

(1978) 11 MAD CK 0036

In the Madras High Court

Case No : Writ Petition No. 2885 of 1972

Velayudham Junior Basic School, Srivilliputtur

APPELLANT

Vs

The District Educational Officer, Virudhunagar

RESPONDENT

Date of Decision : 24-11-1978

Acts Referred:

Constitution of India, 1950 — Article 226

Tamil Nadu Elementary Education (Amendment) Act, 1939 — Section 14

Citation : AIR 1979 Mad 167 : (1979) 92 LW 174

Hon'ble Judges : Ramaprasada Rao, C.J.;Varadarajan, J;Ramanujam, J

Bench : Full Bench

Judgement

Ramaprasada Rao, C.J.—The Correspondent-Manager of Velayudham Junior Basic School, Srivilliputtur, seeks for the issue of a writ of certiorari or such other writ or direction calling for the records culminating in the challenged order dated 3-10-1972 passed by the respondent and to quash the same and for other incidental directions. Though the petitioner-institution was founded in 1908, we have authentic information from the records that it was granted permanent recognition, under the Madras Elementary Education Act, 1920 (VIII of 1920) which held the filed till Madras Act 2 of 1939 was passed. The school is a Junior Basic School catering to the needs of the pupils in Srivilliputtur and is said to be popular. On account of wilful neglect of duty, gross insubordination and activities prejudicial to the institution, one of the teachers, R. Sakuntala Kanakabai's services were sought to be dispensed with for which purpose permission was sought from the Deputy Inspector of Schools for such due termination of service. On refusal by the authority to accord such permission, the petitioner on 11-5-1960 terminated her services by giving her three months' notice and the teacher was discharged from service after the expiry of the period. On representations made by the aggrieved teacher, the District Educational Officer, on 11-1-1971, set aside the order of termination and the teacher was directed to be reinstated. A further appeal by the petitioner-institution to the Chief Educational Officer, Ramanathapuram, against the order of the District

Educational Officer was unsuccessful. The Chief Educational Officer rejected the appeal of the petitioner-institution on 22-6-1971. Thereafter the District Educational Officer Virudhunagar, issued a show cause notice to the petitioner on 27-7-1972 invoking R. 28-A of the Rules for the Grant of Recognition and Aid to Elementary Schools. The main ground on which recognition was proposed to be withdrawn was the failure of the institution to reinstate the discharged teacher in due compliance of the orders of the educational authorities. The institution gave an explanation, pleading that there was no ground for withdrawing the recognition, and also made it clear that it wanted to file a suit for a declaration that the termination of the service of the teacher was valid and legal. Notwithstanding this a final order was made by the authorities on 3-10-1972, wherein they reiterated their stand that under Rs. 28 and 28-A of Chap. I in Part II of the rules relating to Elementary Schools, the order was justified. The institution was also informed that the Manager-Correspondent had dealt with the properties of the school for private purposes and that, the institution having disobeyed the orders of the authorities and having violated the conditions of the grant, the order of de-recognition would stand. It is this order which is being questioned in this Writ Petition.

2. In the pleadings the case of the institution is that the relationship between the teacher and the institution was that of an employer and employee, that the employment was purely contractual and that such a contract was not controlled or enlarged by the rules relating to the recognition of elementary schools. It was therefore stated that the remedy, if any, of the discharged teacher, was only to take action against the management for the alleged wrongful termination. In that context it is stated that the respondent cannot impose the services of a teacher on them and direct her reinstatement on the erroneous view that the termination of the teacher in question was not in accordance with the rules governing grant-in-aid, etc. It is admitted that the rules which have been alleged to have been violated in terminating the services of the teacher are non-statutory and that no enforceable or justifiable right can ever be claimed by the aggrieved teacher against the institution. Contemporaneously it is pleaded that such an action of the part of the management cannot be a ground for withdrawal of recognition of the institution and that therefore the challenged order is illegal and void. It is stated that in passing the order the principles of natural justice have been violated. The further plea is that the institution is not guilty of any default or failure to implement or obey the orders of the authorities. Having admitted that the institution has filed a Civil Suit, as already referred to, the plea is that there is no other statutory or other remedy to question the order and that therefore it became necessary for the petitioner to invoke the extraordinary jurisdiction of this Court under Art. 226 of the Constitution of India.

3. In the counter-affidavit filed by the Deputy Director School Education, the position taken is that the charges levelled against the teacher, Selvi. R. Sakuntala Kanakasabai, were not genuine and that therefore approval for the termination of the services of the said teacher was refused. The complaint is that

the management arbitrarily dispensed with the services of the teacher and that therefore the educational authorities had to interfere in appeal. As such dispensation of service was on inadequate and false grounds. According to the respondent the Department was satisfied that the discharge of the teacher was not for the reasons contemplated in R. 13(2)(11)(b) of the Rules. The further complaint is that before the issue of the notice of termination of the services of the teacher, the procedure prescribed in R. 13(2)(11)(b), which enjoins consultation with and approval by the Deputy Inspector of Schools, was not followed and that the appellate order made by the District Educational Officer to reinstate the teacher was not respected by the management. In this context it is stated that the conduct of the institution resulted in violation of the conditions for the recognition and aid and that therefore withdrawal was proposed, and in order to satisfy the provisions of the rules, a show cause notice was issued and ultimately the challenged order was passed. The defence is that the reinstatement of the teacher was ordered in strict conformity with the rules governing the administration of aided schools and that, as the termination was on inadequate grounds and also in the teeth of the rules under which the grant was made, the teacher was directed to be reinstated. As the prior approval of the Deputy Inspector of Schools was not obtained. The order challenged has been validly made. The rules relating to elementary schools are rules made for the administration of aided institutions constituted by the Government and recognition and aid are granted under the rules and likewise withdrawal of recognition and aid is also taken up with reference to the same rules. As such withdrawal is based on the rules framed and as R. 28-A provides for such withdrawal if any of the conditions of recognition is violated by any aided institution, and as the Correspondent failed to carry out the orders of the Department, there has been an open violation of the conditions of recognition and in that sense also the order cannot be challenged.

4. The Writ Petition originally came up before Koshal, J. The learned Judge made the following order :--

"In Kumari Regina Vs. St. Aloysius Higher Elementary School and Another, it was held that Part II of the rules relating to Elementary Schools, which regulate the grant of recognition and aid to such schools, were non-statutory in character, that the enforcement thereof was a matter between the Government and the management of elementary schools and that third party, such as a teacher aggrieved by some order of the management would not derive from the rules any right enforceable against the management on the ground of a breach of or non-compliance with any of those rules. Relying on this verdict, Ramaprasada Rao, J., decided a writ petition on the 9th October, 1971, holding that, the said rules being non-statutory in character, they could not be enforced even by the management of a school against whom an order by the Educational Authorities was passed in breach thereof.

In Illathar Valibar Sangham Higher Elementary School, Tuticorin v. Government.

of Tamil Nadu (W. P. No. 6599 of 1973) decided by me on the 5th of Aug. 1976 (Mad), the dictum of their Lordships of the Supreme Court in Regina's case (supra) as also the judgment of Ramaprasada Rao, J., were brought to my notice and following the same, I held that no remedy by way enforcement of the said rules was available to a school under Art. 226 of the Constitution of India for the reason that the rules were non-statutory in character. However, learned counsel for the petitioner has drawn my attention to a Bench decision of his Court reported in Government of Madras v. Ramanujulu Chetty Elementary School 1973 86 MLW 440. Wherein Veeraswami, C. J. and Raghavan, J. held that, by reasons of provisions of S. 14 of Madras Act II of 1939, a school which was enjoying recognition earlier would continue to enjoy the same on a statutory basis and that such a recognition could not be withdrawn by an administrative decision (such as can be taken under the rules above mentioned). It is contended on behalf of the District Educational Officer that this Bench decision runs counter to the dictum of their Lordships of the Supreme Court above referred to. As it is, I am of the opinion that it is a matter of considerable importance and merits consideration at the hands of a Full Bench of this Court. I, therefore, direct that the records be laid before my Lord the Chief Justice with a request that a Full Bench may be constituted to decide this case."

5. The order of reference says that there is a conflict between the ratio of the Supreme Court in Kumari Regina Vs. St. Aloysius Higher Elementary School and Another, and the Bench decision of this Court in Government. of Madras v. Ramanujula Chetty Elementary School 1973 86 MLW 440. It is in these circumstances that this petition has been placed before us for a final decision on the question.

6. The Division Bench of this Court in the decision referred to above held that, after the passing of Madras Act 2 of 1939, the rules relating to elementary schools, including the rules for the grant of recognition and aid to elementary schools in Part II therein, in so far as they applied to recognition given before 1939, were statutory and that therefore a writ could issue, and that any order by the authorities passed in the discharge of their functions, while administering such rules, could not be sustained, if they were contrary to the provisions of the Act. We are not inclined, in this case, to set out the history of the development of elementary education in the State : In fact, it has been referred to in detail in the judgment of Kailasam, J. in Sri Hindu Bala Patasala Vs. Director of Public Instruction and Others, . We shall, however, refer to the salient provisions of the Act which are necessary for our purpose. When Madras Act 2 of 1939, the Madras Elementary Education (Amendment) Act, 1939, was passed, it purported to serve certain purposes specifically dealt with therein. Section 14 of Act 2 of 1939 reads as follows :--

"All orders of recognition in respect of elementary schools and all orders admitting elementary schools to aid, made or deemed to have been made by a District Educational Council before the commencement of this Act under Ss. 41

and 42 of the said Act respectively, shall be deemed to have been made by the Director of Public Instruction or by such authority as may be empowered by him after this Act comes into force to grant recognition to elementary schools or to admit elementary schools to aid, as the case may be, and any such order shall be liable to cancellation or modification as if it had been made after the commencement of this Act."

7. Chapter IV of the Madras elementary Education Act, VII of 1920, dealt with the recognition of elementary schools and grant-in-aid to such schools. Section 41 empowered the District Educational Council to grant such recognition, with or without conditions, and, in a like manner, to cancel or suspend any order granting such recognition. An appeal was provided to the Director or Public Instruction in regard to such an order. A suo motu power was also vested in the Director of Public Instruction to modify or cancel any order of recognition or interfere with any such order granting recognition or cancelling recognition or suspending any order granting recognition. Section 41(5) made it clear that all orders of recognition in respect of elementary schools made by the Director of Public Instruction or by an Inspector of Schools, before this Act came into force, shall be held to have been made under that section. Section 42 enabled the management of elementary school to seek for grant-in-aid and such an application for aid shall also be dealt with in the same fashion as an application for recognition. The amended provisions referred to above made all orders of recognition in respect of elementary schools and all orders admitting elementary schools to have made or deemed to have been made by the District Educational Council before the commencement of Madras Act 2 of 1939, and under Sections 41 and 42 of Madras Act VIII of 1920, as if they have been made by the Director of Public Instruction or by such authority as may be empowered by him, after Madras Act 2 of 1939 came into force, granting recognition to elementary schools or admitting elementary Schools to aid, as the case may be, and any such order shall be liable to cancellation or modification, as if it had been made after the commencement of Madras Act 2 of 1939. The primary question argued before us is whether under S. 14 of Madras Act 2 of 1939, any order of recognition or de-recognition or any order admitting elementary Schools to aid or withdrawing such aid, and made after the passing of Madras Act 2 of 1939, would be an order passed under the provisions of Madras Act VIII of 1920, or whether it would be an order passed by the appropriate authority after the commencement of Madras Act 2 of 1939. It is on the interpretation of this part of S. 14 of Madras Act 2 of 1939 that the entire argument of counsel rests. The Division Bench of this court in *Government of Madras v. Ramanujulu Chetty Elementary School*, (1973) 86 MLW 440, while agreeing with Kailasam, J., observed :

"It may be seen that recognition accorded to the respondents originally under the provisions of the Act was continued statutorily by reason of S. 14 of Madras II of 1939. That amounts to a statutory sanction of the continued recognition."

On the plain language of S. 14 of the Act, we are not able to agree with this

interpretation. It would not have been difficult for the Legislature to have made in the amending Act itself provisions similar to Ss. 41 and 42 of Madras Act VIII of 1920. On the other hand, it is seen that Chapter IV dealing with recognition and grant-in-aid to elementary schools has been omitted by S. 5 of Madras Act 2 of 1939. Such a precision, specificity and definiteness in the language of the amended Act should be borne in mind while interpreting S. 14 of Madras Act 2 of 1939. The language deployed in S. 14 of Madras Act 2 of 1939 clearly indicates that all orders of recognition and orders admitting elementary schools to aid, under Ss. 41 and 42 appearing in Chapter IV (of Act VIII of 1920) which has been omitted, shall be deemed to have been made by the Director of Public Instruction or such appropriate authority empowered in that behalf, after Madras Act 2 of 1939 comes into force, to grant recognition to elementary Schools or to admit elementary schools to aid. A legal fiction therefore come in to play and makes the quondam orders of recognition, as if passed by the Director of Public Instruction, who is the authority to grant such recognition "or admit" elementary schools to aid after Madras Act 2 of 1939 comes into force. It is at this stage that the rules relating to elementary schools framed under the Madras Elementary Education Act, 1920, loom large. These rules were admittedly rules made by the Executive to carry out all or any of the purposes of the Act. They were framed under S. 56 of the Parent Act. After the commencement of Madras Act 2 of 1939 the District Educational Officer is the person, who has been apparently authorised by the Director of Public Instruction in that behalf, to pass an order of recognition or admit an elementary school to aid. The Division Bench of this court took the view that all quondam orders passed by the District Educational Council under Ss. 41 and 42 of the Parent Act shall be deemed to have been made under Act 2 of 1939 and hence they would be orders made under the provisions of a statute. With the utmost respect to the learned Judges, we are unable to agree, as S. 14 makes it clear that by operation of a statutory fiction such orders shall be deemed to have been made by the Director of Public Instruction or by such other authority empowered by him, after the commencement of Madras Act 2 of 1939, to grant recognition to elementary schools or to admit elementary schools to aid. In our view therefore this would be an executive order made by the rule making authority under its non-statutory powers derivable from the rules framed in Part II of the Rules Relating to Elementary Schools and in particular touching upon the grant of recognition and aid to such schools. It is common ground that after Madras Act 2 of 1939 has become law, such grant of recognition and aid to elementary schools could only be made under the rules relating to elementary schools. In our opinion, therefore, it cannot be said that the recognition accorded to the petitioner-institution originally under the provisions of Madras Act VIII of 1920 was continued statutorily by reason of S. 14 of Madras Act 2 of 1939. On the other hand, by the operation of the legal fiction created under S. 14 of Madras Act 2 of 1939, any recognition and grant-in-aid granted to the petitioner-institution should be deemed to have been so made or granted only under Part II of the rules relating to elementary Schools.

8. Having reached this position, it is obvious, as per the decision of the Supreme Court in *Kumari Regina Vs. St. Aloysius Higher Elementary School and Another*, , that the enforcement of such rules is a matter as between the Government. And the management and that such rules being non-statutory in character, could not be enforced even by the management of any school against whom an order by the educational authorities has been passed in an alleged breach thereof. Learned Counsel for the petitioner before us very fairly concedes that the rules made in part II of the rules relating to elementary schools are non-statutory in character and that any order passed thereunder either in the matter of recognition or in the matter of grant-in-aid is pursuant to the non-statutory rules. It is fundamental that whatever may be the remedy the petitioner may have in common law against the respondent or the State, as the case may be, in such circumstances, it cannot seek the aid of Article 226 of the Constitution. We are reinforced in our view by another decision of the Supreme Court in *Cyril E. Fernandes Vs. Sr. Maria Lydia and Others*, , which reiterated their earlier opinion in *State of Assam and Another Vs. Ajit Kumar Sharma and Others*, . The Supreme Court observed (at p. 2147):--

"Where such 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. 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. On the other hand, if the college accepts the conditions contained in the instructions, it receives the grant-in-aid. 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 is, however, a matter between the Government and the private college concerned. Such conditions and instructions as to grant-in-aid confer no right on the teachers of the private colleges and they cannot ask that either a particular instruction or condition should be enforced or should not be enforced."

9. The position therefore is that, following the decision in *Kumari Regina Vs. St. Aloysius Higher Elementary School and Another*, , which held in unambiguous terms that the rules in Part II of the rules relating to Elementary Schools are non-statutory in character, it cannot be said that the order of derecognition, such as the one challenged in the case, springs from the exercise of a statutory power purporting to be under S. 14 of Act 2 of 1939.

10. On merits also it is clear that under Part II of the Rules relating to Elementary Schools the authority has the power to cancel a quondam grant. In the show-cause notice issued by the respondent rules 28 and 28-A of the Rules for the grant of Recognition and Aid to Elementary Schools have been invoked. This is a case in which the appropriate authority did not agree with the management in the matter of the termination of the services of the teacher. On and from the date when the challenged order was made the petitioner-

management did not pay any salary to the concerned teacher. Rule 28 contemplates that recognition may be withdrawn if the salary of any teacher in the school is not being paid to him or her in accordance with the instructions set forth in the service register. Rule 28-A says that the recognition may be withdrawn if any of the conditions of the recognition are violated. It is also seen from rule 13(2)(ii)(b) of the rules that the management of a school shall have the power to terminate the services of any member of the staff after having given three months' notice or three months' salary in lieu thereof for wilful neglect of duty, serious misconduct, gross insubordination, etc., provided that in such cases, before the issue of the notice, the Deputy Inspector of Schools is consulted and his approval obtained by the management about the propriety of such action. It is common ground that no such approval was obtained. There is enough material on record to show that under the rules recognition could be withdrawn, because one of the conditions of recognition, namely, That in the case of dispensation of service of a teacher the prior approval of the Deputy Inspector of Schools should be obtained, was not complied with.

11. Even on merits there appears to be no case available to the petitioner to challenge the order. We are, however, not expatiating on this since the petitioner is free to enforce its rights in a proper forum, having regard to the later enactment, Tamil Nadu Act 29 of 1974, which again brought to the anvil the process in and by which recognition is provided to private schools under the statute. (Vide Ss. 11, 12 and 13 of Tamil Nadu Act 29 of 1974). If the petitioner has any right the new enactment of 1974, it is still open to it to agitate them in the correct forum. But, as matters stand, and as in our view the rule in *Kumari Regina Vs. St. Aloysius Higher Elementary School and Another*, has to prevail, and as such rules are non-statutory in character, we are unable to issue a writ of certiorari under Article 226 of the Constitution. Though a Writ of certiorari is a writ of right, is not a writ of course, and generally is refused where there is an alternative remedy available by which the challenge can be otherwise agitated and adjudicated. The court has sometimes a discretion also to refuse the rule when there are no reasonable grounds for the issue of the same, and if it is satisfied that a writ ought not to issue in the peculiar circumstances of the case. In the instant case, we are not satisfied that such a writ of course ought to issue since it is a writ of right. Having regard to the attitude of the petitioner, who has violated the rules under which the recognition had been granted, we are unable to exercise the discretion, for that reason also.

12. In the result the writ petition fails and is dismissed. There will be no order as to costs.

13. Petition dismissed.