(2013) 09 KL CK 0028

In the High Court Of Kerala

Case No : Writ Petition (C) No. 21951 of 2013

Muslim Educational Society APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 11-09-2013

Acts Referred:
Constitution of India, 1950 — Article 19(1)(g)

Citation : (2014) 1 KLJ 210 : (2013) 4 KLT 616

Hon'ble Judges : K.M. Joseph, J;A. Hariprasad, J

Bench : Division Bench

Advocate : Babu Karukapadath, M.A. Vaheeda Babu, K.A. Noushad, Kandampully Rahul, Mithun Baby John and J. Ramkumar, for the Appellant; Roshan D. Alexander, Government Pleader, for the Respondent

Judgement

K.M. Joseph, J.—First petitioner is a Society registered under the Societies Registration Act, which is alleged to be constituted, established and administered by the members of Muslim Community in the State for establishment of educational and charitable institutions for the welfare and benefit of the community. The members of the first petitioner, it is stated, under its auspices, established the third petitioner Medical College. It is a Self Financing Medical College established and administered by the Muslim Educational Society. The Medical College is run with an annual intake of 100 students. Ext. P1 purports to be the Essentiality Certificate dated 23.8.2001 issued by the first respondent. It is stated that the college is a minority educational institution. Ext. P2 purports to be the Minority Certificate dated 17.8.2007 issued by the National Commission for Minorities Educational Institutions to the third petitioner. It is alleged that the third petitioner college admitted the first batch of M.B.B.S. students in the year 2004-2005 with an annual intake of 100 students with the approval of the Medical Council of India. The Government has issued Ext. P3 Government Order prescribing the procedure for issuance of Essentiality Certificate. In terms of Ext. P3, the third petitioner made application. It is the case of the petitioner that the petitioner is having all facilities and infrastructures for increasing the intake of

M.B.B.S. students by 50. An inspection was conducted in the Medical College by the officials and it is alleged that they have given favourable report to the first respondent. The complaint, however, is against Ext. P6, which reads as follows:

I am to invite your attention to the reference cited and to request you to take necessary steps to execute agreement with Government for sharing 50% of the enhanced seats for issuing Essentiality Certificate.

The prayers sought for are as follows:

(i) Call for the records leading to Ext. P6 order of the 1st respondent.

(ii) Issue a writ of certiorari or any other appropriate writ, order or direction, quashing Ext. P6 order of the 1st respondent.

(iii) Issue a writ of mandamus or other appropriate writ, order or direction commanding the 1st respondent to issue essentiality certificate to the 3rd petitioner for increasing the intake of students for M.B.B.S. Course by 50 seats to make a totally strength of 150 seats in its Medical College immediately.

We heard the learned counsel for the petitioners and the learned Government Pleader.

2. Learned counsel for the petitioners would submit that the request made by the first respondent to take necessary steps to execute agreement with the Government for sharing 50% of the enhanced seats for issuing Essentiality Certificate, is unconstitutional and in violation of the law laid down by the Apex Court Learned counsel for the petitioners would in fact point out that the third petitioner was entering into seat sharing agreement on earlier occasions, but on principle, he would submit that the request made by the Government that the petitioner must enter into a seat sharing agreement for 50% of the enhanced seats is clearly illegal.

3. Per contra, the learned Government Pleader would first point out that Ext. P6 is a letter. The application is being considered. He would further submit that even if it is found that the request is bad, the Court cannot quash Ext. P6 as it is not a final decision on the application.

4. We asked the learned Government Pleader to get instructions as to whether there is any other ground for denial of Essentiality Certificate. On getting instructions, learned Government Pleader would submit that the reason for non-issuance of the Essentiality Certificate is the refusal to execute the agreement. However, the learned Government Pleader raised a contention with reference to the following clause in the form in which the Essentiality Certificate is to be issued:

It is certified that:-

(d) Adequate clinical materials as per the Medical Council of India norms is available. It is further certified that in case the applicant fails to create infrastructure for the medical college as per MCI norms and fresh admissions are stopped by the Central Government, the State Government shall take over the responsibility of the students already admitted in the College with the permission of the Central Government.

He would submit that if the Government were to issue the Essentiality Certificate and if ultimately the contingency contemplated in clause (d) occurs, Government would be saddled with the liability to take over the responsibility of the students already admitted in the college. Therefore, Government cannot be directed to issue an Essentiality Certificate containing the said clause. While the learned Government Pleader does not plead for the case of absolute discretion and he agrees that the discretion must be exercised not arbitrarily, he would submit that the Government, at the same time, cannot be compelled to issue Essentiality Certificate containing the undertaking on the part of the Government. Learned counsel for the petitioners would point out that sans the aforesaid clause which is part of the statutory form of the Essentiality Certificate, the petitioners will have difficulties in getting sanction. By a catena of decisions of the Apex Court, it is now settled law that a Self Financing Institution is free to admit students to all the seats available. However, the admission procedure must be fair, transparent and non-exploitative. Be it a minority institution or an institution run by the members of the majority community, there is freedom to admit students.

5. Suffice it to say that as far as minority institutions are concerned, they trace their right to Art. 30. A Self Financing Institution is always free to enter into seat sharing agreement with the Government. The very concept of an agreement posits that it is free consent of both parties. There cannot be any of the vitiating factors known to law for the existence of a valid agreement. The parties to an agreement must be free agents. There cannot be any form of compulsion. Certainly, it is not open to the State to compel a Self Financing Institution to surrender any part of its seats to the Government. May be the Government is driven also by the noble objective of seeing that the seats are made available to it so that meritorious students as they consider them can be afforded education at lower fees. But here again, the learned counsel for the petitioners would point out that under the law as it stands, even the management of the Self Financing Institutions cannot make admission except which satisfies three elements, namely, fairness, transparency and non-exploitativeness. We cannot also ignore the existence of the committee constituted under the Act prevalent in the State of Kerala and also the powers with which they are vested with, and the law laid down by the Apex Court.

6. We are of the view that the request as couched in Ext. P6 to the petitioner to enter into the agreement is nothing short of conduct which is anathema to the high constitutional doctrine established by the Apex Court viz., that the Self Financing Institutions are free to make admissions to all the seats and the only exception thereto is the entering into an agreement for seat sharing. It is clear that any such agreement must be voluntary. Call it a request or command, we

are of the view that it makes no difference. It is clear that the object of the Government was to compel the petitioner to enter into a seat sharing agreement. This is per se illegal and unconstitutional. We are of the clear that the Government should not have issued such a request. This we say as it is not as if the Government is making a request without the petitioner having to pay a price for the same. The compliance of the request would entail an unwilling self financing institution to surrender its constitutional rights which have been recognised by the Apex Court.

7. As far as the condition which is referred to by the learned Government Pleader, he would submit that such a request as it contained in Ext. P6 has not been made till now. In other words, Essentiality Certificates were being granted even without a request to enter into an agreement as sought in Ext. P6. The objectionable part in Ext. P6 essentially is mixing up the issuance of the Essentiality Certificate with the "request" to execute the seat sharing agreement. We asked the Government Pleader as to whether there had been any case in the State of Kerala where on account of the college authorities failing to provide the infrastructure, the Government had taken over the students. Learned Government Pleader was not able to bring any such instance to our notice. We further asked the learned Government Pleader as to whether the adequate clinical materials as per the Medical Council of India norms are available in the petitioner''s college to which the answer was that the said facilities are there. It is pointed out by the learned Government Pleader that there can be no difficulty about certifying that adequate clinical materials as per the Medical Council of India norms are available. No doubt, he points out that in the inspection, some deficiencies were noted in the faculty in the para-clinical departments. Learned counsel for the petitioners in fact points out that the Essentiality Certificate was sought for in respect of the enhanced seats and as far as failure to create infrastructure it is a matter which relates to the future. In regard to the stand of the Government that if there is no seat sharing agreement entered into between the third petitioner, the Government is not inclined to give the undertaking as mentioned in clause (d), the argument apparently is that when there is a seat sharing agreement entered into, the Government would have the motivation for undertaking responsibility of taking over their education. Here, we must note that seat sharing will relate to 50% of the seats and yet the Government would have to undertake the liability to take over the students in regard to all the seats. As far as the admission of the students is concerned, whether it is done by the self-financing institution or whether the students are allotted by the Commissioner, in view of the law laid down that admission can be made only on the basis of merit, there can be no doubt that merit is not expected to be a causality even when admission is effected by the self-financing institution. Compelling the self-financing institution to surrender the seats, as already noted, is impermissible. It would involve the infraction of the fundamental right under Art. 30 in the case of the minority and Art. 19(1)(g) in the case of a non-minority self financing institution. The issuance of Essentiality Certificate is a mandatory

requirement as per the Medical Council of India Regulations, The form in which it is to be issued is as shown in Ext. P1. It is the statutory form. If the Government refuses to issue Essentiality Certificate as provided in the statutory form, it is quite likely that ultimately the petitioner will not be able to get approval in the matter of enhancement by 50 seats. If the Government is directed to issue certificate without containing the undertaking in clause (d) the apparent object with which the Government refused to grant the Essentiality Certificate in Ext. P6 would stand satisfied. There is also case for the petitioners that the clause that in case there is failure to create the infrastructure facilities, Government is to take over the responsibility of the students already admitted reflects the social responsibility of the Government. In this regard, we again re-iterate that the learned Government Pleader was not able to establish any case in the past where on account of the failure to create the infrastructure facility, the Government had taken over the students already admitted. At any rate, we would think that Government cannot be permitted to put up the prospect of it having to undertake the liability of taking over the students as a ground to support a palpably unconstitutional and illegal "request" as contained in Ext. P6. We are of the view that the attempt of the Government in "requesting" the the Government *(sic) to enter into into seat sharing agreement having regard to the timing and the context is intended to compel the self-financing institution to give up its constitutionally guaranteed rights which have been declared by the Apex Court in a catena of decisions. In such circumstances, we are of the view that not only must Ext. P6 be interfered with, but we should also direct that an Essentiality Certificate must be directed to be given as we do not think that this is a case where this Court should direct the Government to take a decision as such. Therefore, we quash Ext. P6 and we direct the first respondent to issue Essentiality Certificate to the petitioner for increasing the intake of students by 50 seats, within a period of ten days from the date of receipt of a copy of this Judgment.

The Writ Petition is allowed as above.

*Self Financing Institution

