

(1989) 01 AHC CK 0011

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No"s. 15952, 16044, 16045, 16695, 16696, 16792, 16793, 16794, 17567, 17568, 17569, 17654, 17655, 17656, 17657, 17658, 17705, 17763, 17766, 17767, 17810, 17843, 18466, 18541, 18566, 19958, 20107, 20705, 20708, 20881, 22574, 22724

Sheetansu Srivastava

APPELLANT

Vs

Principal, Allahabad Agricultural Institute and Another

RESPONDENT

Date of Decision : 25-01-1989

Acts Referred:

Constitution of India, 1950 — Article 14, 15(1), 15(4), 29, 29(1)

Citation : (1989) 2 AWC 808

Hon'ble Judges : R.M. Sahai, J;J.N. Dubey, J

Bench : Division Bench

Judgement

R.M. Sahai, J.—Does the right to establish and administer, a minority institution of their choice guaranteed under Article 30(1) of the Constitution extends to or includes the right to reserve seats for the students of minority community in a State financed or aided institution, is the issue of some importance due to paucity of any judicial precedent on this aspect which has been described by American jurists as reverse discrimination. The issue has arisen as many students who appeared in the entrance test held for admission to B.Tech. and B.Sc (Agr.) by Allahabad Agricultural Institute, a premier and renowned institute of the country imparting education in agricultural science founded by an American Christian Philonthrophists, Dr. Sam Higginbottom, as far back as 1911, were denied admission even though they secured high percentage of marks in the competitive test held by the Institute due to admission policy of reserving 50% seats, for, "Church sponsored students from the whole of country of which at least 1/5th shall be from Uttar Pradesh" 40% "of U.P. Domiciled including Church sponsored coming on merits", 5% "from other States including foreign students but excluding Uttar Pradesh and Church sponsored " and 5% for "tribals". Although the scope and ambit of educational right guaranteed to a citizen under Article 29(2) and the right of religious or linguistic minority to

establish and administer educational institution of their choice under Article 30(1) has been explained in various decisions of the Hon'ble Supreme Court but there is (no) direct decision on the issue if a minority institution is entitled to reserve seats for students of its own community in the purported exercise of power to administer an institution of its own choice.

2. For convenience the two sub-Articles are reproduced below:

Article 29(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 religious, race, caste,, language or any of them.

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

Historically Article 29(2) as recommended by the Minority sub-committee and approved by the Advisory Committee proposed a provision Which read as under:

No minority, whether of religion, community or language, shall be deprived of its rights or discriminated against in regard to the admission into State Educational Institute.

Since such a provision coupled with Article 30(1) would have given rise to apprehension as was argued and it would have resulted in destroying the secular character of the educational institution which are temples of learning consequently despite Article 14 and which guarantees equality, Article 29(2), as it stands, was incorporated to obviate any misgiving as an exception to Article 30(1). Its scope was explained in the very first decision which came up before Hon'ble Supreme Court in The State of Madras Vs. Srimathi Champakam Dorairajan, and what was described as communal government order reserving seats in Medical College on basis of caste was held to be violative of Article 29(2). It was held, "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". This led to First Constitutional amendment and an exception to Article 29(2) was grafted in shape of Article 15(4), what needs mention is that even though the Constitution was amended but it attempted to carve out an exception in favour of socially and educationally backward class of Scheduled castes or tribals only for their advancement in keeping with the Constitutional ideal of ensuring reservations for depressed classes for sometime. For others including Hindus, Muslims, Anglo Indians and Christians, there was no change. Since what was struck down in

Smt. Champakam's case (supra) was a government order and not any action of a minority institution itself it occasioned the submission that Article 30(1) should not be construed in a manner which may destroy the very purpose for which it was incorporated in the Constitution and is described as cherished right of minority. Passionate appeal was made to confine enforceability of guarantee under Article 29(2) to educational institutions other than those established under Article 30(1). Apprehension was expressed on non-admission of even one student of the minority in an institution established and administered by minority if the merit formula was adhered to. Emphasis was laid on word "choice" used in Article 30(1) and it was stretched to extend to admission of own community. Inspiration was drawn by picking up sentences, shorn out of their context, from the judgments of Hon'ble Court in different decisions for instance, "the real import of Article 29(2) and Article 30(1) seems to be that they clearly contemplated a minority institution with sprinkling of outsiders admitted to it", in AIR 1958 SC 956 the famous Kerala Educational Bill was put forth as laying down the law that students other than minority could be few only. Similarly the observations, "that the right guaranteed under Article 30(1) was in terms absolute" and the right could not be "whittled down by so called regulative measures conceived in the interest not of the minority educational institution but of the public or the nation as a whole...the right guaranteed by Article 30(1) will be put a "teasing illusion" a promise of unreality" in *Sidhrajibhai v. State of Gujrat* AIR 1963 SC 540 was pressed time and again as supporting the right to reserve seats for minority community. What was lost sight in the zest of argument, however, was the well established principle which has been explained by Hon'ble Supreme Court, thus, in *Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others*, "every judgment must be read as applicable to particular facts proved or assumed to be proved since the generality of the expressions which may be found are intended to be expositions, of the whole law but governed and qualified by the particular facts of the case in which such expressions are found" However, the issue that calls for adjudication is if government aided minority institutions are constitutionally competent to preclude students of majority community or community other than that which established the institution by reserving seats for students of their own community in purported exercise of power under Article 30(1) to educate their own children notwithstanding Article 29(2).

"Religion is a realm in which faculties beyond reason and experience removed from the public sphere prove central to merit conception of the values at stakes". But religions autonomy in education as articulated by Article 30 expressed in absolute terms unhedged with any restrictions is a mandate of religious voluntarism in faith and belief, but not in its actions and practice which in a secular democracy must carry the impress of secular purpose and effect. That is why an educational institution whether established or administered by majority or minority has been prohibited from denying admission to anyone on ground of religion, caste etc. Any effort to create pervasively sectarian outlook should not

be countenanced on public funds. When the word "minority" as proposed in the Constitution bill was dropped from Article 29 and was replaced with word "citizen" it was deliberately done not to destroy absolutism of Article 30 but to inhibit any institution majority or minority from acting in a manner which may be destructive of secular philosophy which pervades the Constitution. "Therefore, the Constitutional concept of religious autonomy in education in Article 30 has to be balanced with the Constitutional guarantee under Article 29(2). While making any attempt to constitutionalise the relationship between the two broad ideals projected by these Articles what is important to bear in mind is that even though the educational and cultural rights guaranteed under Articles 29 and 30 have been generally described as protection of interest of minorities yet Article 29 having used the word citizen both in Clause (1) and (2) it is a right guaranteed to both majority and minority. "Article 29 confers the fundamental right on any section of the citizens which include the majority section" The Ahmedabad St. Xavier's College Society and Another Vs. State of Gujarat and Another, . Since Articles 29(2) and 30(1) operate in same field namely, educational institutions the right guaranteed to minorities under Article 30(1) to establish and administer educational institutions of their choice cannot be read in isolation, and they have to be interpreted in a manner that one does not destroy the right of other while maintaining their basic characteristic of absolutism inherent in them. They must be tested on touchstone of human values. When the choice to establish and administer institution was guaranteed it meant freedom of conscience and faith which could not be interfered directly or indirectly. It was a mandate for linguistic and religious; freedom but not for separatism. Since phraseology of both the Articles is in absolute terms and if either of them is expanded to the extreme, it is bound to clash with other it is imperative to evolve way out giving full play to both without doing violence to any. Absolutism of Article 29(2) irrespective of Articles 14 and 15(1) was explicitly and clearly brought out in Champakam's case (supra). To what extent it was watered down by Legislature has already been narrated. The principle was reiterated even in The State of Bombay Vs. Bombay Education Society and Others, , which probably was the first case in which Hon'ble Court was called upon to balance the two rights guaranteed by Article 29(2) and Article 30(1). It was concerned with a circular issued by government directing schools imparting education in English Medium not to admit students other than anglo-Indian and citizens of non Asiatic descent. The Hon'ble Court while maintaining right of minority under Article 30(1) to determine medium of instruction in which education could be imparted to children of own community struck down the order of government as, 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 ground of language. The more emphatic pronouncement came in re Kerala Education Bill case (supra) where the Hon'ble Court held that the right of the minority to conserve its language, script or culture under Article 29(1) of the right to maintain and administer a minority institution under Article 30 was

"subject to Clause (2) of Article 29 which provides that 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." The word choice used in Article 30(1) was emphasised in *Sidhraj Bhai case* (supra) and the order of government to reserve seats to its nominee in training college run by a minority institution was struck down as beyond regulative measure. But it cannot be taken assistance for extending the word choice to reserve seats for own community. The expression establish and administer used in Article 30(1) came up for elucidation in *St. Xaviers College's case* (supra). Its various phases were highlighted in separate judgments of Hon"ble Judges. But none of them recognised the right to admit students of minority community or to reserve seats for them so as to exclude others. It was held by every Hon"ble Judge that right to establish and administer guaranteed under Article 30(1) was an absolute right But like any other fundamental right it was subject to reasonable regulation and control. Justice Diwvedi observed at page 1463, "A glance at the context and scheme of Part HI of the Constitution would show that the Constitution makers did not intend to confer absolute rights on a religious or linguistic minority to establish and administer educational institutions. The associate Article 29(2) imposes one restriction on the right in Article 30(1). No religious or linguistic minority establishing and administering an educational institution which receives aid from the State funds shall deny admission to any citizen to the institution on grounds only of religion, race, caste, language or any of them. The right to admit a student to an educational institution is admittedly comprised in the right to administer it. This right is partly curtailed by Article 29(2)" In *All Bihar Christian Schools Association and Another Vs. State of Bihar and Others*, , right of Hate to regulate a minority institution for excel lance etc where public fund was paid, observed, "on the one hand the State is under an obligation to ensure that educational standards in the recognised institutions must be according to the need of the society and according to standards which ensure the development of personality of the students in turning out to be civilized useful members of society, and to ensure that the public funds disbursed to the minority institutions are properly utilised for the given purpose. On the one hand the State has to respect and honour minority rights under Article 30(1) in the matter of establishing and carrying of administration of institution of their choice. In order to reconcile these two conflicting interests the State has to strike a balance and statutory provisions should serve both the objects and such statutory provisions have to withstand the test of Article 30(1) of the Constitution."

3. Thus the right to establish and administer an institution under Article 30 even though absolute is not above regulation and control. Further its absolutism in respect of government aided institutions is subject to Article 29(2). Therefore, the right of admission which vests in an institution by virtue of the power of administration enjoyed by it under Article 30(1) cannot be in violation of Article 29(2). It would not be out of place to refer to the decision given by American

Supreme Court in *University of California Regents v. Allan Bakke* 1978 57 Law Ed. 750, the celebrated reverse discrimination case as in *State of U.P. v. Deoman Upadhyaya* AIR. 1960 SC 1125, it was observed by the Hon'ble Court, "Article 14 of the Constitution of India is adopted from the last clause of Section 1 of the 14th Amendment of the Constitution of the United States of America and it may reasonably be assumed that our constituent Assembly when it enshrined the guarantee of equal protection of the laws in our Constitution, was aware of its content delimited by judicial interpretation in the United States of America. In considering the authorities of the superior courts in the United States, we would not, therefore, be incorporating principles foreign to our Constitution, or be proceeding upon the slippery ground of apparent similarity of expressions or concepts in an alien jurisprudence developed by a society whose approach to similar problems differ from ours." Bakke a white man was rejected admission to medical school in which sixteen out of hundred seats were reserved for minority. It was claimed by him that his test score being higher than some of the blacks who were admitted against reserve seats he was denied the right to equal protection. The claim was upheld. It was observed, "In summary, it is evident that the Devis special admissions programme involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian or Chicano that they are totally excluded from a specific percentage of the seats in an eating class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity, to compete for every seat in the class. The fatal flaw in petitioner's preferential programme is its disregard of individual rights as guaranteed by the 14th Amendment." It is thus clear that a minority institution cannot insist in reserving seats for students of own community. If such reservation would have been in violation of equal protection guaranteed under Article 14 then any reservation policy which is in teeth of Article 29(2) cannot be upheld. Such construction, from which there appears no escape, the independence of religion or linguistic minority is neither eroded nor curtailed nor its independence minimised or shaken, rather it harmonises and advances the objective of secularism the ideal of society and foundation of the Constitution What crystallises from above discussion is that neither government is entitled to interfere with right of minority and direct it to admit a student as it may contravene the choice of minority under Article 30 nor the institution can deny admission to any student because he is not a member of any community nor it can reserve seats for members of its community so as to preclude others as it shall be in violation of Article 29(2). That is choice should be of minority but within the constitutional frame work, namely, without denying admission on ground of caste or religion etc.

4. Ratio in *Director of School Education, Govt. of Tamilnadu v. Rev. Brother G.*

Arogiasamy S.H.J. Correspondent of Christhurain Basic Training School AIR 1971 Mad 440 , is not of any help as right to admit is, undoubtedly, included in right to administration. And it was for this reason that interference in this right at instance of government was not upheld. But the observation, "what is the effect of the impugned order? In our opinion, it places serious restrictions on the freedom of the minority institutions to make admissions of students according to their choice. It throws the students of the minority community into a competition with the generality of students belonging to that and all other communities. The applications for admission to any institution cannot be restricted to a particular community because of Articles 15(1) and 29(2). The result is the students of the Roman Catholic Community, which is said to represent less than ten per cent of the total population, when in competition with students of the other communities who have all applied for admission, obviously will have but slender chances of admission, contrary to the protection afforded by Article 30(1)". With profound respect were not called for and are not only contrary to Article 29(2) but its elucidation by Hon"ble Supreme Court in St. Xeviers"s (supra) extracted earlier. We respectfully express our dissent. Nor the decisions of Hon"ble Supreme Court in Rt. Rev. Msgr. Mark Netto Vs. State of Kerala and Others, , of any assistance as here again it was executive action of refusing to grant permission to admit girl students in a school which was imparting education to boys for last twenty five years as it interfered with right of administration and the decision in Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others, , was concerned with appointment of teachers, their suspension, dismissal and right of appeal against such order. These are squarely within ambit of right to administer.

5. Absolutism has not been accepted in any form in the constitutional set up. Even in America it has been held, "Laws are made for the government of actions and while they cannot interfere with religious belief and opinions they may with practices." Since every citizen has a right to be admitted to any educational institution and he cannot be denied admission on ground of religion or caste. It is reservation frustrate such right. As observed earlier it was upheld in the very first case which went to Supreme Court in Smt. Champakam"s case (Supra) and the only exception created was in favour of socially, economically, backward class and Scheduled caste that also by the State. The apprehension that by denying the policy of reservations religious character of the institution shall be split is to say the least misconceived. A minority may have religious freedom to impart education so as to maintain its identity and culture but no religion preaches separatism. If activities of an entity religious or otherwise can be regulated or controlled for public interest and welfare so long it does not effect or interfere religious belief or activities then there can be no rational to claim that government aided minority institutions should be permitted to confine its educational activities to students of own community, otherwise it shall erode religious or linguistic autonomy guaranteed, under Article 30. An institution established by minority may claim to impart education in keeping with its religious faith and belief but it cannot insist in imparting such education to

members of its own community only. No religion, however, dogmatic is narrow in its outlook. Therefore, both on general approach and constitutional prohibition under Article 29(2) the reservation policy of the institution cannot be sustained.

6. Law being thus denial of admission to students, who were higher in merit competitive test held for entrance because the students who were church sponsored or others were granted admission in pursuance of admission policy of the institution in preference to petitioners is liable to be quashed being in violation of Article 29(2). Two objections, however, were raised, one preliminary in nature and the other on exercise of power. It was urged that all students who were lower in merit having not been impleaded no writ or direction could be issued as it would be in violation of principle of natural justice and non-hearing of necessary party. Reliance was placed on *Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar*, neither appear to have any substance. When these petitions had come earlier before another bench of which one of us (Hon'ble J.N. Dubey, J.) was a member, the petitioners were directed to implead the selected students. The order was complied and service was effected through office of the Institute as is clear from the affidavit filed by Vice-Principal. Some of the students put in appearance as well. If others chose to remain absent and watch and wait then that would not vitiate the hearing. Since they have been served in one and all the petitions are being heard together the non-impleadment in each petition cannot be considered fatal as basic requirement of notice and opportunity stand satisfied. In *Prabodh Verma and Others Vs. State of Uttar Pradesh and Others*, , it was observed that where there were large number of parties the petition could be heard by impleading some in representative capacity. Apart from it the order that we propose to pass shall not effect any of the selected candidate, therefore, their impleadment, presence or absence, in our opinion is immaterial.

7. Reliance for the next objection was placed on *Y.C. Reddy v. State* 1985 UP LB EC 545, and it was urged that the institute being a private body its actions were not amenable to writ jurisdiction. But the institute is affiliated to Allahabad University which is governed by State Universities Act. The admissions are made by University u/s 28 of the Act. In *Aley Ahmad v. District Inspector of Schools* 1976 AWC 731 (FB), it was held that writ could be issued even to a private body if it was entrusted with performance of statutory duty. Since admission of students is governed by rules or order framed under the Statute the act or omission in this regard can be scrutinised by this Court. Apart from it the admission policy framed by Government aided institution is challenged for constitutional violation. Such a petition would be maintainable under Article 226.

8. Even the decision in *Anupam Srivastava v. Principal Agricultural Institute Naini Allahabad* 1981 EC 72 laying down that no relief under Article 226 should be granted if the academic session was going to end is of no help as the learned Counsel for the Institute himself stated that an authoritative decision on validity of admission policy be given as it has become a perennial problem and every

year large number of petitions are filed resulting in dislocation of studies and running classes beyond sanctioned strength. Further the session is stated to have commenced recently and examinations are still not at card.

9. Coming to merits from the two lists one described as merit list and other provisional admission list it is undisputed that the candidates who were fifth onwards in the order of merit in the list of fifty candidates were denied admission and admission was granted to candidates in pursuance of admission policy to candidates who were Church sponsored etc. Since the policy has been found to be bad and violative of constitutional guarantee under Article 29(2) the admission of candidates from serial Nos. 5 to 50 has to be quashed. But that shall result in untold hardship to those who were granted admission in pursuance of policy which till today was not in dispute. To protect their interest but without depriving petitioners of their Constitutional right following directions are issued. But before doing so it is necessary to be clarified that the writ petitions which were heard and are being decided can be classified as one, of candidates who were in the merit list, second those who were not in merit list but claim that admission having been granted in pursuance of admission policy to candidate with 40% only they too were entitled to be admitted. Third the candidates who had applied for admission to B.Sc (Ag.). In the first group are petitioners in Civil Misc. Writ Petition Nos. 15952, 16695, 16045, 16792, 17745, 16794, 16793 and petitioners Nos. 1, 2 and 4 of Civil Misc. Writ Petition No. 17767. In the other group are petitioners in Writ Petition Nos. 20705, 20107, 17567, 17568, 17569, 17654, 17655, 16044, 20708, 22574, 17656, 17657, 17658, 17763 17843, 18466, 19958, 18541, 26881 and 22724. In Civil Misc. Writ no 16696 the petitioner claims that he secured 70% marks in the entrance test. His name however, does not appear in merit list. The opposite party shall check it and if it is an omission only then he shall be placed in first group and shall be entitled to same relief. Civil Misc. Writ No. 17810 and 18566 relate to admission to B.Sc. (Ag.). No merit list has been filed. But the admission policy has been quashed, If petitioners were entitled on merit but they were denied only because of reservation policy then their case shall become at par with group one. Civil Misc. Writ No. 17766 relates to admission to I. Sc. (Ag.) but this too is governed by the ratio laid down for first group.

Consequently:

(1) Admission policy of the Institute reserving seats for various categories 1 to 4 for Ist year course being in violative of Article 29(2) is quashed. (2) Candidates of writ petition Nos. 15952, 16695, 16045, 16792, 17705, 16794, 16793, 1, 2 and 4 17767 of and petition No. 13 of 18466 are entitled to be admitted to B.Tech. Ist year and petitioners of Civil Misc. Writ No. 17810 and 18566 are entitled to be admitted to B.Sc. (Ag.) and of Civil Misc. Writ No. 17766 to I. Sc. (Ag.). The opposite parties shall admit them in the Session 1988-89. The petitioner of Civil Misc. Writ No. 16696 shall be granted admission only if the marks obtained by him would have entitled him to be placed in the merit list.

(3) Candidates who have been admitted in pursuance of admission policy which has been found to be ultra-vires shall not be displaced.

(4) Since admission of students with 40% marks or with higher marks but lower, than those who have been denied admission is being maintained not because it was valid but to avoid any hardship to them it cannot furnish any ground for granting admission to candidates who were not in the merit. Therefore, the remaining petitions and part of Civil Misc. Writ No. 1776 of 1988 are dismissed.

Parties shall bear their own costs.