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**(2015) 05 KL CK 0012**  
**In the High Court Of Kerala**  
**Case No : WP(C). No. 13198 of 2015 (Y)**

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|----------------------------|----|------------|
| Kitty Sanil                | Vs | APPELLANT  |
| State of Kerala and Others |    | RESPONDENT |

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**Date of Decision :** 25-05-2015

**Acts Referred:**

Constitution of India, 1950 — Article 19(1)(g), 19(6), 21, 21A, 45  
Right of Children to Free and Compulsory Education Act, 2009 — Section 13, 16, 17, 2, 25

**Citation :** (2015) 3 ILR Ker 68 : (2015) 3 KHC 234 : (2015) 3 KLT 280 : (2015) 3 SCT 567

**Hon'ble Judges :** A.K. Jayasankaran Nambiar, J

**Bench :** Single Bench

**Advocate :** Mary Benjemin, for the Appellant; Devan Ramachandran, SC, Advocates for the Respondent

**Final Decision :** Allowed

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## Judgement

A.K. Jayasankaran Nambiar, J.—The petitioner in the writ petition is the mother of Varkey Mathai, a minor aged 12 years, who was a student of standard VI in the 3rd respondent School during the academic year 2014-2015. She is aggrieved by the stand taken by the 3rd respondent School that her son will not be promoted to standard VII in the academic year 2015-2016, set to commence in June this year, for the reason that his academic performance in standard VI was not satisfactory.

2. The 3rd respondent School relies on the norms/guidelines issued by the 2nd respondent Board with regard to assessment of academic standards, to contend that the petitioner's son did not match upto the requirements in his academic performance, and therefore, cannot be promoted to standard VII in the School. In the writ petition, the petitioner seeks the issuance of a writ of mandamus to direct the 3rd respondent School to promote her son to standard VII in the School during the forthcoming academic year. She relies on the provisions of the

Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the "RTE Act"), to contend that the the 3rd respondent School, which does not dispute the applicability of the Act to it in these proceedings, is statutorily obliged to promote her son to the next higher standard, corresponding to his age, and continue to do so every year till he attains 14 years of age, without subjecting him to any screening procedure or detaining him in any particular class for any reason whatsoever.

3. The contentions of the petitioner are vehemently opposed by the 3rd respondent School which would contend that an interpretation of the provisions of the RTE Act in the manner suggested by the petitioner, would result in a lowering of the standard of education in the institute, and further, that no student is entitled to an automatic promotion without attaining the minimum academic standards that are required to be met at the relevant level.

4. I have heard Smt. Mary Benjamin, the learned counsel for the petitioner and Senior counsel Sri. Kurian George Kannanthanam, on behalf of the 3rd respondent School.

5. On a consideration of the facts and circumstances of the case and the submissions made across the bar, I find that the short issue to be resolved in the instant case is whether the 3rd respondent School can, in the light of the express statutory provisions of the RTE Act, and the Rules framed by the State Government thereunder, detain any student undergoing an elementary education in the School, in any of the classes on the ground that the student has failed to meet the academic standards set by the Board to which the School is affiliated. The RTE Act was enacted to give effect to the provisions of Article 21A of the Constitution of India which reads as under:

"21A. Right to education.-The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

6. A three Judge Bench of the Supreme Court in *Society for Un-aided Private Schools of Rajasthan Vs. Union of India* (UOI) and Another, AIR 2012 SC 3445 : (2012) 114 CLT 862 : (2012) 4 SCALE 272 : (2012) 6 SCC 1 : (2012) AIRSCW 3400 : (2012) 3 Supreme 305 , while upholding the constitutional validity of the Act noted that fundamental rights have two aspects -firstly, they act as fetters on plenary legislative powers and secondly, they provide conditions for fuller development of our people including their individual dignity. The right to live in Article 21 covers access to education. But unaffordability defeats that access. It defeats the States endeavour to provide free and compulsory education for all children of the specified age. It was observed that to provide for free and compulsory education in Article 45 is not the same thing as to provide free and compulsory education. The word "for" in Article 45 is a preposition and although the word education was read into Article 21 by judgments of the Apex Court, Article 21 merely declared "education" to fall within the contours of the right to

live. It was to provide for the right to access education that Article 21A was enacted to give effect to Article 45 of the Constitution. Under Article 21A, a right is given to the State to provide by law "free and compulsory education". Article 21A contemplates the making of a law by the State. The RTE Act is the law that was enacted by the State in terms of Article 21A, and it was enacted primarily to remove all barriers (including financial barriers) which impede access to education. The Apex Court in the aforementioned judgment also found that education was a well established head of "charity" and noted that in *T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others*, AIR 2003 SC 355 : (2002) 9 JT 1 : (2002) 8 SCC 481 , the Apex Court had held that if an educational institution goes beyond charity into commercialisation it would not be entitled to the protection of Article 19(1)(g).

7. It is clear from a reading of Article 21A of the Constitution and the provisions of the RTE Act that it is the primary obligation of the State to provide for free and compulsory education to children between the children ages of 6 and 14 years and, in particular, to children who are likely to be prevented from pursuing and completing their elementary education due to inability to afford fees or charges. It is also settled that every citizen has a right to establish and administer educational institutions under Article 19(1)(g) of the Constitution of India so long as the activity remains charitable. In fact, such an activity undertaken by the private institutions supplements the primary obligation of the State. Thus, the State can regulate by law the activities of the private institutions by imposing reasonable restrictions under Article 19(6). The RTE Act not only encompasses the aspects of right of children to free and compulsory education but it also deals with matters pertaining to establishment of Schools and grant of recognition. Thus, after the coming into force of the RTE Act, the private managements intending to establish a School have to make an application to the appropriate authority and it is only after a certificate has been granted by that authority that it can establish or run the School. It is in the back drop of the above scheme of the RTE Act that, I have to examine some of the provisions of the Act and the Rules so as to resolve the issue in the instant case. Some of the relevant provisions are extracted hereunder:

"The Right of Children to Free and Compulsory Education Act, 2009

2. In this Act, unless the context otherwise requires.-

(a) "appropriate Government" means -

(i) in relation to a school established, owned or controlled by the Central Government, or the administrator of the Union territory, having no legislature, the Central Government;

(ii) in relation to a school, other than the school referred to in sub-clause (i) established within the territory of-

(A) a State, the State Government;

(B) a Union territory having legislature, the Government of that Union territory;

(b) xxxxxx

(c) "child" means a male or female child of the age of six to fourteen years"

(d) xxxxxx

(e) xxxxxx

(f) "elementary education", means the education from first class to eighth class;

(g) xxxxxx

(h) xxxxxx

(i) xxxxxx

(j) xxxxxx

(k) xxxxxx

(l) xxxxxxxx

(m) xxxxxx

(n) "school" means any recognised school imparting elementary education and includes-

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category;

and

(iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority;

3(1) Every child of the age of six to fourteen years, including a child referred to in clause (d) or clause (e) of Section 2, shall have a right to free and compulsory education in a neighbourhood school till completion of his or her elementary education;

(2) For the purposes of sub-section (1), no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education;

4. Where a child above six years of age has not been admitted in any school or though admitted, could not complete his or her elementary education, then, he or she shall be admitted in a class appropriate to his or her age:

Provided that where a child is directly admitted in a class appropriate to his or her age, then he or she shall, in order to be at par with others, have a right to receive special training, in such manner, and within such time-limits, as may be prescribed:

Provided further that a child so admitted to elementary education shall be entitled to free education till completion of elementary education even after fourteen years.

5. xxxxxx

6. xxxxxx

7. xxxxxx

8. The appropriate Government shall -

(a) Provide free and compulsory elementary education to every child ;

Provided that where a child is admitted by his or her parents or guardian, as the case may be, in a school other than a school established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or a local authority, such child or his or her parents or guardian, as the case may be, shall not be entitled to make a claim for reimbursement of expenditure incurred on elementary education of the child in such other school.

Explanation-The term "compulsory education" means obligation of the appropriate Government to-

(i) Provide free elementary education to every child of the age of six to fourteen years; and

(ii) ensure compulsory admission, attendance and completion of elementary education by every child of the age of six to fourteen years;

(b) ensure availability of a neighbourhood school as specified in section 6;

(c) ensure that the child belonging to weaker section and the child belonging to disadvantaged group are not discriminated against and prevented from pursuing and completing elementary education on any grounds;

(d) Provide infrastructure including school building, teaching staff and learning equipment;

(e) Provide special training facility specified in Section 4;

(f) ensure and monitor admission, attendance and completion of elementary education by every child;

(g) ensure good quality elementary education conforming to the standards and norms specified in the Schedule;

(h) ensure timely prescribing of curriculum and courses of study for elementary

education; and

(i) Provide training facility for teachers.

9. xxxxxx

10. xxxxxx

11. xxxxxx

12. xxxxxx

13. (1) No school or person shall, while admitting a child, collect any capitation fee and subject the child or his or her parents or guardian to any screening procedure.

(2) Any school or person, if in contravention of the provisions of Sub-section (1)-

(a) receives capitation fee, shall be punishable with fine which may extend to ten times the capitation fee charged;

(b) subjects a child to screening procedure, shall be punishable with fine which may extend to twenty-five thousand rupees for the first contravention and fifty thousand rupees for each subsequent contraventions.

14. xxxxxx

15. xxxxxx

16. No child admitted in a school shall be held back in any class or expelled from school till the completion of elementary education.

17. (1) No child shall be subjected to physical punishment or mental harassment.

(2) Whoever contravenes the provisions of Sub-section (1) shall be liable to disciplinary action under the service rules applicable to such person.

The Kerala Right of Children to Free and Compulsory Education Rules, 2011.

14. Recognition/Upgradation to school - (1) Every school, other than a school established, owned or controlled by the Central Government or the State Government or the local authority, established before the commencement of this Act, and referred to under sub clause (iv) of clause (n) of section 2 as an unaided school and which has obtained recognition under the Kerala Education Act and Rules issued thereunder or has obtained No Objection Certificate from the Government for affiliation to other Boards of Education, shall make a self-declaration within a period of three months from the appointed date, in Form No. 1 to the Assistant Educational Officer concerned, regarding its compliance or otherwise with the norms and standards stipulated in the Kerala Education Rules in addition to the norms in the Schedule and fulfilment of the following conditions, namely-

(a) the school is run by a society registered under the Societies Registration Act,

1860 (21 of 1860), or a public trust or an educational agency constituted under any law for the time being in force;

(b) the school is not run for profit to any individual, group or association of individuals or any other persons;

(c) the school conforms to the values enshrined in the Constitution;

(d) the school complies with the provisions in the Kerala Education Act and Rules issued thereunder relating to area, location and accommodation;

(e) Malayalam is taught as a compulsory language in all classes;

(f) the Pupil-Teacher Ratio as specified in section 25 is maintained;

(g) The school complies with the provisions under sections 13, 16, 1st 17 of the Act;

(h) the school provides barrier free access and adapted toilets for children with disabilities;

(i) the bio-metric identification details along with the Unique Identification Number of each child is maintained in the school;

(j) the school buildings or other structures or the grounds are used only for the purposes of education and skill development;

(k) the school does not run any unrecognised classes within the premises of the school or outside, in the same name of the school;

(l) the school is open to inspection by any officer authorized by the Government;

(m) the school furnishes such reports and such information as may be required from time to time and complies with such instructions of the Government as may be issued to secure the continued fulfilment of the condition of recognition or the removal of deficiencies in the working of the school."

8. It will be apparent from a reading of the aforementioned provisions in the RTE Act and Rules, that the 3rd respondent School is also statutorily obliged to obtain a recognition under the Act and Rules in the manner prescribed in Rule 14 of the Rules. Rule 14(1)(g) makes the recognition granted to the 3rd respondent School conditional on the School complying, inter alia, with the provisions of Sections 13, 16, and 17 of the Act. A reading of the provisions of Sections 13, 16 and 17 of the Act would clearly indicate that once a student has been admitted to a recognised School in accordance with the provisions of the Act, then the student must progress through the various stages of elementary education in that School without any hindrance and without being held back in any class, or expelled from the School, till the completion of his elementary education. This appears to be the statutory mandate of the RTE Act, the purpose and object of which, as already noted earlier, is to ensure that every child receives free and compulsory elementary education pursuant to the fundamental right guaranteed through

Article 21A of the Constitution of India. The learned Senior counsel appearing on behalf of the 3rd respondent School would contend that, the provisions of Section 16 of the RTE Act must be read as referring to only a conscious Act on the part of any School in preventing a student from progressing further in his educational carrier. The contention is that if a student does not succeed in attaining the academic standards prescribed by the Board to which the School is affiliated, then it cannot be said that the student has been "held back" in any class by the School in question. I am unable to accept the said contention of the learned Senior counsel. Firstly, Section 16 which mandates that no child admitted in the School shall be held back in any class till the completion of his elementary education is a statutory provision that will override any norms or guidelines that have been issued by the affiliating body. Secondly, I am of the view that, the detention of a student in a particular class during the course of his elementary education, on the ground that he has failed to meet the academic standards prescribed by the affiliating Board, would amount to a holding back of the student in a class for the purposes of Section 16 of the RTE Act. It is apparent from a conjoint reading of the statutory provisions that they contemplate the admission of a student to a class corresponding to his age, between the ages of 6 and 14, and an unhindered progression of the student through various standards till he reaches the age (completes standard 8) that marks the culmination of his elementary education. The academic performance of the student in any year can be of no significance when the statutory mandate is only that the student must receive compulsory education during the years between Class 2 and Class 8. The fundamental right of the child to elementary education, which is traceable to Article 21A read with the provisions of the RTE Act and Rules, cannot be made conditional on the child attaining minimum standards of academic performance as prescribed by the School or the affiliating Board. As a matter of fact, the provisions of Sections 3 and 4 of the RTE Act would indicate that a stand taken by a School that a student has failed to meet the minimum educational standards prescribed for a particular class can only be viewed as an admission by the School, of its failure in the matter of imparting sufficient training to the said student and thereby having inadequately discharged its obligation under the Act. Other than alerting the School concerned to the inadequacies of its training programme, the "unsatisfactory" academic performance of a student cannot act as a fetter to the pursuit by a student of his elementary education in the said School. Thus, I am of the view that, it is not open to the 3rd respondent School to detain the petitioner's son in standard VI on the ground of inadequate academic performance.

Accordingly, the writ petition is allowed by directing the 3rd respondent to promote the petitioner's son to standard VII in the School for pursuing his elementary education in the School during the academic year 2015-2016. The 3rd respondent School shall do the needful in ensuring that the petitioner's son enrolls as a student of standard VII in the School and pursues his elementary education in the said School during the academic year 2015-2016 and thereafter

till he attains the age of 14 years.