

State of Kerala Vs. Manager, Nimala Public School and the Principal Officer, Central Board

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Court : Kerala

Decided On : Apr-10-2008

Reported in : AIR2008Ker197; 2008(2)KLJ704; 2008(3)KLT47

Judge : J.B. Koshy and; K. Hema, JJ.

Acts : Kerala Education Rules - Rule 3; [Constitution of India](#) - Articles 12A, 13, 14, 15, 16, 19(1), 21A, 30, 30(1), 32, 136 and 226

Appeal No. : W.A. Nos. 2497, 2465, 2512, 2513, 2514, 2516, 2532, 2535, 2539, 2543, 2544, 2547, 2548, 2546, 2549,

Appellant : State of Kerala

Respondent : Manager, Nimala Public School and the Principal Officer, Central Board

Advocate for Def. : Sri Mohan Jacob George, Adv.

Advocate for Pet/Ap. : Government Pleader

Disposition : Appeal dismissed

Judgement :

J.B. Koshy, J.

1. All these appeals are filed by the State against the common judgment passed by the learned Single Judge quashing of a Government order No. GO(P). No. 107/07G.Edn. dated 13.6.2007 regarding issuance of no objection certificate for starting CBSE and ICSE school in the State of Kerala. Petitioners in those cases applied for issuance of NOC for affiliation to CBSE and ICSE respectively in the year 2005. It is their case that their applications were processed and reports of the concerned District Educational Officer etc. were received. But, they were informed that Government will pass final orders in the applications only after policy decision is formed regarding the matter. It was also not disputed that as per the Government order, and Kerala Education Rules, only up to Vth standard, a student can study in unrecognised schools. But the CBSE will consider the applications only if the school is having classes up to minimum VIth standard. According to the petitioners, their schools started before the year 2001. They have all facilities. They should get NOC to continue the students studying in their schools. According to the learned Advocate General, on the basis of the recommendation of the high level committee, the State passed the impugned order incorporating State policy by not encouraging new schools in the private sector. The high level committee's decision was not produced before this Court. In the Government order there is a mention of the contents of the report as follows:

3. Since many of them may be answering to the demand for English medium and better quality education in the rural areas, those having facilities as per KER and maintaining better academic standards may be considered for recognition, if the local bodies also recommend recognition of a school acknowledging the need for such a school in the local body's jurisdiction. Further steps can be as in Chapter V KER, which also envisages the setting up recognised schools.

4. Considering the demand for schools affiliated to CBSE/ICSE, and the desire of the people for getting better quality education for one's children. NOC may be given for a limited number of schools every year. Such schools shall have all facilities as prescribed by CBSE and should be run by agencies having an education track record.

5. On deciding to give NOC the views of the local body about the affordability and need for such a school in the locality may be given due consideration.

6. The maximum number of schools that can be given NOC in a year may be decided by Govt. 25 schools per year in the state is suggested. The present rate is much more.

Thereafter policy with regard to recognition of unaided schools and NOC for starting CBSE and ICSE schools were mentioned in paragraph 2 of the above Government order. With regard to CBSE schools, the relevant clause is as follows:

2. Recognition of Unaided Schools and NOC for CBSE/ICSE Schools

1. As a policy Un-aided Unrecognized schools will not be given recognition.

2. In order to overcome the educational backwardness of the Muslim community, recognition shall be granted and NOC for starting CBSE/ICSE schools shall be issued to those unaided schools satisfying the following conditions apart from those specified in the Kerala Education Rules as the Government are convinced that extreme educational backwardness among the members of the Muslim community persists in certain areas of Malappuram, Kozhikode and Kasaragod Districts. Accordingly applications shall be limited to the above districts alone. The additional conditions are the following:

a) The school shall have started functioning on or before 01.06.2000

b) The School shall have a minimum of 500 students on its roll.

c) The school shall have classes from 1 to 10.

d) The school shall be functioning in a socially and educationally backward locality.

In the event of non-adherence to the conditions and non-maintenance of quality standards by schools affiliated to CBSE/ICSE with Govt.'s NOC the matter of withdrawal of recognition/NOC will be taken up with Central Government.

2. It is the contention of the writ petitioners that the impugned Government order is also not in accordance with the high level committee's decision as the high level committee's decision is that in view of the demand of starting schools for better quality education, more schools under CBSE should be started, but the number of NOC should be restricted to 25 in an year. But committee never recommended that the schools can be started only in the backward areas or in five districts only or no NOC should be given at all. In this case, in the Government order it is stated that the NOC can be given only in Malappuram, Kozhikode, Kasaragod and Wayanad areas where there is concentration of backward Muslim community members. Later, it is submitted that, Palakkad was also added as another district where CBSE schools can be granted in view of Muslim population. It is submitted that the above clause is discriminatory and violative of Article 14 of the Constitution and is highly arbitrary. It is again submitted that it violates Article 19(1)(g) of the Constitution and reasonable restriction to the above right can be made only by legislative process and not by Government order. It is further stated that some of the applicants belongs to minority community and their right under Article 30(1) of the Constitution is completely taken away. It is further submitted that the order is made in such a way that nobody can start a CBSE school even in the backward areas as it says that school shall have classes from I to X. In the KER it is stated that no school can be started without recognition whether in the aided or in unaided schools after Class V. Therefore, this is an unworkable impractical order to achieve ultimate hidden agenda that no school can be started in the State of Kerala affiliating to CBSE/ICSE as better education should be denied to students in Kerala.

3. Learned Advocate General submitted that this is a policy decision of the Government and the court shall not interfere in the policy decision. Merely because another view is possible the court shall not interfere in the matter. It is further submitted that after the 1980 Government order, affiliation bye-laws was amended by CBSE in 1988 and in view of Rule 3 Clause (3) of the above bye-laws, since these schools were not recognised, they are not entitled to apply at all. It is further submitted that it is the obligation of the State to provide education under Article 21-A of the Constitution and the State has also produced several documents to prove that there are aided schools in other areas, other than the five

districts mentioned in the notification. The school and students ratio, as per the statement, justify the decision. It is further submitted that if new schools are started, the existing schools will have to be closed down and therefore the State will not be able to give free education to the pupil. It is again submitted that five districts were identified to start CBSE schools in view of concentration of Muslim population who are educationally and economically backward. It was also argued that the poor people cannot afford to study in unaided and CBSE schools.

4. All these rival contentions were meticulously considered by the learned Single Judge each contentions while disposing of the matter. The learned Single Judge found that Government order dated 13.6.2007 dealing with granting of NOC for affiliation to CBSE/ICSE cannot be sustained. The learned Single Judge also found that in the peculiar facts and circumstances of the cases the petitioners are entitled to contend that the Government is bound to consider their applications for grant of NOC for affiliation in the light of the previous Government order of 1988. That order is produced as Exhibit P6 in W.P(C). No. 8120 of 2007. The above Government order also imposed various restrictions in giving NOC. Conditions prescribed for granting NOC are as follows:

(i) The schools should be run by a registered society or trust and one of the principal purpose of such society/trust must be educational.

(ii) Each school must have a properly constituted governing Body.

(iii) The society or trust should have financial stability. It should have permanent source of income to meet running expenses of the school to maintain it at a reasonable standard of efficiency and to pay the salaries of teachers regularly and in time.

(iv) The institution should have minimum site of 1 acre of land for the starting of a school. Permanent recognition/affiliation will be recommended only after they have fulfilled standard condition regarding site (3 acres of land) and have achieved a general Standard both in academic and developmental phases of education. It should have adequate play ground also.

(v) It should have suitable equipments and furniture.

(vi) It should provide suitable and adequate apparatus and equipments etc. as may be prescribed by the board from time to time.

(vii) The medium of instruction must be English.

(viii) The School shall appoint only qualified and eligible staff and must pay the salary and allowances and other benefits to the employees of the school. It shall in no way be less than the pay given to corresponding categories of employees working in Government schools of the State Government.

(ix) The school and its record shall be open for inspection by an official of the Board or any person authorised by the Board or the State Education Department at any time and the school shall furnish information as may be asked for by the Board/State Government from time to time.

(x) The rate of tuition and other fees charged shall be commensurate with the facilities provided.

(xi) The admission to the school shall be open to all without any discrimination on the ground of religion, Caste, or race, place of birth or any of them.

(xii) No institution shall be affiliated or continue to be affiliated or recommended to affiliate unless the middle section of the school is recognised by the Education Department of the State except in cases where the syllabus of the middle classes is approved by the Chairman.

(xiii) No unrecognised class/branches shall be run within the premises of school or outside in the same name of school.

Various other conditions were also prescribed. It was submitted that interim orders were passed in the Writ Appeals giving certain directions. Those orders were stayed by the Honourable Supreme Court and directed this Court to dispose of the Writ Appeals.

5. We agree with the learned Advocate General that the policy decision cannot be quashed by this Court unless it is violative of the constitutional provision or statutory provision. It is well settled that in policy matters Courts have very limited scope of interference vide *Union of India v. International Trading Co.* : AIR 2003 SC3983 , *State of Punjab v. Ram Ludhaya* : [1998]1SCR1120 ; *Krishnan Kakkant v. Government of Kerala* : AIR 1997 SC128 , *G.B.Mahajan v. Jalgaon Municipal Council* : AIR 1991 SC1153 and *Federation of Railway Officers Association v. Union of India* : [2003]2SCR1085 . In *Union of India v. International Trading Co.* 2003(51) ALR 598 the Honourable Supreme Court observed:

The court as observed in *G.P. Mahajan v. Jalgaon Municipal Council* : AIR 1994 SC988 are kept out of the lush field of administration policy except where the policy is inconsistent with the express or implied provision of a statute which creates the power to which the policy relates, or where a decision made in purported exercise of power is such that a repository of the power acting reasonably and in good faith could not have made it. But there has to be a word of caution. Something overwhelming must appear before the Court will intervene. That is and ought to be difficult onus for an applicant to discharge. The Courts are not very good at formulating or evaluating policy. Sometimes when the Courts have intervened on policy grounds the Court's view of the range of policies open under the statute or of what is unreasonable policy has not got public acceptance. On the contrary, curial views of policy have been subjected to stringent criticism. As Professor Wade points out (in *Administrative Law* by HWR Wade, 6th Edition), here is ample room within the legal boundaries for radical differences of opinion in which neither side is unreasonable. The reasonableness in administrative law must therefore distinguish between proper course and improper abuse of power. Nor is the test the Court's own standard of reasonableness as it might conceive it in a given situation. The point to note is that the thing is not unreasonable in the legal sense merely because the Court thinks it to be unwise'. In *Netaji Bag and Ors. v. State of West Bengal and Ors.* : AIR 2000 SC3313 the Supreme Court observed:

The Court cannot strike down a policy decision taken by the government merely because it feels that another decision would have been fairer or wiser or more

scientific or logical'. In *State of Himachal Pradesh and Anr. v. Padam Dev and Ors.* : [2002]3SCR90 , the Supreme Court held that unless a policy decision is demonstrably capricious or arbitrary and not informed by any reason or discriminatory or infringing any statute or the Constitution it cannot be a subject of judicial interference under the provisions of Articles 32, 226 and 136 of the Constitution. Similar view, has been reiterated in *State of Rajasthan and Ors. v. Lata Arun* : AIR 2002 SC2642 . At the same time, it is also well settled that a Government order or circular issued on the basis of policy decision must pass the test of Articles 14, 15 and 16 of the Constitution. It should be free from the vice of arbitrariness and conform to the well-settled norms underlying constitutional mandate (See *Kailash Chand Sharma v. State of Rajasthan* : [2002]SUPP1SCR317 , *Bijoe Emmanuel and Ors. v. State of Kerala* 1986 KLT 1037 (paras 14 to 17), *Kharak Singh v. State of U.P* : 1963 CriLJ329 . Here the contention of the petitioners is that impugned Government order is not only discriminatory, arbitrary and irrational, it is violative of Articles 14, 15, 19(1)(g) and 30 of the Constitution. Even reasonable restrictions can be placed on these rights only by a law having statutory force, but not by a Government order (See *Kharak Singh's case*) (supra). As per Constitutional mandate under Article 13, all laws inconsistent with the fundamental rights are void. If the Government order is discriminatory and arbitrary, it is also violative of Article 14 of the [Constitution of India](#). The condition laid down in the policy that there should be Xth standard in the schools for getting NOC shows that it is a total ban imposed for starting CBSE schools because after Vth standard, without recognition under KER or after VIIIth standard without affiliation from CBSE no school can be started. Hence the Government order is irrational and hit by *Wednesbury's* unreasonableness and no authority can pass such an order as it is completely unworkable and violative of constitutional mandate. It is certainly violative of Article 19(1)(g) of the Constitution. As far as minority communities are concerned, Article 30 of the Constitution protect their right to start educational institution. In this connection, we refer to the following Constitution Bench decisions *In Re: Kerala Education Bill*, 1957 AIR 1958 KLT 465 (paragraph 34) : AIR 1958 SC 956; *Rev. Sidhrajibhai Sabbai and Ors. v. State of Gujarath and Anr.* AIR 1963 SC 540; *State of Kerala v. V. Rev. Mother Provincial* 0065/1970 : [1971]1SCR734 ; *The Ahmedabad St.*

Xavier's College Society and Anr. v. State of Gujarath and Anr. : [1975]1SCR173 ; St. Stephen's College v. University of Delhi : AIR 1992 SC1630 . There are many religious and linguistic minority communities in Kerala State. Their right to start schools in private sector is virtually taken over by the impugned Government order. The right to establish school is not only vested in minority communities, but for others also in view of the right guaranteed under Article 19(1)(g) as held by the 11 member bench of the Hon'ble Supreme Court in T.M.A. Pai Foundation and Ors. v. State of Karnataka and Ors. : AIR 2003 SC355 paragraph 125 and 11 and findings in pages 587 to 591. A total ban to establish schools in private sector beyond Class V is violative of the fundamental rights guaranteed under Article 19(1)(g) of Constitution. The above right is further protected in the case of minority communities by Article 30(1) of the Constitution. This has been explained by the Hon'ble Supreme Court in seven member bench decision of the Supreme Court in P.A. Inamdar and Ors. v. State of Maharashtra and Ors. : AIR 2005 SC3226 . Further, high level expert committee report itself shows that there are demand for quality education. Especially in a State like Kerala where there is 100% literacy and large number of people are working abroad, receiving quality education is a must. There are also parents who have got transferable jobs to other States. It is true that under Article 12-A, it is the duty of the State to provide compulsory education. If the Government schools and aided schools provide quality education, there need not be any fear that the pupil who are getting free education will go to unaided institutions, if the Government school or aided school are giving good education. Even if they are giving standard education, poor people who cannot afford to spend any money for education to their children will not send them to unaided institutions. It is not necessary that because of the reduction in the students strength, all the Government and aided schools will be closed. If those who can afford to go to unaided schools, funds now spent can be utilised for quality and better education to students who are unable to go to unaided institutions staff strength ratio can be reduced so that teachers will not become surplus. Therefore, Government funds set apart for compulsory education can be utilised for education for the needy without closing the institutions for lack of students. The reason that new schools can be started only where there is concentration of Muslim population as they are socially and economically

backward is also discriminatory. Apart from Muslim community, there are many backward communities in the State. There are areas where scheduled tribes are concentrated. It is true that in Idukki district, Pthanamthitta district etc. where there are concentration of scheduled caste and scheduled tribes there are number of schools in the town areas, but in the areas where backward communities are living there are no adequate number of schools. They are in hilly areas where travelling to the schools is very difficult. It cannot be stated that only in the areas where Muslim community is concentrated CBSE schools can be started. Even in Wayanad and Pathanamthitta districts there are areas where scheduled caste and scheduled tribes people are living lacking educational institution. But a reading of the impugned Government order shows that CBSE schools can be started only in the areas where there is concentration of Muslim population. Hence, the Government order is discriminatory and violative of Article 14 of the Constitution. At one breath learned Advocate General argued that Muslim population is economically educationally and socially backward and hence CBSE schools can be started in the area where there are concentration of Muslim population. On the next breath it is argued that CBSE schools are very costly and economically backward communities cannot study in those schools. There are contradicting and self defeating arguments. It is argued by the petitioners that if people who can afford to send their children to developed areas are going to CBSE schools, in backward areas where there are less number of schools, Government or aided institutions can be started as the Government expenditure in other areas will be reduced. These are matters to be considered by the Government and we are not expressing any opinion in those matters. But we have no doubt that the impugned Government order is discriminatory, arbitrary, irrational and violative of constitutional mandates of Articles 14, 15, 19(1)(g) and 30 of the Constitution and the learned Single Judge rightly set aside the same.

6. It is pointed out by the learned Advocate General that petitioners are not eligible to apply for affiliation to CBSE schools in view of the new CBSE regulation as those schools are not recognised as provided under item 3.3. Learned Counsel for petitioners submitted that a reading of Clause 3 as a whole would show that what is required is that the schools shall be recognised by the State or the State should give certificate to the effect that State Government has no objection to the

affiliation of the school with the CBSE and the clause has to be read in full. In view of the above requirement only they applied for getting no objection certificate. We are also informed that the Writ Appeals are almost infructuous because of the fact that in implementation of the order of the learned Single Judge, orders were passed in the applications filed and those orders were challenged. Of course, the Government is free to pass fresh orders without violating the constitutional mandate. But since the impugned order is set aside, applications have to be processed according to previous Government order passed in 1988. In fact, according to the learned Advocate General, the Government have considered the applications as per the previous Government order and rejected those applications. Already those orders are under challenge. We are not considering the correctness of those orders in these Writ Appeals. It is true that in the name of quality education CBSE schools cannot be permitted to be started in every nook and corner and it is for the State to frame policy imposing reasonable restrictions in accordance with the constitutional mandate. While considering individual applications, it is for the Government to consider all those aspects. But we are not considering the merits of individual applications which is the subject of other Writ Petitions. CBSE is free to process the applications filed and pendency of other Writ Petitions is not a bar, but affiliation can be granted only if NOC is issued by the Government. In the above circumstances, we dismiss the Writ Appeals subject to the above observations.