

(2015) 10 MAD CK 0075

In the Madras High Court

Case No : Writ Appeal No. 1307 of 2009

The Correspondent/Principal Arokiamada Matriculation Higher
Secondary School

APPELLANT

Vs

Tmt. T. Sorubarani and Others

RESPONDENT

Date of Decision : 15-10-2015

Acts Referred:

Constitution of India, 1950 — Article 19(1)(g), 22, 226, 30(1)

Citation : (2015) 6 CTC 129 : (2016) 148 FLR 940 : (2016) LabIC 341 : (2016)
1 LLN 163 : (2015) 5 LW 544 : (2015) 8 MLJ 257

Hon'ble Judges : Sanjay Kishan Kaul, C.J., T.S. Sivagnanam and Pushpa
Sathyanarayana, JJ.

Bench : Full Bench

Advocate : Fr.A. Xavier Arulraj, for the Appellant; S.N. Ravichandran, for the
Respondent

Judgement

Pushpa Sathyanarayana, J.—The law without justice is like the grain bereft of its fibre. For it is justice which like the fibre of the grain provides the texture that nourishes and sustains. Constitutional interpretation must likewise nourish and sustain.

2. Private Schools on warpath. The reason is an erosion of the autonomy of private schools. In the development of nation, post-independence India is attributable to the efforts of private schools. The implementation of Right to Education Act itself has aroused widespread indignation within the community of private school promoters. Many of them have invested their life-savings into educational institution bench-marked with the best.

3. Educational institutions both schools and colleges are organized by the Government, local bodies like Municipalities and Zilla Parishads, as also by the private organizations. The quality of education or learning outcome is integrally linked to the quality of teachers. Great teachers can make a huge difference to a child. But not every school has great teachers. There are many excellent

teachers in India today and they have been doing a great job unsung and unnoticed for years. 50% children in urban India get admitted in private schools. Bearing in mind the implementation of the Right to Education Act, private unaided schools also have to admit minimum 25% students of their capacity from disadvantaged sections. While teachers' salaries in these schools are low, the pupil - teacher ratio is higher, since they hire more teachers. The issue before us in this matter revolves around the fixation of pay scales of the teachers of the unaided schools on par with the teachers working in Government schools. It is true, good teachers ought to be paid as well as other professions if not more. We need to ensure the salaries of good teachers are far higher than what they are now and figure out the ways to evaluate teacher performance. But the organization of educational institutions in the private sector has been subject to regulation by the State in varying degrees from time to time. It may not be necessary to trace the entire history of such regulation by the State of the various educational institutions. The scales of pay and other conditions of service of teachers and other employees of the private schools may not necessarily compare favourably with those of their counterparts of the Government.

4. In view of the above reference, the question falls for our consideration is,

"Whether the obligation of the State to provide free and compulsory education, can force private educationists over which the Government has no administrative control to ensure equal pay for equal work?"

5. Pursuant to the conversion of Matriculation Schools to the control of Board of Matriculation Schools, the private Schools are guided by the Code of Regulations for Matriculation Schools [hereinafter referred to as "the Code"]. The fact remains that the appellant is an unaided Christian minority school established and administered by a society of Catholic nuns for which, indisputably, the recognition was obtained only on the basis of the said Code.

6. The ruling, which this Full Bench is called upon to render, is guided by pronouncements of the Hon'ble Apex Court. The verdicts of the Hon'ble Supreme Court, particularly, in the land mark cases like T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, and P.A. Inamdar and Others Vs. State of Maharashtra and Others, , expanded the fundamental right conferred by Article 30(1) of the constitution of India upon all linguistic and religious minorities to "establish and administer educational institution of their choice" through transparent merit-based admission system and reasonable fees.

7. We are concerned about the regulatory guidelines of privately promoted educational institutions. After the VI Pay Commission raised the monthly remuneration of Government school teachers even at the entry level, private schools also had to raise teachers' salaries substantially, if not follow strictly. But the State Government had imposed ceiling on tuition fees by appointing Fee Monitoring Committee following the judgment in Islamic Academy of Education and Another Vs. State of Karnataka and Others, which, to certain extent,

diluted the freedom given by the judgment in T.M.A. Pai Foundation case (cited supra).

8. It is normative for Government to provide free education with private educators having freedom to run their schools. To put it in a nutshell, whether the obligation of the State to provide free and compulsory education can force private educationists to provide schooling on the principle of equal pay for equal work merely on the executive instructions which have no statutory force, is the question raised.

9. On the earlier occasion, a learned single Judge of this Court in K. Tamilchelvi v. The President/Special Officer, The Kallakurichi Cooperative Sugar Mills Matriculation Higher Secondary School, Villupuram, vide order dated 05.6.2012, rejected the plea of a teacher to direct the Management to implement the VI Pay Commission with effect from 01.01.1996 in terms of G.O. Ms. No. 162, Finance (Pay Cell) Department dated 13.4.1998. Per contra, a Division Bench of this Court in The Special Officer, Salem Co-operative Sugar Mills, Matriculation Higher Secondary School Vs. All Teachers Front--> , after referring to various judgments, vide judgment dated 28.4.2008, came to the conclusion that the Matriculation School teachers are entitled to get equal pay on par with the teachers who are working in the Government Schools. Subsequently, another Division Bench in the case of The Correspondent Rev. Fr. John Alexander, Don Bosco Matriculation Higher Secondary School v. J. Lourduraj and others [W.A. Nos. 453 and 587 of 2014, disposed on 22.8.2014] expressed the view contra to the view taken by the earlier Division Bench and held that it is for the employer to fix the retirement age of an employee and the same cannot be held as unreasonable or arbitrary. Significantly, the judgment rendered by the former Division Bench was challenged before the Hon"ble Apex Court in S.L.P. (Civil) No. 26743 of 2008 in which stay was granted on 17.11.2008.

10. The issue got triggered with the filing of writ of mandamus in W.P. No. 604 of 2004 by one Sorubarani, since deceased, who joined the service in the year 1989 under the appellant management, viz., Arokiamada Matriculation Higher Secondary School, Pollachi, and was subsequently terminated in 2001, seeking for direction to the Management for implementation of pay fixation on par with the teachers in the Government Schools. The learned single Judge by order dated 09.6.2009, allowed the Writ Petition directing the Management to fix the scale of pay guided by Rule 16(ii) of the Code of Regulations for Matriculation Schools. Challenging the same, the Management has preferred the present Writ Appeal. Since the earlier judgment on the same lines was sub-judice before the Hon"ble Supreme Court, this Writ Appeal was kept pending and in view of the pronouncement of the judgment in S.L.P. (C) No. 26743 of 2008 on 22.7.2014 dismissing the Special Leave Petition preferred by the Management, the present reference is before this Larger Bench.

11. This is how we have been called upon to decide the question whether the Private Schools are liable to adopt the fixation of pay scale to its teachers on par

with their counterparts in Government Schools.

12. The brief background, leading to the aforesaid question is that the Hon''ble Supreme Court in T.M.A. Pai Foundation case (cited supra) has held that fees to be charged by the unaided educational institutions cannot be regulated. The Larger Bench (11 Judges) in paragraph 161 of the said judgment upheld the financial autonomy of the unaided private schools and the relevant passage is extracted hereunder:--

"Q.5. (c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and Principal including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to an university or board have to be complied with, but in the matter of day-to-day management like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a Judicial Officer of the rank of District Judge.

The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the state, without interfering with the overall administrative control of the management over the staff.

Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee."

13. The above said judgment was further interpreted by the Constitution Bench of the Hon''ble Supreme Court in Islamic Academy of Education case (cited supra) which was echoed in P.A. Inamdar case (cited supra).

14. As regards the day-to-day administration of the minority unaided educational institutions asking for affiliation or recognition, the Constitution Bench of the Hon''ble Apex Court in P.A. Inamdar (cited supra), held that there can be no interference by the Executive body. In paragraph 121 of the judgment, it has been observed as under:--

"Minority unaided educational institutions asking for affiliation or recognition Affiliation or recognition by the State or the Board or the University competent to do so, cannot be denied solely on the ground that the institution is a minority educational institution. However, the urge or need for affiliation or recognition brings in the concept of regulation by way of laying down conditions consistent with the requirement of ensuring merit, excellence of education and preventing mal-administration. For example, provisions can be made indicating the quality of the teachers by prescribing the minimum qualifications that they must possess and the courses of studies and curricula. The existence of infrastructure sufficient for its growth can be stipulated as a pre-requisite to the grant of recognition or affiliation. However, there cannot be interference in the day-to-day administration. The essential ingredients of the management, including admission of students, recruiting of staff and the quantum of fee to be charged, cannot be regulated. (para 55, Pai Foundation)"

15. As regards the relationship between the Management and its staff, the Hon''ble Supreme Court in T.M.A. Pai Foundation's case (cited supra), inter alia observed that the teachers and the institutions exist for the students and not vice versa. Where allegations of misconduct are made, it is imperative that a disciplinary enquiry is conducted and that a decision is taken. In the case of a private institution, the relationship between the Management and the employees is contractual in nature.

16. Simultaneously, it would also be relevant to go into the question as to how far and to what extent unaided private institutions can be subjected to regulations.

17. Indisputably, the standard of education, the curricular and co-curricular activities available to the students and various other factors are matters which are relevant for determining of the fee structure. It is pertinent to point out that the Matriculation Schools are depending upon the fees paid by the students to meet out the expenditure on the salary of its teaching and non-teaching staff, maintenance of campus, water and electricity charges. To provide good quality of education to the standards, they have got the right to establish and administer their educational institutions and any regulation on pay parity by the unaided schools is impermissible as it infringes the Fundamental Right of the unaided educational institutions whether belonging to minorities or otherwise to practice any profession or to carry on any occupation, trade or business, which is available under Article 19(1)(g) of the Constitution of India. This law imposing the restrictions thereunder cannot be said to be in the interest of general public. Moreover, the Matriculation Schools are not financially supported by the

Government. In such circumstance, any direction issued to the Management with regard to fixation of pay on par with the teachers in the Government Schools would only have adverse effect on the quality of education provided by them.

18. Again, in T.M.A. Pai Foundation case, in paragraph 54 of the judgment, Their Lordships observed as under:--

"The right to establish an educational institution can be regulated; but such regulatory measures must, in general, be to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of management. The fixing of a rigid fee structure, dictating the formation and composition of a government body, compulsory nomination of teachers and staff for appointment or nominating students for admissions would be unacceptable restrictions."

19. In order to appreciate the issue in hand, it is necessary to refer to the relevant provisions of the Code. Annexure VII read with Article 22 of the Code deals with the code of conduct for teachers and other persons employed in a Matriculation School as per which every teaching and non-teaching staff of a Matriculation School enters into an agreement. It is also to be seen that there is no clause of precondition to give salary on par with the Government teachers. Moreover, the Code of Regulations for Matriculation Schools is only a Code and only an enabling provision, which has no statutory effect and cannot be enforced in a Court of law.

20. Though reliance is placed on Section 16(ii) of Chapter V and 18 (ii) of Chapter VI of the Code for pay parity, it is not denied that the Hon"ble Supreme Court had, on more than one occasion, held that the Government cannot regulate the salary structure of the unaided institutions as the same is a matter of contract between the teacher and the school which is outside the domain of public law.

21. There cannot be any rigidity in respect of salary payable to the teachers. Any such stipulation would interfere with the overall administrative control by the Management and would infringe its rights to establish and administer the educational institutions.

22. Regarding maintainability of a Writ Petition seeking pay parity, the Hon"ble Apex Court in Sushmita Basu and Others Vs. Ballygunge Siksha Samity and Others, held in paragraph 4 of the judgment as under:--

"In this context, we must also notice that the Writ Petition in the High Court is filed for the issue of a writ of mandamus directing a private educational institution to implement the recommendations of the Third Pay Commission including their implementation with retrospective effect. Even the decision relied on by learned counsel for the appellants, namely, K. Krishnamacharyulu and Others Vs. Sri Venkateswara Hindu College of Engineering and Another, shows that interference under Article 226 of the Constitution of India to issue a writ of

mandamus by the court against a private educational institution like the first respondent herein, would be justified only if a public law element is involved and if it is only a private law remedy no Writ Petition would lie. We think that even going by the ratio of that decision, a writ of mandamus could not have been issued to the first respondent in this case."

23. Subsequently, in *Mrs. Satimbla Sharma and Others Vs. St. Paul's Senior Secondary School and Others*, , the Hon"ble Apex Court in paragraphs 23 and 25 observed in the following words:--

"Para 23: We also do not think that the Court could issue a mandamus to a private unaided school to pay the salary and allowances equal to the salary and allowances payable to teachers of Government schools or Government aided schools. This is because the salary and allowances of teachers of a private unaided school is a matter of contract between the school and the teacher and is not within the domain of public law.

Para 25: "Where a statutory provision casts a duty on a private unaided school to pay the same salary and allowances to its teachers as are being paid teachers of Government aided schools, then a writ of mandamus to the school could be issued to enforce such statutory duty. But in the present case, there was no statutory provision requiring a private unaided school to pay to its teachers the same salary and allowances as were payable to teachers of Government schools and therefore a mandamus could not be issued to pay to the teachers of private recognized unaided schools the same salary and allowances as were payable to Government institutions."

24. Their Lordships, while confirming the view taken by the Division Bench of High Court of Himachal Pradesh, have also held to the following effect:--

"... teachers of Private Unaided Schools had no right to claim salary equal to that of their counterpart working in Government Schools and Government Aided Schools, and the reliance placed claiming equivalent salary under Clause 5(b) of the Council for Indian School Certificate Examinations stating that salary, allowances and other benefits of the staff of the affiliated school must be comparable to that prescribed by the State Department of Education as the said condition for provisional affiliation are not statutory and are not enforceable."

25. In *T.M.A. Pai Foundation* case, the Hon"ble Supreme Court also observed that while granting recognition to private unaided institution, authority can lay down conditions consistent with requirement to ensure excellence of education.

26. Thus, the issue regarding claim of salary by unaided school staff on par with the Government School/Aided School staff is no longer *res integra*. In order to avoid prolixity, we have not reiterated the arguments and considerations which have already been raised before the earlier Division Benches. Also, since the learned single Judge has gone into the judgments of the Hon"ble Supreme Court in detail, we have not repeated the observations here again.

27. This Court would also like to place on record that even the staff of the State Government are not paid salary on par with their counterparts of the Central Government. In such situation, the State Government cannot force the Management of a private school to pay salary to its staff on par with the staff of the State Government, which, in the considered opinion of this Court, will indirectly forcing the institution to surrender the fundamental right guaranteed under Article 30(1) of the Constitution of India.

28. It is settled law that writ of mandamus could be issued only if a public law element is involved. In the instant case, no public interest is involved. In view of the clear and unambiguous legal proposition set out by the Hon''ble Supreme Court in its various decisions and the fact that the Code is only an enabling provision and not statutory, there can be no manner of doubt that the private institutions are at liberty to fix their own norms in administration with reasonable restrictions. As such, no direction can be issued against an unaided private institution to enforce the policy of the Government in its administration.

The reference is answered accordingly.