

(1997) 05 GUJ CK 0011

In the Gujarat High Court

Case No : Special Civil Application No. 7907 of 1995

H.B. Kapadia Education Trust and Another

APPELLANT

Vs

Gujarat Secondary Education Board and Another

RESPONDENT

Date of Decision : 05-05-1997

Acts Referred:

Constitution of India, 1950 — Article 29, 30

Gujarat Secondary Education Act, 1972 — Section 17(21), 2(1), 23(1), 23(2), 23(3)

Citation : AIR 1997 Guj 189 : (1997) 3 GLR 2655

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Advocate : Bharat R. Pandya, for the Appellant; Premal Joshi and Mukesh Patel, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

R. Balia, J.—These three petitions raise an identical issue and are hereby decided by this common order. The petitioner in Special Civil

Application No. 7907 of 1995 is an H.B. Kapadia Education Trust Established by H.B. Kapadia and R.H. Kapadia by Trust Deed dated 15-3-

1956. Special Civil Application No. 7908 of 1995 is by Preyas Education Trust settled by Arvindbahi Mohanlal Shah by Trust Deed dated 8-2-

1960 and Special Civil Application No. 7909 of 1995 is by Kapadia Education Trust established by trust deed dated 5-3-1956 by H.B. Kapadia.

All the three trusts applied to the State Government claiming benefit of being exempt from the provisions of Section 17(21), Sections 34 35 and

Clause (b) of Sub-section (1) of Sections 2 3 4 and 5 of Section 36 in terms of Section 40A stating that the trusts are established and administered

by the persons belonging to minority community of Jains.

2. In the first instance when the application dated 2-2-1994. 12-2-1994 were not decided in respect of H.B. Kapadia as well as Preyas Education

Trust the respective trusts filed Special Civil Application No. 2785 of 1995 and 4471 of 1995 in which ultimately the court directed the competent

officer to decide the applications within the time specified i.e. 31-5-1995 and 31-7-1995. Finally by separate orders made on 17-8-1995 the

Secretary, Gujarat Secondary Education Board had rejected all the three applications. The reasons as per the translated version of order

submitted along with the petition for refusal are firstly that there is no term in the constitution that the member except Jain cannot remain the trust. It

means at the time of establishment of the trust. It means at the time of establishment of the trust, there were the members except the Jain

Community. Hence it proves that the institution is not established, by minority community. Secondly, it was stated by the Secretary that there is

also not a provision that only the person of Jain Minority Community can be appointed as the trustees and the method of appointment of trustees

has been so provided from which it becomes clear that the trust is not established by minority community. Moreover, it is not that the

administration of the trust will be made by only the persons of minority community. However, it found that at present all the persons who are

trustee belonged to Jain religion. With the aforesaid conclusion the Secretary concluded that it does not prove that as per the provisions of Article

29/30 of the Constitution the institution is established by minority community and administration of it is made by minority.

3. It will be apposite to refer to Articles 29 and 30 of the Constitution of India and Section 40A of the Gujarat Secondary Education Act.

Article 29 : Protection of interests of minorities:

(1) Any section of the citizens residing in the territory of India or any part thereof having distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State, funds on grounds only of religion race caste language or any of them.

Article 30 : Rights of minorities to established and administer educational institutions;

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a

minority, referred to in clause (1) the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property

is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions discriminate against any educational institution on the ground that it is under the

management of a minority, whether based on religion or language.

Section 40A :

Nothing contained in clause (23) of Section 17. Sections 34 and 35, and Clause (b) of subsection (1) and Sub-sections (2), (3), (4) and (5) of

Section 36 shall apply to any educational institutions established and administered by a minority, whether based on religion or language.

4. Article 29 preserves the cultural rights of every class founded on distinct language, script or culture of its own by providing that it shall have the

right to conserve the same. Article 30 of the Constitution specifically deals with rights of all minorities to establish and administer educational

institutions whether founded on religion or language and provides that every minority based on religion or language shall have right to establish and

administer educational institutions of their choice. While clause (2) of Article 30 prohibits discrimination by the State in the matter of granting aid to

educational institutions on the ground that it is under the management of minority based on religion or language, sub-clause (2) of Article 29 inhibits

the rights of educational institutions maintained by minority section to deny admission thereto on the ground only of religion, race, caste, language or

any of them where such educational institution is maintained by the State or receiving aid out of State Funds.

5. The two provisions read together make out a comprehensive scheme of the rights of minorities in the matter of establishing and administering

educational institutions and inhibition against grant in aid on the ground of denial of admission on the basis of religion, race, caste, language or any

of them, It is the declaration already made in favour of educational institution which has been established by members of minority community and is

being administered by it. If the two factors are established, namely that it has been established by member or members of minority community

whether founded on language or religion and is being administered by such minority the protection under Articles 29/30 follows. It necessary

implied that a protection which is available in praesenti may be lost if at any time either of the conditions ceases to exist. In other words, the

declaration and protection of rights have nexus and correlation to the point of time when such right is sought to be enforced. If at that relevant time

it is established that the educational institution in question has been established by member/members of minority community and is being

administered by such minority the rights or benefits flowing from Articles 29/30 at that point of time secures the protection, and the same cannot be

denied by imaginary projecting in future that for want of certain conditions in the deed of settlement such protection may or may not exist in future.

The provision under which benefit for the educational institution is sought u/s 40A of the Gujarat Secondary Education Act was to operate in a

specific field as noticed above. Educational institution established or administered by a minority whether based on religion or language has been

granted exemption from the operation of certain provisions of the Act leaving room for freedom of operation for the management in that area. The

provisions which are not made applicable to the institutions established and administered by minority relates to laying down qualifications and

method of selection and condition of appointment, promotion and termination of employees and rules of conduct and discipline of the Headmaster

and teaching and non-teaching staff of registered private secondary school. Provisions of Section 13 and the provisions relating to service in

registered private secondary schools delineated in Sections 34 35 and 36 and Section 23(1), (2),(3),(4) and (5). Thus it is to be seen that in the

matter of recruiting personnel to its institution which is established and administered by minority has been left free from interference from outside

and rigor of the other provisions of the Act except to the extent it provides for providing a reasonable opportunity for showing cause against action

proposes to be taken against the Headmaster and member or members of non-teaching staff, which is fundamental to all proceedings resulting in

civil consequences. The exemption How automatically on fulfillment of two conditions namely the institution has been established by member or

members of such minority community that is based on religion or language and that such educational institution is being administered, as distinct

from shall continue to be administered by that community.

6. In the aforesaid scheme of the constitutional provisions and the provisions of Gujarat Secondary Education Act so as far as the present

administration of the institution is concerned, it has been found by the competent authority in its impugned order in unequivocal terms that all

persons who are trustees and managing affairs of the institution in question belonged to Jain community. It is not the case of the authority that

members belonging to Jain religion did not fulfill the criteria of a minority community for the purpose of Articles 29/30 of the Constitution or Section

40A of the Act. Rather he proceeded on the assumption that person following Jain religion fulfills the criterion of Articles 29/30 and Section 40A.

The criteria that the institution is being administered in praesenti by members of that community is the finding reached by the officer himself. What

shall be the future constitution of the management cannot affect the rights which are being claimed in praesenti. If in future the institution loses its

character of its being administered by such minority community, it may lose entitlement to continued exemption flowing from Section 40A but that

cannot be a ground for refusing the operation of exemption clause when both the conditions can be shown to have fulfilled at the given point of time

when the question arises about operation of such provision at that point of time:

7. So far as the finding which has been reached by the Secretary that the institution is not established by minority community, it is neither supported

by any reason which can lead to such conclusion at all on the reading of the (trust deed) nor there is reference to any material to that effect. The

sole ground for coming to the conclusion that institution is not established by minority community emanates from the fact that the constitution of

trust did not provide that no members except Jain community can become the trustee to administer the said trust. So far as the question of

institution established by a minority community or members of minority community is concerned is directly related to the question whether the

settlor of the trust or founder of the institution belonged to any such class founded on language or religion. Therefore, the question directly asks for

the religion to which the settler of such trust or institution belong to and not the

religion of trustees who have been or may be entrusted with the task of administering the trust. The fact that the trustees belong to a minority community or not can have no relevant bearing whatsoever on the question whether an institution has been established by any member or members belonging to a particular Community founded on language or religion which can be termed as minority institution. No material other than the lack of prohibition against appointment of any person other than Jain as trustees has been referred to or has been pointed out by the learned counsel for the respondents to support this conclusion. Obviously the conclusion is neither supported by any reason nor founded on any material. An order founded on such findings suffers from error apparent from record. It appears that the Secretary has not drawn any distinction between the class to which settler belongs and the class to which the trustees may belong. The order therefore cannot be supported on any of the grounds disclosed in the order.

8. Moreover, it would not be out of place to mention decision of this Court in the case of *F.A.H.S. School. Ahmedabad v. M.M. Dave* (Guj)

1950 (4) All I E C 377. This clearly postulates that merely because one or some of the members in the governing council are engaged for the

better management of the institution who may or may not belong to minority community it does not cease to be an institution administered by

minority community so far the majority of the governing body are belonging to minority community. Induction of outsiders in the governing body

may be necessitated for the reason of better administration required of educational institution or securing better standards of education and ancillary

activities so much so such right to establish educational institution under the Constitution and exemption from outside control in administration is

envisaged in the context of establishment of educational institution to which the admissions to outsiders without distinction of religion, caste, race or

language is the constitutional requirement. Right to administer such institution to the member or members of such religion or linguistic community

exclusively is guaranteed to such member or members but that does not inhibit member or member of such community to exercise their right with

the assistance of others.

9. As a result of the aforesaid discussion these petitions succeed. The impugned orders in each case rejecting the application of the petitioners

claiming benefit of Section 40A of the Gujarat Secondary Education Act is quashed and set aside and the competent officer is directed to decide

the application afresh in accordance with law keeping in view the observations made hereinabove and the principles laid down in the F.A.H.S.

School. Ahmedabad's case referred to above. These respective applications shall be decided within six weeks from the date of service of the writ

of this order. Rule made absolute accordingly in each case. No order as to costs. Direct service is permitted.