
(2016) 06 KL CK 0039
In the High Court Of Kerala
Case No : W.P.(C) No. 30712 of 2015

Sobha George Adolfus

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 10-06-2016

Acts Referred:

Constitution of India, 1950 — Article 12, 21, 21A, 226

Citation : (2016) AIR(Kerala) 175 : (2016) 3 ILRKerala 412 : (2016) 3 KHC 809 : (2016) 3 KLT 271 : (2016) 3 SCT 825

Hon'ble Judges : A. Muhamed Mustaque, J.

Bench : Single Bench

Advocate : John Jude Issac, for the Appellant; Government Pleader, Gikku Jacob, Devan Ramachandran, Advocate, S.P. Aravindakshan Pillay, Smt. N. Santha, K.A. Balan, V. Varghese, Peter Jose Christo, S.A. Anand, Smt. L. Annapoorna, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

A. Muhamed Mustaque, J.—Petitioner is the grandmother of a child, by name, Acquin Victor, a student of 6th standard in St.Joseph Public School, Pattanakkad, Cherthala, the 3rd respondent herein.

2. The issue in this writ petition is about the denial of promotion to the child from 6th to 7th standard by the 3rd respondent school during the academic year 2015-16. Petitioner's claim is based on Section 16 of the Right to Education Act (hereinafter referred to as the "RTE" Act, for short). Petitioner approached the various authorities, including the Government. Though the Government appeared to have issued certain directions, those directions have not been complied with by the school authorities, stating that, the school is an unaided recognised minority institution. It is also seen that an order has been passed by the Kerala State Commission for Protection of Child Rights, Thiruvananthapuram, recommending the school authority to promote the child from 6th to 7th standard, forthwith. The order was passed on 13.10.2015. However, all attempts

of the petitioner ended in vain, on account of non-compliance. Accordingly, the petitioner approached this Court.

3. In the counter filed by the school authority, a certificate issued by the Government of India has been produced, conferring minority status to the school. Therefore, it is contended that, in the light of the judgment of the Hon"ble Supreme Court in *Pramati Educational and Cultural Trust v. Union of India*, 2014 (2) KLT 547), the petitioner, cannot claim any right based on Section 16 of the RTE Act.

4. The question in this writ petition is, "does a child have a right to promotion in a minority institution upto elementary school level?".

5. The question, as above, would depend upon the maintainability of the writ as against a private unaided school. Therefore, before considering the issue of the right claimed by the petitioner, it is appropriate to refer to the nature of function being discharged by the school authority.

6. The nature of the function has to be considered to determine whether a particular body is amenable to writ jurisdiction. If the school discharges the State function or public function, necessarily, the functional duty carried out by the school, to that extent would be amenable under Article 226 of the Constitution.

7. This Court in *Karthikeya Varma v. Union of India* [2015 (3) KLT 424] had adverted to the approaches to be made to determine the public function, which is structural approach and functional approach.

8. The structural approach is about an entity, though a private body, but whose control, financially or functionally or administratively, is vested with the State. The functional approach is essentially about the function discharged by that body.

9. In this case the issue cannot be approached as though the school is a State or other authority, considering the nature of composition of the entity, within the meaning of Article 12 of the Constitution. However, it can be treated as one, coming under the functional activities of the State, in imparting education.

10. The Hon"ble Supreme Court in the case of *Dr. Janet Jeyapaul v. SRM University & Anr.* in AIR 2016 SC 73], held that, imparting higher education is a public function. In this case, the school is affiliated to the Council for the Indian School Certificate Examination, New Delhi. The recognition granted to the school to impart education is through a deemed agency, created under the State, for imparting education. In *Mohini Jain (Miss) v. State of Karnataka and others* [(1992) 3 SCC 666], it was observed by the Hon"ble Supreme Court that:

"Right to life" is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the

right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens."

11. In *J.P. Unnikrishnan v. State of Andhra Pradesh* (1993) 1 SCC 645], the Supreme Court held as follows:

"The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles of Part IV of the Constitution."

12. Imparting education is a State function. Therefore, when a private entity performs such a State function, it can be treated as a discharge of public function by the private body. In *Islamic Academy of Education v. State of Karnataka & others* (AIR 2003 SC 3724), it was observed as follows:

"Imparting education is a State function. The State, however, having regard to its financial and other constraints is not always in a position to perform its duties. The function of imparting education has been to a large extent, taken over by the citizens themselves. Some do it as pure charity. Some do it for protection of their minority rights whether based on religion or language and some do it by way of their occupation. Some such institutions are aided by the State and some are unaided."

13. In *Marsh v. Alabama* (3) 326 US 501; 19 L.ed.265, it was opined by the Hon'ble Supreme Court of the United States that where a private corporation is privately performing a public function, it is bound by the constitutional standard applicable to State actions.

14. In *Binny Ltd. v. V. Sadasivan* [(2005) 6 SCC 657], the Hon'ble Supreme Court held in para. 11 as follows:

"....A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest..."

15. The State under Article 21A of the Constitution is obliged to provide free and compulsory education upto the age of 14 years. Thus, there may not be any difficulty in holding that, even an unaided educational institution imparting education to the children upto the age of 14 years is discharging a State function. Thus, a writ petition would be maintainable as against a private body which discharges a State function of imparting education to the children upto the age of 14 years.

16. RTE Act is an enactment that is flowing from Article 21A of the Constitution. Under the Directive Policies of State, the State is duty-bound to take measures to provide education. The Constitution by its 86th amendment added Article 21A to carry out the above duty by declaring it as a fundamental right of all children in

the age of 6 to 14. The right to education is thus implicit in the right to life. Thus, Article 21A has to be understood as a species of the larger genus of the rights protected under Article 21.

17. Section 16 of the RTE Act stipulates that no child admitted in school shall be held back in any class or expelled from the school, till the completion of elementary education. The RTE Act, no doubt, has no application in the case of a minority school, referred to in Article 30(1) of the Constitution. In *Pramati Educational and Cultural Trust's case* (supra), the Supreme Court held in Para. 46 as follows:

"Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. While discussing the validity of clause (5) of Article 15 of the Constitution, we have held that members of communities other than the minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr.* (supra) insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct. "

18. Thus, as rightly argued by the learned counsel for the School, Sri. Aravindakshan Pillai, RTE Act has no application in a minority school, whether aided or unaided. However, the Court has to examine whether Section 16 of RTE Act is a mere statutory right or can be treated as a fundamental right expressed in the form of statutory provision. If it is a mere statutory right, no relief can be granted to the petitioner's grandchild, as he is admittedly undergoing his studies in 6th standard in an unaided minority school. However, if the right, as referred above under Section 16 can be considered as a fundamental right, forming part of "life," as envisaged under Article 21, the issue would survive for consideration in the writ petition.

19. In modern deontology, most of the human rights are expressed in the political document as fundamental rights. To claim a right as a human right, one has to look at the moral condition of the interest related to human in the domain or space in which it is asserted. If such right has gained acceptance as a value in the social sphere or in the space in which it is claimed and treated as an essential pre-requisite for existence of human interest as a part of life the Court need not be hesitant to recognise such right. While interpreting Article 21 of the Constitution, the Court must bear in mind the duty of the Court to give horizontal effect of value as the right to life has evolved through International Conventions,

U.N Resolutions etc. If those norms are compatible with domestic law, the Court is obliged to apply such values or "norms" horizontally between private individuals. It is to be noted that the best interest of children has already become an accepted "norm" under the Juvenile Justice (Care and Protection of Children) Act, 2015.

20. The fundamental right guaranteed under Article 21 has been given horizontal application in several judgments of the Hon"ble Supreme Court by applying into private actions. In Consumer Education & Research Centre and others v. Union of India and others [1995 (3) SCC 42], the Hon"ble Supreme Court in a challenge made in a Public Interest Litigation ordered enforcement of fundamental rights as against private employees by directing them to provide protective measures to the workmen. It was observed at para.24 as follows:

"... The right to human dignity, development of personality, social protection, right to rest and leisure are fundamental human rights to a workman assured by the Charter of Human Rights, in the Preamble and Articles 38 and 39 of the Constitution. Facilities for medical care and health to prevent sickness ensures stable manpower for economic development and would generate devotion to duty and dedication to give the workers best physically as well as mentally in production of goods or services. Health of the worker enables him to enjoy the fruits of his labour, keeping him physically fit and mentally alert for leading a successful life, economically, socially and culturally. Medical facilities to protect the health of the workers are, therefore, the fundamental and human rights to the workmen."

It was also observed at para.28 as follows :-

"... in an appropriate case, the court would give appropriate directions to the employer, be it the State or its undertaking or private employer to make the right to life meaningful; to prevent pollution of workplace; protection of the environment; protection of the health of the workman or to preserve free and unpolluted water for the safety and health of the people. The authorities or even private persons or industry are bound by the directions issued by this Court under Article 32 and Article 142 of the Constitution."

The Hon"ble Supreme Court while interpreting Article 23 of the Constitution in the People"s Union for Democratic Rights and others v. Union of India and others [AIR 1982 SC 1473] held that Article 23 of the Constitution protects individuals not only against the State but also against private citizens and it was further held at para 16 as follows :

"... whenever any fundamental right which is enforceable against private individuals such as, for example, a fundamental right enacted in Article 17 or 23 or 24 is being violated, it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same. Of course, the person whose fundamental right is

violated can always approach the court for the purpose of enforcement of his fundamental right, but that cannot absolve the State from its constitutional obligation to see that there is no violation of the fundamental right of such person, particularly when he belongs to the weaker section of humanity and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him."

The Hon"ble Supreme Court in *Zee Telefilms Ltd. and another v. Union of India and others* [(2005) 4 SCC 649] defined the extent and scope of horizontal application of the fundamental rights against non State actors. The majority view was as follows:

"There is no doubt that Article 19(1)(g) guarantees to all citizens the fundamental right to practise any profession or to carry on any trade, occupation or business and that such a right can only be regulated by the State by virtue of Article 19(6). Hence, it follows as a logical corollary that any violation of this right will have to be claimed only against the State and unlike the rights under Articles 17 or 21, which can be claimed against non-State actors including individuals, ..."

Thus, a fundamental right can be enforced even as against a private minority school in the light of the discussions as above.

21. In United Nations Convention on the Rights of Child (UNCRC), it is stated that, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (see Article 3(1) of the UNCRC).

22. In an Article written by Milka Sormunen under the title "In All Actions Concerning Children?" in the *International Journal of Children's Rights* [Vol.24, No.1, 2016], the author explains the nature of right referred in Article 3(1) of the Convention on the Rights of the Child (UNCRC) as follows:

"Of the two central changes brought by the CRC to the concept of the best interests of the child, the study presented in this article concentrates on the obligation to consider the best interests of the child in all actions concerning children. The second significant change, the connection of the best interests to the human rights of children, is equally important."

The "best interest" principle has thus become the focal point of many human right guidelines such as United Nations, High Commission for Refugees, (UNHCR) *Guidelines for Determining the Best Interest of the Child*, 2008.

23. It appears that to retain status of the best interest of the child to secure adequate standards of educational rights, Section 16 of RTE Act has been enacted. Section 16 of RTE Act epitomizes universally accepted principle of best interest status of the child, while evolving adequate standards of educational rights by the State. The goal of Section 16 appears to be to remove psychological

barriers that are likely to be sown in the mind of the child, consequent upon the denial of promotion. Some of the studies herewith indicate the above aspect.

At Chapter 10 entitled "Policy Implications of Retention Research", Ernst R House in *Flunking Grades: Research and Policies on Retention* (Lorrie A. Shepard, Mary Lee Smith eds., 1989) says that:

"The effects of flunking are immediately traumatic to the children and the retained children do worse academically in the future, with many of them dropping out of school altogether. Incredibly, being retained has as much to do with children dropping out as does their academic achievement. It would be difficult to find another educational practise on which the evidence is so unequivocally negative.

Better ways of dealing with low achieving students are ignored. Certain groups - males, the poor, and minorities - suffer disproportionately. That is, the interests of particular groups of people are served at the expense of other social groups, All this is legitimated by theories, arguments, and language that turn out to be spurious upon inspection. Retention has all the signs of an entrenched ideology rather than a simple educational belief which happens to be wrong.

... Almost everything points in the same direction - retention is an extremely harmful practise.

The blame is most often placed upon the students personally for not availing themselves of the educational opportunities rather than upon the social system itself. Retaining students appear to be a way of instilling the needed skills, though in reality it is a way of increasing the likelihood that students will eventually drop out of school. Blame is deflected away from society and onto the individual students and their families."

In *Grade Retention: Good or Bad? A Review of the Literature*- Kelley Stapleton and Rebecca A. Robles-Piqua, Sam Houston State University -

"Research suggests that retention can cause a variety of negative socio-emotional outcomes. One study by Byrnes (1989) indicated that retention increases the level of stress secondary students feel. The results of this study, consisting of grade 6 students, equated retention with the loss of a parent or going blind (Byrnes, 1989). Of the students surveyed, 87% said retention depressed them (Byrnes). Accordingly, the study demonstrated that retaining children versus promotion including intense interventions and remediation does in fact impact their emotional state and feelings. Jimerson et al. found that teachers need to think about the socio-emotional state of the children when they begin interventions for academics or behaviour (Jimerson et al., 2006). They also studied the effect of the child's home life and socioeconomics and how they affected the child's attitude towards school and teachers. They discovered that retention is not the only event that will cause negative feelings in a child's life; however, retention is a result of a child's current and previous development at

home and in school that causes a large portion of the emotional disturbances and negative feelings students display. Clearly, these studies demonstrate that retention is ineffective in solving early problems such as immaturity, learning disabilities, low self-concept, and maladaptive behaviour. For that reason, students need involvement in activities that facilitate development and growth during the school year."

In a publication by the National Association for School Psychologists, *Grade Retention: Achievement And Mental Health Outcomes* by Gabrielle E. Anderson, Angela D. Whipple and Shane R. Jimerson of the University of California observed that:

"Analysis of multiple studies of retention indicate that retained students experience lower self esteem and lower rates of school attendance, relative to promoted peers (Jimerson, 2001). Both of these factors are further predictive of dropping out of school. Indirectly, low self-esteem and poor school attendance influence adult outcomes. Students who ultimately drop out of school without a diploma face considerable difficulty finding and maintaining employment for self-sufficiency and experience higher rates of mental health problems, chemical abuse and criminal activities than do high school graduates. There are several explanations for the negative effects associated with grade retention, including:

- i) Absence of specific remedial strategies to enhance social or cognitive competence;
- ii) Failure to address the risk factors associated with retention (short-term gains following retention mask long-term problems associated with ineffective instruction).

Retained children are subsequently overage of grade, which is associated with deleterious outcomes, particularly as retained children approach middle school and puberty (stigmatization by peers and other negative experiences of grade retention may exacerbate behavioural and socio-emotional adjustment problems)"

24. The child upto the elementary school level is in the process of evolving a personality. In this formative period, the child conditions his learning skills without discretion. The fixation standard upto elementary school in Section 16 of RTE Act is obviously by taking into account adolescence of the children. On pubertal changes, adolescents become more independent and would be in a position to assess their own ability and can mould themselves to correct the defects existing in their performance. Any denial of promotion before reaching the age of discretion would have an impact on their emotional state and feelings, and in that sense, it amounts to negation of "best interest value" horizontally affecting right to life of the child.

25. It is to be noted that, if a child with normal ability fails in any examination conducted by the school, it must be treated as the inability of the teachers of the

school. If the child suffers from any cognitive skills in performance, the school authorities must address the issue through compensatory education. Any treatment of issue related to non-performance by denying promotion, no doubt, can be treated in the light of the afore-noted study as a negative approach denouncing the best interest status of the child about his educational needs or requirements. Section 16 of RTE Act, in fact, commands all school authorities to initiate a constructive approach in moulding the best interest status of the child upto elementary school level. Articles 28 and 29 of the UNCRC oblige the State to take measures to protect the right of a child to education. Specifically Article 28(e) provides that the State is obliged to take measures to encourage regular attendance at school and reduction of drop out rates. Article 29 of the UNCRC also directs the State to take steps for the development of child personality and to respect human rights and fundamental freedom and for the principles enshrined in the Charter of UNCRC. Thus, the best interest principle obliges every State and non State actor to obey the directives. Thus, it is a constitutional obligation for every State and non State actor to ensure reduction of drop outs from the school by taking affirmative actions to secure "best interest" of the children. In an article "No detention doesn't mean no exams", written by Akshaya Mukul in the Times of India dated 4th June, 2013, the dropout rates after the enactment of the RTE Act based upon a report of the Ministry of Human Resources and Development, have been referred to. It reads as follows:

"... It has also been revealed through analysis of District Information of System of Education data that learning ability in states with no-detention is on the rise. The report clarifies no-detention does not mean no examination should be conducted.

... The HRD report while setting straight many misconceptions about Continuous & Comprehensive Evaluation said 25 states have fully implemented it, and introduced some kind of written examination that ranges from paper pencil test, semester end test, summative as well as formative assessment. The report points out that the annual drop out rate was 9.1% in 2009-10, a year before the RTE came into force, which further dropped to 6.8% in 2010-11 and 6.5% in 2011-12. Repetition rate, percentage of students repeating same class, was 3.9% in 2009-10, which went up to 5.1% in 2010-11 and further came down to 3.2% in 2011-12..."

It is evident that after RTE came into force, the dropout rate has been reduced considerably.

26. Thus, as has been noted above, denial of promotion upto elementary school level in minority schools also would amount to denial of fundamental rights of the child, as it would have a direct bearing on the right to life of the child guaranteed under Article 21 of the Constitution.

27. Next point to be examined is; what is the extent of right that could be claimed by a minority educational institution in relation to the fundamental right

claimed by a child. Article 30 (1) of the Constitution protects the rights of the minorities to establish and administer educational institution of their choice. This is essentially a right to create a feeling of security among minorities and a declaration that they will be treated at par with the majority in all respects. Minority institutions have no superior right that can be claimed by them in terms of the Constitution to deny rights of others. The right, as guaranteed under Article 30(1), is to protect the mere right to retain the character of the distinct nature of the culture, social identity, etc. of the minority status. Thus, the special provision is provided to permit them to establish and administer institution such that it retains its identity and character. No minority can be heard to say that to protect their identity, they have a right to trample upon the rights of others which are asserted or claimed not in derogation of goals of Article 30(1) of the Constitution. No right of minority will be affected if a child is ordered to be promoted to a higher level class. As has been noted, protection as envisaged under the Constitution is to protect the minority character of the educational institution. Therefore, when denial of others' rights by such institutions have no nexus or relation with the object of the protection, court has to denounce upon such claim. In the Ahmedabad St.Xavier's College Society and another v. State of Gujarat and Another (1974 (1) SCC 717), it was observed as follows:

"The whole object of conferring the right on minorities under Article 30 is to ensure that there will be equality between the majority and the minority. If the minorities do not have such protection, they will be denied equality."

It was further observed that--

"The right which has been conferred by Article 30(1) is on two types of minorities. Those minorities may be based either on religion or on language. The right conferred upon the said minorities is to establish and administer educational institutions of their choice. The word establish" indicates the "right to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institution. Administration connotes management of the affairs of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. The words "of their choice" qualify the educational institutions and show that the educational institutions established and administered by the minorities need not be of some particular class; the minorities have the right and freedom to establish and administer such educational institutions as they choose."

It was again observed that--

"The right to administer is said to consist of four principal matters. First is the right to choose its managing or governing body. Second is the right to choose its teachers. Third is the right not to be compelled to refuse admission to students. Fourth is the right to use its properties and assets for the benefit of its own

institutions."

28. Therefore, this Court is of the view that, protection under Article 30(1) is not available to a minority educational institution to hold back any child in any class upto elementary education.

29. In this case, the child was held back from promotion to 7th standard for the academic year 2015-16. It is now admitted that the child has been promoted to the 7th standard for the academic year 2016-17.

30. Learned counsel appearing for the petitioner submits that the child should be promoted to 8th standard. as he was illegally detained without promotion for the last academic year.

31. This court is of the view that, if the court orders such promotion, without the child undergoing 7th standard, it would be against the best interest of the child. However, at the same time, the court will not remain oblivious to the negation of fundamental rights when court cannot give relief sought in the writ petition. The Court can mould relief to remedy the loss by way of compensation.

32. The Supreme Court in Rudul Sah v. State Of Bihar (AIR 1983 SC 1086) held as follows :-

"But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right."

33. Further in Smt. Nilabati Behera Alias Lalita Behera v. State Of Orissa And Ors., AIR 1993 SC 1960), it was observed:

" The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilise public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court molds the relief by granting compensation" in " proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen."

34. This Court is of the view that a sum of award of Rs. 25,000/- as compensation would secure the ends of justice. The school authority is directed to deposit the amount in a fixed deposit till the child attains the age of 18 with a

provision to draw the interest for the benefit of the child. This Court is also of the view that the cost shall follow the event. The school authorities, in spite of the direction from the Government and Kerala State Commission For Protection of Child Rights, have refused to promote the child. Therefore, a sum of Rs. 10,000/- shall be paid as cost to the petitioner. The deposit and cost shall be made within a period of one month from the date of receipt of a copy of this judgment. The writ petition is disposed of with the above observations and directions.