

(2014) 04 KL CK 0027

In the High Court Of Kerala

Case No : W.A. Nos 1341, 1375 of 2013

State of Kerala

APPELLANT

Vs

Manager, ST. Roch's High School

RESPONDENT

Date of Decision : 11-04-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Kerala Education Act, 1958 — Section 3, 3(1), 36

Citation : (2014) 3 ILR 123 : (2014) 2 KHC 520 : (2014) 3 KLJ 125

Hon'ble Judges : Dr. Manjula Chellur, J; A.M. Shaffique, J

Bench : Division Bench

Advocate : K.P. Dandapani, Advocate General, Ramakumar, Senior Advocate, T.T. Muhamood, Government Pleader, Benoy Thomas and Paulson Thomas, Advocate for the Appellant; Babu Varghese, Senior Advocate, Dr. Aswani Kumar S., Senior Advocate, V.P. Seemanthini, Senior Advocate, George Poonthottam, C.V. Alexander, K. Mohanakannan, P. Naijal Kumar, M.R. Anison, K.P. Geetha Mani, T.B. Remani; Raffeeekh K., V.A. Muhammed, M. Sasindran, N.K. Subramanian and S. Ananthakrishnan, Advocate for the Respondent

Judgement

A.M. Shaffique, J.

1. The respondents in the writ petition are the appellants. The writ petition is filed by the first respondent herein seeking to quash Ext. P14 Government order dated 11/06/2013 issued by the Higher Secondary Education Department, by which the Government announced its decision to accord sanction for two batches of Higher Secondary Courses (for short "H.S. Course") in 148 Grama Panchayats where there is no Higher Secondary School (for short "HSS") and 382 batches in eight northern Districts from Ernakulam to Kasargode. Pursuant to Ext. P14 the Higher Secondary Department issued Ext. P14(a) dated 17/06/2013 inviting applications for sanctioning such batches of H.S. courses. The main contention of the petitioner was that the impugned orders restrict the right of other schools to apply for upgradation of the existing high school as HSS or opening of a new HSS. That apart the benefit of order is confined to the existing High Schools of

Grama Panchayats and confined to the northern Districts alone which according to the petitioner is illegal, arbitrary and discriminatory. Petitioner also seeks for a declaration that they are entitled to get the Plus Two courses during the current academic year and seeks for a direction to the respondents to receive their application and accord sanction upgrading the school as HSS. It is contended that by virtue of Exts. P4, P5 and P12 the petitioner was assured of getting preference if the Government proposes to grant HSS in aided sector in future. As against the said assurance, the said facility is confined to applicants in Grama Panchayats and certain northern Districts. Ext. P4(b) is an order dated 18/05/2012 issued by the Government clarifying that the recommendation of District Level Committee will be given due consideration when new schools are sanctioned. This order is issued pursuant to directions issued by this Court in Writ Appeal No. 18/2001. During the pendency of the said Writ Appeal, as per directions issued by this Court a committee was formed to examine the applications submitted by various schools in Trivandrum District. The committee found that the area for which the petitioner had made application is a socially and educationally backward area and thus recommended the grant of Plus Two courses to the petitioner's School. Ext. P4(a) is the said report. Ext. P5 is the judgment of this Court in WP (C) No. 17629/2004 wherein this Court directed that those schools which have been recommended by the District Level Committee constituted on the basis of the direction issued by the Division Bench of this Court should have preference if the Government proposes to grant HSS in aided sector in future.

2. Petitioner has a case that violating the aforesaid directions substantial changes has been made in the policy of the Government and finally the Government has issued Ext. P14 thereby depriving the petitioner School of a legitimate right to start HS course.

3. The first appellant herein has filed counter-affidavit in the writ petition supporting their stand taken in issuing Ext. P14 and P14(a). It is inter alia contended that the Government declared the policy that the HSS would be sanctioned in 148 Grama Panchayats where there are no existing HSS either in Government or aided sector. It was also indicated that new HSS would be opened/sanctioned in 8 northern Districts starting from Thrissur to Kasargode taking into account the educational needs of the locality. Further additional batches will also be sanctioned in the said 8 Districts in accordance with the requirement and educational need. It is contended that no person has any fundamental right or statutory right to seek sanction of Plus Two courses in their schools. It is further contended that there are 148 Grama Panchayats in the State which does not have HSS either in the Government or aided sector. It was decided to sanction two higher secondary batches in each Panchayats where there is no HSS which will take care of 296 batches out of which 194 batches will be in Trivandrum, Kollam, Pathanamthitta, Allapuzha, Kottayam and Idukki Districts. The remaining 392 batches will be in the northern Districts beginning at Ernakulam. According to the appellant this is a measure intended to reduce the

imbalance in the existing facilities of higher studies of students who pass out SSLC from those Districts. The respondent points out that the data available with the Department shows shortage of seats in the Northern Districts whereas surplus seats are available in the Southern Districts. Reference is made to Ext. R1(a) document showing the Students School ratio and other particulars in order to substantiate their contention.

4. The learned Single Judge after an elaborate consideration of the case along with a batch of other writ petitions quashed the impugned orders on the ground that the impugned orders are ultra vires the provisions of Chapter V of the Kerala Education Rules (for short KER") and a fraud on Statute. It is observed that such orders could be enforced only after conducting appropriate study in the manner contemplated under KER and subject to the said rules. It is further observed that the judgment will not stand in the way of the authorities taking steps to open new HSS or upgradation of the existing schools or granting additional batches after adhering to the provisions of KER. The learned Single Judge allowed the writ petition on the following findings:

(i) Though the Division Bench in K. Krishnankutty and Others Vs. State of Kerala and Others, . held that Chapter II Rule 2 sub-rule (3) and (4) refers only to the erstwhile HSS consisting of Standards VIII, IX, X and XI, on account of the impact of the introduction of Chapter XXXII in KER, and Government orders issued thereafter, Krishnankuttys case (supra) will not apply especially in view of the subsequent decisions in Sam Joseph Vs. State of Kerala and others, .

(ii) Paragraph 3(1) and 1(4) of the Government order dated 13/06/2007 would reveal that all the steps for sanctioning new schools or upgradation shall be as per KER. The delay in bringing appropriate amendment to KER in terms of Government order dated 13/06/2007 is of no consequence as regards application of such procedure of following KER as the Government order dated 13/06/2007 is not modified or cancelled.

(iii) Chapter V of KER is applicable to HSS as well taking into account the Government order dated 13/06/2007 and the decision of this Court in Sam Joseph's case (supra).

(iv) After introducing Chapter XXXII in KER by invoking the rule making power under Section 36 of the Kerala Education Act, and issuing Government order dated 13/06/2007 State cannot contend that the provisions of KER are not applicable to HSS and in terms of Rule 9 of Chapter V of KER the educational needs of the locality have to be looked into before opening a new school including HSS.

(v) (sic: vi) The statement submitted by the Government showing the short fall or surplus of seats in each District do not have any co-relation with the circular and the order. No proper study has been conducted to ascertain the educational need in the Panchayat. Study if any conducted is only on District wise basis.

(vii) The impugned order is ultra vires the provisions of Chapter V of KER. The decision for opening new schools or upgradation of HSS or even sanctioning of additional batches in existing HSS amounts to fraud on powers.

5. WA No. 1375/2013 is filed by the petitioner in WP (C) No. 16199/2013. The writ petition is filed by HSS teachers working in various schools. They challenge the very same Government order which is impugned in the other writ petition. This writ petition came to be dismissed on the ground that the petitioners have no locus standi to challenge the impugned orders. The learned Single Judge observed that insofar as the impugned Government orders has not created any adverse order to the prejudice of the petitioners, it will be open for them to challenge the same at the appropriate time.

6. Learned Advocate General Sri. K.P. Dandapani appearing on behalf of the appellants in WA No. 1341/2013 while impugning the judgment laid specific emphasis on the fact that Ext. P14 order has been passed after conducting a detailed study after taking into consideration the requirement of Plus Two courses in the State and being a policy decision of the Government, Court ought not to have interfered in such policy matters, which is against the well settled principles laid down by the Apex Court. It is further argued that Chapter V of KER has no application to HSS and directing compliance of such provisions for starting H.S. course is bad in law. Reference is also made to Krishnankutty's case (supra) and Sam Joseph's case (supra) to contend that Chapter V of KER has no application. It is further argued that Government order dated 13/06/2007 is superseded by subsequent orders including the impugned order.

7. Learned counsel appearing for the party respondents as well as other counsel appearing for the petitioners in connected writ petitions were also heard, as all the appeals filed by the State were not listed for hearing. They supported the impugned judgment and contended that several schools which were eligible to get higher secondary status were denied the same by formulating such a policy. According to them the need in the locality has to be considered while sanctioning higher secondary status for a school and therefore the impugned order is discriminatory and arbitrary. It is argued that the provisions of KER mutatis mutandis applies to HSS also and therefore compliance of Chapter V of KER is mandatory.

8. Learned Senior Counsel Sri. Babu Varghese while supporting the judgment also placed reliance on the judgment of the learned Single Judge in Annakutty Robert Vs. State of Kerala, . for the proposition that the decision of the Government to sanction Plus Two course to a few schools ignoring the claims of other applicants is arbitrary, discriminatory and violative of Article 14 and 21 of the Constitution of India.

9. Sri. Ramakumar, learned Senior Counsel appearing on behalf of one of the petitioners in the batch of writ petitions in support of the judgment placed reliance on judgment of the Supreme Court in Brij Mohan Lal Vs. Union of India

(UOI) and Others, . for the proposition that even though as a general rule the Courts would decline to exercise power of judicial review, in a policy decision, it is not free from exceptions. If the policy decision is arbitrary, capricious or mala fide the Courts can interfere. It is held that in cases where policy matters relate to general policy decisions of the State, the Courts have expanded the scope of judicial review when the actions are arbitrary, mala fide or contrary to the law of land. Another judgment relied upon is S.R. Tewari Vs. Union of India (UOI) and Another, . to reiterate that Court's should interfere with administrative orders if there is manifest error in exercise of power or the exercise of power is manifestly arbitrary or power is exercised on the basis of facts which do not exist.

10. We also heard the arguments of learned counsel for respondents who got themselves impleaded in the case who argued for and against the judgment.

11. Dr. Ashwani Kumar, learned Senior Counsel appearing on behalf of one of the respondents while supporting the impugned Government order places reliance on the judgment in BALCO Employees Union (Regd.) Vs. Union of India and Others, . to contend that the Courts cannot interfere with policy decisions unless it is contrary to any statutory provision or the Constitution. Another judgment relied upon is a Division Bench judgment in Secretary Cannannore District Muslim Education Association v. State of Kerala 2008(1) KHC 245 : ILR 2008(1) Ker. 319 : 2008(2) KLT 879 ., wherein this Court held that the Government cannot be tied down to a policy permanently and it should be conceded the freedom to change the policy from time to time. Reference is also made to another Division Bench judgment of this Court in State of Kerala Vs. Manager, Nimala Public School and The Principal Officer, Central Board, . That was a case in which this Court declared the Government order to be irrational and unreasonable as the said order was unworkable. Further it was held that the reason that new schools can be started only where there is concentration of Muslim population as they are socially and economically backward was found to be discriminatory and violative of Article 14 of the Constitution, as there were other socially and economically backward communities. It is argued that the impugned Government order does not suffer from such a vice. Another judgment relied upon is N. Kunhichekku Haji (Dead) by Lrs. Vs. State of Kerala and Others, . in which the Supreme Court upheld the upgradation granted to a school observing that when the Government finds that there exists need for upgradation of an existing school into upper primary the Government must be allowed to exercise its statutory power unless it is mala fide or colourable exercise of power. Union of India (UOI) and Others Vs. S. Srinivasan, . is relied upon to contend that only if a rule was beyond rule making power conferred by the parent Statute or if a rule supplants any provision for which power is conferred it becomes ultra vires. While declaring a Statute ultra vires the Court should consider the source of power which is relatable to the rule. The argument therefore is that the Government order does not suffer from any such vice. Another judgment relied upon is Academy of Nutrition Improvement and Others Vs. Union of India (UOI), . wherein Supreme Court held that Courts will be reluctant to interfere

with policy decisions taken by the Government in matters of public health, after collecting and analysing inputs from service and research, nor will Courts attempt to substitute their own views as to what is wise, safe, prudent or proper in relation to technical issues relating to public health in preference to those formulated by persons said to possess technical expertise and rich experience. Yet another judgment relied upon is *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Others*, . The Supreme Court held that the "discretion to change policy in exercise of executive power, if untrammelled by any Statute or rule is wide enough, but what is imperative and implicit in terms of Article 14 is whether the change in policy is made fairly and not arbitrarily or with any ulterior motive. He also relied upon *Jayasree T. (Former Hsst of ZHS School) Vs. The Director of Higher Secondary, The Educational Agency (Manager) and P.C. Ranjith Raja*, . to contend that Chapter V of KER does not apply to HSS. He further relied upon the Constitution Bench judgment in *State of Orissa Vs. M.A. Tulloch and Co.*, . in which the Court considered the question of implied repeal.

12. Smt. Seemanthini, learned Senior Counsel, in support of the Government order placed reliance on the Full Bench judgment of this Court in *Varghese, K.A. Vs. The Deputy Director of Education and Others* . to contend that in the absence of specific rules executive orders govern the field, insofar as upgradation from High Schools to HSS are concerned. In *Aided Higher Secondary School Teachers Association Vs. State of Kerala*, . the Full Bench has given a narration of how the transition occurred by de-linking pre-degree and starting Plus Two classes while considering administrative orders in relation to appointment of Principal's in HSS. She also referred to judgment of the Division Bench in *Pathanapuram Taluk Samajam Corporate Management Schools Vs. Sreelatha*, . wherein also this Court held that unless specific provision as contained in Rule 51B of KER is incorporated in Chapter XXXII of KER it may not be possible to apply the same to Higher Secondary Section.

13. Sri. George Poonthottam, learned counsel has relied upon a notification dated 07/06/2010 issued by the Government as per GO (Ms) No. 91/10/G.Edn in order to contend that even earlier the Government had invited applications to start HSS stage by stage in the District of Thrissur, Palakkad, Malappuram, Kozhikode, Wayanad, Kannur and Kasaragode.

14. Sri. Binoy Thomas, the learned counsel for the appellant in WA No. 1375 of 2013 contended that if there is violation of statutory rules or Article 14, Government order could be challenged. He relied upon the decision in *M.S. Jayaraj Vs. Commissioner of Excise, Kerala and Others*, , *Abraham Vadakancherry v. State of Kerala and Others* 1984 KHC 312: 1984 KLT 704: 1984 KLJ 529:ILR 1985(1) Ker. 186: 1984 KLN 441 ., *BALCO Employees Union (Regd.) Vs. Union of India and Others*, , *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, , *State of Kerala and Others Vs. The Tribal Mission*, . to demonstrate the locus standi of the petitioners to file the writ petition. He also placed reliance on the *M.M. Dolichan's* case

(Supra) to contend that Krishnankutty's case (supra) cannot be relied upon on account of the principle of merger with the judgment in appeal. Reliance was placed on the judgment in Kunhayammed and Others Vs. State of Kerala and Another, . to indicate that when judgment of the High Court becomes merged with the appellate decision of the Supreme Court, the appellate decision alone can be relied upon as the former does not exist in the eye of law. He also relied upon the judgment in Agricultural Produce Market Committee Vs. Shri Ashok Harikuni and Another Etc., . Reference is also placed to the Supreme Court judgment in State of Kerala and Others Vs. The Tribal Mission, . and also the Supreme Court judgment in Kailash Chand Sharma Vs. State of Rajasthan and Others, . to contend that the rationale of classification should be based on empirical data or survey or scientific study and not on assumptions as to the existence of a state of affairs.

15. Before proceeding further a consideration of the scope and effect of Ext. P14 Government order would be useful. Ext. P14 indicates the intention of the Government to provide more facilities for pursuing Higher Secondary studies in the State. It is inter alia observed that the matter was examined in detail and it was found that there are no HSS in 148 Grama Panchayats either in Government sector or in aided sector. It is further observed that the students from such Grama Panchayats are finding it difficult to pursue their studies. Further, the Government noticed that there is deficiency of plus one seats in eight northern Districts namely Ernakulam, Thrissur, Palakkad, Malappuram, Kozhikode, Wayanad, Kannur and Kasaragode. It is also observed that there is deficiency of 678 batches all over Kerala if 50 students are taken in one batch. It is based on the said factual observation made by the Government that direction has been issued to the Director of Higher Secondary Education to issue notification inviting applications for sanctioning HSS in 148 Grama Panchayats by sanctioning two batches each in one school by giving preference to Science and Commerce. Further direction was issued to sanction the remaining 382 batches in the northern Districts starting from Ernakulam, taking into account the deficiency of availability of plus one seats in such areas, taking into account the infrastructure facilities available, the number of candidates who had passed SSLC, either by upgrading the existing Government/aided high schools or sanctioning two batches each and for sanctioning one additional batch each in the existing Government/aided HSS. The whole intention is to fill up the total deficiency of 678 batches by sanctioning H.S. Course as well as sanctioning an additional batch in the existing Government/aided HSS.

16. Paragraph 3 of Ext. P14 are the norms applicable for submission of application. It inter alia provides that H.S. Course is to be sanctioned in Grama Panchayaths where there is no HSS by sanctioning one batch each giving preference to Science and Commerce. Priority is first given to the Government High Schools, thereafter aided High School run by Corporate Management and lastly aided High School run by individual and Trust Management. The said priority is to be followed while sanctioning additional batches in the existing HSS

as well. Sub Paragraph (3) of paragraph 3 again indicates that priority will be given to those Revenue Districts which require more number of seats by sanctioning additional batches in the existing HSS. Sub paragraphs (4) to (7) relates to the formalities for submitting the application. Sub paragraph (8) relates to the selection of existing combination from among Science/Commerce subjects. Sub paragraph (9) deals with the infrastructure facilities to be available for the applicant school. It should have a land facility of minimum 1.2 hectares and the building facility should be as provided under KER. The facility of class room as well as lab is also specifically mentioned. Paragraph 4 of the impugned order narrates the eligibility criteria for considering the application, which are as follows:

The following will be taken into consideration for fixing the eligibility for the application.

1. The number of High Schools situated within the jurisdiction of Grama Panchayat/Local Self Government Institution where the applicants situate.
2. The number of students passed out in the SSLC examination held in March, 2013 from those institution and eligible for higher studies.
3. The number of Higher Secondary/Vocational Higher Secondary School within a radius of 5 Km.
4. The number of seats available in the said Higher Secondary/Vocational Higher Secondary Schools.
5. The number of High School situated within a radius of 5 Km for which there is no Higher Secondary/Vocational Higher Secondary section and the number of students eligible for higher studies by appearing SSLC examination held in March, 2013.
6. The Social/Economical and Educational status of the area where the applicant's school situate, the deficiency of these factors in the area, the distance to the nearest Higher Secondary School, the conveyance facility, the infrastructure facility, the number of backward classes etc. available in the area.
7. The number of classes and students available in the applicants school.
8. The academic excellence of the applicants school for the last 5 years.
9. The necessity to rectify the educational imbalance of the area."

Only if the above parameters are met, the school concerned qualifies for starting HSS and becomes eligible for additional batches.

17. Right to education is a fundamental right to the extent mentioned in Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., . It is the duty of State Government to provide access to education and unless new schools are not permitted in private sector the State will not be in a position to discharge its Constitutional obligation. (Superstar Education Society Vs. Stats of

Maharashtra and Others,). Therefore it is not in dispute that State owes the duty to impart education and particularly primary education since the same is a fundamental right within the meaning of Article 21 of the Constitution (Modern School Vs. Union of India (UOI) and Others,).

18. As rightly observed by the learned Single Judge, and as argued by the learned counsel appearing for either side, the Court normally does not interfere on matters affecting policy unless the policy is inconsistent with the Constitution and the laws Tata Iron and Steel Co. Ltd. etc. Vs. Union of India and others and Industrial Development Corporation of Orissa Ltd., . Courts will interfere with matters of Government policy only when the action from Government is unconstitutional or contrary to statutory provision or arbitrary, irrational or in abuse of power. In Narmada Bachao Andolan Vs. State of Madhya Pradesh and Another, , a three Judge Bench of the Supreme Court while evaluating the case law with reference to interference of Court in policy matters held as under:

POLICY DECISIONS: 33. In State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc., , this Court while examining the State policy fixing the rates for reimbursement of medical expenses to the Government servants held:

.....When Government forms its policy, it is based on a number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion. It would be dangerous if Court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The Court would dissuade itself from entering into this realm which belongs to the executive. It is within this matrix that it is to be seen whether the new policy violates Article 21 when it restricts reimbursement on account of its financial constraints.....

For every return there has to be investment. Investment needs resources and finances. So even to protect this sacrosanct right finances are an inherent requirement. Harnessing such resources needs top priority..... No State of any country can have unlimited resources to spend on any of its projects.

That is why it only approves its projects to the extent it is feasible.

34. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. (See: Ram Singh Vijay Pal Singh and Others Vs. State of U.P. and Others, ; Villianur Iyarkkai Padukappu Maiyam Vs. Union of India (UOI) and Others, and State of Kerala and Another v. Peoples' Union for Civil Liberties, Kerala State Unit and Others, (supra).

35. Thus, it emerges to be a settled legal proposition that Government has the power and competence to change the policy on the basis of ground realities. A

public policy cannot be challenged through PIL where the State Government is competent to frame the policy and there is no need for anyone to raise any grievance even if the policy is changed. The public policy can only be challenged where it offends some constitutional or statutory provisions.

19. Therefore the first question to be considered is whether before sanctioning and inviting applications in terms of Exts. 14 and 14(a) Government order whether the Government should undertake a procedure as prescribed under Chapter V of KER. In other words, whether the impugned order is in violation of any of the provisions of KER. The answer depends upon the question whether KER applies to Higher Secondary Education at all. The Kerala Education Act, 1958 (hereinafter referred to as KE Act) provides a statutory backing for better organisation and development of educational institutions in the State in order to provide varied comprehensive educational service throughout the State, as provided in the preamble to the Act. Section 3(1) of the Act authorises the Government to regulate the primary and other stages of education and courses of instruction in Government and private schools. Sub-section (3) of Section 3 further provides that the Government may for the purpose of providing such facilities establish and maintain schools or permit any person or body of persons to establish and maintain aided schools or recognise any school established or maintained by any person or body of persons. Sub-section (4) of Section 3 provides that all existing schools shall be deemed to have been established in accordance with the provisions of the Act and sub-section (5) of Section 3 reads as under:

After the commencement of this Act the establishment of a new school or the opening of a higher class in any private school shall, subject to the provisions of this Act and the rules made thereunder and any school or higher school established or opened otherwise than accordance with such provisions shall not be entitled to be recognised by the Government.

Section 36 gives the power to the Government to make rules for the purpose of carrying into effect the provisions of the KE Act.

20. It is by virtue of the power conferred by Section 36 of the KE Act that the KER has been framed. Rule 3 of Chapter I of KER provides that

Where the Government are satisfied that the operation of any rule under these rules causes undue hardship in any particular case, the Government may dispense with or relax the requirement of that rule to such extent and subject to that conditions as they may consider it necessary for dealing with the case in a just and equitable manner.

21. Chapter II of KER deals with classification of schools. It inter alia provides that the schools for general education shall be of two grades primary and secondary. The first seven standards shall be collectively known as primary grade and sub divided into lower primary and junior basic containing Stds. I to IV and upper primary and senior basic containing Stds. V to VII. Stds. VIII, IX and X is

collectively known as Secondary grade. Stds. VIII, IX, X and XI shall be collectively known as Higher Secondary grade. Rule 2(4) indicates that secondary schools providing three year course shall be known as High Schools and secondary schools providing four year course shall be known as HSS. Apparently, Chapter II which had come into force on 01/06/1959 contemplates a situation of having HSS level education upto Std. XI.

22. It is also not in dispute that school level education was available for a considerably long period only upto Std. X and only after Pre-Degree course was delinked from colleges, that a new system has been adopted to have Plus Two courses in schools whereby the HSS had Standards upto Std. XII. Chapter V of KER deals with opening and recognition of schools and lays down a procedure for recognising the schools. It also provides the procedure for determining the areas where new schools are to be opened or the existing schools are to be upgraded. Rule 9 of Chapter V indicates the conditions for granting permission for opening new schools and Rule 11 narrates the procedure for issuing orders for opening new schools. Apparently, there is no dispute about the fact that the Government has not followed Chapter V of KER on the ground that the same has no application for starting Plus Two courses. Another provision which is of relevance is Chapter XXXII of KER. It deals with the method of appointment and qualifications of teachers and non-teaching staff in aided HSS. This provision was inserted as per Government order GO (P) 331/2001/G/Edn. dated 09/11/2001. Rule 1(c) defines higher secondary course as meaning a continuous two year course of study offered as part of school education after Std. X. The rule provides for method of appointment and qualification of teachers and non-teaching staff.

23. Primarily, if one looks at the classification of schools coming under Chapter II of KER, Plus Two courses are not provided. Therefore, in the absence of any other interpretation being given to the meaning of word school in KER as including Plus Two courses, it may not be possible to arrive at a conclusion that the school, as classified in Chapter II included Plus Two course as well. Even if the Division Bench judgment of this Court in Krishnankutty's case (supra), need not be considered as a proposition, in the light of the judgment in Sam Joseph's case (supra), Jayasrees case (supra), Vargheses case (supra), Aided Higher Secondary School Teachers Association's case (supra) it is all the more clear that other than Chapter XXXII of KER no other provisions applies to HSS. In Sam Joseph's case (supra) the issue involved was regarding the claim for seniority. It was contended that provisions of various chapters of KER does not apply to HSS unless expressly made applicable by the Government. It is further held that provisions like Rule 51B coming under Chapter XIV A of KER is made applicable to Higher Secondary wing by specific order of the Government. It is also held that insofar as Rule 51A has not been made applicable as evident from the Division Bench judgment in Jayasree's case (supra) and since there is no Government order extending Rule 35 of Chapter XIVA of KER to HSS, a claim based on Rule 35 will not apply to the Higher Secondary classes. Taking into consideration the overwhelming judicial opinion on this point we are unable to

agree that all the provisions of KER mutatis mutandis applies to HSS as well.

24. In fact, the learned Single Judge having come to the conclusion that the decision in Sam Joseph's case applies, finds that Government order dated 13/06/2007 applies to the facts of the case and therefore Chapter V of KER is applicable for starting HSS as well.

25. GOP No. 107/07/G.Edn dated 13/06/2007 is the said Government order. It is inter alia provided that the Government has appointed a committee to suggest guidelines for opening new schools upgradation of existing schools, recognition of unaided schools, grant of CBSE/ICSE schools, sanctioning of new courses/batches in HSS and vocational HSS. The committee has submitted a report with certain suggestions for consideration by the Government. The Government having examined the matter in detail ordered sanctioning and upgrading Government or aided schools. With reference to HSS paragraph 3 is relevant which reads as under:

1. The criteria for Government and aided schools mentioned in 1(1-4) except 1, 2(a) above will be applied to HSS in the normal course.
2. The procedure in KER will be extended to HSS also by amending the KER.
3. No recognition to new unaided school in higher secondary section will be allowed for the time being.
4. The additional seats granted during the academic year 2006-2007 will be allowed to continue during the a.y 2007-2008 without any additional financial commitment.

26. Apparently, this Government order recognised the fact that sanctioning or upgrading of Government and aided schools shall be as per paragraph 1(4) which states that all steps for sanctioning new schools or upgradation, provisions of KER will be followed. However, it is indicated that the procedure in KER will be extended to HSS by amending the KER. No such amendment has been made so far. The point is whether the aforesaid Government order dated 13/06/2007 is superseded by issuing Ext. P14.

27. As held by the learned Single Judge, it is also true that Ext. P14 Government order does not anywhere indicate that it has superseded the Government order dated 13/06/2007. But a perusal of the aforesaid Government order indicates a procedure to be followed depending upon the particular requirement of the locality. When the provisions of KER has not been amended in order to indicate that Chapter V of KER applies, on coming into force of Government order dated 11/06/2013 which lays down a procedure for implementing the policy of the Government to start HSS in 148 Grama Panchayats and to fill up the deficiency of plus one seats in 8 northern Districts, and when the Government order clearly stipulates the norms for applying for H.S. course in such Grama Panchayats and also for sanctioning additional batches in the existing HSS, apparently there is an intention to depart from the earlier Government order dated 13/06/2007. It is

found by the learned Single Judge that the impugned Government order does not either modify or cancel the Government order dated 13/06/2007. Even though there is no specific provision which indicates that the present Government order is in supersession of the earlier Government orders, insofar as the Government has the executive power to issue such Government order in the realm of a policy matter, there is an implied supersession of the earlier Government order which could be inferred as evident from the impugned order itself. In *State of Orissa Vs. M.A. Tulloch and Co.*, the Constitution Bench held as under:

The entire theory underlying implied repeals is that there is no need for the later enactment to state in express terms that an earlier enactment has been repealed by using any particular set of words or form of drafting but that if the legislative intent to supersede the earlier law is manifested by the enactment of provisions as to effect such supersession, then there is in law a repeal notwithstanding the absence of the word "repeal" in the later Statute. Now, if the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded could there be any incongruity in attributing to the later legislation the same intent which 5.6 presumes where the word "repeal" is expressly used. So far as statutory construction is concerned, it is one of the cardinal principles of the law that there is no distinction or difference between an express provision and a provision which is necessarily implied, for it is only the form that differs in the two cases and there is no difference in intention or in substance.

28. Therefore, we are of the view that though the Government have issued Government order dated 13/06/2007 applying the provisions of KER for starting H.S. Courses, since the rules have not been amended so far, it was open for the Government to frame another policy which definitely reflects a change of policy by the Government from the earlier view taken by them. Of course, if pursuant to the Government order dated 13/06/2007 KER had been amended, in order to make applicable the provisions of KER to H.S. Course as well, the question would have been different. That is not the situation here. It is by an executive order that KER was made applicable and when another executive order is passed describing a different procedure for starting H.S. Courses in existing schools and to provide additional batches, the irresistible conclusion will be that the subsequent Government order will have to be given effect to. In other words, for the limited purpose of starting H.S. Courses, in the areas specified depending upon the requirement as well as the competency of such schools in complying with the norms to start Plus Two courses, sanction can be issued in that regard.

29. The learned Single Judge has also come to a conclusion that the impugned order has been passed without conducting a proper study in the matter. First of all, as already held by the learned Single Judge and as laid down by the Apex Court in various judgments referred above, unless a policy decision is stated to be unconstitutional or illegal, the Courts cannot interfere with such decision or decision making process. Apparently, a perusal of the impugned order by itself would show that the Government had conducted an enquiry in the matter. It is

inter alia provided that they have conducted a detailed verification of the requirement of the HSS and it was found that 148 Grama Panchayats do not have HSS. It cannot be said that when the State has an obligation to provide education either directly or as a facilitator the State has to see that such facilities are available to the students within a reasonable distance. Taking into consideration the said fact, if the Government is of the opinion that HSS are to be sanctioned in all the 148 Grama Panchayats, in the absence of any material to prove otherwise that there is no such requirement, the policy can only be termed as laudable. The main objection raised by the learned counsel appearing for the contesting respondents is with reference to the object of providing 382 batches to schools who have the deficit in the northern parts of the State starting from Ernakulam. This according to the contesting respondents is purely discriminatory. On a perusal of the Government order it is seen that such a decision had been taken on account of the deficiency of Plus One seat in the 8 northern Districts. Whether there is deficiency of Plus One seats in the State and what are the figures relating to the same are again matters relating to a decision by an expert committee formed by the Government. The District wise requirement and other particulars have also been placed before this Court. The learned Advocate General has also filed an affidavit dated 07/09/2013 narrating the list of Panchayats having Government/aided HSS, indicating the number of students passed in SSLC examination with reference to each Panchayat, the District wise details and other particulars. A statement is also filed indicating the local bodies which does not have any HSS and various other particulars. When such particulars are available with the Government to indicate the deficiency of plus two courses in the State, it is the paramount duty of the Government to provide such facilities. Only when the Government fails to provide such facilities one can come to a conclusion that the State does not comply with the Constitutional mandate. This is an instance where the intention of the State is to provide adequate facilities for the students of every Panchayats to have easy access to HSS and to provide additional batches to the existing schools where there is deficiency of Plus Two courses. Hence we are of the view that as held by the Supreme Court in Narmada Bachao Andolan case (supra) Government has the power and competence to change the policy on the basis of ground realities. It could only be said that the policy evolved when Government order dated 13/06/2007 has been changed on account of changed circumstances and therefore we are of the view that the impugned order does not suffer from any vices as held by the learned Single Judge.

30. The learned counsel for the party respondent would however submit that there are several schools situated in areas which does not have sufficient HSS and unless such areas are also taken into consideration, limiting the benefit of the Government order only to 8 northern districts has substantially affected their rights to seek HS courses in the existing High Schools. In fact, the respondent school has no legal right to demand that they should also be provided with HSS. The right to conduct schools is subject to reasonable restrictions and when the

Government had imposed some restrictions based on certain factual considerations, it cannot be stated that the respondents have been discriminated. But, at the same time, by evolving a policy in the nature of Ext. P14 the Government also should not shut their eyes on the requirement of other Government/aided or unaided institutions as the case may be in areas falling outside the ambit of Ext. P14, if there is a genuine requirement for starting Plus Two courses. In addition to providing Plus Two courses to make up the deficit in the Panchayats as well as in the 8 northern Districts the impugned order does not preclude the Government from independently considering whether other schools having the required facilities requires upgradation. Each and every request has to be considered based on its own facts and taking into consideration the over all requirement of the locality. In WA No. 1375 of 2013, the issue involved is whether the petitioners have locus standi to file the writ petition to challenge the impugned order. Since we have already held on merits that Ext. P14 Government order is sustainable and does not suffer from any illegality, there is no reason to consider the locus standi of the petitioners separately as it would only amount to an unnecessary exercise. In view of the discussion made above, the writ appeal is only to be dismissed.

In the result,

- i) WA No. 1341 of 2013 is allowed setting aside the judgment of the learned Single Judge. It is made clear that while proceeding with Ext. P14 Government order, the Government shall also give sufficient opportunity to other schools in other districts also to start Plus Two courses if there is a requirement taking into consideration the need of the locality.
- ii) WA No. 1375 of 2013 is dismissed.