

(2008) 10 KL CK 0039

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 12745 of 2007-P etc.

Al-Ishan School

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 20-10-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 21, 226, 337
Kerala Education Act, 1958 — Section 2(1), 2(3), 2(7), 2(8), 3(4)
Kerala Education Rules, 1959 — Rule 1(3), 1(5), 11, 16, 16(1)

Citation : (2008) 4 ILR (Ker) 790 : (2008) 3 KLJ 699

Hon'ble Judges : Thottathil B. Radhakrishnan, J

Bench : Single Bench

Advocate : V.P. Seemanthini, S. Karthika, M.S. Unnikrishnan, M.R. Anison, K.P. Geetha Mani, T.R. Rajesh, V.A. Muhammed and K.E. Hamza, for the Appellant; T.P. Kelu Nambiar P.G. Rajagopalan, M. Gopikrishnan Nambiar, K.K. Ravindranath, GP, Anu Sivaraman, P.K. Suresh Kumar, Priya Vijayan, K. Jaju Babu, T.S. Shyam Prasanth, P.S. Abdul Kareem, Kaleeswaram Raj, K. Jaju Babu and T.R. Sadeesan, for the Respondent

Judgement

Thottathil B. Radhakrishnan, J.—Certain questions relating to the grant of recognition to schools in Kerala and the conditions and procedure regulating such grant; and a further issue as to the availability or otherwise of any extra-statutory power for the Government to grant recognition to unrecognized schools, without following the prescribed statutory procedure, arise for decision in these writ petitions. They are therefore bunched, heard and hence, this common judgment.

2. Having all the beneficiaries of the impugned decisions on its array, WP(C). 18050/ 2008 is treated as the lead case and exhibits are referred to, as numbered therein.

Facts Encapsulated

3. the Kerala Education Act, 1958 and the Kerala Education Rules, 1959; for

short, the "Act" and the "KER", respectively; contain provisions regulating grant of recognition, including approval to commence schools, Chapter V in KER deals with recognition.

4. Acting on the opinion of a Committee appointed as per a Government Order dated 19-8-2006, to suggest guidelines, for opening of new schools, upgradation of existing schools, recognition of unaided schools, grant of NOC for CBSE/ICSE schools, etc., the Government issued Ext.P13 GO(P).No. 107/07/G.Edn., dated 13-6-2007, disclosing its policy in that regard and enumerating the suggestions of the Committee. The policy so declared, related to, among other things, recognition of unaided schools. Ext.P11 containing the policy of the Government is not under challenge. It provides, as a policy, that unaided unrecognized schools will not be given recognition. However, the Government being convinced that extreme educational backwardness among the members of the Muslim Community persists in certain areas of Malappuram, Kozhikode, Kasaragod, Kannur and Wayanad Districts, recognition would be granted to schools satisfying the conditions stipulated in Ext.P13, apart from those specified in the KER; in order to overcome the educational backwardness of the Muslim Community and accordingly, applications will be limited to those districts only.

5. Following Ext.P13, DPI issued Ext.P14 Circular dated 20-6-2007 calling upon the Deputy Directors (Edn.) of the aforesaid five districts to call for applications from unaided schools satisfying the aforesaid conditions and to submit the same with the detailed report with reference to the above guidelines and educational need of the locality with the survey report and school mapping, specifically showing educational institutions within a radius of 3 kms. of the proposed ward where the school seeking recognition is located.

6. It appears from Ext.P15 that, the DPI issued letters dated 8-10-2007, 8-1-2008 and 4-2-2008 to the Government.

7. On 6-3-2008, the Government issued Ext.P15 to the DPI, forwarding a list of 16 schools, with a direction to publish that list as preliminary notification. Though five districts are mentioned in Ext.P13, 15 out of the 16 schools in that list are in Tirur; the only other in Kasargod.

8. As directed by Government, DPI published Ext.P16 notification as one under Sub-rule (2) of Rule 2 of Chapter V KER, appending the list of those 16 schools as the list of new unaided LPS/UPS/HS to be recognized and inviting objections thereto.

9. This is under challenge. Certain directions are also sought for; to consider the applications of some of the petitioners, for recognition; allegedly pending for sometime, in terms of the Act and KER or the new policy.

Pleadings and Arguments

WP(C) No. 18050/2008

10. This writ petition is filed by Islamic Primary School, Koilandy, Majma's Public School, Malappuram and K.C. Jamaludheen Musliyar Memorial Public High School represented by their respective Managers and supported by the affidavit of Sri. Yousuff Saquary, the manager of the 3rd petitioner's school. This writ petition is filed impleading all the 16 schools which are enlisted in Exts.P15 Government Letter No. 57324/F207/G.Edn. dated 6-3-2008 addressed to the DPI directing to arrange publication of the list of 16 schools shown therein as preliminary notification and DPI's notification No. NS1/19510/2008/DPI dated 28-3-2008 - Ext.P16 published by the DPI, purportedly in exercise of power under Rule 2(2) of Chapter V KER enlisting 16 schools and calling for objections from aggrieved parties. The policy document of the Government, GO(P) No. 107/07/GEdn. dated 13-6-2007 is produced as Ext.P13 and the Circular issued by the DPI on 20-6-2007 is produced as Ext.P14.

11. Impeaching Ext.P15 and P16, the writ petitioners plead that those orders are highly discriminatory and arbitrary and are issued without following mandatory procedures stipulated in the Act and KER and such orders have been issued without even ascertaining whether the infrastructural facilities stipulated in the KER are available in the schools run by respondents 5 to 20.

12. It is also contended that out of 16 schools enumerated in Exts.P15 and P16, eleven schools are functioning under the DEO, Tirur and that by itself would show that the Government has not considered the educational need of any other localities in the northern districts which is a criterion for granting recognition to the schools, going by the Government Order containing the policy (Ext.P13) and Rule 2 of Chapter V KER. The petitioners contend that if the pre-requisite conditions prescribed under Rules 2(1)(a) to (e) are followed, no recognition could have been granted to 11 schools functioning within the jurisdiction of the DEO, Tirur. It is pleaded that the said situation itself shows that respondents 1 and 2 have not given any weightage to the conditions prescribed under Rule 2(1) of Chapter V of KER before issuing Exts.P 15 and P16. Those decisions are accordingly impeached as issued on totally irrelevant considerations and on ulterior motives.

13. The petitioners further contend that though it is stated in Ext.P16 that 16 schools were notified on the basis of the powers conferred on DPI under Rule 2(2) of Chapter V KER, a perusal of Ext.P15 would show that Government issued specific direction to the DPI to publish a preliminary list of 16 schools. It is contended that such decision of the Government is taken, in advance, at its whims and fancies without looking into any of the provisions of KER.

14. It is further contended that the procedure adopted by respondents 1 and 2 is in flagrant violation of Rule 2(2) and Rule 2(4) of Chapter V KER. It is pleaded that the statutory procedures are totally violated by the second respondent while issuing the impugned decision. The petitioners plead that the provisions of Chapter V have been totally violated and no procedures stipulated therein are followed. Rule 16(a) of Chapter V KER is also pointed out as one that has been

violated.

15. Respondents 1 and 2 are alleged to have adopted a pick and choose method for issuing the impugned lists and the petitioners contend that their schools which have satisfied the conditions prescribed under the Act for recognition long before, have not been granted recognition and the refusal to grant recognition to the petitioners' schools for all these years is highly discriminatory and violative of the petitioners' fundamental rights under Articles 14 and 19(1)(g) of the constitution.

16. It is also contended that is none of the schools of the private respondents, the minimum number of 500 students are studying. The infrastructural facilities are also allegedly not complied with by the said schools, it is contended. The petitioners contend that their schools are situated in the backward area and educational need of the locality warrants recognition of those schools. The concerned Educational officer is also stated to have recommended the petitioners' schools for recognition and such recommendation by the Educational Officer is the only criterion prescribed in Rule 16(1) of Chapter V KER for granting recognition to the existing schools.

17. It is further contended that in Ext.P13 Government order, all that is stated is that recognition can be granted in those districts of the State which are mentioned therein, but the Government have not considered the areas where the schools can be recognized and that therefore, the impugned action taken by respondents 1 and 2 by issuing the impugned orders before notifying the area is against the provisions contained in Chapter V of KER.

18. It is pointed out that having regard to the fact that the Government themselves, by the issuance of Exts.P13 and P14, concede to the existence of good number of unrecognized schools, the Government are bound to consider all the applications of the unrecognized schools in the state together and to process all those applications before taking any action to close down all the unrecognized schools in the state, which is also part of the above policy of the Government, going by Exts.P13 and P14.

19. Petitioners also seek a direction that their schools be granted recognition as per the provisions of the Act and KER. In support of their claim of such recognition, twelve documents are produced to demonstrate their preferential entitlement qua the private respondents.

20. Respondents 5, 9 and 16 have placed a counter affidavit through the 5th respondent contending that the writ petition is premature and not maintainable at this stage. Iris pleaded that the petitioners are labouring under a misapprehension regarding the subject matter of the writ petition and that they had complied with Ext.P13 policy decision and Ext.P14 circular and they had applied, however that their institutions do not find place in Exts.P15 and P16. It is contended that they are invited to file objections and are at liberty to do so and have,, therefore, to wait for the decision on their objections and therefore,

the stage has not come for them to approach this Court without exhausting the statutory remedies.

21. It is further contended in that counter affidavit that the procedure in Rule 2(1) in Chapter V of the KER is not applicable in the instant case. It is pleaded that this is not a case of recognizing new schools, but is a case covered, by a policy decision in regard to recognition of unaided unrecognized school. It is stated that the petitioners have also proceeded on that footing when they submitted Exts.P8 and P9 applications pursuant to the policy decision evidenced by Ext.P13 and therefore, it does not lie in the mouth of the petitioners to state that Rule 2(1) should have been followed, when they themselves proceeded on the footing that that rule is not relevant; and what was relevant was the policy decision. It is contended that for implementing the policy decision, Rule 2(1) will not apply.

22. It is contended that the petitioners waited to hear from the Director of Public Instruction, the result of Exts.P8 and P9 applications and the result came in the form of ExtP16 and therefore, for challenging Exts.P15 and P16, the petitioners cannot go back to Rule 2(1). The petitioners can only start from Rule 2(2); and here, the petitioners have made a faulty start by challenging Exts.P15 and P16, it is contended. It is also pleaded in that counter affidavit that recognition of unaided unrecognized schools, doubtless, comes within the realm of policy of Government. The policy decision cannot be challenged and is, in fact, not challenged in this case. If so, the only question is as to the scope of the challenge against Exts.P15 and P16, it is pleaded. It is contended that the case of the petitioners is not concluded by Exts.P15 and P16 as they are invited to file all their objections to Exts.P15 and P16 and that they can do so; not before this Court; but before the prescribed statutory authorities. It is further pleaded that the writ petitioners claim the benefit of the policy decision, as these respondents also do. The benefit of the policy decision is tentatively denied to the petitioners; and they are invited to adduce reasons to obtain the benefit of the policy decision. The reasons are to be advanced in the form of objections to Ext.P16. Instead, the petitioners have approached this Court under Article 226 of the Constitution of India and it is too early for the petitioners to air their grievances against Ext.P16 for the first time before this Court. Denouncing the right of the writ petitioners to relief (b) in the writ petition, i.e., for a direction to grant recognition as per the provisions of the Act and KER, it is contended in the counter affidavit of respondents 5, 9 and 16 that the said prayer is misconceived and that the official respondents are to consider the question as to whether the petitioners are entitled to the grant of recognition of their schools as per the statutory provisions.

23. The 14th respondent has filed a counter affidavit stating that Ummalqura Second School is run by Bilai Islamic Centre and that the said school is in Ward No. 7 of Morayur Grama Panchayat; it imparts education to 570 students from Standards I to X, including about 200 orphans. It is stated that there is not even

an LP School within a radius of 2 1/2 kms. from its seat and the school has 4 1/2 acres of land, a concrete building for 21 class rooms and other facilities in terms of KER. It is also stated that there are 636 students in Classes I to X and the school was repeatedly applying for recognition and many other similarly situated schools in Malappuram District have been recognized. It is contended that the educational need is undisputed and is recognized by the policy decision of the Government in Exts.P13 Government Order dated 13-6-2007. It is further contended that the action of the Government cannot be found fault with, taking into account the social and educational backwardness of the area and the undisputed educational need. It is further pleaded that the present challenge, before the grant of recognition, is premature.

24. A counter affidavit is sworn to by P.K. Abdurahman Saquafi, the manager of the 15th respondent's school and also in behalf of respondents 7, 8, 10, 18, 19 and 20 producing the online press release issued by the DPI as Ext.R15(a) and Ext.P14 Circular as Ext.R15(b). It is pleaded that applications were invited as per online press release and the Circular by the DPI and objections were called for from the aggrieved parties within one month of the publication of the impugned notification Ext.P16 and therefore that list is not finalized and the petitioners are at liberty to file objections before the prescribed statutory authorities. It is contended that these respondents had applied several times as per the notifications, however that those applications were not attended to even though they had strictly complied with the provisions of KER. It is contended that the applications of these respondents were on the basis of Ext.P13 order, Ext.R15(a) online press release and Ext.P14 (Ext.R15(b)) circular and they have applied on the basis of invitation of applications and were included in the impugned ExtP16 notification since these respondents satisfy the conditions laid down in Ext.P13 Government Order. These respondents plead that the Government have not considered the schools which come under KER and the unrecognized unaided schools come under the policy decision of the Government and such decision cannot be challenged. It is further pleaded that the decision taken by the Government is not against the Act and KER. It is also contended that by Ext.P15 letter, the Secretary to Government had directed the DPI to publish list of the schools as a preliminary notification and that the direction was not to notify it as per the Act and KER and that the absence of the petitioners' schools from the list would be for the reason that those schools did not satisfy the conditions of the policy decision contained in Exts.13 and P14. The schools of the petitioners do not find place in the preliminary list, though they applied and therefore, they have to wait for consideration of their objections and the statutory remedies are not exhausted and the stage has not come for them to move this Court. It is pleaded that the relief (a) as sought for, is premature and the petitioners can file objections before the statutory authorities. The petitioners, according to these respondents, claim the benefit of a policy decision and that the official respondents are going to consider whether the petitioners are entitled to grant of recognition and therefore, prayer (b) is not sustainable in law. It is pleaded that

the inclusion of these respondents in the preliminary notification is legally valid and that the writ petition is liable to be dismissed.

25. The first respondent State of Kerala has filed a counter affidavit sworn to on 7th July, 2008 by its Under Secretary in the General Education Department. It is contended therein that the writ petition is premature and Exts.P15 and P16 are only preliminary lists and that the Government have not finalized the list. The petitioners have alternate and efficacious remedy by way of filing objections against the list, it is contended. It is specifically pointed out that Rule 2(2) of Chapter V KER itself provides such an opportunity to file objections and that the petitioners may, therefore, file their objections against recognition of schools and Government will finalize the list only after considering the objections. The State Government pleads that in the past, large number of schools were sanctioned, upgraded or recognized in the State, without any criteria and the Government felt that guidelines and policy parameters for sanctioning, upgrading and recognizing schools have to be laid down to ensure fairness and transparency. It is appropriate to quote the following from paragraph 4, of that counter affidavit.

The Government as per GO.(Rt.) No. 369/06/GEdn.dated 19-8-2006 appointed a Committee to recommend the principles and guidelines to be followed in sanctioning new schools, upgrading and recognizing existing schools. After considering the report of the Committee and all other relevant materials, the Government issued Ext.P13 Government Order dated 13-6-2007 laying down new policy parameters for sanctioning, upgrading and recognizing existing schools. As a policy, it was decided that unaided unrecognized schools would not be given recognition. Since the Government was convinced that extreme educational backwardness persists among the members of Muslim community in certain areas of Malappuram, Kozhikode, Kasaragod, Kannur and Wayanad districts, it was decided to grant recognition to unaided schools satisfying the conditions specified in KER. Following four conditions were imposed for granting recognition to unaided unrecognized schools:

- i. The schools shall have started functioning on or before 1-6-2000.
- ii. The school shall have a minimum 500 students in its roll.
- iii. The school shall have classes from 1 to 10.
- iv. The school shall have functioning in the educationally and socially backward locality.

26. It is contended that there is no challenge against Ext.P13 Government Order and the petitioners had submitted applications for recognition of their unaided schools. It is further contended that pursuant to Ext.P13 Government Order, the DPI had issued Ext.P14 circular directing the Deputy Directors to call for applications from the unaided schools satisfying the conditions stipulated in Ext.P13 Government Order. The Deputy Directors were asked to submit detailed report.

27. A1-Ihsan school filed this writ petition on 11-4-2007 seeking a direction to the State of Kerala and the Director of Public Instruction to consider its applications and grant recognition to that school which is run by A1-Ihsan Educational Association, a society registered on 30-5-1989 and is represented in this writ petition by its President Abdul Kareem Koya Thangal, in Tirur of Malappuram District. It sought recognition as an unaided school for Classes V to X; standard X functioning from 1993-94. It is pleaded in the writ petition that high school Section started in 1989 and thereafter, the upper primary Section was also started. The writ petition stands on the assertion that in spite of favourable report of the District Educational Officer, no action was taken on the applications. The cause of action for filing the writ petition was that the petitioner came to know that the Director of Public Instruction had published a list of unrecognized schools over the Internet and the petitioner school is also included. The report of the DEO shows, among other things, that the petitioner school is in educationally backward area dominated by backward communities and it is in a hilly area with no high school within the radius of 3 kms. As regards the educational need of the locality with reference to habitation and backwardness of the area, the DEO recommended that a sanction of an high school in the area is essential and that would benefit 500 families. The DEO had also remarked that the area is educationally backward and Standards V to X are functioning now in the school and it will be a great blessing to the pupils of the locality of the school, if the school is ordered to be recognized as an high school. Accordingly, the DEO recommended the petitioner school for consideration.

28. The Additional Secretary in the General Education Department has, on 5-6-2007, sworn to the counter affidavit on behalf of the State of Kerala, stating that the petitioner had applied for recognition in 2003, though the DPI had not called for applications as per the KER and that as per Chapter V of Rule 2A(2) of KER, applications for recognition of schools, not in response to the notification in that regard are not to be considered. The DEO's recognition was impeached as not one as per the direction of the first respondent State and was, hence, characterized as no acceptable. In that counter affidavit, it is further stated that the Government as per Letter No. 33432/F1/05/G.Edn. dated 13-6-2005 directed all District Educational Officers and Assistant Educational officers to call for the details of unaided unrecognized schools functioning in the State as on 1-6-2005 in a specified proforma and based on that direction, the Educational Officers concerned obtained filled up proforma from the manager of this school and a consolidated list of such schools at the district level was prepared by the Deputy Director of Education and that the list was forwarded to the Government through the Director of Public Instruction. Going by that counter affidavit, the Government constituted a High Level Committee to recommend the guidelines and principles in order to assess the educational need in a systematic and scientific way. It is stated in that counter affidavit dated 5-6-2007 that the said Committee had recently submitted its report to the Government in the matter

and serious discussions at various level are on, the way, however that, no decision was taken by the Government. It is also stated that the Policy of the Government is that there should be a fair, just, transparent, equitably and non-discriminatory policy in the matter. It is further stated that when the Government declares the policy decision regarding the opening/upgradation/recognition of schools in the state, the petitioner can also approach the Government through proper channel. It is contended that since the application said to have been submitted before the Government is not in accordance with the provision contained in the KER, Government are not supposed to entertain it. Accordingly, it is urged that the writ petition does not merit consideration and may, hence, be dismissed.

29. In the reply affidavit, among other things, the petitioner states that pursuant to Government Order dated 13-6-2007, petitioner approached respondents 3 and 4, namely, the Deputy Director of Education, Malappuram and the DEO, Malappuram for submitting a fresh application in the prescribed format. Who informed the-petitioner that they have no instruction from the State Government or the DPI to collect the application for recognition of new schools and they refused to accept the fresh application. In the reply affidavit dated 9-6-2008, it is averred that the DPI has now published a notification dated 28-3-2008 which was produced by the petitioner along with I.A. No. 6263/2008 and that they have submitted objections dated 4-4-2008 and 7-4-2008, to that list. This is Ext.P16 in WP(C) 18050/2008.

WP(C). 9898/2008

30. This writ petition is filed on 24-3-2008 by Vadihuda Educational and Charitable Islamic Society registered in the year 1998 with the object of establishing and administering educational institutions for imparting education to the poor inhabitants of Omassery Village, more particularly, students of Muslim Community. The petitioner is represented in this writ petition by its Manager Abdulla A.K. It established a school in 2000 as an unaided and unrecognized U.P. School. An L.P. School, namely, Vidyaposhini LPS which was functioning within a radius of 1.5 kms. from the situs of the petitioner's U.P. School was being closed down by its Manager and the petitioner purchased that L.P. School as a running establishment and that was approved by the AEO, Thamarassery by transfer of management of that L.P. School to the petitioner in terms of departmental order dated 16-11-2004. That school which was not then housed in a permanent building was shifted to the premises of the petitioner and it is averred in the writ petition that as of now, a full-fledged unrecognized UP and High School is functioning along with the said aided L.P. School, in terms of the provisions of the Act and KER. It is averred that all infrastructural facilities are provided for running the aided school and sufficient land is available in terms of the KER for running a full-fledged High School with LP, UP and HS sections. Since the application of the petitioner for granting recognition to UP and High School Sections was not considered by the Government for quite a long period, it

instituted WP(C). 8338/2006 and obtained judgment dated 31-3-2006 requiring the State Government to consider such application and pass appropriate orders thereon strictly on its merit, at the appropriate stage. The Government thereafter issued communication dated 25-5-2006 to the Secretary of the petitioner stating that at that time there was no policy to sanction recognition to unaided schools in the State and hence, the application of the petitioner for recognition could be considered only as and when Government takes a policy decision in the matter and the petitioner was requested to submit application through educational officers at the appropriate time. Thereafter, the Government issued Government Order dated 13-6-2007 declaring a new policy of the Government in sanctioning and recognizing the schools situated in the State of Kerala. This was followed by the issuance of a circular by the second respondent DPI on 20-6-2007 inviting applications for recognition of unaided schools in the State. Since, according to the petitioner, it satisfied the conditions prescribed in Ext.P13 Government Order and Ext.P14 circular, it submitted application in the prescribed format through the Deputy Director of Education on 7-7-2007. The DEO, thereafter, inspected the school and prepared a detailed survey report recommending recognition of the petitioner's school. The third respondent Deputy Director of Education is stated to have acted on that survey report and forwarded petitioner's application for recognition. Petitioner seeks to evidence this by documents which would show that the DEO visited the school on 25-7-2007 and verified the facilities provided there. It was then noticed that there is an aided L.P. School under the management and the school is functioning in a permanent concrete building with 12 class rooms and six class rooms are under construction. During the year 2007-08 there are 239 students on the roll in Standards V to X. The survey report contains the statement that the School has three acres of land and approximately 500 families would be benefited by the sanctioning/upgradation of the school in the proposed area. The DEO had recommended that recognition of the petitioner's school is essential for the educational improvement of the area which is educationally and socially backward and the school authorities have provided sufficient accommodation, qualified staff etc. The Omassery Grama Panchayat passed resolution on 25-6-2007 recommending recognition to the petitioner's school. The Panchayat also prepared a statistical report of the educational need those documents were also forwarded along with petition filed on the apprehension that on enquiry, the petitioner came to know that the petitioner's application is not being considered on the sole ground that the students in the unrecognized Section of the petitioner's school do not number 500 while, according to it, as a matter of fact, 324 students are studying in the aided L.P. School and 245 students are studying in the recognized Section of the petitioner's school and accordingly there are more than 500 students studying in the petitioner's school. On such allegations, the petitioner seeks a direction to the State Government and the DPI to consider and pass appropriate orders on its application in accordance with law and to grant recognition for the UP and High School section. It also seeks a further direction that the petitioner may be permitted to conduct the annual examinations and to issue transfer certificates to

the students studying in the petitioner's unrecognized school until recognition is granted to the petitioner's school, as sought for by it.

31. Thereafter, I.A. No. 6162/2008 is filed producing therewith Ext.P16 and Government Letter dated 6-3-2008 addressed to the DPI, which is Ext.P15 in WP(C)No. 18050/2008. In that interlocutory application, the petitioner seeks a direction that its school be granted recognition before granting recognition to those schools mentioned in that notification or in the alternative, to include the petitioner's school also in the final list of schools to be recognized by the Government, pursuant to that notification, pending final decision in this writ petition.

WP (C). 11126/2008

32. This writ petition is filed by the Manager, Mooniyur High School supported by the affidavit of Smt. V.P. Beepathumma, the Manager. That school is within the jurisdiction of the Tirur Educational District and is in Moonniyur Grama Panchayat. It commenced in June, 1976 and caters to students of Standards VIII to X for about 2300 students in 54 divisions. It is an aided high school with staff strength of 96 and had 97% result in SSLC, 2007. This writ petition is filed challenging the Government Letter dated 6-3-2008 ? Ext.P15 - to the extent it includes the school of the 5th respondent Nibrasul Islam Sangham at Sl. No. 9. it is alleged that the government direction to publish notification in the Gazette "today itself" was carried out by the DPI by issuing notification dated 28-3-2008 (Ext.P16), calling for objections.

33. According to the petitioner, the 5th respondent had commenced functioning of an unauthorized school in the vicinity of the petitioner's school just across the road and the application for recognition has been submitted by the 5th respondent including paddy fields and the site of a mosque. It is also pleaded that complaints have been made to the authorities by the Moonniyur Grama Panchayat regarding illegal filling up of paddy fields and the Paddy Field Protection Council of the area has also objected to the unauthorized conversion of paddy fields into garden land by the 5th respondent. The petitioner, in paragraph 3 of the writ petition, states specific reasons as to why it objects to the grant of recognition to the 5th respondent's school. It states that such recognition of the 5th respondent's school has been objected to by the petitioner and even the local Government School Headmaster has addressed the DEO in the matter.

34. The DPI's notification is produced by the petitioner by stating that to the knowledge of the petitioner, it was yet to be published in the gazette, when this writ petition is filed.

35. The issuance of Exts.P15 and P16 are impeached by me petitioner, as being clearly opposed to the provisions of chapter V of the KER and the decision of the Apex Court in *State of Kerala v. Prasad* 2007 (3) KLT 531 (SC), a Copy of which has been placed by the petitioner along with the writ petition as an exhibit.

36. Petitioner states that the Government has, by the impugned action, contradicted Ext.P13 Government Order which declares the policy of the Government that unaided recognized schools need not be given recognition.

37. It is specifically contended that the action of the Government in issuing the list of unaided and unrecognized schools is nothing but the Government ratifying the illegal actions of the managements which have started those unaided and unrecognized schools without any authority.

38. The petitioner also impeaches the impugned action on the ground that the statutory authority cannot travel beyond the power conferred and any action without power has no legal validity and is ab initio void and cannot be ratified, as held by the Apex Court in *Marathwada University Vs. Seshrao Balwant Rao Chavan*, , which is quoted by the petitioner.

39. The petitioner has also placed on record a copy of the resolution of the Moonniyur Grama Panchayat requesting the Government not to grant recognition to the 5th respondent for reasons, which include the specific assertion that the 5th respondent has carrying out illegal activities by converting paddy fields adversely affecting the agricultural operations in the area.

40. The 5th respondent has filed a counter affidavit sworn to by its Secretary Sri. P.K.M. Kutty Haji on 29-5-2008 asserting that the 5th respondent's school had come into existence since 1994 and though the Government of Kerala did not grant formal recognition to fee school in question, it did not, however, discourage the conduct of the same. It is averred that at various points of time, several orders were issued granting permission to the school and similar schools to conduct examinations for the students to whom education is imparted there. The 5th respondent contends that the grant of recognition was delayed on account of "the confusion prevailed in the state as regards sanctioning of aided and unaided schools" and that "all the confusion and chaos came to an end by the passing of GO.(P). No. 107/2007 dated 13-6-2007 as per which broad guidelines have been issued by the Government in the matter". The 5th respondent states that though in the aforesaid Government Order, the Government has declared that as a policy, unaided unrecognized schools will not be given recognition, it has hastened to say that in order to overcome the educational backwardness of the Muslim Community, recognition will be granted to those unaided schools satisfying certain conditions laid down therein. It is stated that Government mentions in that extreme educational backwardness among the members of the Muslim Community prevails in certain areas of Malappuram, Kozhikode, Kasargod, Kannur and Wayanad Districts. It is pointed out that that the Clauses in that regard would sufficiently indicate that they refer to existing unaided unrecognized schools. The 5th respondent pleads that it is in implementation of the above policy, that the Government identified 16 unaided unrecognized schools from the Districts mentioned in the Government Order, for being considered for the grant of recognition.

41. The 5th respondent further pleads that it is evident from Ext.P15 that what has been directed is the issuance of a notification as contemplated by Sub-rule (2) of Rule 2 of Chapter V of KER and once the list is published under Sub-rule (2) and objections are called for, they would be considered and it is only thereafter that the list would be finalized.

42. It is asserted that nobody has raised any objection as regards the grant of recognition to the 5th respondent's school since the publication of the list. It is further asserted that the fact that no objection has been filed against the school is evident from the letter issued by the DEO on the application filed by the 5th respondent under the Right to information Act.

43. The 5th respondent further criticizes the petitioner for not disclosing the grounds on which the petitioner states that it would be affected by granting recognition to the 5th respondent. It is contended that the 5th respondent's school is an English Medium school maintaining very high standard in education and it has been functioning for the last ten years and such functioning has not affected the petitioner's school in any manner which is a High School having only three classes, the mould of which is entirely different.

44. The 5th respondent states that no right of the petitioner, whether statutory or constitutional, is infringed by the grant of recognition to the 5th respondent's school.

45. As regards the legal contention raised by the petitioner on the absence of notification contemplated by Sub-rule (1) of Rule 2 of Chapter V of KER, the 5th respondent contends that a notification under Sub-rule (1) is contemplated only in cases where new schools are sought to be opened and the Government, having already declared that as a matter of policy, new unaided schools are not to be sanctioned, no question of such notification arises.

46. The 5th respondent projects a case that the situation in hand is one where the Government has taken a decision to grant recognition in favour of certain existing unaided schools as a special case and the said decision has to be treated as one taken by invoking the residuary power vested in the Government especially by virtue of Rule 3 of Chapter I of KER. It is accordingly pleaded by the 5th respondent that the absence of area notification under Sub-rule (1) of Rule 2 will not, in any way, vitiate the impugned action of the Government.

47. The 5th respondent impeaches the plea of the petitioner that the impugned action is opposed to the law laid down by the Apex Court in Prasad (supra). The 5th respondent, even by pleadings, attempts to point out that Prasad was a case where individuals or institutions made applications for recognition or starting of unaided schools and sought for directions from the court in that regard and it was in such a case that the Apex Court had held that unless a notification is issued under Sub-rule (1), none would have the right to apply for recognition. It is pleaded that the Apex Court has not considered the power of the Government to pass orders like those in hand. The 5th respondent further pleads that the law

laid down in Prasad has no application to the case in hand where the Government itself has identified a few schools as fit for being granted recognition.

48. The 5th respondent states that the petitioner is running an unaided English Medium school within the premises of Moonniyur High School and that the said English Medium school is running without any recognition and therefore, the contention of the petitioner that the 5th respondent has been indulging in an illegal activity by running unaided school without recognition does not merit consideration of this court. The 5th respondent asserts that the grant of recognition in its favour is the need of the local society at large and such grant of recognition is in accordance with law and in consonance with the present policy of the Government

49. It accordingly seeks that the writ petition be dismissed.

50. The 1st respondent state has filed a counter affidavit through its under secretary in the General Education Department admitting me functioning of the writ petitioner's school from 1976 with aided status. It is submitted that the medium of instructions in the petitioner's High School Section is Malayalam. Pleadings in paragraphs 3 to 5 in that counter affidavit sworn to on 9-6-2008, are comparative assessment of the different aspects of the schools of the petitioner and the 5th respondent.

51. It is further pleaded in the counter affidavit that the 5th respondent's school is included in the preliminary notification dated 28-3-2008 ? Ext.P16 - issued by the DPI and that according to Rule 2(2) of Chapter V of KER, objections against the granting of recognition to a school shall be filed before the concerned District Educational Officer/Assistant Educational Officer within one month from the date of notification of preliminary list of schools to be recognized, but the petitioner has not filed any objections by remitting the required fee, against the granting of recognition to the 5th respondent's school, within the stipulated time as per rules and preliminary notification.

52. It is further averred that as per the policy decision published as per order - Ext.P13, it was decided mat unaided unrecognized schools would not be given recognition. However, in order to overcome the extreme educational backwardness prevailing among the members of Muslim Community in certain areas of Malappuram Kozhikode, Kasargod, Kannur and Wayanad districts, it Was decided that recognition will be granted, subject to additional conditions stipulated therein. It is further pleaded that Government have decided to recognize schools in the districts of Palakkad, Malappuram, Kozhikode, Wayanad, Kannur and Kasargod to minimize the imbalances and cater to the educational requirements and that the social and educational backwardness of the Muslim Community, who dominated in those districts also prompted the Government in taking such a decision and that such decision cannot be found fault with.

53. It is stated that the Government have, on the basis of the Sachar Committee recommendations, taken a policy decision to recognize unaided schools in

Malabar area for the upliftment of the educational backwardness of the Muslim Community. It is further pleaded that at this juncture, it is to be noted that though none of the Muslims are treated as Scheduled Tribes in main land of Indian territory, the Muslims in Lakshadweep Island are treated and enjoying all the benefits of Scheduled Tribes and that the Central Government has extended those benefits to all the Muslims of Lakshadweep alone and that none of the Muslims in the main land of the Indian territory are treated as Scheduled Tribes and the said benefit is not at all considered as a discriminatory or violative of Article 14 of the Constitution of India. It is further submitted that various committees and commissions appointed by the Central Government established the extent of educational deprivation experienced by the Muslim Community and those committees recommended various measures in that regard. It is further pleaded that it was after considering all those aspects and objective assessment with reference to the prevailing circumstances, that the Government have decided to recognize the unaided schools in the said districts and in the case of other districts in the State, there is no further need for more schools as the educational facilities available there are sufficient and enough to cater to the need of the area. Accordingly, it is contended that there is no element of arbitrariness or discrimination.

54. It is pleaded that the Government have issued Ext.P13 as part of a policy decision considering all the relevant materials, which are neither disputed nor found to be incorrect. The policy decision is not at all against any statutory provision or violative of the fundamental rights guaranteed in the Constitution; it is contended.

55. It is stated that the education is enumerated in the List III of Schedule VII and it is for the Government to take a decision whether any school has to be given recognition.

56. It is also stated that there is no element of discrimination or arbitrariness and therefore the petitioner cannot challenge the policy decision by way of judicial review.

57. It is further pleaded that the DPI, in tune with Ext.P13 Government Order, called for applications for recognition of unrecognized schools in Malappuram, Kozhikode, Kasargod, Kannur and Wayanad districts and published the list of new unaided LP/UP/HS to be recognized vide Preliminary Notification - Ext.P16 and the final notification of the schools will be done only after considering the objections, if any, received on the basis of the preliminary notification.

58. It is also submitted that the Government have not finalized the list of schools in view of the interim order dated 29-4-2008 granted in W.P.(C) 13836/2008 (a matter in this bunch); It is also submitted that as per the preliminary notification, it is open to the petitioner to file objections before the appropriate authority.

59. It is thus pleaded that the writ petition is devoid of merits and is liable to be

dismissed.

WP(C) 13836/2008

60. This writ petition is filed by the Manager, Soopikutty Naha Memorial Higher Secondary School and supported by the affidavit of Sri. A. Ahammed, the Manager. That school falls under the administrative jurisdiction of the DEO, Tirur and is in Parappangadi Grama Panchayat limits. It states that it commenced functioning in June, 1979 and is an aided school with Standards VIII to X and Higher Secondary session.

61. Giving the details of the pupils' strength of the school, the petitioner states that there are only four High Schools functioning in the Parappanangadi Panchayat and of late, the 5th respondent consented functioning of an unauthorized High School in the vicinity of the petitioner's school at a distance of about 300 meters.

62. It is pleaded that there are only five U.P. Schools in the Panchayat and that the educational need of the locality has been successfully met by the existing High Schools and that, therefore, there is no need for any more High School in Parappanangadi Panchayat.

63. On the aforesaid factual premise, the petitioner challenges the decision contained in the Government Letter - Ext.P15 - addressed to the DPI directing to arrange to publish the list of 16 schools, including the 5th respondent's school as a preliminary notification in the Gazette. The challenge to that decision is to the extent it includes the school of the 5th respondent.

64. Specific reliance is placed on Rules 2 and 2A of Chapter V of KER and to the decision of the Apex Court in Prasad (supra), a copy of which is also produced.

65. It is specifically pleaded in the writ petition that no notification was issued as per Rule 2 of Chapter V of KER for determining areas and that it is only after determining the areas, could another notification be issued as per Rule 2A of Chapter V KER calling for applications for Opening schools in the areas notified by ensuring the procedure in Rule 2 of Chapter V.

66. It is pithily contended that the grant of recognition to the unauthorized school of the 5th respondent is in clear violation of the provisions in Chapter V and that the impugned action amounts to notification by the Government of an illegal action of the management of the 5th respondent.

67. It is also pleaded that the Government have suo motu decided to ratify the illegal action of the management of unaided and unauthorized schools, without following the provisions which are mandatory and that this amounts to infraction of law laid down by the Apex Court in Marathwada University (supra).

68. The petitioner further pleads that there is no provision in the KER to start unaided and unrecognized schools and the only provision under the KER is for private study as per Rules 7 and 8 of Chapter VI.

69. It is also stated that even as per the policy decision in Ext.P13 order of the Government, the node of the local authority is required for recommending a High School and that the Parappanangadi Grama Panchayat has not recommended the 5th respondent's school for being recognized as an High School. Ext.P15 is so criticized, to be even contrary to the policy of the Government as stated in Ext.P13.

70. On the aforesaid contentions, the Government decision contained in Ext.P15 to the extent it includes the 5th respondent's school as Sl. No. 11 therein is sought to be quashed.

71. The 5th respondent has filed a counter affidavit dated 6-7-2008 stating that Ext.P13 contains the declaration of the Government regarding a new policy and contending that after the issuance of that policy document, the second respondent issued online press release and a circular - Ext.P14. That circular issued by the DPI with reference to Ext.P13 Government Order reiterates the Government policy not to grant recognition to unaided unrecognized schools.

72. It further states that in order to overcome the educational backwardness of the Muslim Community, recognition would be granted and NOC for starting CBSE/ ICSE schools shall be issued to those unaided schools satisfying the four conditions enumerated in that circular, apart from those specified in the KER as the Government are convinced that extreme educational backwardness among the member of the Muslim Community persists in certain areas of Malappuram, Kozhikode, Kasargod, Kannur and Wayanad districts. The applications were to be limited from the said districts alone and the additional conditions enumerated in that circular are as follows:

1. The schools shall have started functioning on or before 1-6-2000.
2. The school shall have a minimum 500 students in its roll.
3. The school shall have classes from 1 to 10.
4. The school shall have functioning in the educationally and socially backward locality.

73. It is pleaded that, accordingly, the Deputy Directors concerned were requested to call for applications from the unaided schools satisfying the above conditions and submit the same with the detailed report with reference to the guidelines issued therein and the educational need of the locality with the survey report and school mapping specifically showing educational institutions within a radius of 3 kms. of the proposed ward where the school seeking recognition/NOC is located.

74. The 5th respondent further states that following that, Ext.P16 notification dated 28-3-2008 was issued.

75. The 5th respondent contends that Rules 2 and 2A. of Chapter V. KER deal with procedure for determining the areas where new schools, are to be opened

or existing schools upgraded and for applications for opening up new schools and upgrading of existing schools, while in the case in hand, the Government have "not considered" the schools which come under KER.

76. It is pleaded that unrecognized unaided schools come within the policy decision of the Government and Ext.P13 is a policy decision and therefore, cannot be challenged.

77. It is further pleaded that the decision taken by the Government is not against the Act and KER.

78. It also pleads that Ext.P15 letter from the Secretary to Government to the DPI contains only a direction to the DPI to publish the list of the schools as preliminary notification and the DPI was not directed to notify as per Chapter V Rule 2(2).

79. By pleadings, it attempts to state that the decision of the Apex Court in Prasad (supra) was delivered under entirely different circumstances and that the ratio of the said decision is that unless a notification under Sub-rule (1) is issued, nobody has a right to apply for recognition. It is stated that the Apex Court did not consider in that case, the powers of the Government to pass policy decisions or the notifications which are under challenge.

80. On to the facts relating to the school, the 5th respondent states that the Government considered the application of the 5th respondent's school because it is one for orphans and an orphanage is run by the society which conducts the school and the inclusion of the 5th respondent's school in the preliminary notification is legally valid and sustainable.

81. Different applications were filed seeking impleadment. Those applications were allowed.

82. The other schools which are enlisted in the impugned notification are also on record supporting the Government decision. Through their counter affidavits, they project the individual case of those parties in support of the claim that they were entitled to be recognized. They also support the impugned decision.

Judicial Determination of the Issues

83. Ext.P13 GO(P) No. 107/07/G.Edn., which contains the policy of the Government, is not under challenge. Going by that document, Government had, earlier, as per GO(Rt.) No. 3691/06/G.Edn. dated 19-8-2006, appointed a Committee to suggest guidelines for opening of new schools, upgradation of existing schools, recognition, unaided schools, grant of NOC for CBSC/ICSE schools, sanctioning of new courses/batches in Higher Secondary Schools and Vocational Higher Secondary Schools. That committee submitted its report with the suggestions, which are enumerated in Ext.P13. Acting on those recommendations, Government declared its policy as per Ext.P13 in relation to (I) sanctioning and upgrading Government or aided schools, (II) recognition of

unaided schools and NOC for CBSE/ICSE Schools and (III) Higher Secondary Schools.

84. The writ petitions in hand relate to the question of recognition of unaided schools. It is, therefore, apposite to quote Ext.P13 - GO(P) No. 107/07 in so far as it relates to Clause (II):

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

1. As a policy, unaided unrecognized schools will not be given recognition.

2. In order to overcome the educational backwardness of the Muslim Community, recognition will be granted and NOC for starting CBSE/JCSE 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 member of the Muslim Community persists in certain areas of Malappuram, Kozhikode, Kasaragod, Kannur and Wayanad Districts. Accordingly applications will be limited to the above districts alone. The additional conditions are the following:

(a) The school shall have started functioning on or before 1-6-2000.

(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.

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

(emphasis supplied)

85. Of the above, Clause 1 provides that, as a policy, unaided unrecognized schools will not be given recognition. Clause 2 provides that, the Government being satisfied that extreme educational backwardness among the members of the Muslim Community persists in certain areas of Malappuram, Kozhikode, Kasaragod, Kannur and Wayanad districts; in order to overcome the educational backwardness of the Muslim Community, recognition will be granted to those unaided schools, of those districts; satisfying conditions (a) to (d) enumerated there under, apart from those specified in the KER. Applications were to be called for only from those districts. The additional conditions to be satisfied (i.e. over and above the conditions specified in the KER) are that the school shall have started functioning, on or before 1-6-2000 and shall have a minimum of 500 students on its rolls and shall have classes from 1 to 10 and the school shall be functioning in a socially and educationally backward locality.

86. After issuing Ext.P13 Government Order on 13-6-2007, Ext.P14 circular

dated 20-6-2007 was issued by the DPI calling upon the Deputy Directors (Edn.) of those districts to call for applications from aided schools satisfying the conditions enumerated in Ext.P14 circular which are in pari materia with the four Clauses (a) to (d) quoted above from Clause II. 2 of Ext.P13 and to submit the same with the detailed report with reference to the above guidelines and the educational need of the locality with the survey report and school mapping, specifically showing educational institutions within a radius of 3 kms. of the proposed ward where the school seeking recognition/NOC is located. The applications with report were to reach the office of the DPI on or before 15-7-2007.

87. Going by Ext.P15, it appears that the DPI issued letters dated 8-10-2007, 8-1-2008 and 4-2-2008 to the Government with reference to Ext.P13 GO(P). No. 107/07. On 6-3-2008, the Government issued Ext.P15 forwarding a list of 16 schools with a direction to the DPI to publish the list of those schools as preliminary notification in the gazette today itself. Ext.P16 is, thereafter, published by the DPI on 28-3-2008 as a notification under Sub-rule (2) of Rule 2 of Chapter V KER whereby the DPI purported to publish the list of new unaided LPS/UPS/HS to be recognized. Objections were invited from the aggrieved parties within one month of publication of that notification, to be placed before the concerned DEO/AEO. The list appended to that notification is the list forwarded by the Government as per Ext.P15. Exts.P15 and P16 are under challenge.

88. As already noticed, the issue relates only to recognition of unaided schools.

89. Section 2(8) of the Act defines "recognised school" to mean a private school recognised by the Government under that Act. "Private school" is an aided or recognised school, going by Section 2(7). "Aided school" in terms of Section 2(1), is a private school which is recognised by and is receiving aid from the Government, excluding those schools entitled to receive grants under Article 337 of the Constitution; provided no aid is received by them in excess of the grants referable to that provision of the constitution. An aided school is a recognised school. To put it simply, those schools which are not recognised schools are merely unrecognized schools. The use of the term "unaided" is, therefore, a misnomer in relation to a school, so long as it is an unrecognised school. Exts.P15 and P16 and Ext.P13, to the extent it applies for the purpose of this case, relate to those schools which are not recognised and are private.

90. Any aided, recognised or Government school established before the commencement of the Act and continuing as such at the commencement of the Act is termed as an "existing school" by Section 2(3) of the Act. Sub-section (4) of Section 3 of the Act would apply only to those schools which fall within the definition of "existing schools".

91. Sub-section (5) of Section 3 of the Act provides that after the commencement of the Act, the establishment of a new school or the opening of a higher class in any private school shall be subject to the provisions of the Act,

and the rules made thereunder and any school or higher class established or opened otherwise than in accordance with such provisions shall not be entitled to be recognised by the Government. Therefore, the Act, which is a legislation to provide for the better organisation and development of educational institutions in the state of Kerala, categorically provides the law that after commencement of that Act, the said Act and the rules made thereunder, namely, KER provide the provisions for establishment and recognition of private schools whatever little exception, being available only to those "existing schools" as defined in Section 2(3) and falling within Section 3(4) of the Act.

92. The Act was made because it was deemed necessary to provide for the better organisation and development of educational institutions in the state, providing a varied and comprehensive educational service throughout the state. It extends to the whole of the state of Kerala. That being part of primary legislation, the Government are obliged to act in terms of that and not otherwise.

93. The power of the Government, in terms of Section 35, to remove any difficulty that arises in giving effect to the provisions of the Act, is only to do such things as are not inconsistent with the provisions of the Act.

94. In particular and without prejudice to the generality of the power in Sub-section (1) of Section 36 of the Act, Clause (c) of Sub-section (2) of that Section enjoins that the Government may make rules for, among other things, the grant of recognition to private schools. That rule-making power is subjected to a laying procedure in terms of Section 37.

95. KER is made in exercise of the powers conferred u/s 36 of the Act. Chapter V therein deals with opening and recognition of schools. The embargo in Sub-section (5) of Section 3 read with Rule 1(3) of Chapter V clearly establishes that a school can be opened only with the permission of the competent authority, to be called a school that is recognised, at least provisionally. The question of recognition of schools is, therefore, a matter directly falling within the statutory rules contained in Chapter V of KER. In terms of Rule 1(3), a school which was opened without the permission of the competent authority is never to be treated as one opened with the permission of the competent authority and hence is not to be provisionally recognised, until conferment of recognition in terms of the rules in Chapter V. The said provision in Sub-rule (3) of Rule 1 of chapter V establishes beyond any pale of doubt that recognition is a matter, the procedure for which is provided in that chapter and the conferment of recognition can be only in accordance with the rules in Chapter V; following the mandate of Rule 1(3) in that chapter Sub-rule (5) of Rule 1 provides that the opening of schools by educational agencies and their recognition shall be governed by the procedure laid down in Rule 2 onwards of Chapter V and permission to open and for recognition for each standard shall be separately obtained. This insistence is made after making the rules, as are applicable for opening and recognition of schools, applicable to opening and recognition of new standards.

96. Rule 2 of Chapter V KER prescribes the procedure for determining the areas where new schools are to be opened or existing schools upgraded. Rule 2A provides for applications for opening of new schools and upgrading of existing schools. Rule 9 enumerates the conditions for grant of permission to open new schools and provides that no permission to open a new school shall be granted otherwise. Rule 11 provides for grant of permission to open new schools in certain circumstances referable to opening of schools included in the development plan. Rule 17 provides the conditions to be satisfied for grant of recognition of schools. The Full Bench of this Court in *Fr. Mathew v. State of Kerala* 1978 KLT 763 held that Rules 2A, 9, 11 and 17 amplify Rule 2. So much so, those rules work in unison, to regulate the areas where new schools are to be opened or existing schools upgraded; for grant of permission to open new schools and upgrading of existing schools and for recognition of schools.

97. Chapter V KER commences from identifying the localities where new schools are to be opened and existing schools; are to be upgraded. The object of KER being complimentary to that of the Act, namely; to provide for the better organization and development of the educational institutions in the State, providing a varied and comprehensive educational service through the State, the DPI is conferred with the statutory power under Sub-rule (2) of Rule 2 of Chapter V to prepare lists indicating the localities where new schools are to be opened. Two lists are contemplated, one focusing on aided schools and the other in respect of recognised schools. The need that will be assessed by the DPI to indicate the locations would be to identify the localities where new schools of any or all grades are to be opened and localities where existing Lower Primary School or Upper Primary Schools, or both, are to be upgraded. It is the statutory requirement of Sub-rule (1) of Rule 2 that the DPI, in preparing those lists, shall consider the five matters enumerated in that Sub-rule as Clauses (a) to (e). It is not obligatory for the DPI to prepare the two lists simultaneously. But, what has to be published in the gazette, inviting objections or representations, is the list prepared by the DPI under Sub-rule (1) of Rule 2. Objections are to be called for to that list. The time limit to file objections and the manner to do so are prescribed in Sub-rule (2). The AEO and the DEO have certain duties under Sub-rule (3) of Rule 2, in relation to the objections to the list prepared by the DPI and published under Rule 2(2). They are to send their reports with their views on the objections. They are to conduct enquiries, hear the parties and visit the areas before sending their views. The DPI may also hear the parties, if found necessary may also hear¹ the parties, if found necessary and finalise the list and send his recommendations with the final list to Government as provided in Sub-rule (3) of Rule 2. The Government, going by Rule 2(4), is to scrutinise all the records and may approve the list with or without modification and forward it to the DPI within one month from the last date of receipt of recommendations of the DPI. The list as approved by the Government is to be published by the DPI in the gazette. This is the final list and no appeal or revision shall lie against that final list. This inhibition is in Rule 2(5), subject to the suo motu powers etc. contained in the

provisos to that sub-rule. The Government have the power to extend the period specified for the exercise to be undertaken under Sub-rules (3) and (4) of Rule 2. After quoting Rules 2 and 2A of Chapter V, the Apex court stated in Prasad (supra), as follows:

10. The two Rules, quoted above, lay down a comprehensive procedure for opening of new schools in particular areas; their recognition and upgradation. It is manifest that a decision in this behalf has to be primarily by the Government on an application made for that purpose under Rule 2A. The Rules also lay down the guidelines which are to be taken into consideration for preparing the list in terms of Sub-rule (1) of Rule 2, On the lists being finalized, after their publication and consideration of objections, if any, the same have to be sent to the Government for its approval, with or without modification. Nevertheless the decision by the Government whether opening of new school is to be sanctioned or whether an existing school is to be allowed to be upgraded has to be taken on consideration of the matters enumerated in Clauses (a) to (e) of Rule 2(1) of the Rules. Similarly, an application for either opening of new school or for Upgradation of an existing aided school can be submitted only after the Director publishes a final list of areas where new schools are to be opened or existing schools are to be upgraded under Sub-rule (4) of Rule 2. Any application received otherwise cannot be considered. In view of such comprehensive procedure laid down in the statute, an application for upgradation has necessarily to be made and considered strictly in a manner in consonance with the Rule's.

98. Chapter V KER provides a step by step procedure. It provides an entire procedure; with a sequence. It is comprehensive. It is a statutory prescription. It is exclusive and works as a code by itself. The entire activity is through the exercise of statutory powers by the competent repositories in a hierarchy. That should be in the manner prescribed. It is a piece of legislation: subordinate. It is law. It leaves no room for the executive Government to deviate from it. Nor is there any such authorization available in the Act.

99. As already noticed, KER are statutory rules. The DPI and the Educational Officer, meaning thereby the DEO or the AEO, should discharge statutory duties under the KER. Where the law prescribes a procedure and states that a particular thing shall be done in a particular manner, it shall be done only that way, and not otherwise.

100. The prescription of Section 36(2)(C) of the Act authorising the Government to make rules for the purpose of the grant of recognition to private schools is made after declaring the legislative policy that a varied and comprehensive educational service throughout the state is required to be provided and therefore, it is necessary to provide for the better organisation and development of educational institutions. Reading the Act as a whole, the thrust that is inexcusably evident is that the constitutional goals in the field of education have to be achieved and education is treated as a subject on which attention is to be focussed without any classification, in the formative years of childhood. This

flows from Article 21, Article 45 and other provisions of the constitution.

101. It is in the aforesaid context that Chapter V KER has to be appreciated as containing provisions which are ultimately aimed at improving and reaching out to satisfy the educational need of the entire state of Kerala. This is why the DPI is conferred the authority to prepare lists indicating the localities where new schools are to be opened or any school has to be upgraded. The public is given the liberty to place its views and objections to those lists by making representations to the DEO or the AEO, who are the statutory officers having immediate control and opportunity to assess every local situation. Their reports on the objections and representations are to be considered by the DPI who should finalise his views regarding the list of localities, prepared by him in terms of Rule 2(1) of Chapter V. After formulating that, the DPI has to forward the records to the Government. It is then and only then that the Government scrutinises the entire records in terms of Rule 2(4) and decides on the list forwarded by the DPI. The Government, at the helm, looks at the entire records to consider whether the list forwarded by the DPI is to be approved as such or with modification. Unlike Sub-rule (3), which contains a statutory provision, for hearing the parties, Sub-rule (4) does not enjoin any hearing of parties by the Government, the question of objection to a "final list" comes only in terms of the first proviso occurring after Rule 2(5); that is, after the publication of the final list by the DPI which is an act of the DPI after the Government approves the list under Sub-rule (4) of Rule 2.

102. After publication of the "final List", so christened in Sub-rule (5) of Rule 2 and subject to any review in terms of the proviso under that sub-rule, the DPI has to publish a fresh notification in terms of Rule 2A calling for applications for the opening of new school? or Rising of the grade of the schools in the areas specified. The procedure for identifying the schools which are to be upgraded pr identify of the person for grant of permission to open a school thus, commences, clearly, only after the identification of the localities. Sub-rule (2) of Rule 2A provides that applications for opening of new schools or for upgrading, shall be submitted only in response to the notification published by the DPI and applications received otherwise shall not be considered.

103. A composite reading of Rules 2 and 2A of Chapter V would clearly establish that the process, of inviting and processing applications for opening of new schools of any or of all grades and for raising the grade of Lower Primary Schools or Upper Primary Schools which already exist, can be had only after the areas are specified in the notification issued by the DPI following the Government decision in terms of Sub-rule (4) of Rule 2 of chapter V. These procedures weed out the chances of picking one's choice from among those who want to establish schools wherever it would suit them.

104. The areas will have to be first decided, the cardinal criterion being educational need. Following that, applications would be invited for establishment of schools. If the DPI identifies the schools even before deciding on the localities,

that would exclude the issuance of a decision in terms of Rule 2(4) of Chapter V and the publication of the final list of localities where schools or higher grades are needed.

105. With the aforesaid in view, an assessment of the impugned action would show that 16 schools were first picked up by the Government may be through the DPI and the Deputy Directors (Education); using the process of Ext.P14 and then, the DPI was directed to notify that list as a preliminary one. This is clearly contrary to the prescriptions of the Act and KER and is also violative of the inhibitions in the Act and KER, as enunciated above.

106. The learned Counsel appearing for the Government and the private respondents supporting the impugned action attempted to argue that the policy of the Government reflected in Ext.P13 is not a matter falling within the Act and KER; but is an unoccupied field that relates to those schools which had started functioning on or before 1-6-2000 and is in the unrecognised unaided sector. Having noticed the quality of the said sector, the adjectives "unaided" and "unrecognised" are nothing but admission as to the illegal status, its commencement and in continuance of such establishments. The grant of recognition is a field governed by the Act and KER. If any classification is attempted to state that "unrecognised unaided sector" is one by itself, that would be, nothing but an affront to the Act and KER and therefore, to the laws. The grant of recognition is essentially a matter regulated by the Act and KER. In this context, it needs to be noticed that it was attempted to be canvassed on behalf of the contesting respondents that theirs are "existing schools" and therefore, the provision of Chapter V would not apply because, according to them, those provisions relate only to opening of "new schools" and higher grades in existing Lower Primary or Upper Primary Schools. This argument is fallacious. The indisputable position is that "an existing school", for the purpose of the Act and KER, means one established before the commencement of the Act and continuing as such at its commencement. Section 2(3) of the Act. The respondents are merely schools functioning without any sanction of the statute law governing the field. If they are a class; they may be, but only to be identified for being contrary to law and not as those entitled to be cushioned to legitimacy by any executive fiat.

107. Even Ext.P13 Government Order proceeds to state that the conditions enumerated in Sub-clauses (a), (b), (c) and (d) in Clause II.2 have to be satisfied by the schools, that could be identified for recognition in terms of that Government Order only if those conditions are also satisfied, apart from those specified in KER. This means that even the Government never intended to deviate from the provisions of the Act and KER in the matter of granting recognition to the school that have to be identified from the Malappuram, Kozhikode, Kasargod, Kannur and Wayanad districts which were treated by the Government as districts of extreme educational backwardness among the members of the Muslim Community. Even in the counter affidavit filed by the

State of Kerala through its under Secretary in the General Education Department (counter affidavit sworn to on 7th July, 2008 - WP(C). 18050/2008), it is specifically pointed out that Rule 2(2) of Chapter V KER itself provides an opportunity to the writ petitioners to file objections. This specific plea of the state takes the wind off the sail, of the argument on behalf of some the private respondents that the impugned exercise is done standing outside the area of application and operation of the Act and KER.

108. The educational need could be geographic. It could also depend upon communities. It could depend upon religious identities. It could also depend upon linguistic identities. It could depend upon economic power. It could depend upon different other social, economic, historic and political reasons. If the Government have, in their wisdom, concluded on the basis of the report of the High Power Committee, that extreme educational backwardness persists among the members of the Muslim Community in certain areas of Malappuram, Kozhikode, Kasaragod, Kannur and Wayanad districts, it may not be possible to find fault with such a view provided it is supported with appropriate data on the basis of which the policy decision of the Government can rest. In fact, the petitioners do not challenge that view of the Government as contained in Ext.P13. But the issue in hand is as to whether the procedure has been adopted in terms of statutory provisions contained in the Act and KER which apply to identifying localities for permitting the establishment and running of schools and for recognition backwardness has been found by the Government in "certain areas" of the districts mentioned. Five districts are mentioned. But Ext.P16 would show that 15 out of 16 beneficiaries of ixt.P16 are from Malappuram district and 12 out of 15 in Malappuram district fall within fee jurisdiction of DEO, Tirur. It is pointed out by the learned Counsel for the contesting respondents without being contested by the official respondents that there would be more than one district educational officer in a revenue district. It is pithily pointed out that if it were educational backwardness among the members of the Muslim Community that was taken into consideration, there is no reason to exclude opportunity to different persons, at least in that community, to start the schools. It is pointed out that all the petitioners in these writ petitions belong either to the Muslim Community or are institutions run by members of that community. It is further pointed out, at least as an argument, that even if it is the, extreme educational backwardness of the Muslim Community that prompted the Government to take the policy decision contained in paragraph II.2 of Ext.P13, that could not preclude or exclude any citizen not belonging to the Muslim Community, proposing to establish the schools, ultimately, more importantly and rightly, it is. pointed out that while the Government concluded that there is extreme educational backwardness among the members of the Muslim Community in certain areas of five districts, namely, Malappuram, Kozhikode, Kasargod, Kannur and Wayanad, there is an exclusive conferment of the benefits of that policy decision to Malappuram district, that top, to Tirur atone, while a solitary school from Kasargod has been identified. Resultantly, the contention of the petitioners that the impugned action is a

conferment confined to the Muslim Community of Tirur alone, barring one school of Kasargod and amounts to hostile discrimination and results in abuse of authority and fraud on powers, is only to be upheld.

109. Of immediate notice is also the fact that while Ext.P13 states that for consideration in terms of the said Government Order, the school shall have classes from 1 to 10, the school at Sl. No. 12 in the list forming part of Ext.P16 has only classes from 1 to 7. Even in terms of the policy propounded, that school could not have been included.

110. The necessity for legislation; fundamentally, is nothing but the need for expression of the legislative will of the people through the constitutional body which, it, as a Nation, has authorised to legislate, on its behalf. The purpose of expression of such legislative will may be multifarious and taking into consideration the need for every piece that comes out as legislation. In a democracy governed by Rule of Law, it is an exceptionally fundamental and a dearest and seminal doctrine of the Constitution that the sacrosanct equality principle enshrined in Article 14 of the Constitution is zealously preserved. Equality before law and equal protection of the laws is not a concept of charity that flows to any individual citizen from the different limbs of the State. It is a core guarantee protecting every individual against all established wings under the constitution. This is why different aspects and shades of the equality principle have bloomed to be identified from time to time, with the growth of constitutional and administrative law; to preserve the checks and balances in a large polity.

111. Governance is not a privilege of the Government. It is a duty. Governance in accordance with the command of the constitution and the Laws is a fundamental entitlement of the we, the people, as a Nation. The executive Government is merely a societal agent of the Sovereign; the sovereignty lying impregnated in the citizenry. The first principle of equality is that the sovereign power within each citizen is in equal measure and it is this equality principle that forms the fundamental substratum for the development of the seminal doctrine of equality, leading to justice; social, economic and political and to equality; of status and of opportunity. The legislative exercises, in situations and circumstances; provide insulation even against the executive Government. The fundamental reason for this is not any lack of confidence in the system, but the earnestness to exclude nepotism, favouritism, arbitrariness, corruption, bias, prejudice and every other vitiating element that would result in forking the equality principle.

112. Every state action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 and basic to the rule of law, the system which governs us, arbitrariness being the negation of the rule of law. Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary in whatever sphere must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the state and exercise of all powers must be

for public good instead of being an abuse of power - see Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, .

113. With the aforesaid scenario, the action of the Government of making a list of schools of its choice; even if it were on the basis of any material provided by the DPI, having collected it through the Deputy Directors; is an exercise in total violation of the laws. Having done so, for which, there was no power; and having acted in violation of the statutory provisions, it amounts to fraud on powers. It is arbitrary. It bespeaks favouritism. It is unsustainable even on the policy of the Government, which, it propounds in the counter affidavit, stating that "the policy of the Government is that there should be a fair, just, transparent, equitable and non-discriminatory policy in the matter". It is wholly short of that. A clear case of hostile discrimination and selective conferment is established.

114. There is total exclusion of the rule of law in the matter.

115. For the foregoing reasons, Circular No. NS1/42725/07 dated 20-6-2007 issued by the Director of Public Instruction, the decision of the Government of Kerala as contained in Letter No. 57324/F2/07/GE dn. dated 6-3-2008 and Notification No. NS1/19510/2008/DPI dated 28-3-2008 of the Director of Public Instruction are quashed preserving all other rights of parties, in accordance with law.

116. Writ petitions are allowed accordingly and to that extent.