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IN THE HIGH COURT OF MADRAS

Writ Petition No. 30928 of 2015

Decided On: 29.02.2016

Appellants: **Amalorpavam Higher Secondary School**
Vs.

Respondent: **Union of India and Ors.**

Hon'ble Judges/Coram:

Sanjay Kishan Kaul, C.J. and Pushpa Sathyanarayana

ORDER

Sanjay Kishan Kaul, C.J.

1. The petitioner, an unaided private minority school, seeks to lay a challenge to the Memorandum bearing No. 09/DSE/EE/FC/2015 dated 19.08.2015 issued by the third respondent/Fee Committee of the Directorate of School Education, Government of Puducherry alleging that the said Memorandum and the amendments made to the Puducherry School Education (Amendment) Rules, 2014 are ultra vires the Parent Act i.e., the Puducherry School Education Act, 1987 (for short "the said Act") and violative of Articles 14 & 19(1) (g) of the Constitution of India.

2. The petitioner-school is stated to be recognized under the said Act and the Rules of 1996 are applicable. The petitioner-school is not receiving any aid from the Government of Puducherry nor does it collect any donations from the students, as stated. The students are hailing from middle and lower middle class families and only nominal fee is stated to be charged from the students.

3. Despite the aforesaid, in view of the location of the petitioner-school in the heart of Puducherry Town, as also the large extent of land, coupled with spacious modern buildings, infrastructure facilities and encouragement to extracurricular activities, is producing desired results with efficient and dedicated teachers. The pay scales of the regular staff are stated to be at par with the Central Government employees and are revised as per the Central Government Pay Commission Recommendations.

4. The petitioner claims that in the absence of any donations, and in view of the nominal fee, in order to have appropriate infrastructure, a loan to the tune of Rs. 9.15 Crores was availed by the petitioner from State Bank of India, and the interest relevant being paid on the same itself is to the tune of Rs. 1.08 crores.

5. Now turning to the Act in question, it is stated that the same was enacted to provide for better organization and development of school education in the Union Territory of Puducherry and for matters connected therewith or incidental thereto. An 'aided school' is defined under Section 2(c) of the said Act to mean a recognized school, which is receiving any aid in the form of maintenance grant from the Central Government or the State Government or a local authority etc. Sub-clause (m) defines 'minority school' to mean a private school of its choice established and administered, by any such minority whether based on religion or language. Such a minority school, as per Section 10 of the said Act, is required to send a statement to the Government. The said Section reads as under:--

"10(1) Every minority school in existence immediately before the date of the commencement of this Act shall send to the appropriate authority a statement containing the particulars specified in clause (c) excluding sub-clause(ii) thereof of subsection (2) of Section 5 within such time as may be prescribed.

(2) Every minority school established and administered after the date of the commencement of this Act shall send to the appropriate authority a statement containing particulars specified in clause (c) of sub-section (2) of Section 5 within such time as may be prescribed. "

6. Chapter VI of the Act deals with admission to schools and fees. Subsection (3) of Section 26 reads as under:--

"Admission to a recognized school or to any class thereof shall be regulated by rules made in this behalf."

7. In so far as charging of fees and other charges is concerned, Section 27 reads as under:--

"(1) No aided school shall levy any fee or collect any other charge or receive any other payment except those specified by the Director.

(2) Every aided school having different rates of fees or other charges or different funds shall obtain prior approval of the prescribed authority before levying such fees or collecting such charges or creating such funds.

(3) The manager of every recognized school shall, before the commencement of each academic year, file with the Director a full statement of the fees to be levied by such school during the ensuing academic year and except with the prior approval of the Director, no such school shall charge, during the academic year, any fees in excess of the fee specified by its manager in the said statement."

8. We may add that the emphasis of the aforesaid was to point out that the fee provision really applies to the aided institutions, while the petitioner is an unaided school.

9. The power to make rules is conferred under Section 49 of the Act to carry out the

relevant portion reads as under:--

"49(1) The Government may, and subject to the condition of previous publication, by notification, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a) to (j)

(k) the conditions under which aid may be granted to recognized schools, and on the violation of which aid may be stopped, reduced or suspended.

(l) to (q)

(r) fees and other charges which may be collected by an aided school. "

10. The petitioner seeks to plead that the provisions of clause (r) are specific in so far as fee and other charges are concerned, which may be collected by an "aided school". Thus, the case of the petitioner is that there is no clause under Section 49 (2) for fixation of fee and other charges as may be collected by un-aided private schools.

11. It is in furtherance of Section 49 of the said Act that the said Rules have been enacted, and Rule 64 provides for fixation of fee and other charges, which may be collected by the aided private schools.

12. Sequel to the aforesaid, thus, pleaded is that if the Government of Puducherry wants to constitute a fee committee for fixation of fee and other charges, such power exists only for aided private schools, and if it wants to do so qua unaided private schools, then Rule 64 would have to be statutorily amended.

13. The submission, thus, rests on the following two broad principles:--

"(a) the rule itself does not provide for such regulation, and

(b) that the Act does not even envisage such regulation of fee of unaided private institutions."

14. In order to buttress the case, the petitioner has relied upon the judgment of the Hon'ble Supreme Court in the case of Union of India v. S. Srinivasan reported in MANU/SC/0496/2012 : 2012 (7) SCC 683, wherein, in paragraph-21, it has been observed as follows:--

"At this stage, it is apposite to state about the rule-making powers of a delegating authority. If a rule goes beyond the rule-making power conferred by the statute, the same has to be declared ultra-vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra-vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it." (see SCC page 690)

15. Learned counsel for the petitioner also referred to another decision of the Supreme Court in the case of State of Kerala v. K.M. Charia Abdulla and Co., reported in MANU/SC/0265/1964 : AIR 1965 SC 1585 to canvass that the rule cannot over ride the Section of the Act, and if the Section does not give any jurisdiction any rule would come in conflict with the Act.

16. Learned counsel for the petitioner, while referring to the counter affidavit filed by the respondents, submitted that the only provision referred to was Section 27 of the said Act, which has been extracted aforesaid, which in its clear words is applicable only to aided schools. In so far as other than aided schools are concerned, as per sub-section (3) only a statement of fee to be levied has to be filed before the Director of School Education and in the eventuality, the school wants to charge any fee in excess of the fee specified by its manager in the statement filed during the said academic year, it has to obtain prior approval of the Director of School Education. Thus, the submission was that the respondents cannot seek the aid of Section 27 to determine the fee of an unaided private school.

17. It is in the conspectus of the aforesaid pleas, that under the guise of exercising the powers under Section 49(2)(r) of the said Act, that the first respondent has clandestinely exceeded the said powers and framed a new Rule i.e. Rule 64 for fixation of fee and other charges by constituting a Fee Committee for private schools generally and enacted the amendment rules amending the original rules by deleting old Rule 64 and substituting the same by a new Rule 64 by issuing a notification bearing G.O. Ms. No. 11, Directorate of School Education (Secretariat Wing) dated 03.03.2014 and published the same in the Gazette of Puducherry No. 9 dated 11.03.2014. The same reads as under:--

"64.(1) Fees and other charges in private schools.--Fees and other charges in private schools shall be as fixed by the committee constituted for the purpose of regulating the fee to be collected in private schools.

(2) Committee for fixation of fee and other charges in private schools. -

(i) Constitution of Fee Committee.--The Government shall constitute a committee to recommend a reasonable school fee structure to the aided and unaided private schools in the Union territory of Puducherry. The committee shall comprise of the following officials and non-officials to study the existing fee structure, in the private aided and unaided schools in the

Union territory of Puducherry and recommend appropriate fee and other charges to be collected by each of the private schools.

The committee shall comprise of :

- (1) A Retired High Court Judge / Retired I.A.S. . . .
Chairperson
Officer nominated by the Government.
- (2) Director of School Education . . . Member-Secretary.
- (3) Chief Engineer (Buildings), . . . Ex officio Member
Public Works Department.
- (4) Deputy Secretary / Under Secretary (Education) . . . Ex officio Member.
- (5) Joint Director of School Education . . . Ex officio Member.
- (6) Deputy Director of Elementary Education . . . Ex officio Member.
- (7) Senior Accounts Officer, Directorate of . . . Ex officio Member
School Education.
- (8) Chartered Accountant nominated by . . .
Member
the Government.
- (9) Three representatives of Private School . . . Members
Managements.

(ii) Terms and conditions of Office of the Chairperson and Members. -

The term of Office of the Chairperson and Members shall be for a period of three years from the date of their nomination and in the case of any vacancy arising earlier, for any reason, such vacancy shall be filled for the remainder of the term.

(iii) Sitting fee.--The Chairperson shall be eligible to draw such rate of sitting fee and travelling allowance on par with that of the Chairperson of the Fee Committee, constituted to determine the fee structure of the unaided private professional colleges, etc.

(iv) Proceedings of the committee.--No act or proceeding of the committee shall be invalid by reason only of the existence of any vacancy in, or any defect in the constitution of the committee.

(v) Factors for determination of fee.--(1) The committee shall determine the fee leviable by a private school taking into account, the following factors, namely:--

(a) The locality of the private school, namely, urban/rural area, more specifically, taking into consideration, the taluk, revenue village, hamlet wherein the school is situated;

(b) Students strength of the school;

(c) Classes of study and total number of classes in the school;

(d) The available infrastructure, namely, status of the school, as indicated below:--

(1) Schools having minimum infrastructure facilities as prescribed by the Government from time to time.

(2) Schools having infrastructure facilities more than that prescribed:--

(i) Schools having more than the minimum requirement of laboratory, more number of library books, classroom facilities and other sanitary and drinking water facilities.

(ii) Schools having more than adequate classroom facilities, laboratory facilities, library area, number of

books, very good sanitation facilities, highly protected drinking water facilities and other sanitary facilities together with high percentage of results.

(iii) Schools fully equipped with modern facilities like equipment for conducting smart classes, provision of air-conditioner, etc.

(e) the recurring and non-recurring nature of expenditure on administration and maintenance, including payment of salaries, etc.;

(f) the reasonable surplus required for the growth and development of the private school;

(g) teacher-pupil ratio; and

(h) any other factors as may be prescribed by the committee;

(2) The committee shall, on determining the fee leviable by a private school, communicate its decision to the school concerned;

(3) Any private school aggrieved over the decision of the committee shall file their objection with sufficient material in support of this objection before the committee within fifteen days from the date of receipt of the decision of the committee;

(4) The committee shall consider the objection of the private school and pass orders within thirty days from the date of receipt of such objection;

(5) The orders passed by the committee thereon shall be final and binding on the private school for three academic years. At the end of the said period, the private school would be at liberty to apply for revision;

(6) The committee shall indicate the different heads under which the fee shall be levied.

(vi) Authorised officer.--For the purposes of these rules, the following officers of the Directorate of School Education shall function as the authorised officers:--

(1) Joint Director

(2) Chief Educational Officer of the region concerned

(3) Deputy Director (Women)

(4) Delegate to Director of School Education, Yanam

(5) Deputy Inspector of Schools.

(vii) Maintenance of accounts and submission of returns.--For the said purpose, the schools shall comply with the following:--

(1) Maintenance of accounts.--

(a) Every private school shall keep separate accounts for different kinds of transactions namely, fees collected, grants received, financial assistance received, payments of salary to staff, purchase of machinery and equipments, laboratory articles, library books, stationery and other expenditure incurred.

(b) Every private school shall keep the registers, accounts and records within the premises of the educational institution. They shall be made available at all reasonable times for inspection by the authorized officer.

(c) Accounts maintained by private school together with all vouchers relating to various items or receipts and expenditure shall be preserved by that school until the audit of accounts is over and objection, if any, raised is settled.

(d) The authorised officer or the members of the Fee Committee who have made inspection of any private school shall send a report with relevant records to the Director within 30 days.

(2) Submission of returns.--

(a) Every private school shall submit to the authorized officer an annual financial return in the form for the

period ending with 31st of March of every year, not later than the 1st day of July of every year or within such further time as may be permitted by the authorized officer. The return shall bear the signature of the Secretary or Correspondent or Principal of the private school.

(b) In addition to the returns referred to in sub-rule (1) above, every private school shall within such time, or within such extended time, as may be fixed by the authorised officer furnish such returns, statistics or other information that may be required from time to time by him.

(viii) Powers and functions of the committee.--

(1) The powers and functions of the committee shall be,-

(a) to determine the fee to be collected by private schools;

(b) to hear complaints with regard to the collection of fee in excess of the fee determined by the committee. If the committee, after obtaining the evidence and explanation from the management of the private school concerned comes to the conclusion that the private school has collected fee in excess of the fee determined by the committee, it shall recommend to the appropriate authority for the withdrawal or cancellation of the recognition or approval, as the case may be, of the private school or for any other course of action as it deems fit in respect of the private school concerned.

(2) The committee shall have the power to,-

(a) require each private school to place before the committee the proposed fee structure of such school with all relevant documents and books of accounts for scrutiny within such date as may be specified by the committee;

(b) verify whether the fee proposed by the private school is justified and it does not amount to profiteering or charging of exorbitant fee;

(c) approve the fee structure or determine some other fee which can be charged by the private school.

(3) The committee shall have the power to,-

(a) verify whether the fee collected by the private school affiliated to the respective State Boards of School Education, the Central Board of Secondary Education, Indian Council for Secondary Education (in short ICSE) or any other affiliating body commensurate with the facilities provided by the school;

(b) to hear complaints with regard to collection of excess fee by a private school affiliated to the Central Board of Secondary Education, ICSE or any other affiliating body; and

(c) to recommend to the Central Board of Secondary Education, ICSE or any other affiliating body, as the case may be, for disaffiliation of the private school, if it comes to a conclusion that the school has collected excess fee, in violation of the fee structure prescribed by the committee.

(d) to recommend to the appropriate authority to withdraw permanently or for any specified period the recognition of any private school, under section 13 (1) of the Act."

18. The result of the aforesaid, it is pleaded on behalf of the petitioner, is that in so far as the issues relating to fixation and collection of fee and other charges are concerned, the constitution of the Fee Committee qua unaided private schools is beyond the powers of the Government of Puducherry and ultra vires the Act, apart from being colourable, illegal, invalid and unenforceable endeavour. The memorandum dated 19.08.2015 issued to the petitioner school informing it about the nomination of a Chairperson to the Fee Committee to recommend appropriate fee and other charges to be collected by each of the private schools in the Union Territory of Puducherry within a stipulated time is also, thus, stated to be illegal and non-est.

19. The petition has been strongly opposed by the learned Government Pleader (Puducherry). We are not in a

inception that during the course of hearing, we were given the impression that the Government of Puducherry may like to amend the Act to obviate the challenge, but, subsequently, as noticed in our order dated 28th January, 2016, the situation appears to be to the contrary. The respondents were, thus, permitted to file their written synopsis qua the stand already taken by the petitioner.

20. The stand of the respondents is that the Act being a beneficial legislation for the primary objective of making available wholesome education at reasonable charges, must be looked into in a broader perspective. It confers power and authority on the Government to regulate different stages of education and courses of instruction, and various aspects of regulations in the field of education, including permission to establish a school, its recognition, withdrawal of recognition and fee are envisaged in the same. The authorities are also conferred with the power of conducting audit and to maintain financial control.

21. In the context of Rule 49, it is submitted that sub-rule (2) makes it clear that what is set out therein is in particular and without prejudice to the generality of the foregoing power. The foregoing power, as referred to in sub-rule (1), only provides for rules to be made to carry out the provisions of the Act, and thus it is wide in its character. It was urged that fixation of fee and regulating it is also part and parcel of regulation of education in the aided and unaided private schools, and despite such absolute power under sub-rules (1) & (2), which are only illustrative in character; challenge has been laid to the rule as ultra-vires. Even if clause (r) refers to only aided school, that does not take away the power conferred under the provisions of the Act in respect of private schools.

22. In this connection, reference has been made to Sections 26, 27 & 28 of the said Act, the relevant provisions of Sections 26 & 27 have already been extracted aforesaid, and sub-section (3) of Section 28 provides for Recognized Unaided School Fund to be there in every recognized unaided school, which would inter-alia be credited with the fee charged. It may be useful at this stage to reproduce Section 28, which reads as under:--

"(1) In every aided school, there shall be a fund, to be called the "School Fund" and there shall be credited thereto"-

- (a) any aid granted by the Government,
- (b) income accruing to the school by way of fees, charges or other payments, and
- (c) any other contributions, endowments and the like.

(2) The School Fund and all other funds, including the Pupil's Fund, established with the approval of the Government, shall be accounted for and operated in accordance with the rules made under this Act.

(3) In every recognized unaided school, there shall be a fund, to be called the "Recognised Unaided School Fund", and there shall be credited thereto income accruing to the school by way of:--

- (a) fees
- (b) any charges and payments which may be realized by the school for other specified purposes; and
- (c) any other contributions, endowments, gifts and the like.

4 (a) Income derived by unaided schools by way of fees shall be utilized only for such educational purposes as may be prescribed; and

(b) Charges and payments realized and all other contributions, endowments and gifts received by the school shall be utilized only for the specific purpose for which they were realized or received.

(5) The manager of every recognized school shall file every year with the Director such duly audited financial and other returns as may be prescribed, and every such return shall be audited by such authority as may be prescribed."

Since there is a reference to the issue of fee, it is submitted that under Section 28 regulation of the fee structure of the school is provided for. Even under Section 27(3) of the said Act mandate is to submit statement of full fee and not to charge any excess fee without the prior approval of the Director, who would have the power to approve or disapprove the statement of fee submitted by the management.

23. It has specifically been denied that the petitioner institution is not running for profit motive, and since Section 49(1) of the Act empowers making of rules to carry out the provisions of the Act, the fee fixation is also part of it.

24. We have given our thoughtful consideration to the matter in issue. We may say that there are two possible approaches to the issue involved in this case. The first would be a more statical and strict interpretation of what is set out in the statute, and the other more liberal interpretation, keeping in mind the larger objective.

25. Commercialization of education is a hard fact. We are not attributing anything to the petitioner or giving any finding as to whether the petitioner is carrying on school education for profit motive or not. The issue is that both various High Courts and the Hon'ble Supreme Court have been called upon to take an approach of providing some regulation to the unbridled power of specifying fee.

26. If the first perspective was to be analysed, it is really based on the principle of exclusion of what is not specifically provided for in Section 49(2). This exclusion is in turn based on what is included in it. Since clause (r) of subsection (2) refers to fee and charges which may be collected by aided school, by implication it is canvassed that unaided schools are out of the ambit.

27. We, however, take note of the fact that there are two other clauses, which would assist us in interpreting this aspect. Clause (k) specifically provides for conditions under which aid may be granted to recognized schools, which is in the same line as sub-clause(r). But, sub-clause (v) provides for rules to be made qua the educational purposes for which income derived by way of fee by recognized unaided schools shall be spent. In a sense, this controls the applicability of the fee collected, and thus brings the same within the ambit of the aforesaid provision.

28. Sub-section (1) of Section 49 provides for power to make Rules to carry out the provisions of the Act. Sub-section (2) is without prejudice to the generality of the power under sub-section (1). Thus, sub-section (1) is wider and ambit in its power.

29. Whichever way we may look it, unless a very restrictive interpretation is given, there is general power to make rules to carry out the provisions of the Act, and even clause (v) of sub-section (2) provides for rules for applicability of income derived by way of fee by recognized unaided schools. If we peruse the object of the Act, it is to provide for better organization and development of school education in the Union Territory of Puducherry and "for matters connected therewith or incidental thereto". It is not an Act made only to regulate the education provided by aided institutions. Thus, in our view, the provisions of the Act are wide enough to encompass the rule making power qua unaided institutions.

30. Thus, a collective reading of the different sub-sections falling in Chapter VI, which refers to admission to school and fees, also seeks to support this interpretation. The use of the expression 'aided school' in sub-section (1) and sub-section (2) of Section 27 has to be distinguished from the use of the expression recognized school (which would include aided school) in sub-section (3) requiring the full statement of fee levied to be filed. Such an exercise cannot be a mere academic one, as the objective is to see that there should not be profiteering in education. That is the reason that while dealing with the issue of 'School Fund' in Section 28 of the said Act, sub-section (3) stipulates the recognized unaided schools to have a fund, which would be collected with the fee and other charges, and the utilization of the same only for educational purposes.

31. No doubt, Rule 64 deals with fee and other charges in aided schools stipulating the various fees to be charged including depending on the social status. Can it, thus, be said that the Memorandum dated 19th August, 2015 issued nominating a Chairperson of the Fee Committee to recommend appropriate fee and other charges to be collected by each of the private schools in the Fee Approval Form to be filed can be said to be illegal and ultra vires? In our view, the answer to this question would be in the negative.

32. We have taken larger conspectus of the issue keeping in mind the intent and objective of the Act and thus, though there could have been a better drafting of the provisions, we are not inclined to grant the relief of quashing of the impugned notification.