

(2017) 11 CHH CK 0014
In the Chhattisgarh High Court
Case No : 1001 of 2016

St. Anns English Medium School

APPELLANT

Vs

The State of Chhattisgarh & Ors.

RESPONDENT

Date of Decision : 27-11-2017

Acts Referred:

Constitution of India, Article 14, Article 21A, Article 226, Article 19, Article 51A, Article 30 - Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions - Right to education. - Power of High Courts to Issue certain writs - Protection of certain rights regarding freedom of speech, etc - Fundamental duties - Right of minorities to establish and administer educational institutions
National Commission for Minority Educational Institutions Act, 2004, Section 2(g), Section 12B, Section 11(f) - Definitions - Power of Commission to decide on the minority status of an educational institution. - Functions of Commission
Right Of Children To Free And Compulsory Education Act, 2009, Section 12(1)

Citation : (2017) 11 CHH CK 0014

Hon'ble Judges : Sanjay K. Agrawal

Bench : Single Bench

Advocate : P. George Giri, Kishore Narayan, Prasun Kumar Bhaduri, B. Gopa Kumar

Judgement

1. The petitioners - educational institutions claiming to be the minority unaided private educational institutions under Article 30(1) of the Constitution of India, invoking the writ jurisdiction of this Court under Article 226 of the Constitution of India, have filed these writ petitions for enforcement of their fundamental rights guaranteed under Articles 30, 14 and 19 of the Constitution of India restraining the State Government from initiating adverse action de-recognising them and questioning the impugned order directing them to produce certificate of religious minority institution by the State Government failing which the petitioners schools will be derecognised for not admitting 25% students as provided in Section 12(1)

(c) of the Right of Children to Free and Compulsory Education Act, 2009 (for short, "the RTE Act, 2009").

2. Essential facts necessary to adjudicate the plea raised at the Bar are as under:

- 3. 1) It is the case of the petitioners that they are the Christian Minority Unaided Educational Institutes having minority status certificate issued to them by the National Commission for Minority Educational Institutions under the National Commission for Minority Educational Institutions Act, 2004 (for short, "the NCMEI Act, 2004"). In W.P.(C)Nos.1001/2016 and 1007/2016, the minority status certificate was granted on 26-5-2011 and in W.P.(C) Nos.1005/2016 and 1006/2016, the said certificate was granted on 21-1-2015. Thereafter, the Nodal Officer of the RTE i.e. the Principal of Government Higher Secondary School, Raigarh, directed the petitioners to admit 25% free seats under the RTE Act, 2009 as per the direction of the District Education Officer, Raigarh, to which the petitioners replied that the petitioners are the Christian Minority Unaided Educational Institutes and are exempted from the provisions of the RTE Act, 2009 and also submitted permanent minority status certificate granted under the provisions of the NCMEI Act, 2004, but series of letters were exchanged between the parties, however, ultimately, on 3-12-2015, finally, notices were given to the petitioners to produce minority recognition certificate issued by an authority of the State Government and / or to admit students as per the direction of the respondents failing which the recognition of the schools will be cancelled.

3.2) It is the further case of the petitioners that the District Education Officer, Raigarh publicly announced that the petitioners will admit students as per the RTE Act, 2009 from 1st of April, 2016 by which the petitioners institutions suffered embarrassment and thereafter, they have directly filed writ petitions before the Supreme Court and ultimately, withdrawn the same to file writ petitions before this Court and have filed these writ petitions before this Court stating that the certificate granted under the NCMEI Act, 2004 is a valid minority status certificate which cannot be ignored and the provisions of the RTE Act, 2009, would not be applied to the petitioner institutions.

3.3) Return has been filed by the State / respondents No.1 to 6 stating inter alia that the RTE Act, 2009 has been enacted to give effect to the provisions contained in Article 21-A read with Article 45 of the Constitution of India which is imperative in nature and as such, the provisions of the RTE Act, 2009 are mandatory in nature and the petitioners have even not obtained the necessary certificate issued by the competent authority of the State Government and therefore rightly, notice has been issued to the petitioners institutions on 3-12-2015 directing them to comply the RTE Act, 2009 failing which the recognition of the schools will be cancelled by de-affiliating the schools run by them.

3.4) Rejoinder on behalf of the petitioners has been filed controverting the allegations made in the return.

3.5) Since common question of law and fact is involved in these writ petitions, they are being disposed of by this common order.

3. Dr. P. George Giri, learned counsel appearing for the petitioners, would submit that the petitioners institutions are reputed Christian Minority Unaided Private Educational Institutions under Article 30(1) of the Constitution of India and they made application for grant of minority status certificate to the State Government, but the State Government unnecessarily and unreasonably delayed the adjudication of the said application leading to filing of application under the provisions of Section 2(g) read with Sections 11(f) and 12B of the NCMEI Act, 2004 for granting minority status of educational institution to the petitioners before the National Commission for Minority Educational Institutions (NCMEI) which the National Commission for Minority Educational Institutions has considered and granted in favour of the petitioners insofar as W.P. (C) Nos.1001/2016 and 1007/2016 on 26-5-2011 and in W.P.(C) Nos.1005/2016 and 1006/2016 on 21-1-2015, and declared the petitioners educational institutions to be the minority educational institutions and therefore they are entitled for grant of minority status and issued necessary certificate holding that St. Ann's English Medium School, Gharghoda has been declared as minority educational institute covered under Section 2(g) of the NCMEI Act, 2004. Therefore, the State Government cannot ignore it and cannot direct for grant of certificate by the authorities of the State Government. He would further submit that the Supreme Court in the matter of Pramati Educational and Cultural Trust (Registered) and others v. Union of India and others (2014) 8 SCC 1 has declared the 2009 Act ultra vires to the Constitution as it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution of India. Therefore, the impugned orders passed by the State Government deserve to be quashed.

4. Mr. Prasun Kumar Bhaduri, learned Government Advocate appearing for the State/respondents No.1 to 6, would support the impugned orders. He would submit that firstly, it must be noted that the expansive provisions of the 2009 Act are intended not only to guarantee the right to free and compulsory education to children, but to set up an intrinsic regime for providing the right to education to all children by providing the required infrastructure and compliance with norms and standards. Secondly, he would submit that unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent/guardian of every child. The Constitution directs both burdens to achieve one end: the compulsory education of children free from the barriers of cost, parental obstruction or State inaction. Thus, Articles 21A and 51A(k) of the Constitution of India balance the relative burdens on the parents and the State. Thus, the right to education envisages a reciprocal agreement between the State and the parents and it places an affirmative burden on all stakeholders in our civil society. Thirdly, the right to establish an educational institution has now been recognised as a fundamental right within the meaning of Article 19(1)(g). This view is enforced by the opinion of the Supreme Court in the matters of T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481 and P.A. Inamdar

v. State of Maharashtra (2005) 6 SCC 537 that all citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 19(2) of the Constitution of India but that right is subject to the provisions of Articles 19(6) and 26(a). The constitutional obligation of the State to provide for free and compulsory education to the specified category of children is coextensive with the fundamental right guaranteed under Article 19(1)(g) to establish an educational institution. Lastly, the fundamental right to establish an educational institution cannot be confused with the right to ask for recognition or affiliation. The exercise of a fundamental right to establish and administer an educational institution can be controlled in a number of ways. Indeed, matters relating to the right to grant of recognition and/or affiliation are covered within the realm of statutory right, which, however, will have to satisfy the test of reasonable restriction. Lastly, he would submit that the impugned order is unexceptionable and the writ petitions deserve to be dismissed.

5. I have heard learned counsel for the parties and considered the rival submissions made herein-above and also gone through the records with utmost circumspection.

6. The first question is as to whether the petitioner institution is a minority educational institution entitled to the privilege conferred under Article 30(1) of the Constitution of India.

7. The writ petitioners in this case made an application to the State Government for grant of certificate / grant of minority status certificate which remained pending, as the Commissioner, Tribal Development / the Director, Tribal Welfare is the competent authority, but the certificate was not granted leading to filing of application by the petitioners before the National Commission for Minority Educational Institutions under the NCMEI Act, 2004.

8. The NCMEI Act, 2004 has been enacted to constitute a National Commission for Minority Education Institutions and to provide for matters connected therewith or incidental thereto. Section 2(g) of the NCMEI Act, 2004 defines Minority Educational Institution which states as under: - "Minority Educational Institution" means a college or an educational institution established and administered by a minority or minorities;

9. Likewise, Section 11(f) of the NCMEI Act, 2004 is one of the functions of the Commission which states as under: - "11. Functions of Commission.- Notwithstanding anything contained in any other law for the time being in force, the Commission shall-

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(f) decide all questions relating to the status of any institution as a Minority Educational Institution and declare its status as such;"

10. Section 12B of the NCMEI Act, 2004 is power and jurisdiction of the Commission to decide on the minority status of an educational institution. Sub-

section (1) of Section 12B of the NCMEI Act, 2004, states as under: - "12B. Power of Commission to decide on the minority status of an educational institution.-(1) Without prejudice to the provisions contained in the National Commission for Minorities Act, 1992 (19 of 1992), where an authority established by the Central Government or any State Government, as the case may be, for grant of minority status to any educational institution rejects the application for the grant of such status, the aggrieved person may appeal against such order of the authority to the Commission."

11. A focused perusal of the aforesaid provisions would show that one of the functions of the National Commission for Minority Educational Institutions is to adjudicate all questions relating to the status of any institution and to make a declaration to that effect that particular educational institution is a minority educational institution. Section 12B of the NCMEI Act, 2004 is power of the Commission to take decision on the minority status of an educational institution in case where such an application is rejected by the State Government or the Central Government, as the case may be.

12. This would bring me to the facts of the present case in hand. In the instant case, admittedly, temporary minority status certificate was granted to the petitioners for one year on 28-11-2008, but it is the case of the petitioners that application for permanent minority status certificate remained pending undetermined and it was kept undecided unnecessarily which led to filing of application before the National Commission for Minority Educational Institutions and the Commission considered and finally, granted minority status certificate under the provisions of the NCMEI Act, 2004 on 26-5- 2011 in one case and similar in another case on 21-1-2015. The certificate so granted has not been challenged by the State Government and that certificate has attained finality in absence of challenge laid in a duly constituted proceeding under the NCMEI Act, 2004.

13. The petitioners produced the certificate of minority educational institution granted by the National Commission for Minority Educational Institutions before the State Government and its authorities, but the District Education Officer has ignored the same holding that in order to avail the benefit under Article 30(1) of the Constitution of India, the petitioners must produce the certificate issued by the State authorities i.e. by the Director, Department of SC & ST. Once certificate has been issued by the Commission which is competent to issue certificate under the NCMEI Act, 2004, the State Government and its authorities cannot compel the petitioners to get certificate from an authority who is appointed by the order of the Government, as the statutory authority under the NCMEI Act, 2004 has granted minority status certificate to the petitioners and the same is binding on the State Government. Therefore, the certificate granted by the authority under the NCMEI Act, 2004 will prevail and is binding on the State Government and the State Government or the State authorities cannot ignore the certificate and the declaration made as a minority educational institution holding it to be covered by

Section 2(g) of the NCMEI Act, 2004, unless it is set aside in accordance with the NCMEI Act, 2004 by the authority having jurisdiction. Therefore, it is held that the petitioners are minority educational institutions covered under Section 2(g) of the NCMEI Act, 2004.

14. Now, the question would be whether the RTE Act, 2009, would be applicable to the petitioners and they are bound to admit students to the extent of 25% as provided in Section 12(1)(c) of the RTE Act, 2009.

15. Section 12(1)(c) of the RTE Act, 2009 states as under: - "12. Extent of school's responsibility for free and compulsory education.-(1) For the purposes of this Act, a school,-

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(c) specified in sub-clauses (iii) and (iv) of clause (n) of Section 2 shall admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion:"

16. The principles of law laid down by the Supreme Court in the matter of Society for Unaided Private Schools of Rajasthan v. Union of India and another (2012) 6 SCC 1 in this regard are as under: - "64. Accordingly, we hold that the Right of Children to Free and Compulsory Education Act, 2009 is constitutionally valid and shall apply to the following:

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school including aided minority school(s) receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category; and

(iv) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority."

17. Correctness of the aforesaid judgment was doubted and ultimately, the matter was referred to a Constitution Bench in the matter of Pramati Educational and Cultural Trust and others v. Union of India and another (2013) 5 SCC 752, and ultimately, the Constitution Bench in Pramati Educational and Cultural Trust (Registered) (supra) answered the issue and held that "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" and observed as under: - "54. Under Article 30(1) of the Constitution, all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Religious and linguistic minorities, therefore, have a special constitutional right to establish and administer educational schools of their choice

and this Court has repeatedly held that the State has no power to interfere with the administration of minority institutions and can make only regulatory measures and has no power to force admission of students from amongst non-minority communities, particularly in minority schools, so as to affect the minority character of the institutions. Moreover, in *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225 Sikri, C.J., has even gone to the extent of saying that Parliament cannot in exercise of its amending power abrogate the rights of minorities. To quote the observations of Sikri, C.J. in *Kesavananda Bharati v. State of Kerala* (supra): (SCC p. 339, para 178)

"178. The above brief summary of the work of the Advisory Committee and the Minorities Sub- Committee shows that no one ever contemplated that fundamental rights appertaining to the minorities would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities' rights was ever in the contemplation of the important members of the Constituent Assembly. It seems to me that in the context of the British plan, the setting up of Minorities Sub- Committee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, it is impossible to read the expression "Amendment of the Constitution" as empowering Parliament to abrogate the rights of minorities."

(emphasis supplied)

Thus, the power under Article 21-A of the Constitution vesting in the State cannot extend to making any law which will abrogate the right of the minorities to establish and administer schools of their choice.

55. When we look at the 2009 Act, we find that Section 12(1)(b) read with Section 2(n) (ii) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. We also find that under Section 12(1)(c) read with Section 2(n)(iv), an unaided school has to admit into twenty-five per cent of the strength of Class I children belonging to weaker sections and disadvantaged groups in the neighbourhood. 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* (supra) insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct.

56. In the result, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21-A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not ultra vires Article 19(1)(g) of the Constitution. We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution. Accordingly, Writ Petition (C) No.1081 of 2013 filed on behalf of Muslim Minority Schools Managers' Association is allowed and Writ Petition (C) Nos.416 of 2012, 152 of 2013, 60, 95, 106, 128, 144-45, 160 and 136 of 2014 filed on behalf of non-minority private unaided educational institutions are dismissed. All IAs stand disposed of. The parties, however, shall bear their own costs."

18. Thus, the Constitution Bench has clearly and unequivocally held that the RTE Act, 2009 insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. Therefore, the RTE Act, 2009 is not applicable to the minority educational institutions referred in clause (1) of Article 30 of the Constitution of India. It is held accordingly.

19. A Constitution Bench of the Supreme Court, as back as in the year 1958, speaking through S.R. Das, C.J., In re The Kerala Educational Bill, 1957 A.I.R. 1958 SC 956 while recognising right of minorities to establish and maintain educational institutions very pertinently and further holding that State has no right to interfere with the minority character of the educational institution, held as under: - (AIR p. 985-86, paras 32 and 34) "(32) ... There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Art. 30(1). We repeat that the legislative power is subject to the fundamental rights and the legislature cannot indirectly take away or abridge the fundamental rights which it could not do directly and yet that will be the result if the said Bill containing any offending clause becomes law.

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(34) ... There can be no manner of doubt that our Constitution has guaranteed

certain cherished rights of the minorities concerning their language, culture and religion. These concessions must have been made to them for good and valid reasons. Article 45, no doubt, requires the State to provide for free and compulsory education for all children, but there is nothing to prevent the State from discharging that solemn obligation through Government and aided schools and Art. 45 does not require that obligation to be discharged at the expense of the minority communities. So long as the Constitution stands as it is and is not altered, it is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are of our own. ..."

20. Thus, the provisions of the RTE Act, 2009 shall not be applicable to minority educational institutions under Article 30(1) of the Constitution of India. Since the petitioners institutions have been declared and are granted the status of minority institution by the NCMEI, the provision contained in Section 12(1)(c) of the RTE Act, 2009 will not be applicable to them and they are not required to admit 25% students from weaker section of society. Accordingly, the orders passed by the District Education Officer (Annexure P-1) are hereby quashed.

21. The writ petitions are allowed to the extent sketched herein-above. No order as to cost(s).