
(1996) 08 GUJ CK 0037
In the Gujarat High Court

Shaneelkumar S. Shah

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 09-08-1996

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 16, 19, 226

Citation : (1997) 1 GLR 684

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Judgement

R. Balia, J.—The petitioner is a citizen of India and a student of St. Xavier's School, Ahmedabad. He passed Secondary School Examination, i.e., 10th Std. which is a public examination conducted by the Board of Secondary Education established under Gujarat Secondary Education Act. It is the terminal examination of the first stage of the 10+2+3 scheme of imparting education adopted by the State of Gujarat and the next stage for pursuing further studies is plus 2 course as school education consisting of class 11 and 12 in different streams. The eligibility conditions for pursuing further studies in Commerce stream contained in Resolution No. EDS. 9176/55435-B, dated 19-6-1976 issued by the State of Gujarat stipulate that a student must be S.S.C. with English and Commercial Mathematics. The petitioner being eligible in terms of these qualifications sought promotion to class 11 and 12 in his parent school in Commerce stream. St. Xavier's School imparts education upto 10th Std. in English medium as well as Gujarati medium. The petitioner sought promotion to class 11 in Commerce stream as per the aforesaid eligibility criteria. He secured in all 218 marks at the secondary examinations in the relevant subjects. His case is that he has been denied admission notwithstanding he is standing in higher order of merit. Students aggregating upto 212 marks have been admitted in class 11 by promotion and even students admitted from outside, that is to say, on free seats, include a student securing lesser marks in aggregate than obtained by the petitioner.

2. The school is administered by the public charitable trust known as Ahmedabad Jesuit School Society and claims to be a minority institution belonging to and established and managed by Christian community pursuing Roman Catholic faith. The case of the respondent school is that the school is imparting education in Commerce stream only in English medium, therefore, it has admitted only such students who have been taught in English medium up to 10th Std. and students who studied through other than medium of English language are not considered for admission to class 11, whether by promotion or fresh admission. The only exception, which according to the respondents carved out is in favour of a student securing first position in Gujarati medium 10th class in the school, that too as a reward and not as a relaxation in eligibility criteria.

3. The short question which has arisen before me is whether the language in which medium of instruction has been followed at the qualifying examination can furnish a reasonable and rational criterion for excluding from consideration the petitioner's case for admission to the St. Xavier's School, which is a minority institution receiving aid from the State Government, for running the school.

4. While Mr. Soparkar contends that on the sole basis of language used as medium of instruction in the previous classes cannot be a ground for denying admission to any institution including minority institutions, else, it would result in breach of fundamental right guaranteed under Article 29(2) and Article 14 of the Constitution of India. Mr. Trivedi for the School Management contends that the school being run by a minority community which has absolute choice in the matter of forming policy of admission to the educational institute managed by it and as the school only imparts education in English medium in Commerce stream of plus 2 courses, there is a rational nexus to the purpose sought to be achieved in restricting admissions to those students who have received education only in English medium and there being a reasonable basis of classification, charge of hostile discrimination cannot be sustained against the respondents.

5. Articles 29 and 30 of the Constitution read as under:

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

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

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

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in Clause (1), the State shall ensure that the amount fixed by or determined

under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that Clause

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Scrutiny of the aforesaid provision unfolds the scheme that formation of a minority group as class is permissible on the basis of language, script or culture, which it might have, as distinct from others. This provides criterion for acceptance of a group of persons as a distinct minority which may enjoy such rights as are guaranteed under Part III of the Constitution of India as fundamental right reserved for such minorities.

6. Article 30(1) confers right to establish and administer educational institutions of their choice on all minorities whether based on religion or language. It also protects such minorities from being discriminated against at the hands of the State in the matter of granting aid to educational institutions on the basis of minority management based on religion or language. However, right to manage and administer educational institutions of their choice is not unfettered in the sense that neither it is absolved from duty to exercise such rights in a reasonable manner not offending fundamental rights of equality guaranteed under Article 14 subject to the exceptions provided in the Constitution itself in favour of the minority institutions, more particularly in the field of education. Sub-Clause (2) of Article 29 makes it abundantly clear that in spite of investing with rights under Article 30 to form and establish educational institutions by minority communities identifiable on the basis of religion or language, admission to educational institutions irrespective of by whom established cannot be denied on the grounds only of religion, race, caste, language or any of them, that is to say, notwithstanding that the minority class may be founded on the basis of religion or language to claim a right to establish, maintain and manage any educational institute to promote and conserve its own distinct language, script or culture, language by itself cannot be the basis for excluding a citizen from admission to that institution. Article 29(2), therefore, is a protection, of a particular specie of general right of equality in the field of securing admission to educational institutions which are maintained by receiving aid out of the State funds. This right is not peculiar or confined to minority institutions only. It applies to all institutions imparting education alike. Article 29(2) is a Constitutional bar to such exclusion from consideration.

Soon after the Constitution of India came into force, the Apex Court had occasion to consider the limits of protection envisaged under Article 29(2) to the citizens of this land in the matter of pursuit of education. The Court spelt out the generality and wide amplitude of right of admission to educational institutions maintained or aided by State in *Slate of Madras v. Smt. Champakan Dorairajan* 1951(1) SCR 525. Hon^{ble} Das, J. speaking for the Constitution Bench said:

It will be noticed that while Clause (1) protects the language, script or culture of a section of the citizens, Clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in Clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens. This right is not to be denied to the citizen on grounds only of religion, race, caste, language or any of them. If a citizen who seeks admission into any such educational institution has not the requisite academic qualifications and is denied admission on that ground, he certainly cannot be heard to complain of an infraction of his fundamental right under this Article. But, on the other hand, if he has the academic qualifications but is refused admission only on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right.

Court in clear term declared that if a candidate holds academic qualifications for admittance to a course, denial of admission on the ground of language will be breach of fundamental right. Denial of admission, not on the ground of lack of knowledge of medium of instruction, but mere non-receipt of previous instruction in the particular language, will amount to denial of admission on the ground of language only.

7. In *V.N. Sunanda Reddy and others Vs. State of Andhra Pradesh and others*, , the Court was concerned with the situation where the Education Society of Bombay was running Bernes High School at Deolali at Nasik District which was being administered and managed by the members of the Anglo-Indian Society. It was imparting education through English medium. The mother tongue of the Anglo-Indians is English. The State of Bombay issued directions that no primary and secondary school shall from the date of the order admit to a class where English is used as the medium of instruction any pupil other than a pupil belonging to a section of citizens the language of which is English, namely, Anglo-Indians and citizens of non-Asiatic descent.

The resultant position was that a person alleging himself to be a child of Anglo-Indian parents alleging English to be his language would only be admitted, and another citizen-pupil of a Gujarati Hindu Community alleging Gujarati to be his language was refused admission. Like in the present case, criterion of English background of minority group to which school belonged and medium of instruction was English was sought to be related to object of imparting instructions in English medium. On a petition under Article 226, the Bombay High Court struck down the order holding that it is violative of Article 29(2). Affirming the view of the High Court that minority community managing educational institution by dint of Article 29(1) as part of its fundamental right can have its own choice as medium of instruction of such educational institution but has no choice to exclude admission on the ground of language the Supreme Court said:

The language of Article 29(2) is wide and unqualified and may well cover all citizens whether they belong to the majority or minority group. Article 15

protects all citizens against the State whereas the protection of Article 29(2) extends against the State or anybody who denies the right conferred by it. Further Article 15 protects all citizens against discrimination generally but Article 29(2) is a protection against a particular species of wrong, namely, denial of admission into educational institutions of the specified kind. In the next place, Article 15 is quite general and wide in its terms and applies to all citizens, whether they belong to the majority or minority groups, and gives protection to all the citizens against discrimination by the State on certain specific grounds. Article 29(2) confers a special right on citizens for admission into educational institutions maintained or aided by the State.

In reaching this conclusion, the Court affirmed its earlier enunciation of the right under Article 29(1) in *State of Madras v. Smt. Champakan Dorairajan* 1951(1) SCR 525.

The learned Attorney General had sought to support the impugned circular by stating that admission was not denied under the circular only on the ground of language. For this it was contended that it is incumbent on the State to secure the advancement of Hindi which ultimately is the National Language and it was stressed that imparting education through the medium of pupil's mother-tongue would be achieved through restricting admissions of such students to English medium schools consequently leading to achieving the national objectives of further advancing of teaching in mother language of the pupil concerned. The Court repelled the contention by holding:

Granting that the object of the impugned order before us was what is claimed for it by the learned Attorney-General, the question still remains as to how that object has been sought to be achieved. Obviously, that is sought to be done by denying to all pupils, whose mother-tongue is not English, admission into any school where the medium of instruction is English. Whatever the object, the immediate ground and direct cause for the denial is that the mother-tongue of the pupil is not English. Adapting the language of Lord Thankerton, it may be said that the laudable object of the impugned order does not obviate the prohibition of Article 29(2) because the effect of the order involves an infringement of this fundamental right, and that effect is brought about by denying admission only on the ground of language.

Here again, while the Court accepted the right of an institution managed by a minority to adopt language of its choice for imparting instructions at such institution, declared against any institution having such right to excluding otherwise qualified candidates from admission on the basis of language alone. Clear distinction was drawn between right to have a language as medium of instruction at its institution managed by a minority and Constitutional guarantee against restricting admission to a group to be recognised only on the basis of language of medium of instruction without anything more. An institution imparting instruction in any language cannot be compelled to impart instructions in other language also, at the same time, it cannot adopt the same to be sole

criteria for restricting admission of candidates who have otherwise fully qualified and eligible to be admitted to such course. It cannot be lost sight of the fact that the course with which we are concerned is two-year course of 10+2 scheme for which common syllabus and eligibility criterion has been prescribed by Senior Secondary Board for the entire State of Gujarat and the school in question is admitting students to such course only. It is not imparting training in class XI and XII in any course of its own design for which it could lay down separate eligibility criterion for admission. Perhaps the school cannot lay down its own separate eligibility criteria for admission to such courses, which are governed by common scheme of public examination conducted by an autonomous Board constituted for the purpose of governing educational standards in the State.

8. In *St. Stephen's College etc., etc. Vs. The University of Delhi Etc., Etc.,* , the Court was called upon to determine whether the requirement by St. Stephen's College, for calling the students for interview before granting them admission and not confining to the criteria of merit at the qualifying examinations only, as per University's orders were within the ambit of power of minority institute to manage and administer its own educational institution. While, the Court accepted the plea of the school management that in matters of admission of students to the degree courses, it is for the Principal of the college or Dean of the college to take decision finally and there is no provision in the Delhi University Act which vests the University with overriding powers of precluding the college from exercising such right, the criterion of admission on the basis of examination plus interview was held to be not contrary to such right. The Court emphasised that:

The access to the academic institution maintained or aided by the State funds is the special concern of Article 29(2). It recognises the right of an individual not to be discriminated under aegis of religion, race, caste, language or any of them. This is one of the basic principles of a secular State. The discrimination based solely on the ground of a citizen's particular religion, race, caste, or having any particular language is absolutely prohibited in educational institutions maintained by the State or receiving aid out of State funds. It applies to minorities as well as to non-minorities. When other qualifications being equal the religion, race, caste, language of a citizen shall not be a ground of preference or disability. Similarly, the words "any of them" as used in Article 29(2) are intended to give farther emphasis that none of the grounds mentioned in the Article can be made the sole basis of discrimination.

9. In *Frank Anthony Public School Employees' Association Vs. Union of India (UOI) and Others,* , the Court while considering the ambit of the right guaranteed to religious and linguistic minority to maintain and administer educational institutions of their choice said:

The right guaranteed to religious and linguistic minorities by Article 30(1) is twofold, to establish and to administer educational institutions of their choice. The key to the Article lies in the words, "of their own choice". These words indicate that the extent of the right is to be determined, not with reference to

any concept of State necessity and general societal interest but with reference to the educational institutions themselves, that is, with reference to the goal of making the institutions effective vehicles of education for the minority community or other persons who resort to them. It follows that regulatory measures which are designed towards the achievement of the goal of making the minority educational institutions effective instruments for imparting education cannot be considered to impinge upon the right guaranteed by Article 30(1) of the Constitution.

10. From these pronouncements, it is apparent that while recognising the right of minority institutions recognised on the basis of religion or language, the freedom of choice in the field of management is confined to the object for which such minority institutions have been permitted to have a separate identity and right to manage and administer educational institutions. While recognising such right, the Constitution itself accepts that the right of management and administration does not include exclusion of candidates from being admitted to such institutions to make it as institution meant solely for the benefit of that minority community, on the basis of which, it has been founded. Admission to institutions has to be made open to all irrespective of the identity of the minority community, whether founded on the basis of religion or founded on the basis of language, and any right of admission which vests in the management must not transgress the Constitutional limits as well envisaged under Article 29(2), apart from the requirement that such management and administration should be for the purpose of achieving basic objective, making the institution effective vehicle of education for the minority community and other persons who resort to them for admission.

In these premises, I am unable to accept the contention raised on behalf of the institution that it has absolute choice in the matter of prescribing administrative criterion for admission to its institution without further scrutiny by way of judicial review. Before it can seek the protection of its absolute right of administration and absolute right of choice in the matter of admission which may not satisfy the twin tests that it does not transgress the limits of Article 29(2) and otherwise it is referable to the objective for which the existence of minority community and its independent rights to manage and administer educational institutions has been recognised under the Constitution. None of the decisions relied on by the learned Counsel for respondent takes a view contrary to what has been taken by Supreme Court way back in *State of Madras v. Smt. Champakan Dorairajan* (1951(1) SCR 525) and in *The State of Bombay Vs. Bombay Education Society and Others*, .

11. In *Hindi Hitrakshak Samiti and others Vs. Union of India and others*, , a Mandamus was sought against the Central Government for holding pre-medical and pre-dental entrance examination in Hindi and other regional language and not confining such entrance examinations in English only. The medical courses and dental courses which were to be followed after admission by the candidates

seeking admission, the language of instruction was English. It was not a case where admission was sought to be denied on the ground of the language in which the student has sought instruction upto the qualifying examination. A separate test was being conducted for admission to the medical courses for which required medium of instruction was English and therefore, the tests were required to be taken in English medium, to ensure that candidate seeking admission to such courses had minimum workable knowledge of language of medium, particularly in the context that all candidates holding qualifying examination did not have English as compulsory subject at qualifying academic qualification. The Court said:

It is difficult to accept that in not holding entrance examination in any particular language, be it Hindi or regional language, amounts to denial of admission on the ground of language. Every educational institution has right to determine or set out its method of education and conditions of examination and studies provided these do not directly or indirectly have any casual connection with violation of the fundamental rights guaranteed by the Constitution. It may be that Hindi or other regional languages are more appropriate medium of imparting education to very many and it may be appropriate and proper to hold the examinations, entrance or otherwise, in any particular regional or Hindi language, or it may be that Hindi or other regional language because of development of that language, is not yet appropriate medium to transmute or test the knowledge or capacity that could be had in medical and dental disciplines. It is a matter of formulation of policy by the State or educational authorities in charge of any particular situation. Where the existence of a fundamental right has to be established by acceptance of a particular policy or a course of action for which there is no legal compulsion or statutory imperative, and on which there are divergent views, the same cannot be sought to be enforced by Article 32 of the Constitution.

12. Thus, it was not a case in which admission to a college was denied on the basis of language. It was a case where admission tests for further studies to be carried in English medium which were required to be answered in English language, though the students may be coming from any area holding medium of instruction in any language or script. There was no disqualification attached to his continuing studies in English medium in any institution for being considered for admission to such courses. He was eligible for taking qualifying test irrespective of medium in which he has previously received instructions. If he succeeds in such qualifying test, which had nexus to test the level of knowledge of English language in which studies are to be continued. There was no exclusion altogether from consideration on the basis of previous medium of instruction in any language.

13. Present is the case where the institution is seeking to keep out of consideration those candidates who have secured instructions in a language other than English upto the qualifying examinations. No separate qualifying examinations are required by the institution for testing the level of knowledge of

English for selecting candidates to prosecute studies in English medium. In the present case, eligibility to take the course of X class there is one single examination which is conducted as common public examination for all the students taking instructions in any of the mediums, namely, Secondary Board Examination conducted by the Board in the State of Gujarat and has English as compulsory subject for all segments. In that view of the matter, this decision in no way assists the contention raised by Mr. Trivedi.

14. Learned Counsel placed reliance on a decision in *The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another*, for supporting his contention about the right of minority in the field of admission to the educational institutions managed and administered by it to be their absolute right. But it is of importance to notice that the case really do not concern the denial of admission to any students on one ground or another which was being tested before Their Lordships but was a case which concerned the right of such educational institute to seek affiliation with the University and the question was whether an educational institution maintained by minority community has a fundamental right to secure affiliation as a part of its right to manage and administer the institution. The Court while considering the scope and ambit of Articles 29 and 30 said:

Articles 29 and 30 confer four distinct rights. First is the right of any section of the resident citizens to conserve its own language, script or culture as mentioned in Article 29(1). Second is the right of all religious and linguistic minorities to establish and administer educational institutions of their choice as mentioned in Article 30(1). Third is the right of an educational institution not to be discriminated against in the matter of State aid on the ground that it is under the management of a religious or linguistic minority as mentioned in Article 30(2). Fourth is the right of the citizen not to be denied admission into any State maintained or State aided educational institution on the ground of religion, caste, race or language, as mentioned in Article 29(2).

The Court reiterated later in the judgment:

Third is the right not to be compelled to refuse admission to students, in other words, the minority institutions want to have right to admit students of their choice subject to reasonable restrictions about academic qualifications.

Thus, the Court clearly spelt out that there is no absolute claim to choice concerning admission of students to educational institutions maintained and administered by the minority community, but are understandably subject to the restraints of Article 29(2) and subject to reasonable regulations about academic qualifications. In the present case, the policy adopted by respondent has nothing to do with academic qualification.

15. In *D.A.V. College, Bhatinda, etc. Vs. The State of Punjab and Others*, a question had arisen in the light of the controversy that three colleges concerned were established before the reorganisation of the State of Punjab and were

affiliated to Punjabi University; on establishing Punjabi University under the Punjabi University Act 1961, a notification was issued by Government of Punjab extending the area of jurisdiction of power of University effecting the consequence that college associated with Punjab University ceased to be so associated with the same and were deemed to be associated with Punjabi University. The Punjab University declared that Punjabi will be the medium of instruction and examinations of the pre-University at all its affiliated colleges also even in Science group, shall be only in Punjabi medium. According to these instructions it became necessary for the colleges concerned to teach all subjects including science subjects in Punjabi and students were to write examinations in general, with some exception in Punjabi. The question, therefore, arose about right of minority institution to have their own medium of instruction and whether they are under compulsion to seek affiliation so as to abide by the University regulations.

Reaffirming the principle laid down in *The State of Bombay Vs. Bombay Education Society and Others*, , the Court held that minority institutions have right to choose which language to be medium of instructions in educational institution administered by it and further held that while the University can prescribe Punjabi as a medium of instruction but it cannot prescribe it as an exclusive medium nor compel the pupils to take examinations in that language with Gurmukhi script and the circulars issued by the University in that regard were to be held to be violative of provisions of the Constitution of India. It nowhere supports the contention that such institutions have right to refuse consideration of a candidate for admission, who is seeking admission to pursue training at such institution in the medium which it has opted for instruction therein, merely because upto now he has not been taught in the language of medium of instruction notwithstanding said language one of the subject of qualifying examination and passing in which is compulsory ensuring minimum required knowledge of language of medium of instruction.

It will be seen that this also was not a case where question for consideration had any nexus to the criteria laid down by the management of the institution for admitting a person had any relation to the language in which the candidate received instructions in the qualifying examination.

16. Another case relied upon by the learned Counsel for the respondent is *Rev. Sidhajibhai Sabhai and Others Vs. State of Bombay and Another*, . This was a case where the Government had directed the institution in question to reserve 80% seats in training colleges for Government nominated teachers and to comply with the provisions of Rule 5 of Bombay Primary Training Colleges Rules, failing which it met with the threat of withdrawal of grant. It was contended by the State that the State which makes the grant available or gives recognition to the institution for the examinations held by the State is entitled to impose conditions relating to admissions of students or withdraw the grants in the event of the institution failing to carry out the conditions and regulations prescribed

being in the national or public interest and it was contended that unless such restrictions result in total negation of the right under Article 30(1), the same cannot be held to have contravened any provisions of the Constitution. It is in the context of general right of freedom to pursue any trade or profession under Article 19, the Court said:

Unlike Article 19, the fundamental freedom to establish and administer educational institutions by minorities guaranteed under Clause (1) of Article 30, is absolute in terms; it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Article 19 may be subjected to.

The question about denial of admission to such institutions by the management being in violation of the Constitutional mandate under Article 29(2) was neither before the Court nor it was considered, and answered. It also did not in term decided that exercise of such right is not subject to any requirement of reasonableness. What it spelt that it cannot be subject to reasonable restriction of the nature as one required under Article 19. It is one thing to say that a fundamental right is not subject to regulatory measures which are reasonable in nature and quite another thing to say that exercise of its functions which is an instrumentality of State being aided school and admissions to which are subject to rights of an individual under Article 29(2) is not absolved from duty to act reasonably and fairly in discharge of its functions, which is like a golden thread pervading through the entire Constitutional scheme.

17. The last case which was relied on by the respondent is *Awadeesh Nema and Others Vs. State of Madhya Pradesh and Another*, . It was a case in which Madhya Pradesh Government had framed Rules for holding entrance test for admission to medical science and engineering courses. The Rules provided that marks obtained in the subject of General English will not be added to the aggregate, but a candidate must secure at least 25% marks in General English to qualify for admission to the aforesaid courses. This requirement was challenged to be arbitrary and violative of Articles 14 and 29(2). The Court repelled the contention on two-fold grounds. Firstly, the insistence on obtaining at least 25% marks by a candidates in the subject General English to qualify for admission is only with a view to be assured that the candidate has some knowledge of English language to enable him to study the text-books in English, if he is admitted to the courses in question. This requirement cannot, in the circumstances of the case, be held to be arbitrary. It cannot also be held that the requirement is such as has no connection whatsoever with the object of the examination. Secondly, the Court held:

Prescribing English as one of the subjects for the entrance examination could not also be said to be anti-national and violative of the provisions of Article 29(2) of the Constitution. If a person is denied admission on the ground that he has failed to qualify for admission because he has not passed the requisite test in a language which is compulsory for seeking admission, it cannot be held that he is denied admission on the ground of language.

18. It is to be noticed that the requirement for taking qualifying test for admission to medical courses or engineering courses was pre-medical test and pre-engineering test to be conducted for that purpose. Medium of instruction to be followed for such course and available material of studies was English. Subject of English was not compulsory in all the sources of qualifying examinations. A common test for admitting students on the basis of comparative merit was devised to eliminate the difficulties of finding a comparative merit of all students coming from different qualifying examinations conducted by different institutions. In these circumstances, a common test to know the basic level of previous knowledge of English by way of it having one of the subjects of qualifying examination was also made part of the requirement of qualifying common test for pursuing higher studies of medical courses or engineering courses. In order to achieve the object of getting students, who have some knowledge of English language, enough to study the subject books which were available in English only was held to have direct nexus with the object for selection of the candidates for the next examination for which the courses are to be pursued in English only. Present is not a case where requirement of passing of qualifying examination for seeking admission to the next higher studies laying down any independent criterion to know about the requisite knowledge of English to undertake training in English language has been laid down for the purpose of carrying on studies for examinations to be conducted by the Senior Secondary Board of the next higher classes. Requirement is not for comparative merit but is of basic minimum knowledge of language. Therefore, this decision also is of little assistance as far as the present controversy is concerned, namely, whether insistence of securing previous education in English medium and, not admitting the students having receiving instructions as distinguish from clearing the qualifying examinations making the students eligible for the next higher class impinge upon the requirement of Article 29(2) or to say in other words whether it amounts to denial of admission to the institution in question solely on the basis of language.

19. It has not been suggested and, perhaps it could not have been, that if this requirement results in denial of admission solely on the basis of language, it cannot be sustained. What was really contended by learned Counsel for the respondent was that it is a matter of policy followed by management administering an educational institution by a minority laying down criterion for admission that since medium of instruction to be followed in class 11 is English, the student must have received instructions for previous classes as well in English and no other language, notwithstanding English paper is compulsory paper in qualifying examination and if two views are possible on it, the Courts will not be interfering.

20. Having carefully examined the contention, I am unable to sustain it. Management has chosen the medium of instruction to be imparted at the institution, administered by it. It is admitting students to plus two courses which are designed, and examination to which are conducted as a public examination by the Senior Secondary Board. The Board conducts examinations in all the

languages. English is one of the compulsory subject at 10th Examination conducted by Secondary Education Board. Requirement of admission to Commerce stream is S.S.C. with English and other subject. Thus, requisite knowledge of English as per standard of compulsory English Paper of 10th Standard public examination has been the requisite qualification for Senior Secondary Commerce Examination and a candidate not having English as one of the subjects as S.S.C. or equivalent examination, is not at all eligible to be admitted to Commerce stream Class 11. In these circumstances, it does not stand to reason that with what objective the students who had passed qualifying examination from the same examination having English otherwise, as a subject, the further requirement of having previous instruction in the English language only can be achieved. It is a case where there is no impingement on the right of the society to impart training in Commerce stream in a language of its own choice. The source of admission to Class 11 in the State of Gujarat is one in any stream, namely, the candidate must have passed Secondary Board Examinations which are conducted as a public examination. The result of all the students irrespective of the fact with which medium they have obtained instructions or answered their questions forms one class and the merit at the Xth Examination is also common irrespective of medium in which they have received instruction or taken the examinations. Unless the merit inter se of such class of persons is to be determined by independent competitive examination, to test their level of knowledge in English for the purpose of higher studies in English medium the fact that English is a compulsory subject in the Secondary Examination and passing in that subject also compulsory, a minimum knowledge in the language of English so as to understand the text-books of the subjects concerned, must be attributed equally to all students. In the Commerce stream or Science stream further studies in English medium may require the knowledge of language to understand the text-books or the instructions which are imparted in English medium at the school, it is not the requirement of the eligibility criterion laid down by the State by the Senior Secondary Board which is to conduct examination for all the students whether trained in English medium, Gujarati medium or other medium as one single examination of the same standard, it is not the requirement of the institution either to hold a separate examination to test or to secure a minimum level of English language necessary for understanding the instruction imparted in English medium for the purpose of further studies in their school. In these circumstances, only conclusion possible is that a student is denied admission who has not taken previous courses in English medium, though he had pursued English as subject, only on the basis of language and no other criteria. The minority institution receiving State aid within the precincts of their right to administer and manage the educational institution is not absolved from their obligations to act fairly and reasonably, within the limits of Constitutional requirements.

21. Once it is accepted that institutions are open to all and cannot be confined to the benefit of one class or community of people, namely, minority community

who manages or administers an institution which may be founded on language, it cannot lay down the criteria without anything more solely to exclude the candidates from consideration for admittance to its institution on the basis of language in which instructions have been receiving at the qualifying examination, thus, creating a class of students passing the same examination on the basis of language. Plus two course consisting of 11th and 12th Standard which are to culminate in public examinations to be conducted by the Senior Secondary Board, is one single examination irrespective of the medium in which instructions are imparted at various schools, nor there is any impediment on student trained at a school having one medium of instruction to choose writing examinations in other permissible medium, therefore, the insistence of anything other than the eligibility for admission to classes XI without prescribing a separate opportunity of selection to adjust the competitive merits of those who are to be admitted founded on criterion not permissible under Constitution, but is founded on irrelevant considerations.

22. To adopt the words of Bhagwati, J. as he then was from *E.P. Royappa Vs. State of Tamil Nadu* and Another, equality is anti-thesis to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a Republic while the other to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and Constitutional law and is, therefore, violative of Article 14. Article 14 strikes at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where operative reason of that action is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same voice; in fact the latter comprehends the former.

23. Moreover, it is the case of the respondent school management that admission to Class 11 from Class 10 is a promotion and not a fresh admission. It is also not in dispute that eligibility criterion for admission to Class 11 is to be and has been prescribed by the Board. In these circumstances, the case squarely falls to be governed by ratio laid down in *The Principal, Cambridge School and another Vs. Ms. Payal Gupta and others*, , that in a Higher Secondary School such as one in question, no separate criterion can be laid down, which is not laid by the authority prescribing such criterion, for the students passing Class 10 and wishing to continue their studies in Eleventh and twelfth classes. Obviously, when the inter se merit of students taking same public examination is founded irrespective of medium of receiving instruction, for the purpose of limiting the promotions to the next higher class to the number of seats available medium of instruction cannot be made a criterion for eliminating students who stand higher in order of merit at the same public examination.

24. As a result, this petition succeeds. Respondent No. 2 is directed to consider the case of the petitioner and his likes those who have applied to it and have been refused admission in Commerce stream solely on the ground of medium of instruction being other than English at the level of qualifying examinations and still desirous of seeking admission in the school in question and if it is found that any such applicant is having more marks in aggregate than the student who has been last in merit amongst students admitted in the school, then such students shall be offered admission in the school. If necessary, for this purpose the school must accommodate additional number of students than what is propagated to be the number of existing seats per division. If necessary, respondent No. 1 shall issue necessary permission for increasing seats for this purpose for the current academic session. Admissions already granted shall not be disturbed.

Rule made absolute. No costs.