

(2009) 04 KL CK 0007

In the High Court Of Kerala

Case No : Writ Petition (C) No. 34184 of 2007

Bharathiya Vidya Bhavan, Thriprayar Kendra

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 06-04-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 19(6), 26, 31

Kerala Education Act, 1958 — Section 3(3)

Kerala Education Rules, 1959 — Rule 2, 2A, 3, 3(1), 3(2)

Citation : (2009) 04 KL CK 0007

Hon'ble Judges : K.L. Joseph Francis, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : P.N. Krishnankutty Achan and K. Ramakumcir and Mohan Jacob George, T.P.M. Ibrahim Khan, P.A. Ahammed, V.V. Surendran, Rajasekharan Pillai, V.M. Kurian, Shaji P. Chaly, N. Nagaresh, Benoy Thomas, V.V. Asokan, M.P. Madhavankutty, Elvin Peter, P.J., Babu Varghese, T.A. Shaji, K.I. Mayankutty Mather, Santhosh Mathew and K.G. Balasubramanian, for the Appellant; C.P. Sudhakara Prasad, General and T.B. Hood, Government Pleader, for the Respondent

Judgement

K. Balakrishnan Nair, J.—The Petitioners in these writ petitions have applied for No Objection Certificates (N.O.C.) from the Kerala Government for establishing C.B.S.E. or I.C.S.E. schools. As per the Affiliation Bye-laws of C.B.S.E. and I.C.S.E., N.O.C. from the State Government is one of the mandatory requirements for grant of affiliation. Therefore, the writ Petitioners moved the Government, seeking N.O.C., by filing appropriate applications. Their applications are either pending or have been rejected. Those applications were dealt with by the Government as per Government Order, G.O.(Ms) No. 18/88/G Edn. dated 12-1-1988. Earlier, this Court held that Clause (xii) of the said Government order is arbitrary and unworkable. So, the Government issued G.O.(Ms) No. 204/08/G. Edn. dated 15-12-2008, deleting Clause (xii) of G.O.(Ms) No. 18/88/G. Edn. dated 12-1-1988 and also incorporating certain new provisions in the said Government Order dated 12-1-1988. Still later, the words "recognised by the

Government", in the opening sentence of paragraph 3 of the Government Order dated 15-12-2008 was substituted by the word "established", as per G.O.(Ms) No. 3/09/G Edn. dated 5-1 -2009. Feeling aggrieved by the last two Government orders mentioned above, these writ petitions are filed. Since common questions arise for consideration in these writ petitions, they are heard and disposed of together by this common judgment.

2. We will now briefly refer to the facts of the case.

W.P. (C) No. 34912 of 2007

This case is treated as the main case, for the purpose of referring to the exhibits. The Petitioner in this writ petition is a Trust. It moved the Government by submitting Ext.P-1, which is a copy of the application for affiliation, along with a covering letter, seeking N.O.C. It wanted to establish Nirmala Public School at Karimannoor, Thodupuzha. The proposal is to run a Higher Secondary School with Standards 1 to 12. Ext. P-2 is G.O.(Ms) No. 18/88/G. Edn. dated 12-1-1988, containing the norms formulated by the Government for grant of N.O.C. for affiliation.

3. The Petitioner's application was enquired into by the District Educational Officer and the said officer submitted Ext. P-3 report before the D.P.I, on 24-4-2006, recommending grant of N.O.C. The Director of Public Instruction, by Ext. P-3 (a) dated 5-6-2006, also favoured the grant of N.O.C. to the writ Petitioner. While so, the Government returned the application as per Ext. P-4 dated 26-10-2006, directing the writ Petitioner to submit the application as per the new guidelines to be framed by it. Ext. P-4 was challenged before this Court by filing Writ Petition (C) No. 8120 of 2007. While so, new guidelines for grant of N.O.C. were issued by the Government, as per G.O.(P) No. 107/07/G. Edn. dated 13-6-2007, which is produced as Ext. P-5 in this writ petition. The Petitioner amended the writ petition and challenged the objectionable clause in Ext. P-5. The said writ petition was allowed by Ext. P-6 judgment. Paragraph 2 of Ext. P-5 dealing with recognition of unaided schools and grant of N.O.C. to C.B.S.E. and I.C.S.E. schools was quashed by this Court.

4. The Government filed Writ Appeal against that judgment. While so, the C.B.S.E. team visited the Petitioner's school on 11-7-2007. Later, the Government issued Ext. P-7 order dated 15-11 -2007, rejecting the Petitioner's application for N.O.C. Challenging Ext. P-7, the present writ petition was filed.

5. During the pendency of the writ petition, the Government issued G.O. (Ms) No. 204/08/G. Edn. dated 15-12-2008, a copy of which is produced as Ext. P-26. The said Government Order was corrected by Ext. P-27 Government Order dated 5-1-2009. The Petitioner amended the writ petition, challenging Ext. P-26, as amended by Ext. P-27. Since it is unnecessary to refer to other details pleaded in the writ petition, we will now come straight to the point to be decided. The Petitioner submits that going by Ext. P-26, as modified by Ext. P-27, only persons, who are running recognised schools in the State, are eligible to apply

for grant of N.O.C., for establishing a C.B.S.E. school. The said restriction is an unreasonable restriction. It will infringe the fundamental rights of the Petitioner guaranteed under Articles 19(1)(a), 19(1)(g), 26 and 31, apart from Article 14 of the Constitution of India.

6. The Petitioner submitted that in view of the decisions of the Apex Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, and P.A. Inamdar v. State of Maharashtra (2005) 6 S.C.C. 537, the right to establish a school is a fundamental right under Article 19(1)(g) of the Constitution of India. Reasonable restriction to the same can be brought as permitted under Article 19(6), only by a valid legislation and not by any executive order. So, the impugned order Ext. P-26, as modified by Ext. P-27, is ultra vires and unauthorised. An executive order does not have the efficacy to restrict the fundamental rights of the Petitioner. In view of the above grounds, the Petitioner prayed for quashing Ext. P-26, as modified by Ext. P-27 and Ext. P-7. The Petitioner also prays for a writ of mandamus to the Government to grant N.O.C. to it.

7. The Government filed a counter-affidavit in one of the connected writ petitions. It has filed a memo, with a copy of that affidavit, praying to adopt the same as the counter-affidavit in this case also. The State fully supported its actions.

8. We heard the learned Counsel for the Petitioner, Mr. Mohan Jacob George. We also had the benefit of hearing M/s P.N. Krishnankutty Achan (Sr.), K. Ramakumar (Sr.), T.P.M. Ibrahim Khan, P.A. Ahammed, V.V. Surcndran, R. Rajasekharan Pillai, V.M. Kurian, Shaji P. Chaly, N. Nagaresh, Benoy Thomas, V.V. Asokan, M.P. Madhavankutty, Elvin Peter, P.J., Babu Varghese, T.A. Shaji, K.I. Mayankutty Mather, Santhosh Mathew and K.G. Balasubramanian, learned Counsel appearing for the Petitioners in the connected writ petitions. On behalf of the Respondents, we heard the learned Advocate General Mr. C.P. Sudhakara Prasad and also the Senior Government Pleader Mr. T.B. Hood.

9. The learned Counsel for the Petitioners reiterated the aforementioned contentions, especially the one under Article 19(1)(g), which we have already referred to while dealing with the grounds taken in W.P. (C) No. 34912 of 2007. The learned Counsel pointed out that going by the impugned Government orders, only those who are running recognised schools under the Kerala Education Rules (K.E.R.) are eligible to apply for N.O.C., so that such persons can establish a C.B.S.E. school also. The learned Advocate General, Mr. Sudhakara Prasad, submitted that such an interpretation of the impugned Government Orders is unwarranted. What is meant by the said Government Orders is that the procedures prescribed under Rule 2 and 2A of Chapter V of the K.E.R., have been made applicable for grant of N.O.C. also. In other words, the Director of Public Instruction will identify the places where C.B.S.E. schools can be permitted to be established and the same will be notified. After finalisation of such places, applications for N.O.C. will be received, as contemplated under Rule 2A of

Chapter V of the K.E.R. and eligible persons will be granted N.O.C. The learned Advocate General also submitted that though the right to establish a school is a fundamental right, the right to get affiliation is not a fundamental right. For that, the party will have to follow the statutory procedures, if any, prescribed.

10. The norms for affiliation to C.B.S.E. are contained in the Affiliation Bye-laws published by the Central Board of Secondary Education. Rule 3(1) of Chapter II of the Affiliation Bye-laws deals with different categories of schools, which may be affiliated by the C.B.S.E. The said rule reads as follows:

The Board may affiliate several categories of schools all over India and abroad, as for example:

- (i) Government or Government aided schools;
- (ii) Schools run by autonomous Organisations under the Government like Kendriya Vidyalaya Sangathan (KVS), Navodaya Vidyalaya Samiti (NVS), Central Tibetan Schools Organisation (CTSO), Sainik Schools Society etc.;
- (iii) Schools run by Government Department directly like Defence, Railways etc.;
- (iv) Schools managed directly by Public Sector Undertakings or by reputed societies for Public Sector Undertakings under the financial control of such Public Sector Undertakings or by Societies formed by such undertakings;
- (v) Private, unaided schools established by Societies registered under the Societies Registration Act, 1860 of the Government of India or under Acts of the State Governments as educational, charitable or religious societies having non-proprietary character or by Trusts.

11. The various categories of applications for affiliation are mentioned in Rule 3(2) of Chapter II of the Affiliation Bye-laws. The said sub-rule reads as follows:

Applications for affiliation may be considered under the following categories:

- (i) approval of middle class syllabus;
- (ii) provisional affiliation of a secondary school;
- (iii) upgradation/provisional affiliation of a school for senior secondary stage;
- (iv) Regular affiliation to schools run by the Govt./Govt. Aided/Kendriya Vidyalaya Sangathan (KVS)/Navodaya Vidyalaya Samiti (NVS)/Central Tibetan Schools Organisation (CTSO);
- (v) Permanent Affiliation.

12. Rule 3(3)(i) deals with the necessity of N.O.C. for affiliation, from the State Government concerned. The said rule reads as follows:

3(3)(i): The School seeking Provisional Affiliation with the Board must have formal prior recognition of the State/U.T. Govt. Its application either should be

forwarded by the State Govt. or there should be a No Objection Certificate to the effect that State Government has no objection to the affiliation of the school with the C.B.S.E. "No Objection Certificate" once issued to any school will be considered at par even if it prescribes a specific period unless it is withdrawn. Condition of submitting a No Objection Certificate will not be applicable to categories 3.1 (i) to (iv).

Similar provisions are contained in the I.C.S.E. Affiliation Bye-laws also.

13. The norms framed by the Government for grant of N.O.C. are contained in G.O.(Ms.) No. 18/88/G. Edn. dated 12-1-1988. Now, as per Ext. P-26, a new clause as Clause (1)(a) has been added after Clause (1). A few words in the opening sentence in Clause (1)(a) have been substituted by Ext. P-27. Ext. P-26 also deletes Clause (xii) of Ext. P-2. The said clause, which is already quashed by this Court, reads as follows:

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

14. Now, we will examine whether the newly introduced amendments will have the effect of restricting the field of choice of applicants to persons, who are already running recognised schools, as contended by the Petitioners or it incorporates a procedure for grant of N.O.C., similar to the one concerning opening/upgrading of schools, contained in Chapter V of the K.E.R., as contended by the learned Advocate General. The intention of the Government will be evident from paragraph 2 of Ext. P-26. The relevant portion of Ext. P-26, as amended by Ext. P-27, reads as follows:

The intention of the Government is to grant N.O.C., only to those institutions recognized by the Government after having followed the same procedures and stipulations prescribed in Rule 2 and 2A of Chapter V K.E.R., which are applicable for granting recognition to private aided schools in the State. Government therefore, order that the G.O. read as first paper above shall be modified further by incorporating the following Clause (i)(a) and placed after Clause (i).

(1)(a) N.O.C. will be granted only to those institutions established, after having followed the procedures and stipulations prescribed in Rule 2 and 2A of Chapter V K.E.R. The N.O.C. issued shall liable to be withdrawn in case the institution violates any of the guidelines contained in this order or such other conditions and guidelines as may be prescribed by the Government from time to time.

(Emphasis supplied)

15. Going by the above quoted portions of Ext. P-26, we feel that only persons running recognized schools under the K.E.R. are eligible to apply for N.O.C. Going by Rule 3(1) of Chapter II of the Affiliation Bye-laws, which we have already quoted herein above, persons Running Aided Schools can apply for

establishment of a C.B.S.E. School without obtaining N.O.C. from the State Government. But, for recognized institutions, N.O.C. is necessary. The various types of schools which could be established as per the provisions of the K.E.R. are detailed in Section 3(3) of the Kerala Education Act. Section 3(3) reads as follows:

3(3). The Government may, for the purpose of providing such facilities.-

- (a) establish and maintain schools; or
- (b) permit any person or body of persons to establish and maintain aided schools; or
- (c) recognise any school established and maintained by any person or body of persons.

16. Going by the above section, the Government can establish its own schools, permit persons to establish Aided Schools and recognise any school established and maintained by individuals or body of persons. So, the third type of schools recognised by the Government alone is, now, eligible as per the impugned orders, to apply for N.O.C. To understand the contention of the learned Advocate General, we will now refer to Rules 2 and 2A of Chapter V of the K.E.R.:

2. Procedure for determining the areas where new schools are to be opened or existing schools upgraded.-(1) The Director may, from time to time, prepare two lists, one in respect of aided schools and the other in respect of recognised schools, indicating the localities where new schools of any or all grades are to be opened and existing Lower Primary School or Upper Primary Schools or both are to be upgraded, in preparing such lists he shall take into consideration the following:

- (a) the existing schools in and around the locality in which new schools are to be opened or existing schools are to be upgraded;
- (b) the strength of the several standards and the accommodation available in each of the existing schools in that locality;
- (c) the distance from each of the existing schools to the area where new schools are proposed to be opened or to the area where existing schools are to be upgraded;
- (d) the educational needs of the locality with reference to the habitation and backwardness of the area; and
- (e) other matters which he considers relevant and necessary in this connection.

(Emphasis supplied)

2A. Application for opening of new schools and upgrading of existing schools.-

(1) After the publication of the final list of the areas where new school of any or

all grades are to be opened or existing Lower Primary Schools or Upper Primary Schools or both are to be upgraded the Director shall, by a notification in the Gazette call for applications for the opening of new schools of any or all grades and for raising of the grade of existing Lower Primary Schools or Upper Primary Schools or both in the areas specified.

(2) Applications for opening of new schools or for raising of grade of existing schools shall be submitted only in response to the notification published by the Director. Applications received otherwise shall not be considered. The applications shall be submitted to the District Educational Officer of the area concerned in Form No. 1 with 4 copies of the application and enclosures within one month from the date of publication of the notification under Sub-rule (1).

(3) On receipt of the applications for permission to open new schools or for upgrading of existing schools, the District Educational Officer shall make such enquiries as he may deem fit as to the correctness of the statements made in the application and other relevant matters regarding such applications and forward the applications with his report thereon to the Director within one month from the last date for submitting applications under Sub-rule (2).

(4) The Director on receipt of the applications with the report of the District Educational Officer shall forward the applications with his report to Government within one month from the last date for forwarding the report by the District Educational Officer.

(5) The Government shall consider the applications in the light of the report of the District Educational Officer and the Director and other relevant matters which the Government think necessary to be considered in this connection and shall take a final decision and publish their decision in the Gazette with the list containing necessary particulars within one month from the last date of forwarding the report by the Director.

(6) Applications for permission to open a new standard in an existing school during any school year not involving the raising of the grade of the school shall be submitted to the District Educational Officer in-charge of the area in Form 1 in triplicate.

(7) * * * * *

(8) The Government may, by notification in the Gazette, extend any period specified in sub-rules (3), (4) and (5) for reasons to be stated in the notification.

(Emphasis supplied)

The above quoted Rule 2 contains detailed procedure for identifying, notifying and finalising the areas, where new schools are to be opened or existing schools are to be upgraded. Rule 2A deals with receiving of applications for opening new schools or upgrading existing schools in the places notified, as per the final list published under Rule 2. If the Government wanted a similar procedure for grant

of N.O.C., for opening of new C.B.S.E./I.C.S.E. schools, it should have issued specific orders to that effect. No person of reasonable intelligence will be able to make out such a meaning for the impugned orders.

17. We are of the view that the meaning attributed to the impugned provisions by the learned Counsel for the Petitioners appears to be a reasonable and proper view on the meaning of them. If that be so, the right of a citizen to start a new school affiliated to C.B.S.E. is seriously infringed by the impugned orders. Even if, all the requisite infrastructures are provided by a Trust and it proposes to start a school in an educationally backward and remote area, where there are no schools, it will not get N.O.C., as it is not running a recognised school established as per the provisions of the K.E.R.

18. We have no doubt in our mind that such a stipulation is arbitrary and the same violates the fundamental rights of the Petitioners under Article 14 of the Constitution of India. It is an unreasonable restriction of their right to establish new schools and therefore, will be hit by Article 19(1)(g) of the Constitution of India. We agree with the learned Advocate General that the right to get affiliation may not be a fundamental right and the said principle will apply to the grant of N.O.C. also. For that, the applicants will have to satisfy the requirements of the relevant statutory provisions. But, such statutory provisions should be fair and reasonable. They should pass the test of reasonableness in the constitutional sense. It is not clear why the Government are not enacting a comprehensive legislation for the grant of N.O.C., so that unnecessary arguments could be avoided. The present exercise of issuing executive orders is not likely to yield the desired results for the Government in the field of education. Better steps, preferably in the form of legislation, are necessary to safeguard public interest.

19. In the result, we quash Ext. P-7, as also the newly introduced Clause (1)(a) of Ext.P-2, as per Exts.P-26 and P-27. The Petitioner's application shall be reconsidered in the light of Ext. P-2 Government Order, ignoring Clause (1)(a), which is newly introduced as per Ext. P-26, as amended by Ext. P-27, within one month from the date of receipt of a copy of this judgment. If there is any objection in granting N.O.C. to the Petitioner, it shall be put on notice and it shall be given an opportunity of being heard before its application is finally disposed of. In that event, the decision shall be taken within two months from the date of receipt of the copy of this judgment. The Writ Petition is disposed of as above.

W.P. (C) Nos. 34184, 34871, 34910, 34941, 35008, 35342, 35343, 35405, 35498 and 36428 of 2007, 153, 856, 882, 2923, 6501, 6660, 7604, 8724, 8725, 8732, 8765, 8766, 8780, 8781, 8902, 8903, 9014, 9576, 11260, 11727, 12537, 15516, 16149, 17974, 20204, 30112, 31695, 32531, 32839, 32840, 32846, 33625, 33657, 33836, 33962, 33986, 34370, 34438, 34906, 34973, 35176, 35386 and 36331 of 2008, 164, 922, 924, 1153, 4995, 5117, 5122, 5132, 5153, 925, 6253, 6419, 6476, 6781, 10180 and 10760 of 2009.

20. The judgment in W.P. (C) No. 34912 of 2007 will govern these cases also.

The applications of the wnt Petitioners, whether pending or rejected, shall be taken to file and reconsidered in the light of G.O.(Ms) No. 18/88/G. Edn. dated 12-1-1988, ignoring the newly introduced Clause (1)(a) as per G.O.(Ms.) No. 204/08/G Edn. dated 15-12-2008, as amended by G.O.(Ms) 3/09/G. Edn. dated 5-1-2009, within one month from the date of production of a copy of this judgment. If there is any objection in granting N.O.C., the Petitioner concerned shall be put on notice and it shall be given an opportunity of being heard before final orders are passed. In the cases, where the Government decide to hear the Petitioners, the time-limit for taking the decision shall be two months from the date of receipt of a copy of this judgment.

21. It is pointed out that in some cases, the application for N.O.C. has been rejected, on the additional ground that the teachers are not paid salary at the rate paid to the teachers in Government/Aided Schools in the State, as provided under the Affiliation Bye-laws. If the application for N.O.C. is rejected on the ground that the teachers are not paid salary as provided under the Affiliation Bye-laws, it is a valid ground for rejection. If the Petitioners have a case that they are paying salary at the rate applicable to the teachers in Government/ Aided Schools, they can produce materials and seek review of that decision and representation in that regard can be filed, along with a copy of this judgment before the Government, in that event the Government will reconsider that point also.

22. These Writ Petitions are disposed of as above.