

(2010) 03 KL CK 0076

In the High Court Of Kerala

Case No : W.A. No. 2936 of 2009 and W.P. No. 144 of 2009

Belsi

APPELLANT

Vs

Corporate Management of Latin Catholic Schools

RESPONDENT

Date of Decision : 18-03-2010

Acts Referred:

Constitution of India, 1950 — Article 30(1)
Kerala Education Rules, 1959 — Rule 34, 44(1)
Kerala University Act, 1957 — Section 57(3)

Citation : (2010) 2 ILR (Ker) 256 : (2010) 2 KLT 134

Hon'ble Judges : S.S. Satheesachandran, J;P.N. Ravindran, J;K. Balakrishnan Nair, J

Bench : Full Bench

Advocate : V.A. Muhammed and K.E. Hamza, for the Appellant; George Mecherli, V.C. James, M.A. Firoz, Sr. Government Pleader, for the Respondent

Judgement

K. Balakrishnan Nair, J.—The common question that arises for decision in these cases is whether the decision of the Full Bench of this Court in Kurian Lizy Vs. State of Kerala, is no longer good law, in view of the decision of the Apex Court in Malankara Syrian Catholic College v. Jose 2007 (1) KLT 22 (SC). Therefore, they are heard and disposed of by this common judgment.

W.A. No. 2936/2009:

2. This Writ Appeal is treated as the main case for the purpose of referring to the facts. Though, we propose to answer only the question referred to the Full Bench, for effectively dealing with that question, a brief resume of the facts is necessary. The first respondent herein was the writ petitioner. It is a Corporate Educational Agency, managing the Latin Catholic Schools under the Diocese of Neyyattinkara. St. George L.P. School, Palode is one of the aided Schools managed by it. The Manager of the School appointed the 6th respondent N.Y. Ammini (5th respondent in the Writ Petition), as the Headmistress of the said School with effect from 1.4.2004. The appellant herein, the 7th respondent in the

Writ Petition, who was a senior Lower Primary School Assistant (LPSA) working in the School, staked her claim for promotion to the said vacancy in which the 6th respondent was appointed. The Assistant Educational Officer (A.E.O.), Palode, by Ext.P2 order dated 6.8.2004 declined to approve the said appointment, for the reason that it was made ignoring the claim of the senior hand, the appellant herein. The first respondent filed appeal before the District Educational Officer (D.E.O.), Attingal. The said officer, by Ext.P3 order dated 27.5.2005, affirmed the order of the A.E.O., on the ground that N.Y. Ammini (6th respondent) is junior to Smt. M. Belsi (appellant). The Manager filed a revision before the Director of Public Instruction (DPI). The DPI, by Ext.P5 order dated 21.3.2006, dismissed the revision for the reason that the Manager has not produced any evidence to prove that the School is managed by a minority community, entitled to get the protection of Article 30(1) of the Constitution of India. Challenging Ext.P5 order, the Manager filed a revision before the Government. The said revision was heard and dismissed by the State Government, by Ext.P7 order dated 11.3.2008. The revision was dismissed, relying on the Full Bench decision of this Court in Kurian Lizy (supra). By that order, the first respondent was directed to appoint the appellant as Headmistress of the School. Challenging Exts.P2, P3, P5 and P7 and seeking consequential reliefs, the Writ Petition was filed.

3. The learned Single Judge noticed that the fact that the educational institution is managed by a minority community, was not disputed by any one. Therefore, the Manager is entitled to appoint any qualified hand, overlooking the claims of the seniors, to the post of Headmaster/Headmistress. The learned Judge also noticed that though the procedure suggested in Kurian Lizy (supra) was not followed while overlooking the senior, the same will not vitiate the appointment order, as Kurian Lizy (supra) was impliedly overruled by Malankara Syrian Catholic College (supra). This view was taken, relying on the decision of the Division Bench of this Court in Manager, S.S.H.S. School v. Lijin 2007 (3) KLT 663. In that view of the matter, the learned Single Judge quashed the impugned orders and ordered to approve the appointment of the 6th respondent Smt. N.Y. Ammini. Challenging the said decision of the learned Single Judge, the 7th respondent in the Writ Petition Smt. M. Belsi has preferred this appeal.

4. When the Writ Appeal was heard, a Division Bench of this Court felt that the view expressed in Lijin (supra) that Kurian Lizy (supra) has been overruled by the Apex Court in Malankara Syrian Catholic College (supra), is, prima facie, not correct. Therefore, the Writ Appeal was referred to the Full Bench, to decide on the correctness of the view expressed by the Division Bench in Lijin (supra).

5. We heard the learned Counsel on both sides. Sri George Mecheril, who appeared for the Management, submitted that the absolute right of the minority to make choice of the Headmaster of the School, guaranteed under Article 30(1) of the Constitution of India, has been reiterated and affirmed by the Apex Court in Malankara Syrian Catholic College (supra). The said absolute right and the fair procedure mentioned in Kurian Lizy (supra) cannot stand together. The direction

to follow a fair procedure in selecting the Headmaster of the School dilutes the absolute right of the minority community to manage the School, by appointing Headmaster of its choice. In view of the recognition of the absolute right, the direction to follow the fair procedure stands nullified. Therefore, the view taken by the Division Bench in Lijin (supra) on Kurian Lizy (supra) is absolutely correct. The above submission was supported by Sri V.M. Kurian, who appeared for the petitioner Manager in the connected Writ Petition. The learned senior Government Pleader Sri Benny Gervasis, on the other hand, submitted that the right to administer conferred by Article 30(1) of the Constitution of India does not partake within its fold the right to maladminister. That position is well-settled by several decisions of the Apex Court, it is pointed out. What the Full Bench in Kurian Lizy (supra) said is that the Manager should follow a fair procedure in superseding a senior hand. The Manager cannot follow an unfair procedure while deviating from the seniority rule in the matter of selection of Headmaster. He being a statutory authority, is bound to follow a just and fair procedure, it is submitted. This submission, according to the learned senior Government Pleader, is supported by all the decisions of the Apex Court, interpreting minority rights under Article 30(1) of the Constitution of India, including Malankara Syrian Catholic College (supra).

6. Both sides took us through the decisions in Kurian Lizy 2006 (4) KLT 264 (F.B.), Malankara Syrian Catholic College 2007 (1) KLT 22(SC), Manager, S.S.H.S. School v. Lijin 2007 (3) KLT 663 and T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, . Reference was also made to the Constitution Bench decision of the Apex Court in The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another, .

7. We considered the rival submissions made at the Bar and perused the decisions cited before us. The decision in Kurian Lizy (supra) arose in the context of supersession of Kurian Lizy and two others, who were senior-most High School Assistants in Infant Jesus High School, Vadayar, Kottayam, by the Manager, by appointing Sri Thomas Joseph, a junior High School Assistant. All the claimants belonged to the same religious denomination, which was administering the High School. Varkey Vs. State of Kerala, was also a case where a member of a minority community, who was a junior hand, was appointed overlooking the claims of seniors belonging to the very same community. The Division Bench in that case, took the view that in view of the dictum laid down by the Apex Court in T.M.A. Pai Foundation's case, the course followed by the Manager, though belonging to a minority educational institution, in preferring a junior, cannot be supported. Another Division Bench in Annie Francis Vs. D.E.O., , took the view that even after the decision of the Apex Court in T.M.A. Pai Foundation's case, the legal position that the management of a minority educational institution can appoint a junior hand, ignoring the claims of senior teachers, is not disturbed. In view of the conflict between the decisions in Varkey (supra) and Annie Francis (supra), the case of Kurian Lizy (supra) was referred to the Full Bench. The Full Bench upheld the view taken in Annie Francis (supra). The Full Bench held as

follows:

6. ...

The Division Bench in Annie Francis's case (supra), we are of the view, came to the correct conclusion and, thus, rightly held that the Supreme Court in T.M.A. Pai Foundation's case (supra) had not impliedly overruled the law as laid by this Court referred to above,

7. Our view that the Division Bench in Annie Francis's case (supra) correctly interpreted the law would be fortified from at least one decision of the Honourable Supreme Court wherein the precise question as referred to above in the context of Rule of 1959 itself came to be focussed. In N. Ammad Vs. The Manager, Emjay High School and Others, , it was held that:

The right guaranteed under Article 30(1) is a right that is absolute and any law or executive direction which infringes the substance of that right is void to the extent of infringement. But the absolute character of the right will not preclude making of regulations in the true interests of efficiency or instruction, discipline, health, sanitation, morality, public order and the like, as such regulations are not restrictions on the substance of the right guaranteed by the Constitution.

It was further held that:

Selection and appointment of Headmaster in a school (or Principal of a college) are of prime importance in administration of that educational institution. The Headmaster is the key post in the running of the school. He is the hub on which all the spokes of the school are set around whom they rotate to generate result. A school is personified through its Headmaster and he is the focal point on which outsiders look at the school. A bad Headmaster can spoil the entire institution, an efficient and honest Headmaster can improve it by leaps and bounds. The functional efficacy of a school very much depends upon the efficiency and dedication of its Headmaster. This pristine precept remains unchanged despite many changes taking place in the structural patterns of education over the years.

It was further held that:

The management's right to choose a qualified person as the Headmaster of the School is well insulated by the protective cover of Article 30(1) of the Constitution and it cannot be chiselled out through any legislative or executive rule except for fixing up the qualifications and conditions of service for the post. Any such statutory or executive fiat would be violative of the fundamental right enshrined in the aforesaid Article and would hence be void. The management of a minority school is free to find out a qualified person either from the staff of the same school or from outside to fill up the vacancy. If management of the school is not given very wide freedom to choose the personnel for holding such a key post, subject of course to the restrictions regarding qualifications to be prescribed by the State, the right to administer the school would get much diminished. Hence it is for the management of the minority educational

institution to choose the modality for selecting the qualified persons for appointment.

The facts of the case reveal that the school in question was an aided one and governed by the Kerala Education Act, 1958. It is in the context of Rule 44(1) reproduced below that the observations as reproduced above were made by the Supreme Court:

The appointment of Headmasters shall ordinarily be according to seniority from the seniority list prepared and maintained under Clauses (a) and (b), as the case may be, of Rule 34. The Manager will appoint the Headmaster subject to the Rules laid down in the matter. A teacher if he is aggrieved by such appointment will have the right of appeal to the Department.

In a recent decision rendered by the Honourable Supreme Court in *R. Sulochana Devi Vs. D.M. Sujatha and Others*, it has been held as follows:

It is settled by a catena of decisions of this Court that courts shall be loath in interfering with the choice of the management in the selection of the Principal candidate with reference to the educational institutions under the management of the minority institutions.

Surely, this decision of the Honourable Supreme Court was rendered after the decision of the Supreme Court in *T.M.A. Pai Foundation's* case (supra).

While firmly upholding the right of the minority to make its own choice to the post of Headmaster, the Full Bench in *Kurian Lizy* (supra) noticed the following observation of the Apex Court in *T.M.A. Pai Foundation's* case:

However, a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself.

The above observation is contained in the answer to question No. 5(c) in para, 161 of the said judgment. Thereafter, the Full Bench further observed as follows;

After answer to the question directly covering the issue in hand with regard to appointment of Headmaster or Principal, nothing else survives for determination. It would be unnecessary in this order in probing further the matter. We, thus, hold that the management of a minority educational institution would have freedom to appoint Headmaster or Principal. Rule 44(1) of the Rules of 1959 would have no control over the powers conferred under Article 30(1) of the Constitution, although such institution has necessarily to evolve a rationale procedure for selection of the Headmaster or Principal, this context, we feel that some directions should be issued to the Managements of minority educational institutions, to evolve a procedure for selection to the post of Headmaster, in the light of the observations in the answer to question 5(c) in *T.M.A. Pai Foundation's* case (supra) quoted above. We notice that in many cases senior teachers belonging to the minority community, which runs the institution are superseded without assigning any reason. Article 30(1) of the Constitution of

India is an armour to protect the minority against the legislative and executive actions of the State, which is normally controlled by the majority. The said armour cannot be used as weapon against other members of the same minority community. The protection under Article 30(1) is to the minority community and for the minority community. The Manager may supersede the members of other communities and also members of the minority community, who are found unsuitable for promotion to the post of Headmaster. But there may be teachers, who are, in every respect qualified and suitable to head a minority educational institution. The management may select the best among them. The selection procedure should be fair, reasonable and transparent. The eligible members of the minority community may not have a feeling, that they have been superseded without any valid grounds. So, all minority educational institutions, which propose to select the best person to the post of Headmaster/Principal of a School or College, as the case may be, ignoring seniority in the feeder category or ignoring the available teachers, should frame and publish regulations or bye-laws, containing a transparent procedure, governing such selection, The publication can be made in the Notice Board of the educational institution concerned and a copy of it should be available in school/college library for reference, When superseding a senior, qualified member of the minority community the reasons there of should be clear from the records. The question as framed in the beginning of this order is thus answered accordingly.

(emphasis supplied)

The point to be considered is whether the above quoted observation of the Full Bench can stand with the decision in Malankara Syrian Catholic College (supra).

8. The main case disposed of by the Apex Court in Malankara Syrian Catholic College (supra) was concerning the appointment to the post of Principal in Mar Ivanios College, Thiruvananthapuram. The Manager appointed a qualified and fit person as Principal, though he was junior. The qualified seniors, who were fit for appointment to that post, challenged the same before the University Appellate Tribunal, contending that the appointment was in violation of Section 57(3) of the Kerala University Act, which provided that appointment shall be according to seniority from among the fit persons. The Tribunal allowed the appeal and upheld the said contention. The High Court also affirmed the said decision of the Tribunal. Challenging the decision of the High Court, Civil Appeals were preferred before the Apex Court. The Hon'ble Supreme Court held that the provisions of Section 57(3) of the Kerala University Act do not apply to minority educational institutions and the right of the management to make its own choice to the post of Principal was upheld. The relevant portion of the said judgment reads as follows:

27. It is thus clear that the freedom to choose the person to be appointed as Principal has always been recognised as a vital facet of the right to administer the educational institution. This has not been, in any way, diluted or altered by T.M.A. Pai Having regard to the key role played by the Principal in the

management and administration of the educational institution, there can be no doubt that the right to choose the Principal is an important part of the right of administration and even if the institution is aided, there can be no interference with the said right. The fact that the post of the Principal/Headmaster is also covered by State aid will make no difference.

28. The appellant contends that the protection extended by Article 30(1) cannot be used against a member of the teaching staff who belong to the same minority community. It is contended that a minority institution cannot ignore the rights of eligible lecturers belonging to the same community, senior to the person proposed to be selected, merely because the institution has the right to select a Principal of its choice. But this contention ignores the position that the right of the minority to select a Principal of its choice is with reference to the assessment of the person's outlook and philosophy and ability to implement its objects. The management is entitled to appoint the person, who according to them is most suited to head the institution, provided he possesses the qualifications prescribed for the posts. The career advancement prospects of the teaching staff, even those belonging to the same community, should have to yield to the right of the management under Article 30(1) to establish and administer educational institutions.

29. Section 57(3) of the Act provides that the post of Principal when filled by promotion is to be made on the basis of seniority-cum-fitness. Section 57(3) trammels the right of the management to take note of merit of the candidate or the outlook and philosophy of the candidate which will determine whether he is supportive of the objects of the institution. Such a provision clearly interferes with the right of the minority management to have a person of their choice as head of the institution and thus violates Article 30(1). Section 57(3) of the Act cannot therefore apply to minority-run educational institutions even if they are aided.

9. We have gone through the above decision. But, we find nothing in it, which will have the effect of overruling the direction of the Full Bench in *Kurian Lizy* (supra), to follow a fair procedure while superseding the seniors of the minority community, to make choice to the post of Headmaster. We think, the observations in *Malankara Syrian Catholic College* (supra) only support the view of the Full Bench. In para 18 of the judgment in *Malankara Syrian Catholic College* (supra), the Apex Court noticed the decision in *T.M.A. Pai Foundation's* case and the answer to question No. 5(c) therein, wherein the necessity for evolving a rational procedure for the selection of teaching staff and for taking disciplinary action by the management, was stressed. The relevant portion reads as follows:

But such institutions would have to comply with the conditions of recognition and conditions of affiliation to a university or board; and a rational procedure for the selection of teaching staff and for taking disciplinary action has to be evolved by the management itself. This Court also held that fees to be charged by unaided

institutions cannot be regulated but no institution should charge capitation fee.

(emphasis supplied)

In para. 19 of the said decision, the Apex Court summarised the general principles relating to the establishment and administration of educational institutions by minorities. The said para reads as follows:

19. The general principles relating to establishment and administration of educational institution by minorities may be summarised thus:

(i) The right of minorities to establish and administer educational institutions of their choice comprises the following rights:

(a) to choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;

(b) to appoint teaching staff (teachers/lecturers and Headmasters/Principals) as also non-teaching staff and to take action if there is dereliction of duty on the part of any of its employees;

(c) to admit eligible students of their choice and to set up a reasonable fee structure;

(d) to use its properties and assets for the benefit of the institution.

(ii) The right conferred on minorities under Art, 30 is only to ensure equality with the majority and not intended to place the minorities in a, more advantageous position vis-a-vis the majority. There is no reverse discrimination in favour of minorities. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanitation, taxation, etc., applicable to all, will equally apply to minority institutions also.

(iii) The right to establish and administer educational institutions is not absolute. Nor does it include the right to maladminister. There can be regulatory measures, for ensuring educational character and standards and maintaining academic excellence. There can be checks on administration as are necessary to ensure that the administration is efficient and sound, so as to serve the academic needs of the institution. Regulations made by the State concerning generally, the welfare of students and teachers, regulations laying down eligibility criteria and qualifications for appointment, as also conditions of service of employees (both teaching and non-teaching), regulations to prevent exploitation or oppression of employees, and regulations prescribing syllabus and curriculum of study fall under this category. Such regulations do not in any manner interfere with the right under Article 30(1).

(iv) Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will, have, the freedom to appoint teachers/lecturers by adopting any rational procedure, of selection.

(v) Extension of aid by the State does not alter the nature and character of the

minority educational institution. Conditions can be imposed by the State to ensure proper utilisation of the aid, without however diluting or abridging the right under Article 30(1).

(emphasis supplied)

The portions emphasized by us caution against maladministration, exploitation and oppression of employees and the necessity to adopt a rational procedure for selection of teachers. In para 20, it was further observed as follows:

20. Aided institutions give instruction either in secular education or professional education. Religious education is barred in educational institutions maintained out of the State funds. These aided educational minority institutions providing secular education or professional education should necessarily have standards comparable with non-minority educational institutions. Such Standards can be attained and maintained only by having well-qualified professional teachers. An institution can have the services of good qualified professional teachers only if the conditions of service ensure security, contentment and decent living standards. That is why the State can regulate the service conditions of the employees of the minority educational institutions to ensure quality of education. Consequently, any law intended to regulate the service conditions of employees of educational institutions will apply to minority institutions also, provided that such law does not interfere with the overall administrative control of the management over the staff.

(emphasis supplied)

The highlighted portions would reveal the anxiety of the Apex Court about providing fair and proper service conditions for teachers of minority educational institutions. In *Kurian Lizy* (supra), the managements themselves were asked to frame regulations/bye-laws containing a fair procedure to select teachers for appointment to the post of Headmaster. No outside agency was asked to frame them. So, we find it difficult to accept the view canvassed by the learned Counsel for the management that the direction to follow a fair procedure in the matter of selection of teachers for appointment to the post of Headmaster, will have the effect of diluting the right of the minorities to administer their institutions, guaranteed by Article 30(1) of the Constitution of India. The Manager is a statutory authority under the Kerala Education Act. He is conferred with certain powers, rights and duties. Every power conferred on a statutory authority has to be exercised fairly and reasonably. It is an implied limitation on the power of every statutory functionary. The Manager has the power to take disciplinary action against an erring teacher, but he cannot take action against a teacher for being red-haired. Likewise the Manager of a minority educational institution cannot say that he will select the Headmaster by holding a test of 100 metres race and person who comes out first in the said race will be appointed as Headmaster. If such a procedure is followed, the same will be condemned as *ultra vires*, being arbitrary and irrational. The power to administer does not

include the power to maladminister. The power to make selection does not take in its fold the power to follow an unfair procedure in making the selection. In this context, we refer to the decision of the House of Lords in *Roberts v. Hopwood* (1925) AC 578. It was a case where the Poplar Borough Council substantially increased the wages of its employees, on the ground that the Council was authorised to grant wages it thought fit. The auditors objected. The matter finally reached the House of Lords. The House held that the power to grant such wages the Borough Council thinks fit, is subject to the implied limitation that it can pay only reasonable wages, even though the word "reasonable" is not present in the enabling statute. What is stated by the House of Lords is a well-settled principle of Administrative Law. This decision has been referred to with approval by the Hon"ble Supreme Court in *Delhi Science Forum and others Vs. Union of India and another*, . So, the Full Court in *Kurian Lizy* (supra) only reminded the duty of a statutory functionary that while he overlooks the rights of seniors, he may follow a fair procedure. We have no doubt in our mind that the said direction can definitely stand with the decision in *Malankara Syrian Catholic College* (supra). The said decision does not impliedly overrule the decision in *Kurian Lizy* (supra). So, the observation of the Division Bench in *Lijin* (supra) that *Kurian Lizy* (supra) cannot stand with *Malankara Syrian Catholic College* (supra) is not tenable. Further, we notice that on the facts of *Lijin* (supra), it was not necessary for the Division Bench to consider whether *Kurian Lizy* (supra) survives after *Malankara Syrian Catholic College* (supra) or not. In other words, that observation was unnecessary also.

10. In the result, we answer the reference, stating that the direction in *Kurian Lizy* (supra), to follow a fair procedure for overlooking the seniors and appointing a junior, is not impliedly overruled by *Malankara Syrian Catholic College* (supra). The Writ Appeal may be posted for hearing before the appropriate Bench, as per the roster.

W.P.(C) No. 144/2009:

11. The decision in W. A. No. 2936/2009 governs this case also. Therefore, post this Writ Petition before the learned Single Judge, as per the roster.