

(2009) 04 KL CK 0005

In the High Court Of Kerala

Case No : Writ Petition (C) No. 16379 of 2008

Shafeek, K. and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 08-04-2009

Acts Referred:

Constitution of India, 1950 — Article 16(4), 16(4A), 19, 19(1), 21
Kerala Education Act, 1958 — Section 2(1), 2(7), 2(8), 3, 3(1)
Kerala Education Rules, 1959 — Rule 11, 14, 2, 2(4), 28
Kerala State and Subordinate Services (Amendment) Rules, 1972 — Rule 39

Citation : (2009) 04 KL CK 0005

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : K. Ramakwnar and K.P. Dandapani, George Poonthottam, T. Ramprasad Unni, Smitha George, Manu Tom, Unnikrishnan, S. Harikrishnan, Sunil V. Mohammed, Harilal, Gopan, George Zachariah Eruthickel, Vino V. George, A. Sirji, Millu Dandapani, T.K. Saidalikutty, A.A. Ziyad Rahman, Lai K. Joseph, Sheena Samuel, B. Jayasurya, George Mecheril, Thomas Abraham, Dipu, R., Krishnamoorthy, K.S. Hdridas, V. Venugopalan Nair, G. Harikumar, Sreejith S. Nair, D. Sajeev, R. Bindu, Prasanth, M.P., R. Rajasekharan Pillai, Sabina Javan, George Mathew and Sunil Kumar, A.G, for the Appellant; C.P. Sudhakara Prasad, General, A.J. Vaighese, Government Pleader, K.S. Madhusoodanan, T.V. Jayakumar Namhoodiri, Thushur Nirmal Sarathy, M.M. Vinod Kumar and K.M. Ramya, for the Respondent

Judgement

K.T. Sankaran, J.—These Writ Petitions are filed by the Managers, Parent Teachers' Associations, teaching and non-teaching staff and some of the students of unrecognized schools functioning in the State, challenging the Government Order, G.O.(Rt.) No. 2164/2008/General Education dated 13-5-2008 issued under Rule 3 of Chapter I of the Kerala Education Rules (hereinafter referred to as "KER") relaxing certain conditions in Rule 8 of Chapter VI of the said Rules.

2. To comprehend the nature and scope of the contentions raised by the Writ

Petitioners, it is apposite to extract Rules 7 and 8 of Chapter VI of the Kerala Education Rules, which read as under:

Chapter VI, Rule 7-Admission of Private Study pupils. (1) A pupil who has not attended any school may be admitted as a private study pupil in accordance with Rule 8.

(2) A pupil who has attended a school and left off and has been away from such school for at least one year may also be admitted as a private study pupil. But he will be permitted to sit for an examination as contemplated in Rule 8, only of a class one lower than the one which he would have been eligible to take had he continued on the rolls without interruption.

(3) No private study pupil shall be admitted to any Standard higher than Standard V Chapter VI, Rule 8-(1) Private study pupils seeking admission to a particular Standard in any school shall be required to sit for the annual examination in that school for the Standard immediately below during the previous year along with other pupils; and those who pass in the examination according to the basis of promotion adopted in the school may be admitted as private study pupils to the concerned standard on the reopening day. Private study pupils intending to sit for the annual examination for a particular Standard may be allowed, without payment of any tuition fee but on payment of the special examination fee prescribed in Sub-rule (3), to join that Standard one month prior to the annual examination; but such pupils shall not be deemed to be on the rolls of the school.

(2) Private study pupils seeking admission to standard V in a school which does not contain Standard IV, shall be allowed to sit for the annual examination for Standard IV in any school and may be admitted on production of a certificate from the Headmaster of the latter school.

(3) Every private study pupil who intends to sit for the annual examination of Standards IV shall remit into the Treasury a special examination fee of Rs. 10 and produce the chalan receipt before he is allowed to join the Standard IV, as the case may be- vide Sub-rule (1):

Provided that the pupils belonging to any Scheduled Tribes studying in the schools under the Department of Tribal Welfare shall be allowed to sit for the annual examination of Standards IV, without payment of any Special Examination fee.

(4) The question papers, answer papers, and other records relating to the examination of private study pupils shall be preserved in separate bundles till the next annual inspection.

(5) A candidate who has completed 17 years of age may be permitted to sit for the annual examination of Standard VII in any High School along with the other pupils on remitting a fee of Rs. 10 into Government Treasury. Along with the Treasury Receipt he should submit a declaration duly attested by the Headmaster

of that school to the effect that the candidate is aware that he will not be admitted to the higher class in any school even if he comes out successful in the examination. A successful private candidate may be issued a certificate in the form given below by the Headmaster of the School, after the promotion is got approved by the Controlling Officers.

CERTIFICATE

This is to certify that (name of candidate in block letters, full address and father's name) born on? has been examined in the annual examination Standard VII in March in this school and that he/she came out successful in the above examination.

Under the provisions of Rule 8(5) of Chapter VI of Kerala Education Rules he/she is not eligible for admission to higher class.

Headmaster

Signature of candidate Countersigned District Educational Officer.

3. Chapter I, Rule 3 of the Kerala Education Rules reads as follows:

3. Where the Government are satisfied that the operation of any rule under these Rules causes undue hardship in any particular case, the Government may dispense with or relax the requirements of that rule to such extent and subject to such conditions as they may consider necessary for dealing with the case in a just and equitable manner

4. By the Government Order under challenge, certain relaxations were made in favour of the students studying in unrecognized schools enabling them to continue their studies in the mainstream. In the Government Order, reference is made to the judgment of this Court in W.P. (C) No. 33341 of 2006 and connected cases [produced by the first Respondent as Ext. R-1 (c)], as per which, on the basis of the assurance and undertaking given by the managements of unrecognized schools and the affidavit filed undertaking that private study in the schools of the Confederation of Private Study Schools Association will be confined up to and inclusive of Standard V from academic year 2007-08, this Court granted relief to the Petitioners therein to some extent allowing them to conduct examinations up to Standard VI in their own schools and to issue transfer certificates, on their making appropriate application to the Deputy Director of Education. The Government Order also refers to the representations received from the parents of students requesting to allow the unrecognized schools to conduct examinations in 2007-08 also. Considering the representations, the Government Order dated 13-5-2008 was issued. It is provided in the Government Order thus: (A true English translation)

1. The Headmasters of the respective Government/Aided/Government Recognised Schools are authorized to conduct qualifying examination for promotion from a lower standard to the next higher standard, subject to the

restrictions regarding age etc., for the students of the schools not recognised by the Government to continue their studies upto the 10th standard in Schools recognised by the Government. If such lower standard does not exist in the school one intends to continue the studies, the examination can be conducted in other recognised schools having that standard. The students can be admitted without T.C. to the higher classes on production of certificate showing eligibility for promotion from the School which conducted the examination.

2. The Headmasters of the respective Government/Aided/Recognised Schools are authorized to conduct the qualifying examination as detailed in the above paragraph, if the students of the I Vth standard and below of the unrecognised schools wish to continue their studies in the higher standards in Schools recognised by the Government.

3. The score of the continuing evaluation (CE) need not be considered for the promotion of these students. Only the scores obtained in the written examination in the various subjects need be considered.

4. The Headmasters shall collect the name and address of the unrecognised schools where the students are admitted as such in the academic year 2007-08 and submit the same to the Deputy Director of Education through A.E.O/D.E.O. The Deputy Directors of Education shall collect the details of this and forward the same to the Director of Public Instructions before the 30th of June. The D.P.I, shall forward the list to the Government before the 15th to ponder over the legal proceedings to be initiated against such schools.

5. Those who wish to continue their studies in the schools recognised by the Government during the academic year 2008-09 shall submit application to the Headmasters of the Government/Aided/Recognised schools before 22-5-2008 and the Headmasters shall conduct the qualifying examination in various subjects with the assistance of his teachers, declare the results of the examination before 30-5-2008, and shall admit the eligible students without T.C. on or before 5-6-2008. After 5-6-2008, no permission for admission of such students shall be granted.

6. All the procedures normally applicable for the admission of students to schools, except in the case of T.C., shall be adhered to by the Headmasters.

The admission of students in relaxation of the existing rules shall be applicable for the academic year 2008-09 only. This will not be permitted in future.

5. The contentions raised by the Petitioners, inter alia, are the following: The Government Order dated 13-5-2008, which would have the effect of stoppage of running of private unaided and unrecognized schools in the State of Kerala, is violative of the fundamental rights of the Petitioners who are Managers of schools, teachers and guardians of pupils studying in the schools. The action taken by the Government is hasty, drastic and wholly unconstitutional. The Government Order was issued under pressure from some teachers' organisations

like the Kerala State Teachers' Association, aimed at preventing the loss of strength of pupils in the Government schools and aided schools. The teachers' organisations fear that due to reduction of student strength, there will be consequent reduction of staff strength and loss of job opportunities for teachers. The Government Order is illegal and beyond the jurisdiction of the Government. It would infringe the fundamental right of the Petitioners to run the schools and of the students to get good education in the schools. Right to education is a part of the fundamental rights of a citizen and the right to impart education is also part of such fundamental rights. The right to education includes the right to get excellent education. The ultimate object should be to provide better education in the State and the Government Order in question would be contrary to such an object. The Government have no power to close down private educational institutions, violating the fundamental rights guaranteed by the Constitution. Article 21A of the Constitution creates an obligation on the Government to provide free and compulsory education to all the children of the age of 6 to 14 years. The State has failed to perform the said duty and that vacuum is filled up to a large extent by non-governmental organisations and private managements by establishing schools for imparting quality education. The educational needs of the younger generation, particularly the Scheduled Castes/Scheduled Tribes and the poor and down trodden were not taken note of and protected by the Government. The demand of Grama Panchayats and the parents to establish sufficient number of schools in the State was not properly considered by the Government. Rule 3 of Chapter I of the Kerala Education Rules cannot be invoked to issue the Government Order in question. It is also pointed out that some of the schools are imparting education in English Medium and they follow the syllabus prescribed by the Central Board of Secondary Education. Their intention is to get the schools affiliated to the Central Board of Secondary Education. The Government Order in question would affect the running of such schools as well. The Government is well aware of the existence of unrecognized schools for the past several years. Instructions and directions were being issued from time to time for the conduct of examinations and to issue Transfer Certificates to the students studying in such schools. If the Government Order is implemented, it would result in chaos and confusion- It would cause fear in the mind of students who are pursuing their education in private unrecognized schools. It would result in a feeling of insecurity in the students and their parents and it would affect the educational prospects of the students.

6. Apart from challenging the Government Order dated 13-5-2008, some of the writ Petitioners have prayed for directing the Government to grant recognition to the schools run by them. In one of the Writ Petitions, there is also a prayer for issuing a direction to the State to hold public discussions and seminars on the proposed change and to arrive at a decision without causing interruption to the practice hitherto followed. In some of the Writ Petitions, there is also a prayer to permit the Petitioners to continue to run the unrecognized schools and to declare that they are entitled to conduct annual examinations and issue transfer

certificates.

7. It is stated in the counter-affidavit filed by the first Respondent that as per the direction issued by this Court in a Writ Petition, data were collected as to the number of unrecognized schools functioning in the State. In the counter-affidavit it is stated thus:

The data available with the Director of Public Instruction in respect of unrecognized schools in 14 districts up to IV standard are 1747 and at the Standard VII are 133. At VI standard there are 747 unrecognized Schools.

8. As per G.O. (Rt.) No. 3691/06/G Edn., dated 19-8-2006, Government constituted a High Level Committee for recommending the principles and guidelines to be followed in sanctioning new schools, upgrading and recognising existing schools and for giving NOC for CBSE/ICSE affiliated institutions. A copy of the Government Order and the recommendation of the High Level Committee were made available by the learned Advocate General. In Chapter II of the final draft recommendations, under the heading "Present Educational Scenario of Kerala-An Overview", the following details are furnished:

1961-62 1971-72 1981-82 1991-92 2001-02 2005-06

High Schools Government 276 442 893 961 986 996

High Schools Aided 642 897 1123 1380 1415 1428

High Schools Unaided 11 54 64 111 217 366

UP Schools Government 576 811 882 960 960 954

UP Schools Aided 1407 1723 1865 1883 1874 1870

UP Schools Unaided 2 17 18 72 125 213

LP Schools Government 2835 2823 2657 2565 2565 2548

LP Schools Aided 3901 4014 4101 4068 4031 3992

LP Schools Unaided 9 49 49 134 158 277

Government Total 3687 4076 4432 4486 4511 4498

Aided Total 5950 6634 7089 7331 7320 7290

Unaided Total 22 120 131 317 500 856

Grand Total 9659 10830 11652 12134 12331 12644

High Schools 929 1393 2080 2452 2618 2790

UP Schools 1985 2551 2765 2915 2959 3037

LP Schools 6745 6886 6807 6767 6754 6817

Apart from the above formal and recognized schools, there are a few

unrecognized schools also operating in the sector upto the upper primary level. The details are as follows:

No. of unrecognized school

Sl. No. District Primary stage Upper Primary Stage Total No. of Scool

1. Thiruvananthapurarn 131 72 203

2. Kollam 12 24 36

3. Pathanarnthitta 54 12 66

4. Alappuzha 92 36 128

5. Kottayam 57 22 79

6. Idukki 73 19 92

7. Emakulam 48 10 58

8. Thrissur 50 20 70

9. Palakkad 110 56 166

10. Malappuram 103 54 157

11. Kozhikode 74 19 93

12. Wayanad 40 19 59

13. Kannur 36 13 49

14. Kasargode 47 25 72

Total 927 401 1328

If we add the total number of unauthorized schools which is 1328 to the approved schools in our State which is 12644, the grand total of the number of schools in our State comes to 13972. In other words the percentage of unauthorized schools to the total No. of schools in our State work out to 9-50%. With a total enrollment of nearly 118089 in the primary sector, 25507 in upper primary section this segment of unauthorized schools is fast becoming an area of concern and guidelines for arresting an unbridled growth in this area needs to be immediately formulated. Further a pragmatic assessment of unauthorised schools functioning in our State undercores the fact that they are more in number than that is officially computed by the education department. They may be at least 20% of the total No. of schools in our State i.e., around 2500s. Why parents in increasing numbers are opting for such schools outside the public educational system electing to pay fees and choosing mostly less paid, less qualified and less trained teachers calls for serious thought on the part of educationists and Government.

9. From the counter-affidavit of the first Respondent and the Exhibits produced

therewith, the following facts are revealed: In the year 1988, the Government took note of the functioning of a large number of private unaided and unrecognized schools in the State unauthorisedly and the so called unscrupulous methods adopted by them in the matter of collection of donation for admission, capitation fee, building fund, development fund, deposit fund, apart from exorbitant fee from the pupils. The Government thought that the commercialisation of education was not conducive in the matter of maintenance of educational status and discipline. Accordingly, GO. (Ms.) No. 82/88/G Edn., dated 15-4-1988 [Ext. R-1(f)] was issued. Paragraph 3 of the said Government Order reads as follows:

3. Government therefore order that:

(i) No School shall be established and run in the Private Sector without the previous sanction of Government.

(ii) Establishment and running of schools without previous sanction of Government will constitute violation of law and penal offence amounting to cheating also.

(iii) All such institutions with standards I to IV viz., unaided and unrecognised private schools functioning as on this date shall be registered with the District Educational Officer concerned, in the same manner as they apply to the aided and recognised schools within 3 months from this date, or such further reasonable time as the Deputy Director of Education may extend on petition received.

(iv) Since private study for pupils is restricted upto standard IV only as above, any unaided and unrecognised private schools shall not admit pupils to standard V to standard X. Thus admission of pupils will be restricted to pre-primary classes and lower primary classes (Standard I to IV) only.

(v) These orders will not apply to Government schools, Aided Schools, recognised schools, Kendriya Vidyalayas, Navodaya Vidyalayas and schools registered with/recognised by the Central Board of Secondary Education and the Indian Certificate of Secondary Education.

(vi) Action under the penal laws will be taken for violation of the provisions of this order.

10. The Union of India, on the basis of the recommendations of the Kothari Commission, introduced grading system for the students of Primary, Upper Primary, High School and Higher Secondary Schools. The Government of Kerala introduced the grading system in the year 1997, following the National Policy of Education. The grading system was made applicable to Standard X also in the year 2005, the system having been introduced earlier in other standards. It is also stated that in conformity with the National Policy, the Government of Kerala has replaced "DPEP" by "Sarva Siksha Abhiyan". The method of continuous evaluation of the activities of the students was also introduced.

11. It is stated that in order to bring all the students in the main stream of education, the Government took a decision to stop the practice of allowing students of the unrecognized schools to appear for annual examination. GO. (Rt.) No. 3170/05/G Edn., Dated 25-6-2005 was issued to provide facility to the students to join the mainstream till 8th July, 2005. As per G.O. (Rt.) No. 4589/06/G. Edn., dated 20-10-2006, it was clarified that students studying in unrecognized schools may join the Government/Aided/recognized schools by 30-10-2006. Pupils up to Standard VI were allowed to appear for the annual examination in the Government/Aided/recognized schools and they were allowed to continue their studies as per the Kerala Education Rules. Provision was also made for the benefit of the students in Standards VII to IX. It was provided therein that the concessions will not be extended during the academic year 2007-08 onwards. On the basis of the representation submitted before the Government, the benefit was extended up to 31-5-2007. Challenging certain provisions in G.O. (Rt.) No. 4589/06 dated 20-10-2006, the Confederation of Private Schools Association filed W.P. (C) No. 33341 of 2006. Several other Writ Petitions were also filed challenging the Government Order dated 20-10-2006. A batch of Writ Petitions were disposed of by this Court by the common judgment dated 6-3-2007, which is marked as Ext; R-1 (c). The Petitioners in those Writ Petitions prayed for extension of the facilities and concession given to them for further duration also and it was considered by this Court. The concessions made by the learned Advocate General was also taken note of. The managements undertook that private study in the schools of the Confederation will be confined up to and inclusive of Standard V from the academic year 2007-08 and from the next academic year the students of their institutions will be allowed to pursue their studies in Government/Aided/recognized schools from Standard VI onwards. I would like to extract the relevant portion of the judgment in W.P. (C) No. 33341 of 2006 and connected cases, which is very relevant for the disposal of the present Writ Petitions. The relevant portion of the judgment reads as follows:

4. Learned Counsel for the Petitioners points out that at any rate calling upon the students to comply with the condition in the Government Order may produce various unjust results. They submitted that they would not raise a claim of the nature projected in these writ petitions from the coming year onwards.

5. Learned Advocate General sought time and took instructions in the matter. On receiving instructions, learned Advocate General submitted that Government is not averse to extend the benefit of Petitioners' schools being allowed to conduct examinations as in the previous year on the basis of the orders issued by the concerned Deputy Director of Education upto 6th standard and to issue TC for this year. But he would contend that Petitioners must undertake that in their schools the provisions of KER will apply with full vigour from the next year onwards.

6. A petition to accept an affidavit has been filed in W.R.(C) 33341 of 2006 as

I.A. 3547 of 2007, wherein it is stated as follows:

Chapter VI of KER recognises private study upto Standard V As in Ext. P-16 Government Order students studying upto Standard VI in unrecognised unaided schools can be permitted to pursue further studies in any Government or other recognised Schools provided pupils give their exams in any Government or aided school. It is submitted that the pupils from the schools which are members of Petitioners association are being imparted instructions under a syllabus which is different from the State Syllabus. Therefore the students will not be in a position to give their annual exams under a syllabus which is conducted by the State Board.

It is submitted that therefore, for the current academic year 2006-2007 permission may be granted to all the members of Petitioner Federation to conduct annual exams for the students in their respective schools upto and inclusive of standards CI, and issue a transfer certificate to interested students to pursue further studies in a school of their choice from the next academic year onwards namely 2007-08 onwards. I, as office bearer of the Federation, and, as authorised by other schools which are members of Petitioner federation, undertake that private study in the schools of the Petitioner federation will be confined upto and inclusive of Standard V from the next academic year 2007-2008 and from the next academic year, the institutions which are members of Petitioners federation will enable students from their schools to pursue their studies in Government/Aided/recognised institutions from Standard VI onwards. The instant affidavit may be accepted and appropriate orders may be passed in this regard. The accompanying applications is filed for the said purpose. In the interest of justice it is to be allowed.

7. As far as the other cases are concerned, learned Counsel appearing on behalf of the respective Petitioners adopted the stand taken by the Petitioner in W.P. (C) No. 33341 of 2006 in the aforesaid affidavit. In the light of the stand taken by the parties as aforesaid before me, the writ petitions will stand disposed of as follows:

If the writ Petitioners or members of the writ Petitioners" associations make applications for allowing the examinations to be conducted upto 6th standard in their own schools and for permission to issue TC, the concerned Deputy Director of Education will pass appropriate orders in the light of Ext. P-7 Government Order dated 11-12-2001 within a period of one week from the date of receipt of the applications. Subject to the direction based on the concession of the Advocate General, the impugned Clause is upheld. I make it clear that the stand taken on behalf of the Petitioners shall not stand in the way of the claims of the Petitioners or members of Petitioners" association for recognition being dealt with in accordance with law.

The writ petitions are disposed of as above.

12. It is pointed out in the counter-affidavit that during the academic year

2007-2008 also, the managements of the unrecognized schools approached this Court in various Writ Petitions. No interim orders were granted in those Writ Petitions and some of the Writ Petitions were dismissed as per Ext. R-1 (j) judgment dated 11-2-2008.

13. In the counter-affidavit, it is also contended, inter alia, as follows: The Writ Petitions are not maintainable. The Petitioners have not stated how they are aggrieved by the Government Order in question and what fundamental rights have been infringed and how the Government Order is contrary to the statutory rights conferred on the Petitioners. The Kerala Education Act provides for aided schools, private schools and recognized schools, apart from Government schools. At present, there are three types of schools, namely, Government Schools, aided schools and recognized unaided schools. As per the provisions of the Kerala Education Act and Rules, only these types of schools are permitted to function in the State. The State has the primary duty to regulate education, the subject "education" being included in the concurrent list of the Constitution of India. The State Government provides for free education up to the age of 14 years through Government schools, aided schools and recognized unaided schools in compliance with Article 21A of the Constitution of India. Notifications are being issued from time to time inviting applications for opening of new schools and upgrading of the existing schools in tune with the provisions of Rules 2 and 2A of Chapter V of the Kerala Education Rules. The Petitioners have not opened their schools in accordance with the provisions of Chapter V of the Kerala Education Rules. No consent or sanction was granted to open such schools. Therefore, the Petitioners have no right to challenge the Government Order.

14. In respect of Rules 7 and 8 of Chapter VI of the Kerala Education Rules, the contention raised in the counter-affidavit reads as follows:

4. It is respectfully submitted that Chapter VI of Rule 7(3) of the Kerala Education Rule provides private study up to the age of 5th Standard. In fact the said rule was incorporated in tune with the other rules. Rule 7(2) was incorporated in the year 1965. Rule 7(2) provides that "Pupils who was attended a school and let off and has been away from such school for at least one year may also be admitted as a private study pupil. But he will be permitted to sit for an examination as contemplated in Rule 8, only of a class one lower than the one which he would have been eligible to take had he continued on the rolls without interruption. At the time of incorporating the above rule, the situation prevailing in the State was entirely different from the situation existing as on today or after 1990 onwards. During those days there were inadequate facilities for the students to travel and other constraints for attending the regular School in some areas of the State. But the said situation becomes drastically changed after 1990. The Government has opened new schools in aided sector and also upgraded existing aided schools for free education to all the children. On an overall assessment it can be seen that in our State, the number of aided schools are more than the Government Schools. The contention of the Petitioners is that

the Government has issued orders to get admission to the Government School lacks merit because the numbers of Government Schools are lesser than the Aided Schools. It is further submitted that Rule 7(1) permits any student who has not attended any school to write examination as per the rule provided in Rule 8 of Chapter VI of the KER. Here the Petitioners do not have any case that the Petitioners are not attending any schools or classes. Therefore, they are not entitled to get the benefits as provided in Rule 7(1) and 8 of Chapter VI of KER.

15. The counter-affidavit also discloses that special training is being imparted to the teachers through Sarva Siksha Abhiyan and other coaching classes. The teachers in the Government schools, aided schools and recognized schools are qualified teachers. In many unrecognized schools, the teachers are not qualified. They did not get the benefit of special training and the faculty development and training programmes provided for the teachers of Government, Aided and Recognized unaided schools.

16. The State contends that Rule 7(3) of Chapter VI of the Kerala Education Rules is intended to enable the students mentioned in Rule 7(2). The rule making authority never meant to confer the benefit to a student who was studying in an unrecognized/unauthorised school. The Government Order dated 13-5-2008 helped many students who were misguided and who happened to pursue their studies in unrecognized/unauthorised schools, to come over to the main stream. The Government have taken a policy decision "to stop the practice of allowing unauthorised unrecognized schools to run the school without any recognition of the Government by violating the provisions of Chapter 5(2) and 2(A)".

17. As regards the reason for issue of the Government Order dated 13-5-2008 (marked as Ext. P-3 in the Writ Petition where counter-affidavit is filed), it is stated in the counter-affidavit thus:

9. The Government was not inclined to pass any orders by diluting waters to its earlier Government Orders. Therefore, the Government sought advice from the Hon"ble Advocate General as per the D.O. letter No. 9826/G3/08/G. Edn., Dated 3-5-2008 whereby asked what action can be taken by the Government, since there were a discussion in the Legislative Assembly during the 7th session of 12th Kerala Legislative Assembly considering the consensus arrived during the discussion of the members and Hon"ble Speaker of Kerala Legislative Assembly. Therefore the State Government was constrained to take a lenient view to give one more chance to the pupil to join main stream of Education during the academic year 2008-09. A copy of the Government D.O. No. 9826/G3/08/G. Edn., dated 3-5-2008 submitted by the Deputy Secretary to the Advocate General is produced herewith and marked as Ext. R-I(a), for reference. On the basis of the said letter the Advocate General gave legal advice to the Government to invoke the power vested with the Government as per Rule 3 of Chapter I KER in this peculiar circumstance. On the basis of the said advice the Government of Kerala with a view to prevent the misuse of the provisions contained in Chapter VI of Rule 7(3) and 7(2) of the Kerala Education Rules

issued Ext. P-3 Government Order extending one more chance to the students and parents to come over to the main stream of education as a last chance. Since none of the Petitioners students are coming under the Rule 7(2) of Chapter VI; they cannot seek any relief under Rule 7(3) of Chapter 6 of KER because Rule 7(2) specifically provides for students, who had attended School and left off and has been away from such school for at least one year. Under the context of the above said provisions no one can conduct unrecognized unauthorized schools from 1 to 5th standard or above. Therefore, Ext. P-3 in respect of intending to curtail the practice of conducting unrecognized/unauthorized school is perfectly legal and valid and it did not infringe any statutory rights of any one.

18. It is also stated in the counter-affidavit that the Government is not responsible for the illegalities committed by the managers of the unrecognized schools. They were not authorised to conduct schools. The Government had decided, two decades ago, to stop the running of schools in the private sector without previous sanction of the Government. In view of the Government Order issued on 15-4-1988 [G.O. (MS) 82/88], the managements could get registration but they did not take any steps to get registration. It is stated that unrecognized schools are being conducted by individuals/establishments without getting any recognition from the Government or authorities and that the managers of those schools are financially sound and having influence in the society, including political influence.

19. An additional counter-affidavit is filed on behalf of the first Respondent wherein it is stated that the total number of unrecognized schools functioning in the State as per the data available in the office of the Director of Public Instruction, in respect of Standards V, VI and VII are 2649. The district wise details are also shown in the additional counter-affidavit, which is extracted below:

Sl. No. District Upto 4th Std. Upto 6th Std. Upto 7th Std.

1 Kasargode 61 41 12

2 Kannur 98 52 10

3 Wayanad 30 9 3

4 Kozhikode 193 73 16

5 Malappuram 167 109 62

6 Palakkad 143 67 10

7 Thrissur 70 33 6

8 Emakulam 116 39 10

9 Idukki 50 25 1

10 Kottayam 91 13 1

11 Alappuzha 148 41 1
12 Pathanamthitta 109 44 4
13 Kollam 226 76 9
14 Thiruvananthapuram 245 125 10
Total 1747 747 155

The additional counter-affidavit also furnishes the details of recognized unaided schools as follows:.

District No. of Unaided Recognised Schools

Kasargode 65
Kannur 89
Wayanad 37
Kozhikode 83
Malappuram 152
Palakkad 92
Thrissur 88
Ernakulam 169
Idukki 128
Kottayam 123
Alappuzha 102
Pathanamthitta 47
Kollam 180
Thiruvananthapuram 70
Total 1525

20. Heard the Senior Advocate Sri K. Ramakumar, Senior Advocate Sri K.P. Dandapani, Advocate Sri George Poonthottam, Advocate Sri Babu Varghese, Advocate Sri G. Sreekumar, Advocate Sri B. Jayasurya, Advocate Sri George Zacharia Eruthickal, Advocate Vino V. George, Advocate Sri T. K. Saidalikutty, Advocate Sri V.C. James, Advocate Sri Unnikrishnan, Advocate Sri Harilal and others on behalf of the Petitioners and Sri C.P. Sudhakara Prasad, learned Advocate General, for the Respondents.

21. On a close scrutiny of the arguments of the counsel appearing for the Petitioners, I could gather the impression that the Petitioners are mainly aggrieved by the proposal to stop the relaxation hitherto granted by the

Government and the action proposed to be initiated against the managements of unrecognized schools. Probably, they apprehend that their schools will be ordered to be closed down by the Government. The following averments in the counter-affidavit filed on behalf of the first respondent would give an indication in that direction.

...The Government has honestly and bona fide taken a firm stand to close down all the unrecognized/unauthorized schools without recognition from the Government by violating the provisions of Chapter V, Rule 2. It is further submitted that the Rule 7(3) is provided for the benefit of the students mentioned in Rule 7(2) of Chapter VI and not permitted to conduct any unrecognized schools. The proposal is under the consideration of the Government to amend the Rule 7 due to the changed circumstances because the Rule 7(2) is incorporated in KER during the year 1965. There is a proposal pending consideration before the Government for bringing penal provisions against the violation of the provisions of Chapter 5 of KER by way of conducting unrecognized/unauthorized schools other than the Rules as contemplated in Chapter V

On the other hand, the learned Advocate General has made an undertaking that action against the unrecognized schools will be taken only after framing necessary rules in the matter. He also stated that at present, there is no proposal to close down any school or to take any penal action against the school managements on the basis of the Government Order dated 13-5-2008. Learned Advocate General submitted that the Government Order is intended mainly to provide information to the students about the policy of the Government and their intention not to permit unrecognized schools to function in the State. These statements made by the learned Advocate General are recorded.

22. The Kerala Education Act, 1958 was enacted to provide for better organisation and development of educational institutions in the State providing a varied and comprehensive educational service through out the State. Section 2(7) defines "private school" as " "private school" means an aided or recognised school". Section 2(1) defines "aided schools" thus:

"aided school" means a private school which is recognised by and is receiving aid from the Government, but shall not include educational institutions entitled to receive grants under Article 337 of the Constitution of India, except in so far as they are receiving aid in excess of the grants to which they are so entitled;

Section 2(8) defines "recognised school" as:

"recognised school" means a private school recognised by the Government under this Act;

23. Section 36 of the Act confers upon the Government the rule making power, either prospectively or retrospectively, for the purpose of carrying into effect the provisions of the Act. The Kerala Education Rules, 1959 was framed in exercise of

the powers conferred by Section 36 of the Kerala Education Act, 1958.

24. Section 3 of the Kerala Education Act provides for establishment and recognition of schools. The Section reads thus:

3. Establishment and recognition of schools.- (1) The Government may regulate the primary and other stages of education and courses of instructions in Government and private schools.

(2) The Government shall take, from time to time, such steps as they may consider necessary or expedient, for the purpose of providing facilities for general education, special education and for the training of teachers.

(3) The Government may, for the purpose of providing such facilities:

(a) establish and maintain schools; or

(b) permit any person or body of persons to establish and maintain aided schools; or

(c) recognise any school established and maintained by any person or body of persons.

(4) All existing schools shall be deemed to have been established in accordance with the Act:

Provided that the educational agency of an aided school existing at the commencement of this section may, at any time within one month of such commencement, after giving notice to the Government of its intention so to do, opt to run the school as a recognised school, subject to the condition that the services of the teachers and other members of the staff of the school shall not be dispensed with or their conditions of service under the management varied to their disadvantage on account of the exercise of this option.

(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.

25. Chapter IV of the Kerala Education Rules provides for establishment and maintenance of schools. The Rules contained in Chapter IV provide the requirements to be satisfied for the establishment of a school. Chapter V of the Kerala Education Rules contains the rules for opening and recognition of schools. Rule 2 provides for the procedure for determining the areas where new schools are to be opened or existing schools upgraded. The rules in Chapter V provide the procedure for inviting applications for opening new schools and upgrading of existing schools and the requirements to be satisfied for granting the applications. The Rules specifically provide the conditions to be satisfied by the educational agency for grant of permission to open new schools. Rule 8 of

Chapter V provides as to how the fee income should be utilised for educational purposes. Rule 14 provides that when a new school is opened with permission, it shall be reported to the educational authorities mentioned therein with a statement showing the details provided therein. Rule 15 provides for withdrawal of permission. Application for recognition of schools or of additional standards and the conditions to be satisfied for recognition are also provided in the rules in Chapter V. Rules 21, 22, 22A and 23 provide for the manner in which recognition shall be granted and for withdrawal of recognition. Rule 24 of Chapter V provides that no private school shall be closed down without giving the Director one year's notice expiring with the 31st May of any year of the intention to do so. Rule 7 of Chapter V provides for financial guarantee to be furnished by every educational agency of a recognized school other than aided school. Rule 26 therein provides that if any school is closed down, the financial guarantee furnished by the educational agency shall not be released until all liabilities of the school are discharged and all records and accounts relating to the school are handed over to the Department. Rule 27 states that when the recognition of an institution or the permission to open a school or standard is withdrawn, the fact shall be notified in the Gazette by the Educational Officer. Rule 28 of Chapter V prohibits recognized institutions from competing in any manner with other recognized institutions.

26. The scheme of the Act and the Rules mentioned above would show that elaborate provisions have been made for establishment of private schools which include aided and recognized schools. Section 3 of the Act is to be read along with Chapter IV and Chapter V of the Rules. Chapter VI of the Kerala Education Rules deals with admission, transfer and removal of pupils. Rules 7 and 8 of Chapter VI quoted above provide for admission of private study pupils. Those Rules as such do not relate to the establishment of a school or recognition of a school nor do those Rules control Section 3 of the Act or Chapter IV and Chapter V of the Kerala Education Rules. Rules 7 and 8 of Chapter VI provide for certain benefits to private study pupils. Those Rules do not as such recognize any right of the educational agency or of any school. It is a benefit conferred on the pupil rather than a right conferred on the educational agency. The scheme of the Kerala Education Act and Rules is such that there could be no school in the State which does not come under any of the categories of schools mentioned in the Act and the Rules.

27. Rule 7 of Chapter VI makes provision for accommodating pupils who have not attended any school or who have discontinued their studies in school. Rule 7(1) deals with the former category while Rule 7(2) deals with the latter category of pupils. Rule 7 does not as such mention about private study in an unrecognized school. Rule 7 cannot be sought in aid to contend that anybody has an unbridled right to open schools unauthorisedly and thereby make available hundreds of students who satisfy the requirement of Rule 7 of Chapter VI of the Kerala Education Rules. Private study contemplated in Rule 7 is distinct and different from study in a private school.

28. Sub-rule (3) of Rule 7 of Chapter VI of the Kerala Education Rules provides that no private study pupil shall be admitted to any standard higher than Standard V. This Sub-rule was amended in 1989 and the words "Standard VII" were substituted by the words "Standard V". Consequential amendments were made in Rule 8 as well. Rules 7 and 8, as amended, are in force for the last about twenty years. There was no challenge against the Rules. Even now, the Writ Petitioners have not challenged the validity of Rules 7 and 8 in Chapter VI or the amendments made thereto in 1989. Many among the Petitioners claim that their schools have standards V and above. So long as the Rules stand, the Petitioners are not entitled to contend that they are entitled to run unrecognized schools, admit students in standards above Standard V and conduct examinations.

29. Another question arising for consideration is whether the managements of the unrecognized schools can contend that they have a right to run unrecognized schools up to Standard IV and get their pupils admitted in regular schools as private study pupils, invoking Rules 7 and 8 of Chapter VI of the Kerala Education Rules. Going by Rules 7 and 8, no such right vests in them. However, for a long number of years, such a practice was going on. G.O. (Ms.) No. 82/88 dated 15-4-1988 [Ext. R-1 (f)] referred to in paragraph 9 above indicates the same. Paragraph 3(iv) of that Government Order shows that unaided and unrecognized private schools shall not admit pupils to Standards V to X, as private study for pupils was restricted up to Standard IV. That Government Order shows that the contention raised by the Petitioners that they were allowed to run unauthorized schools and the pupils were being admitted in regular schools as private study pupils is to some extent correct. However, later, the Government thought it fit to stop this practice. Restrictions were imposed on admission of private study pupils and Government Orders were issued for that purpose. W.P. (C) No. 33341 of 2006 and connected cases arose. The matter is now concluded by the judgment in those cases (referred to in paragraph 11 above). At this juncture, the Petitioners are not entitled to rely on Rules 7 and 8 of Chapter VI and contend that they are entitled to run the unrecognized schools without any restriction or regulation and they have got a right to do so.

30. The Kerala Education Act and Rules do not contemplate establishment of a school except in the manner provided therein. Unrecognized school is not a category of schools coming within the purview of the Kerala Education Act and Rules. An individual or an association or a body of persons can establish a school only in accordance with the law, namely, The Kerala Education Act and Rules. A school cannot be opened on one's own whims and fancies. That a person has enough resources to start a school is not a ground to permit him to do so. There are several factors to be taken note of before granting permission to establish a school. Running a school is not a business. It is not a trade. A person cannot claim the protection under Article 19(1)(g) of the Constitution of India to run an unrecognized school. Even assuming that Article 19(1)(g) applies, the Kerala Education Act and Rules shall be treated as an existing law imposing reasonable

restriction, coming within the meaning of Clause (6) of Article 19.

31. Article 21A of the Constitution of India casts a duty on the State to provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law determine. There is no case for the Petitioners that free and compulsory education is not provided by the State, though they say that it is inadequate. Article 21A cannot be taken in aid by the managements of unrecognized schools to contend that they are entitled to run the schools unauthorisedly. The obligation of the State under Article 21A cannot be taken as conferring a right on an individual to indulge in something which he is not entitled to do under law. If the State has not complied with its duty under Article 21A, the persons aggrieved could seek redressal. The managements of unrecognized schools are not entitled to invoke Article 21A for protecting their private interests, which would have the effect of violating the Kerala Education Act and Rules.

32. When the Government issued G.O. (Rt.) No. 4589/06/G. Edn., dated 20-10-2006 to implement the provisions of Rules 7 and 8 of Chapter VI of the Kerala Education Rules by providing facility to the students to appear for the examinations in appropriate classes, the Confederation of Private Study Schools' Association and several other managements filed Writ Petitions challenging the same. W.P. (C) No. 33341 of 2006 and connected cases filed by them were disposed of as per Ext. R-1(c) judgment, relevant portions of which have been extracted in paragraph 11 above. I am of the view that all the managements who run unrecognized schools are also bound by the judgment in W.P. (C) No. 33341 of 2006. Therefore, they are not entitled to raise a contention that they are entitled to continue to run unrecognized schools and that the Government have no power to issue the Government Order under challenge.

33. Learned Counsel for the Petitioners mainly relied on the judgments of the Supreme Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, , P. A. Inamdar v. State of Maharashtra (2005) 6 S.C.C. 537 and Superstar Education Society Vs. Stats of Maharashtra and Others, . Particular reference was made to paragraphs 23, 24, 25, 48, 55, 60 and 61 of the decision in T.M.A. Pai's case and paragraphs 92, 93, 107, 110, 133 and 137 of the decision in P.A. Inamdar's case. The decision of the Supreme Court in Superstar Education Society Vs. Stats of Maharashtra and Others, arose out of orders granting permission to open schools, which was challenged in public interest litigation. In that context, the Supreme Court held that it is a duty of the State Government to provide access to education. Unless new schools in the private sector are permitted, it will not be possible for the State to discharge its constitutional obligation. The learned Advocate General pointed out that the decisions of the Supreme Court in T.M.A. Pai's case and P.A. Inamdar's case have no application to the present cases and the Supreme Court never allowed unrecognised institutions to function. I shall refer to some of the paragraphs in T.M.A. Pai's case later in this judgment.

34. In *State of Kerala and Others Vs. K. Prasad and Another*, , the Supreme Court considered Chapter V of the Kerala Education Rules and held thus:

... Similarly, an application for either opening of new school or for upgradation of an existing aided school can be submitted only after the Director publishes a final list of areas where new schools are to be opened or existing schools are to be upgraded under Sub-rule (4) of Rule 2. Any application received otherwise cannot be considered. In view of such comprehensive procedure laid down in the statute, an application for upgradation has necessarily to be made and considered strictly in a manner in consonance with the Rules. It needs little emphasis that Rules are meant to be and have to be complied with and enforced scrupulously. Waiver or even relaxation of any Rule, unless such power exists under the Rules, is bound to provide scope for discrimination, arbitrariness and favouritism, which is totally opposed to the rule of law and our constitutional values. It goes without saying that even an executive order is required to be made strictly in consonance with the Rules. Therefore, when an executive order is called in question, while exercising the power of judicial review the Court is required to see whether the Government has departed from such Rules and if so, the action, of the Government is liable to be struck down.

35 . In view of the decision of the Supreme Court in Prasad's case, the contention of the Petitioners that there is no restriction to run schools up to Standard IV cannot be accepted. Opening of a school, whether aided or unaided, should be as per the Rules and procedure in the Kerala Education Act and Rules. Or else, any unscrupulous person can open a school and run it as his business concern. Adventurers will revel in the field and the Government, on behalf of the people, will have no say in the matter. The constitutional guarantees and the fundamental rights, to my mind, do not extend the rights of a citizen to such an extent. Even for opening a business concern, shop, industrial establishment or any other business venture, licence or permission of the Government or local authority is required. It is puerile to think that for opening a school and to bring the pupils studying there in the mainstream after a certain standard of study, no permission of any authority is required.

36. Reliance was placed on *State of Kerala v. K.G. Madhavan Pillai* AIR. 1989 S.C. 49 to contend that to open an unrecognized school, no permission of the Government is necessary. In that case, the orders issued by the Government cancelling the sanction to open new unaided schools or to upgrade the existing schools were under challenge. Sanction was originally granted after the list of areas was published in the Gazette as per the Rules. The Division Bench of the Kerala High Court, on appeal, allowed the Writ Petitions and it was confirmed by the Supreme Court. In that context, it was held in paragraph 12 of the judgment thus:

12. Before taking up for consideration these questions, we may set out the various stages contemplated by the Rules which have to be passed through by an educational agency in order to open a new school or upgrade an existing

school and obtain recognition from the Government. It is relevant at this juncture to mention that the Act and the Rules do not prohibit the starting and running of private unaided schools by any agency and the only restriction is that it will not be entitled to secure recognition for the said school from the Government unless the conditions imposed by the Rules are satisfied and complied with. The importance of securing recognition lies in the fact that without recognition the students studying in the unaided schools will neither be permitted to appear as candidates in the examinations conducted by the State nor be eligible to avail of the opportunities for higher education or to enter public service examination. The obtainment of recognition from the Government is therefore a vital factor for the educational agencies starting new schools or newly upgrading their existing schools.

I do not think that this decision is helpful to the Petitioners.

37. The learned Counsel for the Petitioners contended that the managements were permitted to run the classes, to conduct examinations and to grant Transfer Certificates for the last several years, which attracts the existence of legitimate expectation and it would entitle them to continue to run the schools as before. Reliance is placed on *Navjyoti Co-operative Housing Society etc. Vs. Union of India and Others*, *Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others*, and *State of Kerala and Others Vs. K.G. Madhavan Pillai and Others*, .

38. In *Navjyoti Co-operative Housing Society etc. Vs. Union of India and Others*, , it was held:

... The existence of "legitimate expectation" may have a number of different consequences and one of such consequences is that the authority ought not to act to defeat the "legitimate expectation" without some overriding reason of public policy to justify its doing so. In a case of "legitimate expectation" it should afford him an opportunity to make representations in the matter. In this connection reference may be made to the discussions on "legitimate expectation" at page 151 of Volume 1(1) of Halsbury's Laws of England, 4th edn. (re-issue). We may also refer to a decision of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* (1984) 3 ALL ER 935, It has been held in the said decision that an aggrieved person was entitled to judicial review if he could show that a decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he was given reasons for withdrawal and the opportunity to comment on such reasons.

39. In *Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others*, it was held:

133. Legitimate expectation is now considered to be a part of the principles of natural justice. If by reason of the existing state of affairs, a party is given to

understand that the other party shall not take away the benefit without complying with the principles of natural justice, the said doctrine would be applicable. The legislature, indisputably, has the power to legislate but where the law itself recognises existing right and did not take away the same expressly or by necessary implication, the principles of legitimate expectation of a substantive benefit may be held to be applicable.

It was also held that ordinarily, the principle of legitimate expectation of substantive benefit would not have any application where the legislature has enacted a statute.

40. In *State of Kerala and Others Vs. K.G. Madhavan Pillai and Others*, ; while considering the applicability of legitimate expectation, it was held:

In other words once the Government approves an application for opening a new unaided school or a higher class in an existing unaided school and passes an order under Rule 2A(5), then the successful applicant acquires a right of legitimate expectation to have his application further considered under Rules 9 and 11 for the issue of a sanction order under Rule 11 for opening a new school or upgrading an existing school. It is no doubt true, as pointed out by the Division Bench, that by the mere grant of an approval under Rule 2A(5), an applicant will not acquire a right to open a new school or to upgrade an existing school but he certainly acquires a right enforceable in law to have his application taken to the next stage of consideration under Rule 11.

41. I do not think that the Petitioners can rely on the principle of legitimate expectation. Section 3(5) of the Kerala Education Act and Rules 7 and 8 of Chapter VI of the Kerala Education Rules are clear and unambiguous. Amendments were made to these Rules in 1989 restricting the rights of private study pupils. It cannot be said that the Petitioners acquired any rights despite the statutory provisions in Rules 7 and 8 of Chapter VI of the Kerala Education Rules. In 1988 itself, the Government made the position clear, vide G.O. (Ms.) No. 82/88/G. Edn. dated 15-4-1988, followed by the Government Orders issued on 25-6-2005 and 20-10-2006. The rights, if any, are concluded by the judgment dated 6-3-2007 in W.P. (C) No. 33341 of 2006 and connected cases. I am of the view that the plea raised by the Petitioners based on legitimate expectation is barred by the principles of constructive res judicata, in view of the judgment in W.P. (C) No. 33341 of 2006 and connected cases.

42. The Petitioners contend that the word "may" in Section 3(3) of the Kerala Education Act is to be read as "shall". Section 3(3) embodies a power coupled with duty. There is a constitutional obligation on the State to provide facilities for education and it includes recognition of schools. The Petitioners contend that if the State is incapable of providing the facilities, the State should not stand in the way of private ventures in the field of education. According to the Petitioners, Section 3(3)(c) of the Act is an indication that the legislature realised the need of allowing the private sector in the field of education. It was realised that without

the aid of private sector, the Government will not be able to run sufficient number of schools in the State. It was also contended that social changes cannot be ignored by the State in the matter of granting recognition to schools and by the Court in interpreting statutes. Reference was made to the following paragraphs in the "Principles of Statutory Interpretation" by Justice G. P. Singh-10th Edition, pages 239, 240, 241, 248, 249 and 250 which reads thus:

It is possible that in some special cases a statute may have to be historically interpreted "as if one were interpreting it the day after it was passed". But generally statutes are of the "always speaking variety" and the court is free to apply the current meaning of the statute to present day conditions. There are at least two strands covered by this principle. The first is that courts must apply a statute to the world as it exists today. The second strand is that the statute must be interpreted in the light of the legal system as it exists today. Reference to the circumstances existing at the time of the passing of the statute does not, therefore, mean that the language used, at any rate, in a modern statute, should be held to be inapplicable to social, political and economic developments or to scientific inventions not known at the time of the passing of the statute. "Legislative standards are generally couched in the terms which have considerable breadth. Therefore a statute may be interpreted to include circumstances or situations which were unknown or did not exist at the time of enactment of the statute". The question again is as to what was the intention of the law makers: Did they intend as originalists may argue, that the words of the statute be given the meaning they would have received immediately after the statute's enactment or did they intend as dynamists may contend that it would be proper for the court to adopt the current meaning of the words? The courts have now generally leaned in favour of dynamic construction. But the doctrine has also its limitations. For example it does not mean that the language of an old statute can be construed to embrace something conceptually different?.

Insofar as a Constitution Act is concerned, there is greater reason in giving to its language a liberal construction so as to include within its ambit the future developments in various fields of human activity than in restricting the language to the state of things existing at the time of the passing of the Act. A Constitution unlike other Acts is intended to provide an enduring instrument to serve through a long lapse of ages without frequent revision. It is not only designed to meet the needs of the day when it is enacted but also the needs of the altering conditions of the future. It contains a framework of Government, a mechanism for making laws and resolution of constitutional disputes; and in a federation distribution of legislative fields between the centre and the units. It very often refers to the ideals which it seeks to achieve and secures certain fundamental rights to the citizens. The fields of legislation, the ideals and the rights are expressed in general terms which are compressed sentences if not Chapters. "In the interpretation of a constitutional document words are but a framework of concepts and concepts may change more than words themselves." The significance of the change of the concepts themselves is vital and the

constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth. It is aptly said that "the intention of a constitution is rather to outline principles than to engrave details". A Constitutional court, like our Supreme Court, is a nice balance of jurisdictions. It declares the law as contained in the Constitution but in doing so it rightly reflects that a Constitution is an living and organic thing which of all instruments has the greatest claim to be construed broadly and liberally with an object oriented approach and the experience gained in its working. The principle of broad and liberal construction does not, however, mean that limitations based on its scheme and basis structure cannot be read into its language when it becomes necessary to do so. The judicial function of the court in interpreting the Constitution thus presents an "antinomy". It calls both for building upon a continuity of principles found in the instrument and for meeting the dominant needs and aspirations of the present.

A court has more freedom in the interpretation of a Constitution than in the interpretation of other laws. "The great generalities of the Constitution have a content and a significance that vary from age to age" and so the court is not bound to accept the meaning of a provision in a Constitution according to the original understanding of its makers.

43. The learned Advocate General relied on the decision of the Supreme Court in *Minor Oraon Tr. Guardian and Ors. v. C.B.S.E. and Ors.* J.T. 2006 (10) S.C. 375, wherein the Supreme Court in unmistakable terms cautioned thus:

15. Time and again, therefore, this Court had deprecated the practice of educational institution admitting the students without requisite recognition or affiliation. In all such cases the usual plea is the career of innocent children who have fallen in the hands of the mischievous designated school authorities. As the factual scenario delineated against goes to show the school has shown scant regards to the requirements for affiliation and as rightly highlighted by learned Counsel for the CBSE, the infraction was of very serious nature. Though the ultimate victims are innocent students that cannot be a ground for granting relief to the Appellant. Even after filing the undertakings the School non-challantly continued the violations.

44. I am not inclined to accept the contentions of the Petitioners in the matter of interpretation of Section 3(3)(c) of the Act as aforesaid. It is apposite to note that in Sub-sections (1) and (3) of Section 3, the word "may" is used, while in Sub-section (2) the word "shall" is used. The purpose is clear. It is to be read in the light of Article 21 A of the Constitution of India. Even if the word "may" occurring in Sub-section (3) of Section 3 is read as "shall", I do not think it would enable the Petitioners to run schools unauthorisedly and without recognition, in view of Sub-section (5) of Section 3. Clause (c) of Sub-section (3) of Section 3 is controlled by Sub-section (5). Therefore, the conclusion is irresistible that there cannot be a valid category of schools as "unrecognized schools" under the Kerala Education Act and Rules.

45. The learned Counsel for the Petitioners raised a contention that the Government could not validly exercise the power under Rule 3 of Chapter I of the Kerala Education Rules to issue the Government Order dated 13-5-2008. According to them, the power of the Government to dispense with or relax the requirements of a Rule can be exercised in particular cases, meaning thereby, individual cases, and not generally. The counsel relied on the Full Bench decision in T.C. Sreedharan Pillai and Ors. v. State of Kerala and Ors. [1975 KLT 151 (F.B.)]. The learned Advocate General contended that the Full Bench decision is no longer good law in view of the decisions of the Supreme Court. He relied on Government of Andhra Pradesh and Others Vs. Sri D. Janardhana Rao and Another, ; Gangadharan Nair v. State of Kerala and Ors. (1984 KLT 75); State of Madhya Pradesh and Another Vs. Dharam Bir, ; Ajit Singh and Others Vs. The State of Punjab and Others, and Union of India and Anr. v. Narendra Singh (2008 AIR S.C.W. 109).

46. In the Full Bench decision in 1973 KLT 151, Rule 39 of the State and Subordinate Service Rules (Kerala), as amended in 1972 was the subject of interpretation. It was held that it is not permissible to make use of the power under Rule 39 for passing blanket orders granting en masse exemption or a relaxation of the Rules in favour of a large or undefined number of persons without application of the mind of the Government to the relevant facts and circumstances of the individual cases. In 1984 KLT 75, the Division Bench considered the scope and ambit of Rule 3 of Chapter I of the Kerala Education Rules and relying on the decision of the Supreme Court in Government of Andhra Pradesh and Others Vs. Sri D. Janardhana Rao and Another, held that: "The judicial thought on this topic would reveal that the rule is, in a sense, a built-in safety valve to effectively protect the just claims of those in service, where the plain operation of the Rules results in unjust hardship to them. Referring to the Full Bench decision in 1973 KLT 151, it was held:

The Full Bench, according to us, did not intend to lay down that an exemption will be obnoxious under law for the only reason that it is in favour of a group of persons. As a matter of fact, there are clear indications in the judgment of the Full Bench itself that the power under Rule 39 could be exercised in favour of a group of persons.

The Division Bench also held:

15. In this connection, it must also be borne in mind that normally and ordinarily, it is for the Government to judge the facts and assess the necessity for the invocation of a provision like Rule 39, K.S. and S.S.R. or Chapter I Rule 3, KER. The Government runs the service and not the Court. In the absence of vitiating factors, the court would decline interference with a bona fide and proper exercise of the power. The court does not assess the correctness of the Government's decisions as if it were an appellate authority.

47. In Ajit Singh and Others Vs. The State of Punjab and Others, , the

Constitution Bench of the Supreme Court held thus:

Further, if the State is of the opinion that in the interests of efficiency of administration, reservation or relaxation in marks is not appropriate, then it will not be permissible for the Court to issue a mandamus to provide for reservation or relaxation. We also note that in *Superintending Engineer, Public Health, U.T. Chandigarh and others Vs. Kuldeep Singh and others*, , *Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another*, was followed and reference was made to Article 16(4) and Article 16(4A) and to the principle that where a power is coupled with a duty as in *Julius v. Lord Bishop* [(1880) 5 AC 214 (HL)] and *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, the same could be enforced by the court. But we may point out that even in *Kuldeep Singh's* case no reference was made to *C.A. Rajendran Vs. Union of India (UOI) and Others*, . We, accordingly, hold that the view in *Jagannathan's* and *Kuldeep Singh's* cases that a mandamus can be issued either to provide for reservation or for relaxation is not correct and runs counter to judgments of earlier Constitution Benches and, therefore, these two judgments cannot be said to be laying down the correct law.

48. In *State of Madhya Pradesh and Another Vs. Dharam Bir*, , it was held that the power to relax the Rule vests in the authority concerned and that power cannot be usurped by the Court or the Tribunal. In 2008 AIR SCW 109, the Supreme Court referred to the decision in *Keshav Chandra Joshi and Ors. v. Union of India and Ors.* [(1992) Supp. (1) S.C.C. 272] and held that the Court cannot substitute its satisfaction for the satisfaction of the authority in the exercise of the power of relaxation of the relevant Rules.

49. In the light of the aforesaid decisions, I am not persuaded to accept the contention of the Petitioners in respect of the interpretation of Rule 3 of Chapter I of the Kerala Education Rules. Moreover, by the Government Order, relaxation of the Rule is made in favour of the Petitioners and they have taken advantage of the same. After having done so, they cannot turn round and contend that the Government lacks power to issue the order in respect of the matters mentioned therein, which go against the Petitioners.

50. The counsel appearing for the Petitioners submitted the following facts for consideration. Hundreds of unrecognized schools are functioning in the State for the last several years. The additional counter-affidavit filed on behalf of the first Respondent indicates that the total number of unrecognized schools, as per the data collected, is 2649. The Petitioners say that around one lakh persons are working in these schools as teaching and non-teaching staff. It is pointed out that in Kannur District, there are 16 unrecognized schools where the medium of study is English, while in the aided sector, there are only seven English medium schools. The Petitioner in W.P. (C) No. 3181 of 2008 pointed out that the Writ Petition relates to a school at Attapadi and the students therein are the tribals of the area. There are standards up to VIII in the school and the school is not so far recognised.

51. The Petitioners pointed out that the practice hitherto followed is that inspection of the schools run by the Petitioners were being conducted by the Deputy Director of Education. Instructions were being issued by the Educational Officers from time to time and the version of the Petitioners is that those instructions were being complied with. The Government cannot say that they were quite unaware of the establishment, commencement and continued functioning of the schools. At all material points of time, the successive Governments were inclined to protect the uninterrupted functioning of the recognized schools. Some of the Petitioners contended that their schools are outside the purview of the Kerala Education Act and Rules. The Petitioners expressed their willingness to send their teachers for training under the Sarva Siksha Abhiyan Scheme, if they are permitted to do so.

52. It is a reality that for the last more than twenty years, hundreds of unrecognized schools are functioning in the State. It cannot be assumed that the Government was not aware of the functioning of the said schools. The various Government Orders issued from time to time would indicate such awareness. It is not relevant at this point of time to enquire into the question as to who is responsible for the establishment of unrecognized schools, contrary to the scheme of the Kerala Education Act and Rules. Such an enquiry would be counter productive. The relevant question is how this problem can be solved.

53. It is only reasonable to think that there cannot be any educational institution which does not come under a law or set of laws. Either the law should permit any person to start any number of schools as he wishes; or the law should regulate the opening of schools. The Kerala Education Act confers power on the Government to regulate the primary and other stages of education. The contention of some of the Petitioners that they are not bound by the Kerala Education Act and Rules and that administration of their schools cannot be controlled or regulated by the Government in any manner, if accepted, would result in lawlessness and anarchy.

54. According to the Government, the law is clear and unambiguous. That is the reason why they issued the Government Order in question. But the question is, whether the unrecognized schools should be closed down for ever, without even considering any alternative for the benefit and welfare of the pupils? Why did the parents of thousands of pupils decide to admit their wards in unrecognized schools? Can we assume that the parents were completely ignorant of the law? I do not think we can assume so. On the other hand, they were aware of the orders issued from time to time by the Government allowing the pupils to join the mainstream after their study in Standards V to IX in unrecognized schools. The Government would say in the Government Order dated 15th April, 1988 [Ext. R-I (f)] that the private managements of the unrecognized schools are collecting donation for admission and they are extracting money from the pupils illegally and at the same time they engage unqualified teachers in the schools. Then, why did the parents of the pupils in a literate State like Kerala, stand in

queue before the unrecognized schools for ensuring admission for their children? It is common knowledge that in the State of Kerala, to get admission in such unrecognized schools and recognized unaided schools, is not easy. It is expensive too. In the Government Schools and aided schools, it is easy to get admission. It is not expensive also. Then, why, such a heavy rush is there to get admission in unrecognized schools and recognized unaided schools? The recommendations of the High Level Committee constituted by the Government has also raised this question, (vide paragraph 8 above).

55. The contention raised by the Petitioners that the Government is interested in protecting the members of the Teachers' Organisations is to be considered in this background. It is common knowledge that the standard of education is high in private schools (in aided, recognized and unrecognized schools) when compared to the standard in Government schools. It is also common knowledge that the teachers in the private sector are more dedicated in their service. It is not my venture to arrive at a finding on this aspect. But, this may also be relevant in considering the future plans by the Government. It is also relevant in this context that the number of pupils in Government schools and in aided schools are decreasing, resulting in what is commonly called as "division fall". The Government had issued orders to protect the service of the teachers due to such division fall. A considerable percentage of the Writ Petitions in Education matters relate to accommodation of such protected teachers, their deployment and allied matters.

56. We need to think of our future generation and their education. Quality education is the need of the hour. If we lag behind in the same, we will be doing injustice to our coming generations. Density of population and scarcity of land in the State is also a relevant factor. Our pupils have to seek their avenues abroad and within the country. We must think of excellence in the field of education and that is the most important aspect above all other considerations.

57. In this context, it is apposite to refer to paragraph 61 of the decision of the Supreme Court in T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, , It reads thus:

61. In the case of unaided private schools, maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fees to be charged. At the school level, it is not possible to grant admissions on the basis of merit. It is no secret that the examination results at all levels of unaided private schools, notwithstanding the stringent regulations of the governmental authorities, are far superior to the results of the government-maintained schools. There is no compulsion on students to attend private schools. The rush for admission is occasioned by the standards maintained in such schools, and recognition of the fact that State-run schools do not provide the same standards of education. The State says that it has no funds to establish institutions at the same level of excellence as private schools. But by curtailing the income of such

private schools, it disables those schools from affording the best facilities because of a lack of funds. If this lowering of standards from excellence to a level of mediocrity is to be avoided, the State has to provide the difference which, therefore, brings us back in a vicious circle to the original problem viz., the lack of State funds. The solution would appear to lie in the States not using their scanty resources to prop up institutions that are able to otherwise maintain themselves out of the fees charged, but in improving the facilities and infrastructure of State-run schools and in subsidizing the fees payable by the students there. It is in the interest of the general public that more good quality schools are established; autonomy and non-regulation of the school administration in the right of appointment, admission of the students and the fee to be charged will ensure that more such institutions are established. The fear that if a private school is allowed to charge fees commensurate with the fees affordable, the degrees would be "purchasable" is an unfounded one since the standards of education can be and are controllable through the regulations relating to recognition, affiliation and common final examinations.

58. In *State of Kerala v. Manager, Nirmal Public School and Anr.* [I.L.R. 2008 (2) Kerala 788], while considering the question of issuing no objection certificate for starting CBSE and ICSE schools, the Division Bench held that a total ban to establish schools in private sector beyond class V is violative of the fundamental rights guaranteed under Article 19(1)(g) of the Constitution of India. The Division Bench also held thus:

...If the Government schools and aided schools provide quality education, there need not be any fear that the pupil who are getting free education will go to unaided institutions, if the Government school or aided school are giving good education. Even if they are giving standard education, poor people who cannot afford to spend any money for education to their children will not send them to unaided institutions. It is not necessary that because of the reduction in the students strength, all the Government and aided schools will be closed. If those who can afford to go to unaided schools, funds now spent can be utilised for quality and better education to students who are unable to go to unaided institutions staff strength ratio can be reduced so that teachers will not become surplus. Therefore, Government funds set apart for compulsory education can be utilised for education for the needy without closing the institutions for lack of students....

59. In the decision in *Secretary, Cannanore District Muslim Educational Association v. State of Kerala* [I.L.R. 2008 (1) Kerala 319], relating to the sanctioning Higher Secondary Schools, the Division Bench held that sanctioning of new schools will always come in the realm of policy. The Division Bench considered the role of courts in policy matters and held thus:

Further, if the Government take a policy decision not to allot any funds for some time to a particular field, it is not a matter, normally, for the courts to interfere. In that case, the appeal would lie to "the ballot and not to the courts". Ours is a

Government of people and not of courts. The courts which are not answerable to the legislature, are not supposed to interfere with executive decisions and functions, unless they are shown to be illegal or ultra vires. By keeping itself within the four corners of the law, the Government can take a wise or a foolish decision. The courts are not authorised to correct the unwise decisions of the Government. The normal mode to get an unwise policy changed in democracies is by building up enlightened public opinion and not by approaching the court.

60. For the aforesaid reasons, I am of the view that the Government Order dated 13-5-2008 is legal and valid. The Writ Petitions challenging the said Government Order, are dismissed, to the said extent.

61. In individual cases, if the Petitioners have any other grievance, they can approach the Government for appropriate reliefs.

62. In the facts and circumstances of the cases, there will be a direction to the Government to consider the issue, particularly in the light of paragraphs 50 to 59 above, if necessary, after making a detailed study in the matter by appointing a high level committee, and after hearing all the affected parties, educational experts, teachers' organisations, students' organisations etc. and take a final decision, which will be in the best interests of the people at large and the student community in particular.

The Writ Petitions are partly allowed to the extent indicated above and dismissed for the rest.