

(2013) 08 KL CK 0060
In the High Court Of Kerala
Case No : W.P. (C) No. 7540 of 2013

Manager, Aided High School-Parel Mampattumoola	APPELLANT
Vs	
State of Kerala and Another	RESPONDENT

Date of Decision : 21-08-2013

Acts Referred:

Citation : (2014) 1 KLJ 21

Hon'ble Judges : C.T. Ravi Kumar, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

C.T. Ravi Kumar, J.—These writ petitions carry challenge against Government order viz., G.O.(MS) No. 185/13/G.Edn., dated 11.6.2013 and consequential circular and notification issued by the Director of Higher Secondary Education, dated 17.6.2013, on varied grounds. In view of the commonness of points posed for consideration they were taken up for joint hearing and disposal. Government took a decision to grant sanction to upgrade one existing Government/Aided High School each as Higher Secondary School in 148 Grama Panchayats in the State where no Higher Secondary School exists either in the Government sector or in Aided sector and to sanction two batches each in those schools, as per the said G.O. dated 11.6.2013. A decision was also taken thereunder to grant sanction to open new Higher Secondary Schools or to upgrade existing High Schools in eight Northern districts of the State northwards to Ernakulam and inclusive of Ernakulam, in accordance with educational need of the locality. It also carries the decision to sanction additional batches of Higher Secondary Courses in those districts in accordance with the educational need of the locality.

2. Before encapsulating the rival contentions necessary for the disposal of these writ petitions it is only proper and profitable to have a glance at the steps taken anterior and posterior to the introduction of the Higher Secondary Course in the State. In tune with the National Education Policy of 1986 Government of Kerala have decided to reorganize the secondary education and collegiate education in

the State and consequently de-linked pre-degree course from colleges and introduced Higher Secondary Course as a continuous two year course of study to be offered as part of school education after standard X. As per GO(MS) No. 138/90/G.Edn. dated 27.6.1990 Higher Secondary Course initially introduced in 31 Government High Schools during the year 1990- 91 and during 1991-92 it was introduced in 55 more High Schools in the State. Paragraph 3 in the said Government order dated 27.6.1990 would reveal that the Governmental decision was to introduce Higher Secondary Course in selected Government schools in the State and then after watching the progress, to extend the same stage wise in the other High Schools in the State. It is thus obvious that pursuant to the de-linking of Pre-degree course from colleges Higher Secondary Course was introduced in existing High Schools in the State either in the Government sector or in the Aided sector. True that certain Higher Secondary Schools were also established pursuant to the said decision. The subsequent orders issued by the Government in the matter of establishment of Higher Secondary Schools/upgradation of High Schools as Higher Secondary Schools would reveal that the earlier decision to extend higher education to other schools in the State are being implemented in a phased manner. Undoubtedly, the impugned Government order was also issued as part of such phased implementation. The circular and notification dated 17.6.2013 was issued by the Director of Higher Secondary Education in tune with and in pursuance of, the said Government order dated 11.6.2013. It is also apposite to keep reminded of the decision of the Hon"ble Supreme Court in *Modern School Vs. Union of India (UOI) and Others*, in view of the claims and contentions raised in these writ petitions. It was held therein that right of education means that a citizen has a right to call upon the State to provide educational facilities only within the limits of its economic capacity and development.

3. Manifold contentions have been raised to assail the Government order dated 11.6.2013 and the circular and notification, dated 17.6.2013 issued by the Director of Higher Secondary Education in tune with the said Government order dated 11.6.2013. As a matter of fact, only a restricted challenge is mounted against them and in other words, all the petitioners preferred to challenge them not in their entirety. The common contention of the petitioners is that in the matter of opening of Higher Secondary Schools or upgradation of existing High Schools as Higher Secondary Schools the provisions under Chapter V of the Kerala Education Rules (for short "KER") are bound to be followed scrupulously. The said contention is strongly resisted by the State contending that the provisions under the KER except Chapter XXXII thereunder are absolutely inapplicable to matters relating Higher Secondary Education. The learned Additional Advocate General appearing for the State contended further that such decisions to establish Higher Secondary Schools/upgrading existing High Schools as Higher Secondary Schools or sanctioning additional batches to existing Higher Secondary Schools are taken and sought to be implemented as part of policy decisions of the State and hence, cannot be subjected to judicial review. In the

context of the rival contentions I am of the considered view that these points beckon consideration first as findings on those points would ultimately decide the very fate of these writ petitions. I will advert to the other contentions at the appropriate situation, in case of necessity.

4. At the very outset, it is to be stated that decisions on matters of policy like the one involved in these cases are not on that account become sacrosanct against unreasonableness, arbitrariness etc. Evidently, Government committed itself to give sanction to open Higher Secondary Schools and also to upgrade existing High Schools as Higher Secondary Schools and even to sanction additional batches to existing Higher Secondary Schools. Though decision to grant such sanctions falls within the realm of policy of Government it cannot contend that everything in connection with the said decision including the procedures adopted are all beyond the scope of judicial review. In fact, the decision referred supra also makes it clear that the question whether it is arbitrary or violative of constitutional, statutory or any other provisions of law is within the scope of judicial review. That position is evident even from the very decision in *State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc.*, relied on by the learned Additional Advocate General to contend that the right of the State to change its policy from time to time under changing circumstances cannot be questioned. There can be no doubt with respect to the right of the State. The Hon'ble Apex Court held thus:-

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 violative of any constitutional statutory or any other provision of law.

(emphasis added)

I may, now, consider the question whether the procedures under Chapter V of the KER are to be followed for sanctioning new schools or upgradation of existing schools.

5. It is contended by the petitioners that the very decision to grant permission to establish Higher Secondary Schools was based on determination of the educational need Panchayat wise and as such, is against the specific provisions in Chapter V of KER as going by the provisions what is to be taken into account is the need of the locality. It is contended that procedures for determining the areas where new schools are to be opened or existing schools are to be upgraded have been provided in Chapter V of KER. Since the said rules are framed invoking the power u/s 36 of the Kerala Education Act (for short "the Act") and in the light of the specific provisions in Section 3(5) of the Act, after the commencement of the Act, the establishment of a new school or the opening of a higher class in any private school shall be subject only to the provisions of the Act and the rules made thereunder and any school or higher class established or

opened otherwise than in accordance with such provisions shall not be entitled to be recognized by the Government. In this context it is evident from Chapter XXXII, KER that Higher Secondary Course has been introduced as a continuous two year course of study as part of school education after standard X. It is the contention of the petitioners that adherence to the procedures contemplated in Chapter V particularly, Rules 2 and 2A would eschew the element of arbitrariness and also would make the entire process transparent. When specific procedures have been contemplated in Chapter V of KER framed invoking the powers u/s 36 of the Act there is no reason for not following the same and also for prescribing parameters in deviation to such procedures contemplated in the provisions in Chapter V of KER, it is contended. In short, according to the petitioners, the applications submitted by them as also all others who responded to the notification dated 17.6.2013 issued pursuant to G.O. dated 11.6.2013 are liable to be considered in the light of the provisions under Chapter V of KER irrespective of the restrictions enjoined under Government order dated 11.6.2013 and the circular and notification dated 17.6.2013 in pursuance thereof. The learned Additional Advocate General, in addition to the contentions referred to earlier, contended that the "Higher Secondary Grade" or "Higher Secondary Schools" contemplated in Chapter-II and elsewhere in the KER and the "Higher Secondary Course" introduced pursuant to the delinking of pre-degree course from colleges and in relation to which Chapter XXXII was introduced in the KER are different and distinct. It is contended that a bare perusal of Chapter II Rule 2 sub-rules (3) and (4) in the light of the decision of the Division Bench of this Court in K. Krishnankutty and Others Vs. State of Kerala and Others, would reveal that the expression "Higher Secondary Schools" in Chapter II Rule 2 sub-rules (3) and (4) refers only to the erstwhile Higher Secondary Schools consisting of Standards VIII, IX, X and XI. The learned Advocate General also relied on decisions of this Court in Sam Joseph Vs. State of Kerala and others, and Jayasree T. (Former Hsst of ZHS School) Vs. The Director of Higher Secondary, The Educational Agency (Manager) and P.C. Ranjith Raja, . It is submitted that a perusal of Rule 2(3) in Chapter II would reveal that the said standards viz., Standards VIII, IX, X and XI, are collectively known as "Higher Secondary Grade" and the expression "Higher Secondary School" employed in Rule 2(4) in Chapter II is in respect of the four year course viz., Standards VIII, IX, X and XI. Evidently, the endeavour is to bring home the point that the said four year course of study collectively known as Higher Secondary Grade in Chapter II, KER and the Higher Secondary Course introduced pursuant to the de-linking of pre-degree and for which Chapter XXXII has been incorporated in KER are different and distinct. It is to buttress the said contention that the decision in Krishnankutty's case (supra) was relied on. It is contended by the learned Additional Advocate General that the observations and findings of this Court in paragraphs 50 and 51 thereunder would undoubtedly make it clear that the provisions in the Kerala Education Rules are not applicable to the Higher Secondary Schools introduced pursuant to the de-linking of Pre-degree course in tune with the National Educational Policy. The specific contention raised on behalf

of the State is that the provisions under Rule 2(3) to Chapter II or in that matter any other provisions other than Chapter XXXII in the KER and any other provision in the Kerala Education Rules specifically made applicable by issuing appropriate Government orders, are not applicable to any matter relating to the Higher Secondary Education. It is to be noted that the party respondent in W.P. (C) No. 15855 of 2013 also endorsed the said contentions and additionally contended that the petitioner therein who is resisting the consideration of application submitted by the respondent without considering his objections got no such right of being heard in the matter.

6. A short survey on the Government orders issued in respect of Higher Secondary Course is only appropriate to appreciate the rival contentions. Pursuant to the decision to de-link Pre-degree course from colleges and to introduce Higher Secondary Course the first Government order in that subject was issued on 27.6.1990. It is evident from the said Government order dated 27.6.1990 that it was issued to reorganise secondary education and collegiate education in the State in accordance with the "National Education Policy" and to introduce "Higher Secondary Course" in schools. It was only thereafter that Higher Secondary Course was introduced by opening Higher secondary Schools or by upgrading existing schools as Higher Secondary Schools. Admittedly, even thereafter, for a long period of time no rules pertaining to higher secondary education were framed. It was only long later that Chapter XXXII was introduced in the KER as per Government order dated 9.11.2001 and the same was published in Gazette dated 12.11.2001. Admittedly, the Division Bench decision in Krishnankutty's case (supra) was rendered much prior to the introduction of Chapter XXXII in KER. In such circumstances, the impact of the introduction of Chapter XXXII in KER and Government Orders issued thereafter can be gone into despite the decision in Krishnankutty's case (supra) especially in view of the subsequent decision in Sam Joseph's case (supra). Obviously, at the point of time when the decision in Krishnankutty's case was rendered the "Higher Secondary Course" was not made as continuous course of study to be offered as part of school education after standard X by introducing appropriate provisions in KER. In that context, Rule 1(c) in Chapter XXXII assumes relevance and it reads thus:-

1.(c) "Higher Secondary Course" means a continuous two year course of study offered as part of School Education after Standard X.

It is to be noted that even after taking a decision to de-link Pre-degree course from colleges in its implementation courses were introduced initially only in existing schools, firstly, in Government High Schools and later, in Aided schools. Still later, incontestably, it was also sanctioned to some unaided, recognized schools as well. Going by the definition in Rule 1(c) of Chapter XXXII "Higher Secondary Course" is a continuous two year course of study offered as part of school education after Standard X. Even thereafter, in the matter of procedures to be followed for opening Higher Secondary Schools or for upgrading the

existing schools as Higher Secondary Schools there lingered uncertainty. A High Level Committee appointed by the Government after a thorough study submitted suggestions, inter alia, in that regard as well and that ultimately led to the issuance of G.O.(P) No. 107/07/G.Edn. dated 13.6.2007 touching the matter of opening of new schools, upgradation of existing schools and such other matters. The relevant suggestions of the Committee are given under the caption "Higher Secondary Schools" in the said G.O. dated 13.6.2007 itself and they read thus:-

Higher Secondary Schools:

1. The guidelines for Government and aided schools in 1- 7 may be applied to Higher Secondary Schools also. In the normal course, there is no need such as there is sufficient capacity in existence now.
2. The procedure in Chapter V Kerala Education Rules may be extended to the Higher Secondary Schools also either by amending Kerala Education Rules or by an executive order replacing the existing guidelines issued in 2006.
3. For unaided schools the same criteria laid down for other schools may apply mutatis mutandis.

(emphasis added)

Evidently, it was after examining such suggestions in the matter in detail that the aforesaid G.O. was issued on 13.6.2007. In Paragraph 1(4) of the said order under the caption "Sanctioning and upgrading Government or aided schools" it was ordered thus:-

1. Sanctioning and upgrading Government or aided schools
4. All the steps for sanctioning new schools or upgradation as laid down in Kerala Education Rules will be followed.

(emphasis added)

Paragraph 3 therein reflects the orders pertaining to Higher Secondary Schools. The orders issued under the caption "Higher Secondary Schools" in so far as it is relevant read thus:-

1. The criteria for Government and aided schools mentioned in 1(1-4) except 12(a) above will be applied to the Higher Secondary Schools also in the normal course.
2. The procedure in Kerala Education Rules will be extended to the Higher Secondary Schools also by amending the Kerala Education Rules.

A bare perusal of paragraphs 3(1) and 1(4), as extracted above, would thus undoubtedly reveal that as per G.O. dated 13.7.2007 it was ordered that all the steps for sanctioning new schools or upgradation as laid down in KER shall be followed in respect of such matters in the case of Higher Secondary Schools as well. It is pertinent to note that paragraph 3(2) would reveal that it was also

proposed to make appropriate amendments in the KER itself. The suggestions by the committee was to extend the procedure under Chapter V, KER to the Higher Secondary Schools either by amending the KER or by an executive order replacing the existing guidelines issued in the year 2006. Evidently, as per G.O. dated 13.6.2007 Government issued orders to follow all steps for sanctioning new schools or upgradation as laid down in KER in relation to Higher Secondary Schools. It indeed is the executive order replacing the then existing guidelines issued in the matter in the year 2006 and going by the said G.O. appropriate amendments in tune with the G.O. dated 13.6.2007 will be made later. There can be no doubt with respect to the power of the Government to take such decisions by issuing such executive orders pending appropriate amendments in KER. In this case in the absence of specific provisions the relevant provisions of the KER were made applicable to the Higher Secondary Schools as per the executive order. It is nobody's case that the said executive order dated 13.6.2007 violates or goes against any statutory provisions in the KER. In fact, a scanning of the provisions under KER would reveal that the erstwhile Higher Secondary Schools were also to be established and maintained in accordance with the provisions under KER as can be seen from the various provisions under the KER such as Chapter IV, KER. Though it orders for extending such procedures in KER to Higher Secondary Schools by amending the KER hitherto, no amendment was brought in. Still, by virtue of the order dated 13.6.2007 all such procedures are to be followed and the mere delay in bringing in appropriate amendment in KER is of no consequence as regards application of such procedures as long as G.O. dated 13.6.2007 is not modified or cancelled subsequently. It is only apposite to state at this juncture that in the said G.O. dated 13.6.2007 the earlier G.O. dated 19.8.2006 was referred to as item No. 1 and then the orders were issued as aforesaid and the State got no case that the G.O. dated 13.6.2007 was annulled or modified or on the subject another G.O. was issued changing the decisions to make the provisions under the KER applicable to the Higher Secondary Schools in those matters covered by it. It is in this context that the decision in Sam Joseph's case (supra) gains relevance. In paragraph 9 thereunder it is stated thus:-

The Government have prescribed qualifications and method of appointment of various posts under the Higher Secondary wing by framing Rules, which are contained in Chap. XXXII of the KER. The various provisions in other Chapters of the KER are not applicable to the Higher Secondary wing. But, the Government have issued specific orders, extending the applicability of certain Rules to the Higher Secondary wing also.

It is thus obvious that the judgment in Sam Joseph's case (supra) cannot be understood to have laid down a position of law that Chapter XXXII in KER alone is applicable to Higher Secondary Education. Going by paragraph 9 thereunder if Government have issued specific orders extending the applicability of any other rule/rules in KER to Higher Secondary Education that would also be applicable to Higher Secondary Schools.

7. The learned Government Pleader argued that the Government order dated 13.6.2007 was virtually interfered with by this Court in W.P.(C) No. 8120 of 2007 and connected cases. But, the said contention cannot be upheld in the light of paragraph 4 in the Division Bench, decision in *State of Kerala Vs. Manager, Nimala Public School and The Principal Officer, Central Board*, arising from the judgment in the said writ petition. In paragraph 4 thereunder it is stated thus:-

All these rival contentions were meticulously considered by the learned Single Judge each contentions while disposing of the matter. The learned Single Judge found that Government order dated 13.6.2007 dealing with granting of NOC for affiliation to CBSE/ICSE cannot be sustained.

(emphasis added)

Thus, it is evident that in the light of the decision of the Division Bench reported in *State of Kerala Vs. Manager, Nimala Public School and The Principal Officer, Central Board*, it cannot be contended that Government order dated 13.6.2007 in its entirety was found unsustainable and was interfered with by this Court. In the circumstances, I do not think that the other contentions raised by the parties on the aforesaid point require consideration any further. In the light of the Government order dated 13.6.2007 and the decision of the Division Bench in *Sam Joseph's case (supra)* State cannot be heard to contend that in the matter of sanctioning and upgrading of Government or Aided schools steps for sanctioning new schools laid down in KER are not be followed. Indisputably, such procedures are prescribed in Chapter V, KER. In short, the impact of the G.O. dated 13.6.2007 and the decision in *Sam Joseph's case (supra)* is that Chapter V, KER is applicable in Higher Secondary Schools as well. Approaching the said issue at a different angle will also lend support to the said conclusion: Chapter XXXII was inserted in the KER as per G.O.(P) 331/2001/G.Edn. dated 9.11.2001 published in Gazette dated 12.11.2001. A perusal of the said Gazette notification would reveal that rules under Chapter XXXII have been made by exercising the powers conferred u/s 36 of the Act. Thus, it is obvious that the source of power for framing rules under Chapter XXXII is Section 36 of the Kerala Education Act. Rule 1(c) of Chapter XXXII has to be looked into in the said context. It is stated thereunder that "Higher Secondary Course" means a continuous two year course of study offered as part of School Education after Standard X. It is for introducing the Higher Secondary Course that the sanction was granted for establishing Higher Secondary Schools or for upgrading existing Government or Aided High Schools. When that be so, Section 3(5) of the Act assumes relevance to know whether it is mandatory to follow the procedures prescribed under Chapter V of KER in the matter of sanctioning of Higher Secondary Schools or upgrading Government or Aided High Schools as Higher Secondary Schools. Section 3(5) reads thus:-

3(5) After the commencement of this Act, the establishment of a new school or the opening of a higher class in any private school shall be subject to the provisions of this Act, and the rules made thereunder and any school or higher

class established or opened otherwise than in accordance with such provisions shall not be entitled to be recognised by the Government.

(emphasis supplied)

Certain other aspects also are worthy for reference. A perusal of the notification dated 17.6.2013 and the provisions under Chapter IV of KER would reveal that in the matter of minimum site area and the accommodation for each class room the provisions thereunder are virtually followed inasmuch as the area and dimensions prescribed in the notification, though without making specific reference to the provisions under the KER, tally with the area and dimensions prescribed for Higher Secondary School in Chapter IV, KER. In short, after introducing Chapter XXXII in KER by invoking the rule making power u/s 36 of the Act, after issuing G.O. dated 13.6.2007 extending all the steps for sanctioning new schools or upgradation laid down in KER to the Higher Secondary Schools and further stating thereunder that appropriate amendments to that effect would be made in KER itself the State cannot be heard to contend that the said related provisions in KER are not applicable to the Higher Secondary Schools. The incontestable position of fact that such steps are provided under Chapter V, KER would thus makes the position clear that in such matters Chapter V, KER alone is applicable and as such, have to be scrupulously followed in relation to Higher Secondary Schools.

8. Having held that the procedures contemplated under Chapter V of KER have to be followed in the matter of sanctioning new Higher Secondary Schools or upgrading existing Government or Aided schools the other question to be considered is whether any affected party can claim for opportunity to raise objection in the matter of upgradation of an existing High School or opening of a new school. When once it is held that the provisions under Chapter V of KER are applicable in the matter of determination of areas where new schools are to be opened or existing schools are to be upgraded it goes with saying that such opportunities to file objections subject to the provisions thereunder would be available to persons feeling aggrieved by any such proposal in the manner provided under the KER.

9. Now, I will deal with the question whether the State is justified in limiting the area to establish new Higher Secondary Schools or sanctioning upgradation of existing High Schools as Higher Secondary Schools or sanctioning additional batches in eight districts alone. True that the 148 Panchayats identified for upgradation of existing High Schools, one each, as Higher Secondary Schools do not confine to those eight districts whilst they spread in all districts. It is a fact discernible from the very first order till subsequent orders issued in relation to Higher Secondary Course pursuant to the delinking of pre-degree course and, in fact, indisputable also, that the introduction of Higher Secondary Courses are being effected in the State only in a phased manner. In fact, that was the decision right from inception. As already noticed hereinbefore, in *Modern School's* case (supra) the Hon''ble Apex Court held that right of education means

that a citizen has a right to call upon the State to provide educational facilities only within the limits of its economic capacity and development. In *Ram Lubhaya Bagga's case* (supra) the Hon''ble Apex Court held that financial constraints are valid considerations for framing or modifying a policy manner necessarily State has to limit the invitation of application in-some manner, at a particular point of time. In such to certain area the contention of violation of Article 14 of the Constitution of India cannot be upheld. I am of the view that the further contentions of some of the petitioners from those districts other than the 8 mentioned Northern districts regarding discrimination or adoption of dual policies by Government in regard to those 8 districts and the rest of the districts, also would be redressed by a scrupulous adherence to the provisions under Chapter V of the KER.

10. A statement was filed on behalf of the State in W.P.(C) No. 15855 of 2013. It is stated therein that a study was conducted before identifying the areas and on such study it was found that in Northern districts mentioned in the G.O. dated 11.6.2013 there is shortage of seats in Higher Secondary Course and there is surplus/excess seats in the rest of the districts.

11. When once it is found that Chapter V of KER is applicable necessarily in the matter of opening of new schools the provisions under Rule 9 of Chapter V have to be followed. In terms of provisions under Rule 9 of Chapter V KER the educational needs of the locality have to be looked into and if the educational needs of a locality do not require opening of a new school, going by the provisions therein, no permission could be granted for opening a new school. In *Madhavan Pillai v. State*, 1965 KLT 284 this Court held that Rule 9 is mandatory in character and that the educational needs of the locality could be ascertained with reference to relevant materials. Though this Court orally directed for production of the records relating to the study that ultimately culminated in issuance of the impugned Government order and also the circular and notification, dated 17.6.2013 the learned Additional Advocate General submitted that the findings that form part of the statement especially with respect to the short fall of the seats in each of the Districts, were based on the data's furnished by the competent authorities. But, what were the data's furnished by the educational authorities and what was the discussion, if any, made thereafter are not at all discernible from the statement. It is true that, in the statement in tabulated form the short fall or surplus of seats in each District has been given. But, a perusal of the same would reveal that the decision as revealed from the impugned Government order and the circular and also the notification and the short fall identified do not have any co-relation. The statement therein is to the effect that there are 1822 Higher Secondary Schools in the State and the total number of seats in those schools put together is only 335400 and adding the 98169 seats available in other courses such as V.H.S.C., Polytechnic, I.T.I. and I.T.C. would make the total as 433569. As per the statement during the academic year 2013-2014 a total of 4,48,661 students have passed SSLC Examination and therefore, there is a deficiency of 15092 seats. Going by the

statement, after the study, it was found that in Ernakulam District there is short fall of 330 seats. Ext. R1(b) would reveal that after such study it was found that in Ernakulam District in the Panchayats figured at 98 to 125 thereunder, no Higher Secondary School exists and therefore, such Panchayats have been identified as Panchayats wherein upgradation of existing High Schools could be granted. If pursuant to the Government order dated 11.6.2013 and the circular and notification dated 17.6.2013 sanction to upgrade a school in each of the said identified Panchayats is granted the number of seats in Ernakulam District in Higher Secondary Course would increase by 2470. Thus, even when the short fall is identified only as 330 seats the decision taken is not for making up the deficiency whilst for effecting sanction in such a manner which would result in creation of 2800 seats and thereby, from deficiency of 330 seats it would form a surplus by 2470 seats. Another aspect which is evident from subsequent orders issued in the subject matter but not made part of the statement is the availability of seats in unaided schools. How many unaided, recognized schools in Ernakulam District are having Higher Secondary Courses and what exactly is the number of seats available in such schools are also not forthcoming. Whether those seats in unaided schools are also taken into account to reach at the aforesaid figure? If not, whether its number is sufficient to fill up the short-fall is also not at all discernible from the statement. That apart, how can such a study allegedly made district wise form the basis for the decision to open new Higher Secondary Schools or to upgrade the existing schools as Higher Secondary Schools or to sanction additional batches in existing Higher Secondary Schools on Panchayat wise? It is to be noted that the G.O. dated 11.6.2013 would make it abundantly clear that the foundation for the decision is the finding of short fall of seats in Higher Secondary Courses in the 8 Northern Districts and surplusage of seats in the rest of the districts and it is not a policy decision to do so irrespective of the educational need of the locality. Though I have elucidated the case of Ernakulam District the same is the case in regard to the other Districts as well inasmuch as it is not evident as to what were the relevant materials that led to ascertain the shortage of seats as also surplusage of seats. Another important aspect to be noted is that going by the statement data's were collected district wise to find out the educational need but the decision taken is to give sanction to open schools in the 148 Panchayats having no existing Higher Secondary Schools. As noted earlier, the details regarding the study is not available and at any rate, they were not made available. Statement filed on behalf of the State also did not contain the manner in which such a study is allegedly made. Even if, any such study was undertaken the manner in which such figures were arrived at as revealed from the said statement would undoubtedly suggest that it was not done in the manner prescribed in Chapter V, KER and the educational need of the locality was not determined in the prescribed manner. The decision taken is to upgrade High Schools in the identified 148 Panchayats. There is nothing on record to show that even such a decision was taken after conducting a study to ascertain the educational need in those Panchayats. Obviously, what is claimed to have been conducted is only a district wise study. As noticed hereinbefore, when

once Chapter V, KER is held as applicable to the Higher Secondary Schools the determination of area to open new schools or to upgrade schools shall only be based on a study of the educational need of the locality in the manner prescribed under KER. In this context, the decision *Ram Lubhaya Bagga's case* (supra) assumes relevance. Paragraph 31 thereunder would suggest that the court would not interfere with any opinion formed by the Government if it is based on relevant facts and circumstances or based on expert advice. What is its corollary? In this case, as noticed earlier, the opinion cannot be said to be one based on relevant facts and circumstances and above all, it is arrived not in the statutorily prescribed manner. Therefore, on account of violation of statutory provisions interference is inevitable in view of the decision in *Ram Lubhaya Bagga's case* (supra). In the circumstances, the failure to follow the prescribed procedures in Chapter V of KER invites interference in the matter. I have already found that in the light of the Government order dated 13.6.2007 and the decision in *State of Kerala Vs. Manager, Nimala Public School and The Principal Officer, Central Board*, it is incumbent on the authorities to follow the procedures under the KER in the matter of sanction of new schools and upgradation of existing schools. It is an incontestable position that scrupulous adherence would have definitely made the respondents to conduct an authentic survey for determining the areas where new schools are to be opened or existing schools are to be upgraded prior to the issuance of the G.O. in question and also the circular and notification, dated 17.6.2013. Rule 2 of Chapter V KER, enlists the parameters to be looked into for the purpose of determining such areas. In this context, it is only apposite to note that a glance at the earlier orders on the subject would reveal that on certain, previous occasions serious studies were undertaken prior to the issuance of notification inviting applications to open new schools or upgrade existing schools. When it is the specific case of the State that Chapter XXXII, KER alone is applicable to Higher Secondary Education one cannot contend or presume that invoking the powers under Rule 3 of Chapter I, KER Government have dispensed with or relaxed the requirements of the Rules under Chapter V, KER on getting satisfied of the undue hardship which would cause on the operation of the Rules" under Chapter V of the KER. In the contextual situation it is apposite to refer to the decision of this Court in *Al-Ishan School Vs. State of Kerala and Others*, . In the said decision this Court has held that Governance is not a privilege of the Government. It is a duty. Governance in accordance with the command of the Constitution and the Laws is a fundamental entitlement of the We, the People, as a Nation. The executive Government is merely a societal agent of the Sovereign; the sovereignty lying impregnated in the citizenry. The first principle of equality is that the sovereign-power within each citizen; is in equal measure and it is this equality principle that forms the fundamental substratum for the development of the seminal doctrine of equality, leading to justice; social, economic and political and to equality; of status and of opportunity. The legislative exercises, in situations and circumstances; provide insulation even against the executive Government. The fundamental reason for this is not any lack of confidence in the system, but the earnestness to exclude nepotism, favouritism, arbitrariness,

corruption, bias, prejudice and every other vitiating element that would result in forking the equality principle. Every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 and basic to the rule of law, the system which governs us, arbitrariness being the negation of the rule of law. Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary in whatever sphere must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all powers must be for public good instead of being an abuse of power. With the aforesaid scenario, the action of the Government of making a list of schools of its choice; even if it were on the basis of any material provided by the DPI, having collected it through the Deputy Directors; is an exercise in total violation of the laws. Having done so, for which, there was no power; and having acted in violation of the statutory provisions, it amounts to fraud on powers. It is arbitrary, it bespeaks favouritism. It is unsustainable even on the policy of the Government, which, it propounds in the counter-affidavit, stating that "the policy of the Government is that there should be a fair, just, transparent, equitable and non- discriminatory policy in the matter", it is wholly short of that. A clear case of hostile discrimination and selective conferment is established. There is total exclusion of the rule of law in the matter. Those observations and findings in Al-Ishan School's case (supra) referred above are relevant to the fact of this case as well and in the circumstances obtained in this case I have no hesitation to hold that the decision for opening new schools or upgradation of existing schools as Higher Secondary Schools or even sanctioning of additional batches in existing Higher Secondary Schools in the Government order dated 11.6.2013 as also the consequential notification and circular, dated 17.6.2013 are nothing but fraud on powers. The long and short of this discussion is that the Government order dated 11.6.2013 and the consequential notification and circular dated 17.6.2013 issued by the Director of Higher Secondary Education are ultra vires the provisions under Chapter V, of KER and consequently the decision in G.O. dated 11.6.2013 cannot be put to operation as of now, without taking appropriate steps in terms of the provisions under Chapter V, KER. It is therefore, declared that the G.O. dated 11.6.2013 and the circular and notification dated, 17.6.2013 shall not be put to operation and the enforceability of the decision under the G.O. dated 11.6.2013 will depend upon appropriate study in the manner contemplated under the KER and will be subject to the same. Needless to say that fresh notification can be issued thereafter, in accordance with law.

12. In some of the writ petitions the specific contentions of the petitioners is that in the earlier round of litigations this Court considered the genuineness of the request of the petitioners for granting permission/sanction for upgradation of existing High Schools or for establishing Higher Secondary Schools in the concerned area and issued favourable directions to the authorities. In yet another set of writ petitions the contention of the petitioners is that the respondent authorities held out a promise capable to form legitimate

expectations and in such circumstances they are also entitled to seek for consideration of their applications based on the decision of the Government to grant sanction for establishing new Higher Secondary Schools and also for granting sanction for upgradation of existing High Schools. In such cases, it will be open to the concerned parties to produce the judgments wherein such directions were issued or such documents which in their opinion holding out a promise capable of creating a legitimate expectation for consideration of the authorities along with the concerned applications so as to enable the authorities to have a proper consideration of the applications when fresh applications are invited after adhering to the procedures under the KER by the respondents in the matter of opening of new schools, upgradation of existing schools or for granting additional batches. Needless to say that on such occasions it will be open to the petitioner applicants to respond to the notification for the aforesaid purposes subject to the terms of relevant Government orders and consequential notifications. Since I have already found the G.O. dated 11.6.2013 and the circular and notification, dated 17.6.2013 as imperative the individual grievances, claims and contentions of the petitioners as also other legal questions in all these writ petitions are left to be agitated in case of necessity after issuance of fresh notification.

13. It appears that all concerned are oblivious of the fact that the determination of areas where new schools are to be opened or existing schools are to be upgraded or additional batches are to be sanctioned in existing schools, is to be made only to cater the educational need which essentially is linked to the availability of students. Hence, going by the provisions under the KER also, availability of students is the prime factor to be taken into account and any decision taken disregarding the same may ultimately add to the financial constraints of the Government. I am also of the view that the chance of occurrence and recurrence of the perennial problems of protected teachers as also grievances relating non-creation of posts and non-disbursement of salary in the other grades of schools, in Higher Secondary Wing at any later stage could be eliminated by judicious decisions at the appropriate stage. An injudicious sanction in such circumstances might result in allotment of seats much more than the requirement and consequently to creation of posts unnecessarily. Sanctioning of schools sans such a serious enquiry as contemplated in KER and consequential creation of posts may ultimately lead to such unpleasant situation at a later stage. Though it is submitted that there would not be any question of effecting retrenchment in Higher Secondary Wing, is it not better to prevent any remote possibilities? It is made clear that this judgment will not stand in the way of taking appropriate steps in the matter of opening of new Higher Secondary Schools, upgradation of existing schools as Higher Secondary Schools or granting, of additional batches in any existing Higher Secondary Schools after scrupulous adherence to the provisions prescribed under the KER.

Subject to the above, all the writ petitions are disposed of.