

(2000) 06 GUJ CK 0049
In the Gujarat High Court

Case No : Letters Patent Appeal No. 224 of 2000 in Special Civil Application
4183 of 1999

District Education Officer, Himmatnagar

APPELLANT

Vs

Rajvirsinh K. Rathod

RESPONDENT

Date of Decision : 28-06-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 15(4)
Gujarat Secondary Education Act, 1972 — Section 2

Citation : (2001) 21 GLH 299 : (2001) 1 GLR 398

Hon'ble Judges : D.M. Dharmadhikari, C.J.; J.M. Panchal, J

Bench : Division Bench

Advocate : B.T. Rao and R.C. Jani, for the Appellant; A.K. Clerk, for the Respondent

Final Decision : Allowed

Judgement

J.M. Panchal, J.—This appeal filed under Clause 15 of the Letters Patent is directed against judgment dated July 13, 1999/August 24, 1999, rendered by the learned single Judge in Special Civil Application No. 4183 of 1999, by which the appellants and respondent No. 8 are directed to consider the cases of respondent Nos. 1 to 7 for admission to XIth Standard in Science stream according to their merit and in preference to the candidates coming from other schools and to utilise only such number of seats remaining vacant for the purpose of admission to the students coming from other schools after accommodating all the students who have applied for admission to XIth standard on passing the Xth standard examination from the very same school.

2. The respondent Nos. 1 to 7 were studying in Shri K. N. Shah Modasa Village High School at Modasa, District : Sabarkantha, which is a Government aided school. They appeared in the public examination of Xth Std., conducted by the Gujarat Secondary Education Board in 1999 and passed the same. They were desirous of continuing their study in the same school for XIth & XIIth Stds., as

there is Science stream in the same school. According to them, they were not likely to get admission in the same school, as a policy decision was taken to stop admission at 86% in the Science stream; whereas they had secured percentage of marks less than 86. It was their case that respondent No. 8-school had entertained the applications for admission to XIth Std. in Science stream from the students of other schools, as a result, they were denied admission to XIth Std. in Science stream in the school from which they had passed the Xth Std. examination. It was also their case that Higher Education Commissioner had taken a decision that over and above 60 students in each class, only six more students would be accommodated, but even this permitted increase in number of seats was not availed of by the school and there being two sections in the school, only 120 students were likely to be admitted in Science stream in XI Std. Under the circumstances, they instituted Special Civil Application No. 4183 of 1999 and prayed the Court to issue a writ of mandamus or a writ of certiorari or any other appropriate writ or order directing the respondent No. 8-school to give admission to them in XIth Std., in view of judgment of the Supreme Court rendered in *The Principal, Cambridge School and another Vs. Ms. Payal Gupta and others*, .

An affidavit-in-reply was filed by Mr. K. P. Joshi, District Education Officer, District Sabarkantha, controverting the averments made in the petition. In the reply, it was mentioned that pursuant to directions of the High Court in Special Civil Application No. 3252 of 1984 and Special Civil Application No. 3336 of 1984, the State of Gujarat has issued Circular/Resolution dated November 6, 1985, whereby procedure as well as policy of admission has been framed which requires that 70 percent of students of the same school should be admitted on the basis of merits; whereas only 30 percent of seats are reserved for students of other schools, and therefore, the petition should be dismissed. It was stated in the reply that a list of 125 students was received as per merits from amongst the applicants and 48 students of respondent No. 8-school had been admitted; whereas only 20 students from other schools were given admission on merit, and admission of the students studying in the same school was stopped at 173 marks; whereas admission of outsiders was stopped at 190 marks. What was emphasised in the reply was that admission policy has been framed considering the various points and the aspects that basic bifurcation of the stream of Science and Commerce begins from XIth Std. and number of students from different schools are coming out with glorious results from the schools where either there is no XIth Std. or there is no Science stream, and therefore, respondent Nos. 1 to 7 should not be granted relief claimed by them. Along with the reply, a xerox copy of (a) resolution dated November 6, 1985, (b) resolution dated June 10, 1987 and (c) merit list as prepared by the school were enclosed. The averments made in the reply affidavit were controverted by the original petitioners in their rejoinder dated July 13, 1999.

3. The learned single Judge took the view that even if any Circular or Resolution dated November 6, 1985 had been issued by the appellants in the context of the judgment of the High Court rendered on August 21, 1984 in Special Civil

Application No. 3252 of 1984 and 3336 of 1984, the same cannot be held good, as now the law laid down by the Supreme Court in the case of *The Principal, Cambridge School (supra)* holds the field wherein preferential right of a student of the same school to carry on his studies in the next higher class in the very same school is recognised. Therefore, the learned single Judge has allowed the petition by the impugned judgment and given directions which have been referred to earlier, giving rise to present appeal.

4. Mr. B. T. Rao, learned Counsel for the appellants submitted that the admission policy framed by the State Government is neither arbitrary nor unreasonable nor violates any of the fundamental rights of respondent Nos. 1 to 7, and therefore, the learned single Judge was not justified in holding that the said policy was bad in law because of judgment of the Supreme Court in the case of *The Principal, Cambridge School (supra)*. According to the learned Counsel for the appellants, the Supreme Court in the case of *The Principal, Cambridge School (supra)* considered the case of an unaided recognised school, which could not support the contention that after students pass a particular class, there is fresh or readmission to the higher class even in the same school by production of various applications made by the parents or guardians of students for such fresh admission or re-admission, nor could produce any provisions in the Act or Rules, which specifically contemplated that re-admission or fresh admission is necessary to every next higher class after a student passes out a particular class; whereas in the present case the Circular issued by the Government which occupies the field in absence of any legislation, contemplates that re-admission or fresh admission is necessary to XIth Std., and therefore, respondent Nos. 1 to 7 are not entitled to any relief on the basis of judgment of the Supreme Court in the said case. What was maintained was that as the Government is making 100% grant available to the recognised schools, the Government is entitled to lay down admission policy which is in the larger interest of the student community and as institutional preference is recognised to the extent of 70% in the Circular issued by the Government, the appeal should be allowed.

5. Mr. R. C. Jani, learned Counsel for the original petitioners emphasised that the Government Circular is bad in law in view of the judgment of the Supreme Court in the case of *The Principal, Cambridge School (supra)*, and therefore, the appeal should be dismissed. It was pleaded on behalf of the original petitioners that once a student is given admission in any educational institution, the same continues class after class until he leaves the school, and therefore, Circular dated November 6, 1985 being bad in law, the relief granted to the original petitioners should not be disturbed by the Court in the appeal.

6. Mr. A. K. Clerk, learned Counsel appearing for the interveners submitted that the school remains the same, the staff remains the same and the building also remains the same, when a student is seeking admission to standard XI after passing Xth Std. examination and as there is no fresh admission or re-admission of a student to XIth Std., students of the same school are entitled to continue

their studies till the last standard for which education is imparted by the said school, and therefore, the appeal has no merits. The learned Counsel referred to Circular issued by the Government dated July 3, 1995 which provides that for the purpose of grant, Higher Secondary School should be equated with Secondary School and pleaded that there being no distinction between Secondary School and Higher Secondary School, preferential right of a student to carry on his studies in the next higher class in the same school should be recognised by the Court. According to the learned Counsel for the interveners, once the school admits a student, such admission continues class after class, until he leaves that school and as the admission of the students to the XIth Std. is not a fresh admission or re-admission, the appeal should be dismissed after applying the principles laid down by the Supreme Court in the case of *The Principal, Cambridge School (supra)* to the facts of the present case.

7. We have heard the learned Counsel for the parties. The Education Commission recommended in its report a new educational structure having the pattern of 10 + 2 + 3 for adoption by all the State Governments and Union Territories. The Government of Gujarat agreed in principle to implement the Commission's recommendations and introduce higher secondary courses for standards XI & XII from July 1976. Consequent upon the introduction of new pattern of education, either higher secondary schools had to be started or higher secondary classes had to be started in existing secondary schools. There was not much of anxiety on the part of many schools to seek to open Stds. XI and XII in the higher secondary section, with the result that there was pressure in the matter of admission to XIth Std. from students passing out of the Xth standard. This was not in all subjects, but only in the Science stream. In view of the fact that schools which started XIth & XIIth standards were few, year after year, there was pressure on seats in the schools for admission to the Science stream. There were instances where some of the schools did not admit students who had passed the Xth Std. after a course of study in their own schools since they wanted to attract better talent from other institutions evidently with a view to showing good results in their XIIth standard examination. On the other hand, there were some schools which considered that their students were good enough, and therefore, wanted to take in only their students in the XIth Std and did not desire to admit any one else so long as there were students sufficient in number to fill up the classes in the XIth Std., in their schools. Many of the students, some of them getting marks of distinction, found themselves unable to obtain admission because the schools from which they passed out had only standards upto X. Those students had to go from school to school seeking admission in some school where their marks may earn them admission provided the management was willing to give admission to them. Evidently, it was this situation which called for attention by the Government to the need of some policy in regard to admission to XIth standard in schools where such standards were run. The Education Department of the State Government, therefore, issued Circular dated April 23, 1984 introducing rules and the norms of procedure for admission to Science stream of higher

education. By the said Circular, it was inter-alia, directed that the schools shall grant admission in standards XI & XII to their own students on the basis of merits, in respect of 80% seats of their total intake capacity; whereas 20% of the total seats shall be offered to the students of other schools on the basis of merits. The validity of the said Circular was challenged before the High Court in batch of petitions on different grounds. The Division Bench by judgment dated July 23, 1984 upheld the validity of the said Circular, but made certain observations regarding necessity of making reservation to promote interest of weaker Sections of the society. Moreover, it was also observed in the judgment that 20% reservation for the students of other schools was inadequate. The Court permitted the Authorities to enforce the Circular for the relevant academic year, but directed the authorities to reconsider the matter in the light of the observations made in the judgment. We may state that the judgment of the Division Bench rendered in the case of *The Proprietary High School, Trust, Ahmedabad and Others Vs. State of Gujarat and Another*, . In the light of directions given by the High Court, the Government reconsidered the matter and has issued Circular dated November 6, 1985 introducing rules and norms of procedure as regards admission to Science stream of the higher education. According to the rules for admission as set out in Schedule-A to the Circular, first of all repeaters are to be admitted in XIth Std. 7% of the remaining total vacant seats are meant for students belonging to Scheduled Castes; whereas 14% seats are ordered to be reserved for students belonging to Scheduled Tribes and 10% seats are to be reserved for students belonging to O.C.B.C. As per the Circular, 70% of the remaining seats are to be filled up by giving admission in order of merits to the students of the same school who have secured 50% of the marks and remaining 30% of the total seats are to be filled up by giving admission to the students of other schools on the basis of merits. Other eventualities such as how seats remaining vacant should be filled up, are also provided in the Circular, but it is not necessary for us to refer to the same in this judgment. As observed earlier, there were instances where some of the schools did not admit students who had passed the Xth Std. after a course of study in their own schools, since they wanted to attract better talent from other institutions evidently with a view to showing good results in their XIIth standard examination. On the other hand, there were some schools which considered that their students were good enough and, therefore, wanted to take in only their students in the XIth standard and did not desire to admit anyone else so long as there were students sufficient in number to fill up the classes in the XIth standard in their schools. Many of the students, some of them getting marks of distinction, found themselves unable to obtain admission because the schools from which they passed out had only standards upto X. Those students had to go from school to school seeking admission in some school where their marks may earn them admission provided the management was willing to give admission to them. Under these circumstances, in order to strike a balance and protect the interest of student community, the Government has introduced rules and the norms of procedure for admission to Science stream of higher education by issuing Circular dated

November 6, 1985. The learned single Judge has held that the Circular dated November 6, 1985 cannot hold field, as the Supreme Court in the case of *The Principal, Cambridge School (supra)* has upheld the preferential right of a student of the same school to carry on his studies in the next higher class in the very same school and held that once that school has admitted the student, such admission continues class after class, until he leaves the school. Therefore, it is necessary for us to consider the decision of the Supreme Court in detail and find out whether the principle laid down in the said decision is applicable to the facts of the present case. In the said case, Cambridge School, New Delhi with a view to achieving objective that students with certain competence should alone pursue education beyond Class X, had prescribed a cut-off level of 50 percent marks for admission to Class XI of the said school. Consequently, the Principal of the school addressed a Circular to the parents of the students stating that the admission to Class XI would not be automatic, but a cut-off level was prescribed by the school to the effect that a student of Class X must obtain 50 percent marks in aggregate in the Board examination for being granted re-admission in Class XI. That circular was subject-matter of challenge before the Court. The case of the students was that the Principal and the school Authorities were not justified in denying the admission to its own students who had passed Class X examination which is a public examination and as neither the Delhi School Education Act, 1973 nor the Rules framed thereunder prescribed any cut-off level of marks for promotion to Class-XI in the same school, the act of issuance of Circular was arbitrary and illegal. The Authorities contended before the Court that Education Commission while recommending general education at the secondary stage had suggested that it should be followed by two years of diversified and vocational education, and therefore, it was necessary to prescribe a cut-off level of marks. The stand taken by the Authorities was also that when a candidate is admitted to Class XI, it is a fresh admission and in fact, a case of re-admission and not a case of promotion, which is apparent from the scheme of 10 + 2 examination. The Supreme Court did not accept the contention that after a student passes out a particular class, there is fresh or re-admission to the higher class even in the same school because the Authorities could not support the said contention by producing various applications made by the parents or guardians of students for such fresh admission or re-admission from one class to the next higher class. Moreover, the Authorities were unable to produce or show any provision in the Act or Rules which specifically contemplated that readmission or fresh admission is necessary to every next higher class after a student passes out a particular class. Under the circumstances, the Supreme Court on construction of Rule 138 of the Delhi School Education Rules, 1973 and other provisions of the Delhi School Education Act, 1973, has held that the scheme of the Act and the Rules made thereunder go to show that once a student is admitted to a school, the same admission continues class after class, until he passes the last examination for which the school gives training and no fresh admission or re-admission is contemplated from one class to the other. On a combined reading of Sees. 16(3) & 28(2)(q) of the Delhi School Education Act and Rules 135, 137 and 138 of the

Delhi School Education Rules, 1973 as well as in the light of the scheme of the Act and the Rules, the Supreme Court has observed that the examination of Xth class cannot be regarded as a terminal examination for those who wanted to continue their studies in XIth and XIIth classes of the said school. In our respectful opinion, the principle laid down by the Supreme Court in the above mentioned case is not applicable to the facts of the present case. The phrase "Secondary Education" has been defined in Section 2(u) of the Gujarat Secondary Education Act, 1972, which means education including post-basic education in such subjects from eighth standard upto such standard not being higher than the eleventh standard, as may by general or special order from time to time, be determined by the State Government. The State Government by general order has determined that secondary education means education including post-basic education in such subjects from eighth standard upto tenth standard. The new educational pattern of 10 + 2 + 3 makes it very clear that higher secondary examination means the education including post-basic higher secondary education from eleventh standard to twelfth standard. The learned Counsel for the appellants has filed an affidavit on behalf of appellant No. 2 i.e., Commissioner, Higher Education and produced a bunch of documents to show that a student passing Std. X examination has to seek fresh admission to Std. XI, With the consent of the learned Advocates appearing for the parties, Government Resolutions produced with the said affidavit are ordered to be taken on record of the case. The Government Resolutions indicate that a student passing Std. X examination has to seek fresh admission to Std. XI. It is a matter of common knowledge that on passing Xth Std. examination, a student is issued certificate indicating that he has passed secondary school certificate examination conducted by the Board. As soon as a student passes Secondary School Certificate Examination conducted by the Board, he is issued School Leaving Certificate by the school concerned and has to make an application for securing admission to XIth Std and produce mark-sheet of Xth Std., certificate issued by the Gujarat Secondary Education Board, School Leaving Certificate etc. along with the application for securing admission to XIth standard. The different Resolutions/ Circulars issued by the State Government would indicate that those schools which seek to open Classes XI & XII in the Higher Secondary section have to apply for prior permission and necessary registration has to be obtained. The distinction between secondary school and higher secondary school is distinctly maintained even in the Circular which is relied on by the learned Counsel for the intervening students. XIIth Std., public examination is conducted by the Board and a successful candidate is issued another certificate as well as fresh School Leaving Certificate. The staff pattern of Secondary School and Higher Secondary School is also different and the teachers who are imparting education to students of Higher Secondary Schools are required to possess higher qualifications. These and other different aspects highlighted by the provisions of the Gujarat Secondary Education Act, 1972 would indicate that after the students pass Std. X examination, they have to seek a fresh or re-admission to the higher class of XIth Std., even in the same school.

8. Under the circumstances, we are of the respectful opinion that the principle laid down by the Supreme Court in the case of *The Principal, Cambridge School (supra)* cannot be made applicable to the facts of the present case and as there is fresh or re-admission to Std. XIth, a student cannot, as a matter of right, claim that he is entitled to be admitted in the same school class after class, until he leaves the school.

9. It is well settled that in absence of legislation occupying the field on a particular subject, the State Government can issue Resolutions, Circulars, executive instructions etc. to fill up the gap. In the present case, pursuant to the directions issued by the High Court in the judgment which is reported in *The Proprietary High School, Trust, Ahmedabad and Others Vs. State of Gujarat and Another*, , the Government has issued Circular and introduced Rules for admission as well as norms of procedure for admission to the Science stream of the higher education. While recognising the institutional preference, the Circular directs the school management to allot 30% of the seats to the students of the other schools on the basis of merits. The learned Counsel for the appellants pointed out another Government Circular which provides, inter-alia, that if seats meant for S.C./S.T. students remain vacant, the same should be offered to students of the same school as well as of other schools, but students of the same school would be entitled to admission of 15% marks while competing with students of other schools for admission to XIth standard. Thus, it is wrong to contend that institutional preference is given go-bye. On the contrary, we are of the opinion that institutional preference is not only recognised, but directed to be maintained and implemented, and therefore, the Circular cannot be treated as violating any of the rights of the students who claim admission to higher class of XIth Std. in the same school. The State is obliged to promote the interest of weaker Sections of the society. Though Article 15(4) does not expressly authorise providing of reservations in educational institutions, but the words "any special provisions" are of wide amplitude and do certainly take in a provision reserving certain number of seats in educational institutions. Therefore, the reservation made in favour of the students belonging to Scheduled Castes, Scheduled Tribes and other Economically and Socially Backward Class cannot be termed as illegal. On overall view of the matter, we find that the policy introducing rules and the norms of procedure for admission to the Science stream of the higher education is fair and reasonable. It is not normally within the domain of any Court to weigh the pros and cons of the policy or to scrutinise it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or unreasonable or violative of any constitutional, statutory or any other provision of law. When Government forms its policy, it is based on a number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion. Therefore, wisdom of the policy cannot be judicially scrutinised though the Court can consider whether the policy is arbitrary or not. On the facts of the case, we find that the rules and the norms of procedure for

admission are neither unreasonable nor arbitrary nor violative of any statutory provisions. Hence, we hold that the Circular dated November 6, 1985 is valid in the eye of law and does not violate any of the rights of the students who seek admission to higher standard in the same school.

For the foregoing reasons, the appeal succeeds. The judgment dated July 13, 1999/August 24, 1999 rendered by the learned single Judge in Special Civil Application No. 4183 of 1999 is hereby set aside and quashed. Special Civil Application No. 4183 of 1999 is ordered to be dismissed, with no order as to costs. It is clarified that admissions gained in Std. XI by the management of the schools to their own students on the basis of the judgment of the learned single Judge which is set aside in this appeal, shall not stand disturbed in any manner. The appeal is accordingly, allowed with no order as to costs.

D. M. Dharmadhikari, C. J., concurring:

Learned Counsel for the respondents pray for stay of this judgment for four weeks to enable the aggrieved parties to approach the Supreme Court. The interim order staying operation of the learned single Judge impugned in the appeal was in operation during the pendency of Letters Patent Appeal. Grant of any order of stay now, after pronouncement of judgment and clarifications made, would create around confusion in the matter of admission of students. We, therefore, decline to grant the prayer.

10. Appeal allowed.