

(1996) 03 KAR CK 0018
In the Karnataka High Court
Case No : WPs. 2380/95 and 11840/94

Smt. B.S. Gowramma

APPELLANT

Vs

Joint Director of Public Instructions and Others

RESPONDENT

Date of Decision : 21-03-1996

Acts Referred:

Citation : (1996) ILR (Kar) 3032 : (1996) 6 KarLJ 584

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : T.N. Raghupathy, for the Appellant; A.V. Sreenivasa Reddy, Additional Govt. Advocate for R-1 to 4, R.B. Sadashivappa, for R-5 and Ravish Benni, for R-6, for the Respondent

Judgement

M.F. Saldanha, J.—This is a hotly contested litigation and one which has a background in so far as it has been preceded by some earlier proceedings which resulted in directions being issued by this Court, to which I shall make a reference. The point involved is one of some consequence in so far as it concerns an issue which is being agitated in this and several other proceedings, viz., the question as to whether in the case of commerce institutes the one kilometer rule is required to be followed or not. There is no dispute about the fact that the relevant rules prescribe that in the case of urban areas a distance of at least one kilometer is required to be maintained between similarly situated institutes. The reason for this is very obvious in so far as the intention is basically to avoid overcrowding and unhealthy competition. When those factors are present, quite apart from interse disputes. The economic and survival of each of the persons running these institutes gets encroached upon or threatened and the regulations therefore prescribed that a minimum distance of 1 km are to be maintained. Also there is a subsidiary objective viz., the fact that these institutes must preferably be located in different parts of the town or city in order to cater to the local requirement of the area, and therefore, the rule effectively contributes to a degree of decentralization. I have referred to these aspects of the matters because there is a challenge in the petition to the validity of Regulation 3(1) of

the Rules for Commerce Education and the prayer is that the rule should be struck down.

2. Dealing first with the Rule itself, the petitioner who had applied for starting of a commerce institute in the year 1991 and to whom permission was granted on 18.7.92 ran into difficulties because the 5th respondent which was an earlier established institute in that very area, objected to the petitioner being granted permission on the ground that the 1 km rule was infringed. In the course of the various legal proceedings the distances between the two institutes have been measured and the fact remains that the petitioner is within the prohibited radius of 1 km. It is however their contention that the situation of Tumkur town and the development has been such in the course of the last two years, that there are more than enough students available for both the institutes and more importantly what is contended is that the transport facility being sufficiently good and the distances being small that there is no valid or serious ground on which R-5 could object to the petitioner being granted permission. The fact remains that an order was passed against the petitioner's application and they were required to approach this Court on an earlier occasion. My brother Raveendran, J., who disposed of the earlier petition viz., W.P. 27372/93 decided on 2.2.94 had occasion to observe that the rule in question was directory and not mandatory and that therefore the Authorities must reconsider the matter on merits rather than on technicalities and pass a fresh order. The 5th respondent took the matter to the Civil Court and obtained certain injunction orders which were thereafter vacated and the petitioner's Learned Advocate submits that up to the present point of time, that matter has not made any headway at all. The petitioner has also alleged that the 6th respondent who is the Assistant Director of Public Instructions responsible for having sided with the 5th respondent and certain reasons have been set out in support thereof. R-6 has filed his affidavit denying these charges and he states that he has acted strictly in accordance with what he was required to do and merely because the order has gone against the petitioners, that they have chosen to make allegations against him. The Learned Advocate has submitted that there is absolutely no warrant for the parties who may be disputing among themselves to unnecessarily drag the names of the officers into the controversy. I am in agreement with this submission and even though it may be that one or the other party is unhappy with the developments, it is unnecessary and to my mind on the facts of this case improper, to impute motives to any of the officers. It is open to the petitioner's Learned Advocate to attack the order on merits which he has done and the principal ground canvassed by him is that there has been non application of mind which I shall deal with. But, apart from this, it is unnecessary to go into any aspect of personal malafides.

3. Coming to the aspect of challenge to the validity of the rule, the principal submission canvassed by the petitioner's Learned Advocate is that the rule if read to be an inflexible regulation is arbitrary, impractical and therefore unreasonable and is consequently liable to be struck down. What he demonstrates is that there are many factors which this rule does not take into

consideration, the first of them being that the parties very often do not have much choice with regard to the location of their place of business. Quite apart from economic factors, there are several other conditions that impose severe limitations with regard to the choice of location and the Learned Advocate submits in such a given situation it may be well nigh impossible for a party to locate the institute at a place which is more than 1 km radius from any existing ones. He also demonstrates that one of the unfortunate features of urbanization that has hit even small towns not to speak of cities, is that congestion has become the order of the day and in this background, the radius of 1 km, if strictly observed, would impose impossible restrictions. It is in this background he submits that the rule itself requires to be struck down.

4. The Learned Government Advocate has submitted that this is a well considered provision and that experience has shown that even as far as educational institutions are concerned that a certain separation in distance is an absolute necessity. Apart from the aspect of distance, the question of unhealthy competition which affects similarly situated institutes and more importantly the inevitable serious implications that would follow shall have to be taken into consideration while insisting on the 1 km barrier while giving sanction. In an urban set up the Learned Government Advocate submitted that 1 km is a negligible distance and that there is valid ground for insisting upon that much of separation.

5. There are many aspects which require to be looked into as far as this regulation is concerned. There are also local peculiarities because the development of particular areas does not follow any prescribed patterns. These commercial institutes have a wide popularity and they not only attract young people but also elder persons who take advantages of their professional courses with the advent of improving business the number of courses have undoubtedly grown and various machines and systems have also become essential to even employed persons and a persons of the business community. In this background therefore, one needs to take cognizance of the fact that the institutes may require to have to be located in an area where there is enough scope for business. In a given instance, the proximity to the business area may be justified whereas in other instances the convenience or the proximity of a residential area may be justified whereas in the third instance their being close to educational institutions may be useful. The variety of all these factors is something that is required to be assessed rationally and reasonably and added to this fact one has to take cognizance of one other aspect viz., that in certain towns and cities there is a tendency for similar activity to congregate in a particular area. If this is the local norm then one may find that all business of a particular type has a tendency to be located in a particular area. The underlying requirement of 1 km is undoubtedly reasonable because this separation in distance is not much and having regard to the fact that these institutes compete among themselves, the rule that has been promulgated does appear to be perfectly justified. Read as it is, there is nothing wrong with the rule, but in applying this rule disputes and

challenges have cropped up. It is for this reason that my brother Raveendran, J., observed that the rule must be treated as directory rather than mandatory and this was also confirmed by the Division Bench when the matter was arrived in appeal. In this background, therefore, to my mind it is unnecessary to strike down the rule, but it is equally necessary to water it down slightly as far as its application is concerned.

6. The petitioner's Learned Advocate has attacked the impugned rule principally on the ground that the various factors essential to be considered and which I have had an occasion to deal with have been totally ignored. At one stage, I had suggested to the Learned Advocate to ascertain the feasibility of his client moving to a distance of 1 km or more than that, but after obtaining instructions, the Learned Advocate submitted that despite making efforts, this is not possible. The petitioner's Learned Advocate does appear to be justified when he points out that despite a remand from this Court the Authorities have still mechanically rejected the petitioner's application on the ground that the 1 km rule is infringed. While passing these orders, the Authorities have squarely overlooked the interpretation of the rule at the hands of the Learned Single Judge as also the Division Bench. I do not dispute the fact that the Learned Advocate who represents respondent No. 5 submitted that the rule is not only valid but that it imposes a reasonable restriction on the right to do business within the prescribed area and if this is so, that the rule must be enforced as it is and that it cannot be by-passed as the petitioners contend it should be done. The Learned Government Advocate also defended the order on the ground that even if the other aspect of case were pointed out to the Authorities and even assuming they have overlooked this fact since it is recorded earlier that the petitioners are within the prohibited area, then, no other factors are required to be taken cognizance of. I am unable to uphold this view because, with the passage of time the Courts have to take a realistic approach even with regard to the approaches in these cases and it is the totality of the various factors that matters. This Court has held that as far as educational centres are concerned the Authority is required to examine the question as to whether any real loss or damage would accrue to the institutions if they are situated close to each other and more importantly the question as to whether there is enough potential for them to run the institutions in that area. It is basically these angles which require to be locked into.

7. At this stage, I need to refer to a few of the decisions which the petitioner's Learned Advocate has relied on. In support of his plea that there has been non-application of mind, the petitioner's Learned Advocate relied on the decision in the case of Fathima Unnissa Vs. State of Karnataka, where even though the Court was concerned with a provision of the Grant-in-Aid-Code, the order came to be struck down on the ground that it was mechanically passed without due application of mind. The law in this regard is well defined in so far as the Authorities are not required to write elaborate judgments, but what is necessary is that the order must be supported by brief grounds or reasons which are relevant and which must pass the test of legal scrutiny. If the approach is

arbitrary, technical or mechanical the order is bound to fail on the ground of non-application of mind because it was very clear that it was not a reasoned or reasonable order.

8. As regards the quality of the order, the petitioner's Learned Advocate has relied on one of the leading decisions of the Supreme Court reported in the case of Commissioner of Police, Bombay Vs. Gordhandas Bhanji, where the Court emphasised the well known principle that the order must be a self-contained one capable of being upheld on the basis of intrinsic material. Learned Advocate submits that the various justifications that are now sought to be pleaded in support of the order consisted of material that has been grafted on, which is something that is not legally permissible. He has further elaborated his submission by relying on the decision of the Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, wherein the Supreme Court very clearly disapproved of situations where cryptic or inherently unsustainable orders sought to be propped up on the basis of the material that subsequently followed through affidavits and the Court held that such a procedure cannot be permitted. The Supreme Court had occasion to rely on the decision referred to by me later. The petitioner's Learned Advocate has also drawn my attention to a case reported in the case of Indian Iron and Steel Co., Ltd. and Another Vs. Their Workmen, wherein the Court deprecated the situation which sometimes comes about where the particular officer acts as the mouthpiece of some other officer. The Court held that the Authority has to proceed on the basis of an independent consideration and is not permitted to voice some other persons thoughts and views. I do concede that the impugned order in this case which merely states that the permission is rejected on the ground that the petitioner has infringed the 1 km rule is certainly vulnerable when tested from the aspect of any of the aforesaid principles. Petitioner's Learned Advocate submitted that merely because the Municipal Authorities pointed out that the petitioner has infringed the rule that the R-5 has straight-away passed the order without independently assessing as to whether any real damage or injury would result. In any event, I am not satisfied that the 1st respondent has considered the case from the various angles that are required for evaluation, and to this extent, therefore, the impugned order is liable to be quashed and set aside.

9. There is one more aspect on which the petitioner's Learned Advocate dealt with while considering the question of validity and which to my mind is of consequence. I have indirectly referred to that feature while mentioning the fact of circumstances which need consideration and the petitioner's Learned Advocate has relied on a decision of this Court reported in H. Padmanabha Rao Vs. State of Karnataka, wherein the Division Bench of this Court while considering the validity of Section 31 of the Karnataka Rent Control Act had occasion to observe that the effect an economics or economic conditions over the passage of time is a very basic and valid factor which the Courts must bear in mind particularly while considering the implications of various statutes and the

effect of the passage of time. Petitioner's Learned Advocate referred to the change of circumstances as the result of urbanisation which is one of the relevant factor of the case which the authority did not consider. In this context the Learned Government Advocate pointed out that an earlier decision of this Court in the case of SRI INSTITUTE OF COMMERCE v. STATE OF KARNATAKA 1981(2) KarLJ 193 which has not been brought to the notice of my brother Raveendran, J., when this case was decided on the last occasion. The petitioner's Learned Advocate had distinguished that decision on two grounds, firstly by pointing out that the Court was only concerned with the aspect of locus viz., the question as to whether the right of the Government to grant recognition to a new institution could be questioned by a third party as the matter was purely between the State and the party to whom the permission was granted. This Court held that in so far as the party approaching the Court was aggrieved by the decision that it was permissible. Petitioner's Learned Advocate also heavily relied on the fact that the decision is 15 years old and that there has been a tremendous change in economic condition and all other factors which would require that those views should be reconsidered by the Courts. I am in agreement with his submission because the Courts are required to move with the times and to take a practical and realistic view of the situations that are more contemporary and therefore the decision in question would not in any way affect the view which this Court is now required to take.

10. It is in these circumstances, that this Court is required to uphold the validity of the rule and also direct that while applying this rule even though the Authorities shall as far as possible ensure that there is a separation distance of him between similarly situated institutes that in given cases, it would be permissible to water down that rule, if the other circumstances so justify. It is in this background that the respondents will have to reconsider the case in its entirety and to pass fresh orders. He shall give the petitioner and the 5th respondent an opportunity to submit in writing if they so desire, whatever material or objections that they may have, but this will have to be done within eight weeks from today. The first respondent shall thereafter reconsider the case from all relevant angles particularly in the light of the observations made by this Court and the guidelines that emerge. The order in question shall thereafter be communicated to the petitioner and it is directed that no coercive steps of any type shall be taken against the petitioner or their students during the interim period. The R-1 shall try to ensure that the orders in this case are passed expeditiously and that there is no undue delay. This Court also takes note of the fact that the officers concerned are even otherwise over-burdened and therefore, directs that the matter shall be disposed of within a reasonable time. It is further clarified that until these orders are communicated to the petitioners, they shall be permitted to continue and the students shall take their examinations from time to time. The petition accordingly succeeds to this extent. Rule is accordingly made absolute. No order as to costs. Learned Government Advocate is permitted to file his memo of appearance within three weeks.

In the light of the orders passed in this Writ Petition, the companion W.P. 11840/94 does not require any separate orders or directions being unnecessary, the same to stand disposed of.