

(2002) 07 KL CK 0007
In the High Court Of Kerala
Case No : W.A. No"s. 818 and 935 of 2001

State of Kerala	Vs	APPELLANT
The Manager, St. Roch"s H.S.		RESPONDENT

Date of Decision : 11-07-2002

Acts Referred:

Constitution of India, 1950 — Article 21, 41, 45

Citation : (2003) 1 ILR (Ker) 96

Hon'ble Judges : K.S. Radhakrishnan, J;K.A. Mohamed Shafi, J

Bench : Division Bench

Advocate : V.K. Beeran, A.A.G, for the Appellant; Babu Varghese, V.N. Achuthakurup and B.S. Swathykumar, for the Respondent

Judgement

K.S. Radhakrishnan, J.—The question involved in both the appeals relates to the grant of higher secondary courses known as Plus Two Courses in the Trivandrum educational district in the aided and unaided sector.

2. The Writ Appeal No. 818 of 2001 is filed by the State against the judgment in O.P. No. 22462 of 2000 by which learned single Judge of this Court granted a declaration that St. Rock"s High School is entitled to the grant of Plus Two Course. Consequently, direction was given to the State to grant two batches of Plus Two Course to the school. O.P. No. 21625 of 2000 was filed by the Holy Angel"s Convent High School since Pre-degree was delinked from the college established and managed by the same educational agency Direction was given to the Government to consider and pass orders granting higher secondary course to the school in the unaided sector. Writ Appeal No. 935 of 2001 is filed by the State and others against the judgment in O.P. No. 21625 of 2000.

3. Due to non-compliance with the order passed by the learned single Judge in O.P. No. 21625 of 2000, Contempt Case No. 894 of 2001 was also filed by the petitioner. Since the question involved in ail these cases is the same, we are disposing of these cases by a common judgment.

4. State of Kerala as part of the National Education Policy of 1986 decided to delink Pre-degree Course from colleges in the State in a phased manner and to introduce Plus Two Course in High Schools. That process was started from 1990 onwards. With a view to completely abolish Pre-degree Course from the colleges in the State and to make it part of the higher secondary education attached to the High Schools, a legislation by name "Pre-degree Course (Abolition) Act, 1997 (Act 3/98)" was passed by the State Legislature. From 1997 onwards Government was granting Plus Two Courses both to Government High Schools and to Aided High Schools on account of delinking of Pre-degree Courses from colleges. Notification inviting applications from Government/Aided/Recognised High Schools for opening new higher secondary courses for 2000-2001 was issued on 17th February 2000. Applications were filed by the above-mentioned three categories of schools. Government issued two orders dated 2nd June, 2000 and 24th June, 2000 granting permission to 360 High Schools to start Plus Two Courses. Recognised schools were not considered for the grant as per the then existing policy. The aforementioned orders were challenged before this Court in series of writ petitions. Contentions were raised though the applicants had satisfied the requisite eligibility criteria and norms laid down by the State of Kerala in the five Government Orders/Notifications issued from time to time, vide Notification dated 2nd April 1997, Government Orders dated 2nd May, 1997, 11th June 1997, 12th June, 1997, and 13th February 1998, Plus Two Courses were not sanctioned to their schools. Complaints were also raised that though there were 1,429 applications for grant of Plus Two Course the Government arbitrarily selected only 360 Government/Aided School without following the requisite criteria/norms laid down in the Government Orders mentioned above as also the Government Orders, dated 14th February, 2000 and 30th March, 2000. As far as recognised unaided schools were concerned was contended that the refusal on the part of the State even to consider the applications of those schools on the ground of non-existent policy was wholly arbitrary and unreasonable and hence violative of Article 14 of the Constitution of India.

5. A Division Bench of this Court to which one of us (Radhakrishnan, J.) was a party set aside those Government Orders, dated 2nd June, 2000 and 24th June, 2000 holding that the State Government had acted arbitrarily in selecting 360 out of a total of 1,429 schools which had applied for permission to start Plus Two Course for the academic year 2000-2001. This Court held that the impugned action of the State Government was hit by Article 14 of the Constitution of India. The Division Bench accordingly directed the Government to reconsider all the 1,429 applications in accordance with the norms laid down in the seven Government Orders/Notifications. Regarding recognised (unaided) schools the Division Bench observed that while considering the educational need of an educational district, if there is no eligible Government or aided school (eligible in the sense that the school satisfies all the criteria and norms), it will be incumbent upon the Government to consider the applications of recognised unaided schools also in accordance with law.

6. Government after the Judgment of the Division Bench constituted District Level Committees consisting of the District Collector, District Panchayat President and the Deputy Director of Education to consider the applications and to submit reports to the Government. Government considered the reports submitted with regard to Trivandrum district and pass order G.O. (MS) No. 241/2000/G. Edn., dated 26th July, 2000. Petitioner's school did not find a place in the said Government Order. With regard to the claim of the writ petitioner in O.P. No. 21625 of 2000 in the unaided sector, Government Order stated as follows:

"Since there are sufficient number of Government and aided schools to grant higher secondary courses and to meet the educational needs of the district, it was not felt necessary to sanction higher secondary courses in recognised Unaided Schools."

The abovementioned order was challenged by the Manager of St. Roch's High School by filing O.P. No. 22462 of 2000 contending that the District Level Committee and the Director of Higher Secondary Schools had not properly considered the application submitted by the petitioner in the light of the various orders as directed by the Division Bench. It was contended that the entire action of the second respondent was arbitrary, discriminatory and violative of Article 14, 15(1) and 30(1) of the Constitution. Further it was stated that 1,100 seats of the Pre Degree Course had been delinked from All Saints' College, and since the petitioner's school is the nearest has a better claim for the grant of Plus Two Courses.

7. St. Mary Franchess, Mother General, has filed O.P. No. 21625 of 2000 seeking a direction to the Government to grant Plus Two Course to their school in the unaided sector. It was contended on the basis of the Division Bench judgment of this Court State Government was duty bound to consider the application afresh in the unaided sector as well. Contention was also raised that granting Plus Two Course to petitioner's school is absolutely necessary to compensate the loss sustained by the management because of the delinking of Pre-degree Course from All Saints' College. It was stated that no other Government school or aided school in the neighbourhood has got a better claim for the grant of Plus Two Course than the Holy Angel's Convent School. Learned single Judge of this Court heard the abovementioned writ petition along with other writ petitions including O.P. No. 21854 of 2000.

8. A statement was filed by the Secretary to Government, General Education Department in O. P. No. 21854 of 2000 on 7th August 2000 which was treated as general statement in all the cases. It was stated that the Government had forwarded all the applications for granting higher secondary schools to every district for the inspection and report of the District Level Committee and the District Level Committees were directed to visit every school and submit their report. The District Level Committee inspected the school evaluated the comparative merits of all the applicants and submitted a report and it is on the basis of the report submitted by the District Level Committee Government issued

Order, dated 26th July, 2000 sanctioning higher secondary schools in Trivandrum District. Petitioner in O.P. No. 22462 of 2000 had not satisfied all the criteria laid down under the various Government Orders and hence it was not included in the list for the grant of higher secondary course. Petitioners in O.P. No. 21625 of 2000 was also not found eligible for the grant of higher secondary course in the unaided sector. It was stated that as per the report of the District Level Committee the school is having very good infrastructural facilities. It was submitted that the petitioner's school is entitled to the grant of Plus Two Course since Pre-degree seats were delinked from All Saints' College which is under the same management. It is stated by the Secretary that no school had been selected for the grant of Higher Secondary which had not been recommended by the District Level Committee. Government Secretary further stated as follows:

"At the same time all the schools recommended by the Committee cannot be selected for the grant of higher secondary for the obvious reason that all the students who pass S.S.L.C. do not go for higher secondary education. This is indicated by the fact that only 1.07 lakh Pre-degree seats were available in Kerala prior to delinking. Taking into account the students who normally pursue Pre-degree education as private candidates, it is necessary to make a marginal increase in the number of higher secondary seats. This has been the logic behind creating about 1.65 lakhs of higher secondary seats in place of 1.07 lakhs of Pre-degree seats delinked. If all the schools recommended as eligible by the District Level Committees were to be granted Plus Two, the number of higher secondary seats thus created would have been phenomenally high and disproportionate to the actual requirement of the students. This would have led to a situation where a large number of schools would have become unviable for want of students and the Government would have been left with an unnecessary and unproductive burden of meeting the Salary component of the teachers who would not have required number of students to teach. It is evident from the foregoing explanation that it is implicit in the selection process that some schools will have to be denied the grant of higher secondary in spite of being recommended by the District Level Committees. Recommendation of the District Level Committee only makes an objective assessment of the facilities available and brings a school within the zone of consideration. Availability of facilities is only one of the several eligibility criteria that are taken into account while selecting a school for the grant of higher secondary. It has already been made clear in the G.O. (Ms.) No. 107/2000/Gen. Education, dated 30th March, 2000 that even if there is a school which may not have the ideal facilities, Plus Two could be sanctioned to that school, , if there is no alternative to meet the educational need of that area. Correspondingly the fact of having all facilities will also not be the sole criterion for selection."

The Statement also reads as follows:

"As has been explained earlier Government has to necessarily select only such number of schools as are required to cater to the needs of students who pursue

higher studies after they pass S.S.L.C. Sanctioning higher secondary schools to all the applicants without any educational rationale will not only be a self defeating exercise but also lead to a situation where schools will be distributed without any justification or genuine need. As long as Government has to pay the salary and other allowances of the teaching and non-teaching staff of the schools and take over a recurring payment liability including pension, it would be unethical for the Government not to have made a judicious selection of schools based on clearly established educational needs. If the Government were to sanction higher secondary schools only on the basis of the availability of facilities in schools without taking into account other norms stipulated in G.O. (Ms.) No. 107/2000 the distribution of higher secondary schools in the State would have been highly uneven and skewed. It would have led to a situation where schools in certain areas would not attract sufficient number of students and thus become unviable, while schools in certain other areas would not cater fully to the educational need created by the delinking of Pre-degree. It is to avoid this eventuality that the selection process has been necessarily guided and conditioned by the stipulated norms. For the forgoing reasons the argument that the better equipped schools have been overlooked has to be viewed in the total perspective and in the over all interest of equitable distribution of educational facilities in the State."

With regard to O.P. No. 22462 of 2000, though the District Level Committee did not recommend the case of the petitioner, learned single Judge held as follows:

"The school is having all the required facilities. It is situated in the coastal area which cater to the educational need of the fishermen community. The school is also managed by a minority community - Latin Christians, particularly by the nuns.....All Saints" College, Thiruvananthapuram which is a Women's College is situated admittedly within two kilometers from where 990 PDC seats are delinked. The petitioner's school is definitely a feeder school to the said college and the college also belongs to a minority community. This would show that this school satisfied all the norms fixed in various Government Orders and the Division Bench judgment."

Learned Single Judge therefore gave a positive direction to the Government to grant higher secondary course to the school. With regard to the claim of Corporate Management of All Saints" College which runs Holy Angel Convent School it was ordered that the Government should consider the said school also for the grant of higher secondary course and pass order granting Plus Two Courses in the next year.

9. State .Government aggrieved by the abovementioned and various other judgments of the learned single Judge directing the grant of altogether 25 higher secondary schools in the State of Kerala filed W.A. Nos. 2796, 1159 and 1030 of 2001 etc. including the present writ appeals. When the matter came up for hearing a general order was passed on 27th July, 2001 after hearing the learned Additional Advocate General as well as the Counsel appearing in similar cases.

There was unanimity among the Counsel on either side that the Government had failed to comply with various directions given by the earlier Division Bench of this Court in the judgment dated 7th July, 2000 in O.P. No. 11779 of 1997 and other connected matters. Consequently this Court directed the learned Additional Advocate General to ascertain the Government's view with regarding to the finding of the learned single Judge and to file an affidavit to that effect. Accordingly an affidavit was filed by the Principal Secretary to Government, General Education Department which stated that the Government had noticed lot of complaints about imbalance in the grant of higher secondary schools in the previous year. Consequently it was decided to study the entire issue before sanctioning new schools. It was also pointed out that Government proposed to set up a committee to look into the matter in detail and to identify areas where there is a genuine need for new higher secondary schools. In view of the affidavit filed by the Secretary, the Division Bench passed a general order which reads as follows:

"We notice from the affidavit filed by the Principal Secretary to Government, General Education Department that Government have agreed that they would examine the directions given by the learned single Judge and would rectify the illegality pointed out by the court. It is also stated that Government would reconsider the reports submitted by the District Level Committee in the process in the light of the objections raised by the petitioners. The Principal Secretary, General Education would arrange for further verification of the information furnished in the reports of necessary and the petitioners would also be given a chance to present their case at a hearing. It was also stated that a decision would be taken before 31st December, 2001. It was also stated that the Government would consider all the requests for grant of higher secondary course in all fairness to instill confidence in the public mind and render justice all parties."

It was also ordered as follows:

"Counsel for the petitioners submitted that the learned Single Judge has given positive directions to grant Plus Two in certain districts which have to be given effect to. In view of the aforementioned circumstances and in view of the fact that procedural formalities have not been followed though directed by the Division Bench. We are of the view that a direction be given to the State Government to reconsider the complaints of those persons who have approached this Court against the illegal rejection of their applications for the grant of Plus Two. We are of the view, reconsideration of the entire applications is unnecessary. Government has to examine the rival claims with regard to the situation that existed as on 7th July, 2000. We therefore direct the Government to strictly follow the direction given by the earlier Division Bench. The report submitted by the District Committee would be considered after considering the objections raised by the petitioners. All the parties who approached this Court can urge their grievances before the Committee and their objections be

considered on merits,. We make it clear that re-examination would be limited to those persons who have objected to the grant and approached this Court in time,"

When the Order was pronounced counsel appearing on either side requested that the court should specify the Committee which would go into the complaints raised by the petitioners in the Original Petitions. In such circumstances this Court directed the District Level Committee headed by the Director of Higher Secondary Education would constitute the Committee for considering the objections regarding Plus Two and additional batches of Plus Two Courses and to consider the comparative merits of the applicants and take a decision accordingly.

10. The Committee headed by the Director of Higher Secondary Education therefore examined the applications submitted by various schools in Trivandrum District including the applications preferred by the writ petitioners herein. With regard to St. Roch's High School, petitioner in O.P. No. 22462 of 2000 as well as Holy Angel's Convent School, petitioner in O.P. No. 21625 of 2000, the Committee found that the area for which they had made the application is socially and educationally a backward area. After considering all the aspects, the Committee recommended grant of Plus Two Course to the petitioner in O.P. No. 22462 of 2000. With regard to the claim of the petitioner in O.P. No. 21625 of 2000 the Committee noted that the applicant school is in the unaided sector which was recommended by the earlier District Level Committee but was not considered for the grant due to the then existing policy of the Government of not granting Plus Two Course in unaided sector. It was also noticed by the Committee that when there are other aided/Government schools as rival claimants in the same area, unaided schools cannot be preferred. Committee opined that even if Government Sanskrit High School, Trivandrum and St. Roch's High School, Thoppe were also granted Plus Two Course educational need in this area would not be met fully. Consequently Holy Angel's Convent School was also recommended for the grant.

11. The question now to be decided is whether the mere fact that District Level Committee had recommended the grant of higher secondary course to the petitioner in O.P. No. 22462 of 2000 as well as the petitioner in O.P. No. 21625 of 2000, Government is duty bound to grant higher secondary course? We may indicate petitioner in O.P. No. 21625 of 2000 is an unaided school whereas the petitioner in O.P. No. 22462 of 2000 is an aided school. Admittedly if Plus Two Courses are granted to the petitioner in O.P. No. 21625 of 2000 it would not cause any financial burden to the State Government, at the same time if Plus Two Courses are granted to the petitioner in O.P. No. 22462 of 2000 Government will have financial burden. Learned single Judge has directed grant higher secondary schools to both petitioner schools. Government has however taken a policy decision this year to grant higher secondary schools only in the unaided sector due to acute financial crisis being faced by the State.

12. Learned Additional Advocate General submitted that if Plus Two Course is sanctioned to aided schools Government will have to pay salary and other

allowances of the teaching and non-teaching staff of the schools and take over a recurring payment liability and other financial commitments. It is submitted that this aspect of the matter was not taken into account by the learned single Judge when direction was given to grant higher secondary school to the petitioner in O.P. No. 22462 of 2000. Learned Additional Advocate General also submitted that mere fact that the District Level Committee had recommended the school for grant of higher secondary course does not mean that Government is duty bound to grant them higher secondary course. Government has to take into consideration various factors before granting Plus Two Courses. The Government Order issued on 18th May, 2002 only says that it would given due weightage to the report when new schools are sanctioned.

13. We are of the view mere fact that District Level Committee had submitted its recommendation to the Government for the grant of higher secondary school would not cast any legal obligation on the State Government to grant higher secondary schools in the aided and unaided sector. Government has to take into consideration various other factors for the grant of Plus Two Course. It is the overall educational interest of the State that has weighed with the Government while making the selection of the schools for the grant of higher secondary schools. The purpose of sanctioning of higher secondary schools is not to satisfy the new management but to meet the educational need on delinking of Pre-degree Course from colleges in the State. The District Level Committees appointed in various districts cannot have an overall picture on the requirement of the State. While sanctioning Plus Two Schools Government will have to take into account the entire need of the State. All the schools recommended by the Committee cannot be selected for the grant of higher secondary schools for various reasons. First of all, all the students who pass S.S.L.C. do not go for higher secondary education. There are various other avenues available for students who pass out S.S.L.C. Large number of seats are available in the Vocational Higher Secondary Schools, Polytechnic, I.T.I., I.T.C., K.G.T.E. and other job-oriented courses run by I.H.R.D. etc. in the State. Kerala State Open Schools and the National Open Schools also cater to the needs of students who pass out S:S.L.C. The State Government also noticed in various districts in the State in large number of higher secondary schools, seats remain vacant which indirectly causes burden to the State. Learned Additional Advocate General submitted a large number of higher secondary schools were started last year especially in Trivandrum District. In Pathanamthitta and Alleppy also seats are remaining vacant. AH those seats are in aided schools. Government also noticed in certain districts in Malabar a few seats are available and various seats were left out. It was contended economic stringency of the State is definitely a factor to be taken into consideration on the grant of higher secondary school in the aided sector.

14. Article 41 of the Constitution states that the State shall within the limits of its economic capacity and development make effective provision for securing the right to education. Article 45 states that the State shall endeavour to provide,

within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years. In view of the abovementioned Articles in the Constitution, endeavour of the State is to provide for free and compulsory education for all children until they complete the age of fourteen years, within the limits of its economic capacity. Aided schools in the State are governed by the Kerala Education Act and Rules. State has to pay salary and allowances of all teachers as well as non-teaching staff of the aided schools. Government has also to pay maintenance grant to aided schools. Conditions of service of teachers including pension and salary, retirement benefits, etc. are to be met by the State Government. In the affidavit filed by the Government Secretary it is stated that Higher Secondary Education Department has got a budget provision of Rs. 40 crores only for the current financial year. But unfortunately the estimated committed expenditure works out to Rs. 212 crores approximately. Therefore Government should have a cautious approach to the issue. If 25 more schools are sanctioned, each with three batches, the additional financial commitment will be approximately 3.5 crores per year and also the recurring payment liability including pension. We are of the view financial commitment is a relevant criteria to be taken into consideration by the State when higher secondary schools are granted in the aided sector. Learned single Judge failed to take note of this vital aspect of the matter.

15. In *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc.* etc., the Apex Court has held as follows:

"Right to education, understood in the context of Articles 45 and 41, means (a) every child/ citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development."

The obligations created by Articles 41, 45 and 46 of the Constitution can be met by establishing institutions of its own or by aiding, recognising and/or granting affiliation to private educational institutions. Obligation of the State to provide education to children until they complete the age of fourteen years is absolute and make it relevant and progressive. No private educational institution either by recognition or by affiliation to the University can be called an instrumentality of the State. Private educational institutions merely supplement the effort of the State in educating the people. It is not an independent activity. It is an activity supplemental to the principal activity as well. Private educational institutions are a necessity in the present day context. It is not possible to do without them since the Government is in no position to meet the demand. It is in the light of the abovementioned constitutional obligation, Government have evolved a policy in the year 2001-2002 so as to start new higher secondary school in the unaided sector so that constitutional objective under Articles 41 and 45 could be achieved. Consequently Government issued notification, dated 11th June, 2002

calling for applications from unaided sector for starting unaided high schools during the year 2002-2003. We also note that the Government also have taken a policy decision to permit aided school to start higher secondary school in the unaided sector. Policy of the Government is not to start any higher secondary school in the aided sector or Government sector since State is facing acute financial crisis. Therefore aided school also has to apply for higher secondary school in the unaided sector. State could achieve this objective under Articles 21, 41 and 45 so as to render free education only if it has got sufficient finance. No State or Country can have unlimited resources to expand any of its projects. It is due to the financial stringency that the Government have decided not to grant higher secondary schools in the aided or Government sector. Such a policy decision cannot be judicially reviewed. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reasons whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy could be struck down. The Apex Court in *State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc.*, held that State is always free to change its policy from time to time in changed circumstances and that financial constraints are always held valid considerations for framing or modifying a policy. In the case on hand the Government changed its policy due to financial crisis. Apex Court held when Government forms its policy, it is based on a number of circumstances, facts, law including constraints based on its resources. 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. Court would dissuade itself from entering into this realm which belong to the executive. It is within this matrix that it is to be seen whether the new policy violates Article 21 when it restricts grant of Plus Two Courses to the unaided sector on account of its financial constraints.

16. When we examine the claim of the petitioners in the abovementioned perspective, we are of the view the direction given by the learned single Judge to grant higher secondary school in the aided sector burdening the State with financial commitment cannot be sustained. Petitioner's school in O.P. No. 22462 of 2000 was not considered by the Government when it passed Order dated 26th July, 2000 on the basis of the various factors involving financial constraints. It is that Order which was set at naught giving a positive direction to grant Plus Two Courses to that school. Though the present Committees has found that the school is having all the facilities to the Plus Two Course and the said report was accepted by the Government that does not mean automatically higher secondary courses should be granted to the petitioner's school. State has to take into account variety of factors which we have already discussed including financial commitment.

17. In such circumstances the appeals filed by the State are allowed setting aside the direction of the learned single Judge to grant Plus Two Courses to the petitioners in the writ petitions. The present policy of the Government is to grant higher secondary school in the unaided sector, consequently petitioner in O.P. No.

21625 of 2000 is eligible to apply and if applied the application would be considered in accordance with law. In view of the disposal of the abovementioned writ appeals, there is no merit in the contempt case. The same will stand dismissed.