

(1998) 04 MAD CK 0161
In the Madras High Court

The Correspondent, Malankara Syrian Catholic School

APPELLANT

Vs

J. Rabinson Jacob and Others

RESPONDENT

Date of Decision : 30-04-1998

Acts Referred:

Citation : (1998) 3 MLJ 595

Hon'ble Judges : M.S. Liberhan, C.J

Bench : Division Bench

Judgement

M.S. Liberhan, C.J.—The pristine questions referred to this Full Bench for consideration by the Division Bench run thus :

(1) Whether transfer is an incident of service when it is neither specifically provided nor prohibited under the Rules or Regulations of conditions of Service applicable to teachers and others in private schools?

(2) Is not the School Committee in respect of a non-minority institution entitled to stipulate conditions of service for teachers and others employed in private schools, which are not in conflict with Section 19 read with Rule 15 and Form VII-A?

(3) Is not a minority corporate management entitled to effect transfers of those employed in the Schools established and administered by the Educational Agency, when the rules framed by the Government do not touch upon the power of transfer?

(4) Would not the expression "administer" in Article 30(1) of the Constitution take within its fold the exercise of power of transfer as involved in this matter?

2. Proceedings originated from the facts, as culled out from the reference, writ appeals and writ petitions, run thus :

M.K. Syrian Catholic Diocese (hereinafter referred to as "the Society") runs different schools in different places, i.e., 13 schools in the District of

Kanyakumari. Each School is an independent entity. The controlling correspondent for administration is one person. The Tamil Nadu Recognised Schools Regulations Act, 1973 (hereinafter referred to as "the Act") and the Rules framed thereunder (hereinafter referred to as "the Rules") were promulgated to provide the conditions of service of the employees and other matters relating to the admissions, etc. of the recognised private and aided schools. Recognition was granted to each school individually as a separate entity. Seniority list for each individual school as the unit is maintained by the society. There is no approved common seniority list for all the schools run by the Society. Vide letter dated with respect to teachers employed in each school under its management. Undisputedly, the teachers were appointed in the individual school/unit, as an entity in itself. It is a separate school run/established as an independent unit by the Society. Neither the Society nor its management was recognised or conferred with the status of a corporate. It does not fall within the definition of a "corporate management" by the Educational Department, who refused to give its approval for the transfer of 40 teachers.

3. The school-teachers impugned the transfers as invalid, inter alia, claiming, transfer is neither provided under the provisions of the Act nor under the Rules governing the private schools run by the Society, nor there is any condition of service or contract of service for transfer. Thus, the Society cannot effect transfer.

4. The Society/appellants claimed that neither the Act nor the Rules apply to the educational institutions run by the Society, being the minority run schools. Transfer is an act of administration of management and is an incident of service. It is an internal managerial affair of the minority institutions and any interference would be violative of Article 30(1) of the Constitution of India. By transfer, neither the conditions of service were affected nor same are altered adversely to their interest. All these years, one's transfer was approved. The Society is competent to effect transfers. A writ of mandamus, directing the respondent-State to release the aid to the respective schools against the post of the transferred teachers in order to enable the Society to pay their salaries with effect from 2.6.1989, i.e., from the date they were transferred was sought for. It was further claimed that the respondent, apart from claiming the protection under the umbrella provided by Article 30(1) of the Constitution of India with respect to minority schools, half-heartedly raised the plea of estoppel in view of the fact that some of the teachers having accepted the transfer by joining the respective place of transfer, they cannot be permitted to challenge their transfers.

5. In W.A. No. 7288 of 1988, decided on 14.2.1989, a Division Bench of this Court held :

Section 19 of the Act does not prohibit a School Committee from prescribing the conditions of service. It is not violative of the rules regulating the conditions of service of teachers employed in private Schools. After referring to Section 18 and Section 19 of the Act and Rules 15 and 19 of the Rules, it was further held : School Committee can provide conditions of service with respect to transfer

though there is no specific rule of condition of service. It is held that since transfer is an incident of service as the same is not prohibited either by the Act or by the Rules, consequently could be effected. It is an internal administrative function.

6. In W.A. No. 874 of 1987, decided on 23.1.1989, it was observed that transfer is neither an incident of service nor is a necessary concomitant of every service.

7. In view of the conflicting and contrary observations, the questions referred to above, were referred to the Full Bench.

8. At this stage, it would be expedient to notice in verbatim the appointment letter issued by the Society, which, in every case, is in pari materia with respect to all teachers and which fact is not disputed even during the course of arguments before us, runs thus :

Sri/Smt...is informed that he/she is appointed as an acting/temporary H.S.A. teacher (math) in the St. Joseph's H.S. Chellamkonam under this Corporate Management in Boys/Girls Unit with effect from 13.6.1969 in the vacancy of proposed H.S.A. Post. He/She is requested to report himself/herself for duty to the Headmaster/Headmistress of the School on the F.N./A.N. of 13.6.1969. The Headmaster/Headmistress will admit him/her to duty in the School on production of the following records : (1) The qualification certificates, (2) Medical fitness certificate from the competent authority, (3) Conduct Certificate and declaration required under the rules. The details regarding the admission to duty should be reported to this office within three days so as to enable this office to prepare the C.S. statements immediately together with the required records. His/Her present appointment will be subject to the following conditions :

(a) He/She will be relieved if and when fully qualified hands having more service under the management become thrown out of employment.

(b) If any one reasonably and legally claims the post/he/she will be relieved without any emolument for the service rendered till then.

(c) His/her salary will be paid only if and when his/her appointment is got approved from the Department and grant-in-aid in his/her favour is received from Government.

(d) He/she will have no claim for protection or promotion under the Girls/Boys unit of schools under this management.

(e) He/She will be transferred to another Unit of Schools only on condition that he/she opts to become junior most under the new Unit.

-sd/-

Correspondent.

9. A prelude to the various arguments addressed, the Scheme of the Act, enacted with the assent of the President of India, with an object to provide for

the regulation of all the recognised private schools in the State of Tamil Nadu, defines "Educational Agency", "School Committee", "Minority School" and "Private School". Private School could be established only with the permission of the Government, though minority school could be established without such a permission. Reference may be made to Section 4 and Section 9 of the Act. It is incumbent even for the minority school to send a statement containing specified particulars as envisaged by Section 5(2)(c) of the Act in the form provided under the Rules. The competent authority is authorised to grant recognition to the school after satisfying itself with respect to the appropriate arrangements made for the maintenance of academic standing and other conditions prescribed. The functions of the School Committee and the responsibilities of the Educational Agency are enumerated and defined. The Act empowers the State Government to frame rules for regulating the number of teachers, qualifications and conditions of service including promotion, pay, allowances, pension, provident fund, insurance, age, retirement, etc., including the rules with respect to disciplinary matters of the teachers and others persons employed in the private schools. Reference may be to Section 18 and Section 19 of the Act.

10. The Educational Agency of minority Schools is required to apply in Form VI for recognition of the school on the conditions enumerated therein which includes creation of an endowment, pay scale, grant of higher pay scale, bar from collecting fees at the time of admission, carrying out the instructions issued from time to time, safeguarding the interest of the linguistic minorities, maintenance of academic standard, safeguarding the interests of the teachers and pupils. There is no definition provided for qualifications, conditions of service of teachers or other persons, the code of conduct governing the school teachers and other persons. Rules provide for dismissal, removal or reduction in rank or suspension of a teacher or other persons employed in a private school irrespective of the fact it being minority run school. Reference may be made to Rules 8, 9, 15, 16, 17 and Forms V and VI.

11. The State Government in 1977 enacted Tamil Nadu Minority Schools (Recognition and Payment of Grant) Rules (hereinafter referred to as the "Grant Rules") which specifies the requirements to be satisfied by the Management for getting the recognition and payment of grant to the minority schools too. It too provided qualifications for appointment of teachers in minority schools.

12. From the conspectus of the undisputed facts, as referred to above, it emerged, each individual school is an independent entity, with its own seniority of teachers and staff. It is an unit in itself and can be termed as independent and or distinct establishment owned or, may be in some cases, managed by common correspondent or owned and managed by one Society. Schools established represent distinct unit of establishment and does not constitute units of a simple establishment. Persons/teachers and other employees were appointed in a particular school or unit or establishment. No transfer from one unit to another or from one establishment to another is provided either under the statutory rules

or in the conditions of service or by the Act or by the Rules framed thereunder. Grants as well as recognitions were given by the State from school to school as an independent unit or establishment. Corporate Management was never accepted, especially after the coming into force of the Act.

13. Learned Counsel for the parties agreed at the very out set itself that in view of Section 28 of the Act, Question No. 2 has become redundant. Consequently, it calls for no answer, i.e., school committee of minority institution is entitled to stipulate conditions of service for teachers and other employees in private school which are not in conflict with Section 19 read with Rule 15 and Form VII-A.

14. We have heard the arguments of the learned Counsel and gone through the records and the writ petition.

15. Conceptually, freedom to enter into contract of one's free will be a right protected and provided by the Constitution, of course, if we may hasten to add, subject to it being regulated by the statute or by providing imposition of reasonable restrictions in conformity with the right conferred by the Constitution or by common law. Contract, bereft of violation of public policy, or violative of statutory provisions, rules and Act as well as the provisions of the Constitution, is considered to be the freedom of parties privity to the contract. Contract is treated as sacrosanct. It would be reasonable to assume that parties, are the best Judges of their interests as well as free to determine its terms, i.e., their respective obligations under it. Courts cannot rewrite the contract. Neither the terms can be read into the contract merely because it is reasonable to do so nor put meanings different on the words what they plainly and explicitly expressed. Contract has to be seen as a whole in the surrounding circumstances and determined.

16. Learned Counsel for the employees argued that amongst the conditions of service, transfer is one of the conditions, which has neither been provided by the prescription from the statute nor in the contract entered into between the parties. An employee cannot be transferred by the employer except with his consent as it amounts to transfer against the contract of employment, and providing for a new contract. The employer has no power to transfer under the statute. Each school by itself is an independent entity or unit or an establishment, in spite of their being controlled by the common management. There appears to be no proximity of various schools spread over even over the State, in some case country, which are run by the Society, and all the schedule do not constitute either a single unit or establishment, especially when the right has been conferred on the society to establish schools, which by itself, does not carry with it the affiliation or recognition required under the statute as well as the grant which is provided by the State, keeping in view various factors with regard to the establishment of the particular school. Teaching is a personal service, which is incapable of being transferred.

17. Learned Counsel for the teachers relied on the law laid down in :

1. Manager, Pyarchand Kesarimal Ponwal Bidi Factory Vs. Omkar Laxman Thange and Others, . 2. Air Gases Mazdoor Sangh Vs. Indian Air Gases Ltd. and Others, . 3. The Associated Cement Co. Ltd. Vs. P.D. Vyas and Others, . 4. Rohtak and Hissar District Electric Supply Company v. State of U.P. (1996) II L.L.J. 330. 5. General Officer Commanding-in-Chief and Another Vs. Dr. Subhash Chandra Yadav and Another, . 6. Om Prakash Rana Vs. Swarup Singh Tomar and Others, . 7. Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., . 8. Frank Anthony Public School Employees' Association Vs. Union of India (UOI) and Others, . 9. All Bihar Christian Schools Association and Another Vs. State of Bihar and Others, . 10. Christian Medical College Hospital Employees' Union and Another Vs. Christian Medical College Vellore Association and Others, . 11. N. Sampathu Vs. The Chief Educational Officer, Vellore and Others, . 12. Association of University Teachers Vs. State of Tamil Nadu and Another, . 13. T. Chandrasekaran Vs. The Committee of Management of Pachaiyappa's Trust and Others, .

18. Development of law to meet the ground realities keeping in view the mandate of the Constitution it has become axiomatic that aided institutions have to abide by the rules and regulations which are framed by the Government and/or by the affiliating authorities in the matter of recruitment of teachers, staff, their conditions of service, standard of teaching, which are the conditions for grant-in-aid or for recognition. Reference may be made to Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., . From the conspectus of the decisions cited by the learned Counsel for the teachers, the irresistible conclusions that emerge with respect to the law laid down are to the effect :

(i) The contract of employment cannot be transferred by the employer except by consent or where such power is conferred on the employer by the statute.

(ii) In the facts and circumstances, where the Management was running two units, i.e., factory at one place and head Office at the other place, the factory as well as the Head Office were treated separately.

(iii) It is axiomatic principle that subsisting contract of service with one master, unless the contract of service otherwise provides for, or there is consensus of both the parties involving personal service is incapable of transfer.

(iv) Mere transfer of company's assets and liabilities by itself would not bring into existence a contract of service between the employer and the employee from the transferee company to the transfer company. Contract involving personal service is incapable of transfer.

(v) A Division Bench of the Allahabad High Court, in Air Gases Mazdoor Sangh, Varanasi v. Indian Air Gases Ltd. (1977) I L.L.J. 503, observed with reference to the scheme of the relevant Act and the Standing Order, which required to define the conditions of service in the establishment to be reduced into writing to avoid disputes. The standing orders could be framed with respect to the matters

specifically mentioned in the Schedule. It was laid down that where there is no entry with respect to transfer from one unit to another, the employer cannot make provisions for transfer. After referring to *The Associated Cement Co. Ltd. Vs. P.D. Vyas and Others*, and *Rohtak Hissar District Electricity Supply Co. Ltd. Vs. State of Uttar Pradesh and Others*, , the Bench observed to the effect that there is no inherent right to transfer.

(vi) On pari materia reasoning, transfer from one cantonment Board to another, where services were neither centralised nor were State level transfer was held to be the termination of service in one Board and appointment in the other Board. The law laid down was to the effect that the power of transfer can be conferred either by contract of service or by statutory provisions. The power of appointment does not include the power of transfer. Reference may be made to *General Officer Commanding-in-Chief and Another Vs. Dr. Subhash Chandra Yadav and Another*, . In the same context, it was specifically observed that absence of prejudice to the employee in the absence of any condition for transfer is irrelevant. (vii) The Hon''ble Supreme Court observed that power of transfer is not encompassed within the power to appoint as by transfer new contract of employment comes into being i.e., a new appointment comes into existence. Appointment by direct recruitment, promotion or by transfer, by nature, is the same transaction. Transfer involves association of service in one unit and resurrection of service in another unit. Reference may be made to *Om Prakash Rana Vs. Swarup Singh Tomar and Others*, .

(viii) As observed earlier, with reference to *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc.*, , it has been held that there is no difference in minority and non-minority school teachers with respect to service conditions. Reference may be made to *Frank Anthony Public School Employees' Association Vs. Union of India (UOI) and Others*, paras 20 and 22 and *Christian Medical College Hospital Employees' Union and Another Vs. Christian Medical College Vellore Association and Others*, . In *Kundan Sugar Mills Vs. Ziyauddin and Others*, , it was observed, in the context on the facts, where the owner, having purchased another factory and ordered transfer of the worker to the new unit, that right to transfer employees by the employer from one of its units to another is implicit in the contract of service, especially when both formed one unit. It was observed that each concern carried with it different concomitants with respect to different liabilities apart from being at differently situated and to import the term conferring the right of transfer would be really making a new contract, which is basically against the constitutional right of a person to freely enter into a contract, of course, subject to the provisions of the Indian Contract Act.

(ix) Lastly, but not leastly, in *N. Sampathu Vs. The Chief Educational Officer, Vellore and Others*, (which was approved in, *T. Chandrasekaran Vs. The Committee of Management of Pachaiyappa's Trust and Others*, , it was observed that matters relating to transfer of staff in minority educational institutions stand on the same footing as other private schools. In the absence of any specific

statutory power to transfer in the Act or in the Rules or in the Forms, minority institutions have no power, either express or implied or inherent right to transfer vested in the management notwithstanding the fact that the minority schools are not obliged to form school committee. Section 19 and Rule 15 would equally apply to minority schools.

19. Learned Counsel for the respondent put forth his contention that transfer is the plenary power of administration and thus can be termed as the incident of service. In the background of the facts that 13 schools were being run by the society and there is a common correspondent prior to coming into force of the Act, transfers from one school to another were being ordinarily effected. Transfer is part of the internal management. There is no change of employer though there is a change in the place of performance of the contract. The Management, being a corporate body, having separate schools with separate correspondents, and for all the schools there is an educational agency, it was argued that it being a minority institution, the statute would not apply. The society is protected by the umbrella of Article 30(1) of the Constitution and the transfer is an incident of service in the contest of the right to manage the schools. The power of transfer is a plenary power vested in the management. Conditions of service will be governed by the relationship of master and servant in case of minority institution in the absence of any statutory provisions.

20. Learned Counsel for the respondents relied on : 1. Gokulananda Roy Vs. President, District School Board, Burdwan and Others, , 2. Mt. Sembai v. Ganpatrao Yadorao Pande AIR 1944 Nag. 60. 3. The Manager, Corporate Educational Agency, Diocese of Palai and Vs. State of Kerala and Others, etc., . 4. Commissioner of I.T., A.P. v. Cocanada Radhaswami Bank Ltd., Kakinada 1966 S.C.J. 489. 5. Kumari Regina v. St. Alaysius Higher Elementary School (1972)1 S.C.J. 129. 6. T. Venkatesh Vs. Mysore Electrical Industries Ltd., .

21. There is no gainsaying that in Gokulananda Roy Vs. President, District School Board, Burdwan and Others, , it was observed, In the context and text of the case, that right to transfer is an administrative power inherent in the Board and the authority and Form part of the day to day business administration. No statutory conditions are envisaged to confer such a power. It is for the better management and control of the education. If we may has ten to add in the same breath it was observed that power of transfer can reasonably be inferred to be included directly in the power of appointment and it may be regarded as ancillary power. It was in these circumstances held that transfer is an incidental or consequential to the power of appointment. In our considered view the observations having been made in the context of the text of that case, are not attracted to the facts and circumstances of this case. It cannot be held universally that transfer is an incident of service bereft of the facts and circumstances of the case. If we may say it cannot be termed as an incident of service especially where service is governed by the principle of master and servant and the statutory rules do not provide for the same. There are

innumerable factors required for constitutions and terming the transfer as an incident of service i.e., likelihood of change of master, change of terms and conditions of service, place of working, nature of work, general, law of the land, labour laws, measures needed for the need of the society and the regularity provisions enacted by the State. Thus, in our considered view, the above referred to decision, with due respect to the Hon'ble Judges, does not lay down any such universal law that in all facts and circumstances transfer would be an incident of service.

22. The law laid down in *Khem Chand Vs. Union of India (UOI)*, , is again not attracted to the case on hand, as it was considered that right to suspend is an incident of service. Transfer cannot be raised to the pedestal of suspension. Suspension from service, in service jurisprudence as well as under contractual rights, is diametrically a different concept.

23. In *The Manager, Corporate Educational Agency, Diocese of Palai and Vs. State of Kerala and Others, etc.*, , while dealing with the right to appointment of a Head Master in a minority school, it was observed that interference in the right to appoint would be making an inroad in the right to administer which is again not the case on hand or the question which is age in not the case on hand or the questions required to be answered. It was further observed that the requirement to satisfy the test of qualification, experience, essential for the qualities of good teachers would not suffer from the vice of violation of Article 30 of the Constitution of India. It was observed that the regulation in the interest of efficiency, discipline health, sanitation, morality, public order are not the restrictions in substance on the right of the minority institutions. It has been further observed that the protection of Article 30 of the Constitution would not further be available to the aided schools, while relying on the decision reported in *The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another*, , it has to be held that the right to administer does not refer to or include the right to maladminister. Right to administer and prescribing the manner of administration were taken conceptually different.

24. Again in *S.N. Mukerjee v. Kemp & Co.* 1954 L.A.C. 903, observations were made that transfer is implicit in the appointment to any place where the business of the employer is carried on unless there was any express conditions to the contrary in the context of employment are limited to the facts of that case alone.

25. The decision in *Mt. Sembai v. Ganaptrao Yadorao Pande* AIR 1944 Nag. 60, is noticed as it was cited, though the law laid down to the effect that in case of a master and servant and breach of contract courts endeavour is to put the injured party in the same position and every change of master is a new contract and one cannot report to some one other, than the one who has some control over the other, is not relevant to the questions to be answered in the facts and circumstances of the case in hand.

26. From the resume of the observations made above it can be safely concluded

that transfer is not necessarily included in the conditions of service as a term of the conditions of service. Transfer is a specie of the appointment and being one of the modes of appointment, cannot be included in the appointment itself unless it is expressly or impliedly provided for. Thus the assumption that the power to transfer is included in the power of appointment is unsustainable. Power to transfer involving the cessation of appointment would depend upon the nature of the transaction involved. May be in peculiar facts where it does not bring about any alterations of the conditions of service, change of master, change of place, alteration in the terms of appointment, usage prevalent in the statutory provisions, rules and regulations and structure, duration of employment and various other circumstances may provide for a lead that it is an incident of service. The question whether it is an incident of service has to be determined in the facts and circumstances of each and every case and is a question of fact.

27. In our considered view, the Constitution provides right to enter into contracts and the same is protected as a basic right. A registered Society, having a legal personality and having the capacity to act as a legal person, is free to enter into contract resulting in the relationship of master and servant. The mere fact that for a long period before the enactment regulating the relationship of master and servant in aided schools came into force, transferring teachers from one school to another would not deter the courts to bring about a hiatus to enquire into the rights of the management to transfer either under the contract or under the statute or under any law. The management cannot bring about any change in the contract of service without the consent of the employees under the assumption pretending to exercise the power as incidental to the power of administration.

28. As observed earlier, the transfer cannot be termed absolutely as an incident of service when it is neither specifically provided for nor prohibited under the rules and regulations or conditions of service applicable to the teachers and others in a private school. It is only in particular circumstances in the facts and circumstances of each case it can be inferred to be an incident of service.

29. The questions referred to the Full Bench are to be answered on the facts and circumstances of the case as emerge and noticed earlier to the effect that there was no contract of service providing for transfer rather the letter of appointment which is the magna carta of terms of contract conferred a right on the employee to be transferred to another unit of a school only on a condition that if the one seeking transfer opts to become the junior-most in the new unit. The schools have been treated as separate units. Recognition and affiliation are given to the school, not to the management. Separate seniority list is maintained in each individual schools and admittedly there is no common seniority list. Grant-in-aid is provided to each school as a unit and not to the society. Society is at liberty to establish new schools and one joining in one unit cannot assume at the time of appointment that the Society is likely to set up another unit in a different place nor there is any just expectation that he is likely to be transferred to the new unit. Thus the dichotomy of the terms and conditions and the basic principle of

freedom to enter into contract and sanctity attached to the contract with right to rewrite the contract and read into the terms the right to transfer merely because it is reasonable to do so and putting the meaning to the words differently what they clearly and expressly provide for cannot be termed as an incident of service in order to determine the surrounding circumstances as referred to above other relevant factors will be taken into consideration whether it is an incident of service or not. Transfer has either expressly or impliedly to be provided for by the statute or by the contract or must be inherent in the nature of contract or subject matter or the circumstances leading to the conclusion that the parties by necessary implication have intended it.

30. As observed in the earlier part of the judgment, in view of the facts and circumstances of this case, transfer cannot be termed as an incident of service especially when it is neither specifically provided for in the contract nor in the rules and regulations nor in the conditions of service applicable to teachers and others in private schools. No express provisions for transfer is needed when it cannot be termed as an incident of service and cannot be read into it. Rather the appointment condition i.e., one has to become junior-most teacher on being transferred in terms of the contract. Consequently, Question No. 1 is answered in the negative i.e., right to transfer always depends on innumerable facts, incapable of itemised.

31. In view of the observations made above, and the findings rendered that there is no minority corporate management recognised by the authorities and the transfer is not an incident of service, the contract does not provide for the minority institutions being affiliated as one as aided cannot transfer the teachers in the different units established and administered by it and it has no inherent power to transfer. Consequently, Question No. 3 is answered in negative.

32. In view of the observations made in the earlier part of the judgment, the right to transfer is not in all circumstances cannot be taken into the fold of administration. It will depend upon peculiar facts and circumstances of each case. There cannot be any absolute rule that right to transfer is a right to administer minority institutions, protected under the umbrella of Article 30 of the Constitution of India. Consequently, question No. 4 is also answered in negative.

33. We are of the further considered view, that, even on facts, the letter of appointment, leads to an irresistible conclusion that transfer is neither a term of contract, nor an incident of service, nor is provided for under the statutes governing the parties.

34. The reference is answered as above.

35. Nothing further survives to decide and no other question raised either on fact or law to dispose of the writ petitions and writ appeals on merits. Consequently, the writ appeals are dismissed and the writ petitions are also dismissed.