, the termination of the services is improper. But, with respect, it appears to us that it was assumed that those rules were statutory rules. Therefore, we are unable to see how reliance could be placed upon such a decision which proceeded on the assumption that the rules were statutory rules.

28. The learned counsel next relied upon *M. Govindaswami v. State of Andhra* [(1962) 1 An W.R. 263]. In that case also, certain rules relating to grant and withdrawn of recognition and aid to elementary schools came for consideration and Umamaheswaram, J., stated that the powers exercised by the District Educational Officer under the rules for recognition and aid were quasi-judicial and not administrative in character. Here again, we do not find that any contention as to whether these rules are statutory or otherwise was raised and the decision seems to have proceeded on the basis that those rules were statutory rules.

29. The third case on which reliance is placed is *Nanduri Ramakrishna Rao v. Divisional Inspector of Schools* [(1959) 1 An. W.R. 386]. In that case, the question whether the previous approval of the Deputy Inspector of Schools is essential in order to terminate the services of a teachers (by the management of a school) who is found to be guilty of gross insubordination and also of impertinence, was consideration with reference to the Madras Elementary Education Act (8 of 1930) and the rules for the grant of recognition and aid to elementary schools, and it was stated that so long as those rules are not abrogated by the same statutory authority which framed the rules. it is rule 13 that governs the relations between the management and the members of the staff of that institution. Here again, we find that it was assumed that the rules statutory. Thus it would appear that in none of the three decisions on which reliance was placed by Sri Karanth was any contention raised as to whether these rules are statutory or not. The judgment seem to have proceeded on the assumption that these are statutory rules. On the other hand, the Kerala High Court and the Madras High Court in the decisions referred to earlier, considered the questions to whether the rules falling under Part II of the rules are statutory rules and held that the rules are not statutory rules. These decisions, with respect, are, as I stated, in accord with the view taken by us.

30. Sri Karanth then contended that merely because no mention is made in Part II if the rules that these rules are framed under the Madras Elementary Act, 1920, would not make the rules any the less statutory. The framing of the rules, he states, must be referred to the Act and he, therefore, urges that these rules are nonetheless statutory rules.

31. In support of that proposition, he relied upon *P. Balakotaiah Vs. The Union of India (UOI) and Others*, . In that case, the services of the appellants has been terminated by the orders of the railway authorities under rule 3 of the Security Rules and the appellants having filed a writ petition of the ground that the Security Rules were ultra vires, the High Court held that the orders could be

sustained under rule 148 of the Railway Establishment Code, Their lordship held that though no exception could be taken to the proposition that when an authority passes an order which is within its competences, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its powers under any other rule, the validity of an order should be judged on consideration of its substance and not its form. But in our view, this decision has no application to the facts of the present case since, as has already been pointed out, the rules relating to recognition of and aid to the elementary schools falling under Part II, were repealed and republished on 29 August 1939 after the coming into force of the amending Act, 2 of 1939. Therefore we are unable to see how the ratio of that decision could be applied to the facts of the present case.

32. Thus, after a careful consideration of the relevant provision of law and the authorities referred to by the learned counsel on either side, we hold that the rules falling under Part II relating to the recognition and grant of aid to elementary schools are not statutory rules but are mere executive instructions. If so, it is obvious that the order made by the Divisional Inspector of Schools directing reinstatement of the teachers as headmistress is in exercise of the authority given to him by executive instructions contained in the said rules and, therefore, the manager is not bound by such a decision and the plaintiff therefore cannot ask that the management, in obedience to the order given by Divisional Inspector of Schools, must reinstate her as the head mistress of the school.

33. This leads us then to the examination of the other contention urged on behalf of the teacher by Sri Karanth, that the rules relating to recognition and grant-in-aid form the basis of a specific contract between the parties and, therefore, the parties are bound by those rules. In support of this submission Sri Karanth relied on two decisions of this Court, one in *Kumari M. Uma Shenoy v. State of Mysore* [(1965) 1 Mys. L.J. 469] and the other in *Writ Petition No. 583 of 1958*. But in both the decision, it was found that the parties in terms agreed that any order of the Divisional Inspector shall be final and binding on the parties and, therefore, the parties were held bound by the rules. Those decisions, therefore, are of no help to Sri Karanth's client.

34. As pointed out by Anantanarayanan, J., in *A. Ramaswami Ayyangar Vs. State of Madras (Education Department) and Others*, the terms of the contract between the teacher-employee and the private institution-management are those appearing in the service register. In the present case, no service register is produced and it is not shown that these rules form part of the service condition of the teacher. If these rule do not form the service condition of the teacher, then the relation between the employer and the employee is that of a mere master and servant. In that event, all that is necessary to do while terminating the service of an employee is to give him three months' notice or to pay him three months' salary in lieu of three months' notice and dispense with his services,

but the Court cannot force the employer to take the service of his servant.

35. It has been held by the Supreme Court in *S.B. Dutt Vs. University of Delhi*, that a contract of personal service cannot be specifically enforced and that S. 21, Clause (b), of the Specific Relief Act, 1877 and the second illustration under this clause given in the section makes it so clear that further elaboration of the point is not required.

36. In *S.R. Tewari Vs. District Board Agra and Another*, their lordships were dealing with the case of an engineer whose services has been dispensed with by a district board, and during the course of their judgment, it is observed that at p. 4;

"... Under the common law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well-recognized exceptions. It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Art. 311 continues to remain in service even though by so doing the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similar under the industrial law, jurisdiction of the labour and industrial tribunal to compel the employer to employ a worker, whom he does not desire to employ, is recognized. The Courts are also invested with the power to declare invalid the act of statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute, even if by making the declaration the body is compelled to do something which it does not desire to do."

37. It is obvious that the present case does not fall under any of the three exceptions mentioned by their lordships.

38. We have held that the relationship between the appellants and the respondent is that of a master and servant, and in view of the clear provision of law contained in S. 21, Clause (b) of the Specific Relief Act, we cannot direct the specific enforcement of a contract of personal service. In that view of the matter, it is obvious that the plaintiff is not entitled to ask for her reinstatement as headmistress.

39. The other contention urged by the learned Advocate-General on behalf of the appellants that the decision of the manager being that of a domestic tribunal, the Court cannot interfere with such a decision unless it is shown that the decision is opposed to or is in violation of the principles of natural justice, must be accepted since that proposition is supported by the decision of the Supreme Court in *State of Mysore Vs. S.S. Makapur*, .

40. The Courts below have found that the plaintiff was given a fair opportunity to explain the charges framed against her and it is only thereafter that the manager has taken the decision complained of by the teacher. Though it is contended by Sri Karanth that the charges levelled against her are too trivial to warrant the

action taken by the manager, we cannot go into the propriety or the reasoning given by the manager since it was within his competence to take such a decision after giving a fair opportunity to the teacher to explain her conduct regarding the charges framed against her. Therefore, for the reasons stated by us, the plaintiff suit must fail. If so, it is unnecessary for us to consider the question as to whether the plaintiff is entitled to any damages on account of the action taken by the manager of the school.

41. In the result, the appeal is allowed and the decree passed by the lower appellant Court is reversed and the plaintiff's suit is dismissed. We, however, direct that each party should bear its own costs in all the three Courts.