

(2014) 07 KL CK 0270

In the High Court Of Kerala

Case No : Writ Appeal Nos. 776, 780/2014 and W.P.(C) Nos. 13851, 13897, 13909, 14117, 14187, 14255, 14823, 15052, 15246, 15428, 15444, 15460, 15878, 16014 and 16816 of 2014

The Corporate Manager, St. Joseph's High School

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 10-07-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 21A, 32, 39A

Citation : (2014) 07 KL CK 0270

Hon'ble Judges : T.R. Ramachandran Nair, J;P.V. Asha, J

Bench : Division Bench

Advocate : George Poonthottam, Advocate for the Appellant; K.P. Dandapani, Spl. Government Pleader and T.T. Muhamood, Advocate for the Respondent

Judgement

T.R. Ramachandran Nair, J.—The writ appeals have been filed against the interim order passed by the learned Single Judge in W.P.(C) Nos. 13897/2014 and 13909/2014. When the appeals came up for admission, the writ petitions along with the connected cases were ordered to be posted before the Bench for final hearing. Accordingly, we have heard the writ petitions in detail.

2. These writ petitions have been filed by the respective petitioners who are Managers of various High Schools, awaiting sanction to start Higher Secondary courses (for short HSS). The petitioners have challenged G.O.(Ms) No. 86/2014/G.Edn. Dated 24.5.2014, viz. Ext. P6 Government Order (produced in W.P.(C) No. 13851/2014) as well as the subsequent notification Acd. C3/21437/HSE/2014 dated 26.5.2014 issued by the Director of Higher Secondary Education (produced as Ext. P5 in W.P.(C) No. 13909/2014).

3. We are referring to the facts and exhibits as contained in W.P. (C) Nos. 13851/2014 and 13909/2014. The contentions raised in all the writ petitions are common in nature while challenging the two orders noted as above. In a nutshell, we record below those contentions.

4. Ext. P1 produced in W.P.(C) No. 13851/2014 is a copy of the Government Order dated 11.6.2013. By the said order, the Government decided to provide more facilities to students to pursue Higher Secondary education. 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 S.S.L.C., 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.

5. According to the petitioners, the above order was issued by the Government after a detailed study in the matter. This was followed by Ext. P1 notification (produced in W.P.(C) No. 13909/2013) issued by the Director of Higher Secondary Education dated 17.6.2013, inviting applications. All the petitioners are applicants for grant of Plus Two Courses. It is averred that thereafter the Government constituted a committee to scrutinise the applications with the Director of Higher Secondary Education as its Convener. They have identified the eligible applicants from among the applicants for grant of Plus Two courses in 148 Panchayats giving preference to Government High School, aided High School under the Corporate Management wherever Government High Schools are not applicants and then schools run by Societies and Trusts apart from individual management in that order. The above identification was done in tune with the norms prescribed and finally they have recommended various schools for sanctioning of Plus Two courses. It is further averred that the above notifications were under challenge in a batch of writ petitions before this Court and initially the learned Single Judge took the view that the sanctioning of Plus Two course can be done only after following the procedure prescribed in the Kerala Education Rules since Higher Secondary courses also will come within the purview of the said Rules. This was challenged by the Government in Writ Appeals before the Division Bench. Ext. P3 produced in W.P.(C) No. 13909/2014 is the copy of the

memorandum of appeal. Therein, the Government justified the policy decision taken to grant Higher Secondary schools in 148 Grama Panchayats since in those Panchayats there are no Higher Secondary schools and therefore, the students are finding it difficult to pursue their higher studies. With regard to 8 northern districts, there is acute shortage of Plus Two seats in Government and aided sectors. The writ appeals were allowed by the Division Bench as per Ext. P5 judgment (produced in W.P.(C) No. 13851/2014). After the judgment was pronounced, it is stated that, a Cabinet committee was constituted with the Minister for Education as Chairman and the said Committee also accepted the recommendations of the committee constituted with the Director of Higher Secondary Education as Chairman. The recommendation made by the Director of Higher Secondary Education along with the list of schools for starting Plus Two courses and for sanctioning of additional batches was submitted to the Government on 19.5.2014 to place before the Cabinet. But surprisingly, within a couple of days the Government went back on this and issued Ext. P6 Government Order dated 24.5.2014. The said order shows that the decision by the Government is not to sanction new Higher Secondary schools during the academic year 2014-2015, but at the same time, they have decided to sanction additional batches throughout the entire State and to invite applications for the same.

6. We heard Shri George Poonthottam, Shri V.A. Mohammed, Shri Benny Gervasis, Shri K. Mohan Kannan and Shri Bechu Kurian Thomas, learned counsel appearing for some of the petitioners and learned Senior Counsel Smt. V.P. Seemanthini, Shri Jaju Babu and Shri Babu Varghese appearing for some other petitioners and learned Advocate General Shri K.P. Dandapani and learned Special Government Pleader Shri T.T. Muhamood for the State.

7. Shri George Poonthottam, learned counsel submitted that the Government's move to start Higher Secondary Schools in 148 Grama Panchayats is a policy decision, which was taken after an in-depth study. It is clear from the notification that the Government found that in such Grama Panchayats the students are finding it very difficult to pursue Higher Secondary education. The Government Order Ext. P1 will show that the decision taken by the Government is to sanction new Higher Secondary schools with two batches, giving priority to Science and Commerce, in 148 Panchayats, to upgrade existing Government/aided High Schools having facilities, in northern districts from Ernakulam onwards, by sanctioning two batches and to sanction one additional batch in Government/aided Higher Secondary Schools in such districts. It is submitted that the criteria, going by the said Government Order, is that first priority will have to be given to Government schools, next to the aided schools run by Corporate Managements and the last one to schools run by Societies/Trusts/individual management. The Committee headed by the Director of Higher Secondary Education completed the various formalities. The Government itself had taken up the matter before the Division Bench to justify the same and the Division Bench, in Ext. P5 judgment produced in W.P.(C) No. 13851/2014 has considered the issues in detail and held

that the policy of the Government to provide new schools in 148 Grama Panchayats where there are no facilities, is a laudable one. It is submitted that the data provided by the Government in those cases, will show that in southern districts there are excess seats and therefore it is the said aspect that had weighed with the Government to provide additional batches only in northern districts. Now the decision taken is to sanction additional batches throughout the State for which there is no real basis.

8. It is submitted that the report containing the recommendation by the Director of Higher Secondary Education along with the list of schools for starting Higher Secondary courses and additional batches was submitted on 19.5.2014, but the Government Order under challenge which is issued on 24.5.2014 states that they have reviewed the same and has taken a new decision to sanction additional batches. It is submitted that there are no change of circumstances from 19.5.2014 to 24.5.2014. The said decision is taken on extraneous considerations and is totally arbitrary, unreasonable and irrational. It does not reflect any ground realities. It is not based on a study by any committee of experts as before and no relevant data has been brought to the notice of the Government also by any statutory functionaries or any other committees. Therefore, the said decision, according to the learned counsel, is not a sound one and is totally unreasonable and the denial of Higher Secondary education to the students from 148 Grama Panchayats will be discriminatory.

9. It is submitted that for sanctioning additional batches throughout the State also, no study has been conducted. In the last year, after taking into consideration the number of students who have passed out the S.S.L.C. Examination and the deficiency in the number of seats in northern districts, the Government felt that additional batches could be sanctioned in 8 northern districts starting from Ernakulam. The details produced by the Government in the counter affidavit filed in the earlier batch of cases (Ext. P4) will show that in southern districts excess seats are there. It is therefore submitted that in such a situation, the decision now taken to sanction additional batches in all the southern districts also is without any basis and without the support of any relevant data or material. It is therefore submitted that the decision has been taken on a spur of movement without analysing any legal and factual aspects. Learned counsel therefore submitted that such a step taken by the Government being irrational, unreasonable and arbitrary, the petitioners are entitled for relief in these writ petitions. It violates the direction in Ext. P5 judgment.

10. According to the learned counsel, the change made as reflected in the Government Order has no nexus with the object sought to be achieved, viz. to start Higher Secondary schools in 148 Grama Panchayats. Shri George Poonthottam also submitted that the stand taken by the Government in the counter affidavit herein that it is a policy decision taken by them which is beyond the pale of challenge before this Court, is not correct. It is submitted that the policy is to provide Higher Secondary schools in a phased manner which is clear

from the steps taken by the Government from 2010 onwards. In 2010 there was a decision to grant Plus Two schools in Government/aided sector. The learned counsel therefore submitted that it is not a case of change of policy, but actually without following the correct policy, a decision has been taken arbitrarily.

11. With regard to the stand taken by the Government in the counter affidavit that it is to reduce the financial burden that the Government has taken such a decision, learned counsel submitted that the same is also without any substance and the said reason is extended without conducting any study in the matter. Learned counsel further submitted that the Finance Department has not projected any relevant data indicating financial burden before the Cabinet, and he wanted this Court to call for the records and peruse the same to satisfy about the genuineness of the stand. It is submitted that when the Government decided to provide additional batches in the entire State in existing Higher Secondary Schools involving huge amount, the plea that financial constraints is there, falls to the ground.

12. Shri V.A. Mohammed invited our attention to the detailed table provided in the counter affidavit filed by the Government in W.P.(C) No. 16080/2013 in the previous batch of cases. It will show that in the districts of Thiruvananthapuram, Kollam, Pathanamthitta, Alappuzha, Kottayam and Idukki there is shortage of students. From Ernakulam to Kasaragode it is a case of shortage of seats. This was produced by the Government itself in the earlier batch of cases to justify their stand. It is submitted that the change now made is without any justification. There is no justification for sanctioning additional batches to schools in southern districts. There is no justification for the stand taken by the Government now which is under challenge.

13. Shri Benny Gervasis submitted that as far as the policy decision of the Government is concerned, it is now well settled that this Court can interfere if the same is unconstitutional, illegal, arbitrary and unreasonable. Learned counsel elaborated the principles relevant by referring to various decisions of the Apex Court. Our attention is invited to the relevant paragraphs of the decisions reported in Shimnit Utsch India Pvt. Ltd. and Another Vs. West Bengal Transport Infrastructure Development Corporation Ltd. and Others, and Secretary, Cannanore District Muslim Educational Association, Kanpur Vs. State of Kerala and Others, .

14. Learned Senior Counsel Smt. V.P. Seemanthini submitted that the decision not to start any Plus Two schools in 148 Grama Panchayats and in northern districts is totally unsupportable and is arbitrary. Learned Senior Counsel invited our attention to the contentions of the State in the earlier round of litigation whereby they justified their actions. It is therefore submitted that it is an undisputed fact that the students of 148 Panchayats and those in northern districts are struggling to pursue higher secondary education. Therefore, the said policy of the Government is supported by local needs and educational needs. Such a decision taken in public interest has been upset at a stroke without any

supporting material. Learned counsel submitted that it is well settled by the decisions of the Apex Court that to achieve the constitutional goal contained in Articles 21, 41 and 45, the Government cannot take a stand that the resources do not allow it. It is submitted that on the face of the steps already taken, such a plea as per the present Government Order under challenge, to provide additional batches throughout the State without conducting any study, will itself show that the decision taken is arbitrary.

Learned Senior Counsel relied upon the following decisions:

" State of Maharashtra Vs. Manubhai Pragaji Vashi and others, , Paschim Banga Khet Mazdoor Samity and others Vs. State of West Bengal and another, , K. Krishnamacharyulu and Others Vs. Sri Venkateswara Hindu College of Engineering and Another, , Ashoka Kumar Thakur Vs. Union of India (UOI) and Others, , Brij Mohan Lal Vs. Union of India (UOI) and Others, , In Re: Special Reference No. 1 of 2012, and the judgment in W.A. No. 1030/2001."

Shri Jaju Babu, learned Senior Counsel submitted that the Government Order under challenge will show that the Government decided to review the earlier decision without any supporting material for the same. It is submitted that the Government is bound to proceed with the matter in the light of the decision of the Division Bench in the earlier round of litigation. In the said judgment, this Court has elaborately considered various aspects. The stand of the Government, therefore, cannot be accepted, learned Senior Counsel submitted.

15. Shri Babu Varghese, learned Senior Counsel submitted that the schools awaiting for sanction of Plus Two courses are having all the infrastructural facilities and their requirements are supported by the educational need which the Government itself reiterated in Ext. P1 Government Order. While tracing out the history of the sanctioning of Plus Two courses in various schools, it is submitted that it has been a long pending need of many of the petitioners who have fulfilled the requirements as per the norms and have been waiting for the sanction for a number of years. Earlier, the Government has been reiterating that they have no policy to start Higher Secondary courses apart from the schools wherein already the courses have been started. But after the change of policy, the Government cannot now take a different stand.

16. Shri Bechu Kurian Thomas, learned counsel appearing for one of the petitioners, argued that the fallacy in the approach of the Government is that the review now attempted does not reflect ground realities. Relying on Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Others, , it is submitted that the action is totally arbitrary and the proportionality principle will apply and the issue will have to be judged by this Court applying the said principle also. Learned counsel emphasised the fact that the intention behind Ext. P1 order is a laudable one which has been scuttled by the recent Government Order.

17. Shri Mohan Kannan, learned counsel also submitted that in the light of Ext. P5 judgment of the Division Bench, the sanction of Plus Two courses should be

for all components and the same cannot be segregated.

18. The above arguments are supported by the learned counsel appearing for the other petitioners also.

19. Shri K.P. Dandapani, learned Advocate General submitted that the notification Ext. P1 was issued in June, 2013. The same was under challenge before this Court and finally the judgment of the Division Bench was pronounced on 11.4.2014. Therefore, the said academic year came to an end. In this year, the Government therefore reviewed the matter, particularly in the light of the financial aspects. It is submitted that such a policy decision taken by the Government is beyond the pale of challenge and it is upto the Government to evolve policies from time to time based on circumstances. It is submitted that none of the petitioners have got any fundamental right to get Plus Two schools or additional batches. It is also submitted that the details with regard to the expenditure involved given in the counter affidavit will justify the stand of the Government. Learned Advocate General further submitted that the decision taken by the Government therefore cannot be termed as arbitrary, illegal or unconstitutional. The Government felt that as far as the starting of Plus Two schools is concerned, sanctioning of additional batches throughout the State in all the existing Higher Secondary schools will serve the purpose. It is submitted that all the relevant aspects have been considered by the Government while taking a decision. Learned Advocate General relied upon various judgments, viz. Tata Iron and Steel Co. Ltd. etc. Vs. Union of India and others and Industrial Development Corporation of Orissa Ltd., , State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc., , Cannanore District Muslim Educational Association v. State of Kerala (2008 (2) KLT 879) and Narmada Bachao Andolan Vs. State of Madhya Pradesh and Another, to advance the argument that the courts will be slow to interfere with policy matters and the Government has the option to adopt such policies depending upon the circumstances.

20. After the petitioner in W.P.(C) No. 15444/2014 filed a reply affidavit disputing the averments in the counter affidavit, the Government has filed an additional affidavit in the said case. In the reply affidavit the petitioner has pointed out that while the matter was being heard, in spite of the oral direction given to the Government not to proceed further, on 25.6.2014 the Council of Ministers decided to sanction additional batches as an out of agenda item and a list of 525 schools has been prepared for sanction of additional batches. The Government thereafter filed an additional affidavit.

21. We will now come to the stand taken in the counter affidavit filed by the Additional Secretary to Government, General Education Department, on behalf of the State. Upto paragraph 4, the circumstances leading to Ext. P1 notification to start Plus Two courses in 148 Grama Panchayats, the requirement for the same and other factors have been explained. It is stated in paragraph 5 that after the judgment of the Division Bench, the Director of Higher Secondary Education processed the applications received by him with reference to the notification Ext.

P1 and recommended to Government to sanction 258 new Higher Secondary batches in 134 Grama Panchayats where there are no Higher Secondary batches and 383 new/additional Higher Secondary batches in eight northern districts. The number of Higher Secondary batches thus to be sanctioned was 641. A detailed proposal in this regard was forwarded to Government by the Higher Secondary Education Department as per letter No. Acd.C3/16830/13 HSE dated 19.5.2014. In paragraph 6 the stand taken is that the said proposal was reviewed, in view of the precarious financial position. With regard to the issuance of the impugned Government Order, what is stated in paragraph 6 is as follows:

"By the time the situation had changed and a relook into the entire matter had become necessary, especially in view of the precarious financial position of the State. Government had therefore, considered the matter in its totality and taken a policy decision not to start new Higher Secondary batches either in 148 Grama Panchayats where there are no Higher Secondary Schools or in other districts. Instead, Government had decided to sanction additional Higher Secondary batches wherever necessary."

22. In paragraph 7 it is stated, while referring to the present notification dated 26.5.2014, that the Government has not limited Higher Secondary batches to any particular district, locality or area. Higher Secondary Schools all over Kerala are at liberty to submit applications now. Paragraph 8 will show that the recommendation is to sanction 408 additional batches. In paragraph 9 it is reiterated that the main point weighed with the Government while considering the applications for sanctioning Higher Secondary courses in Government/aided sectors was the financial position of the State. It is stated that approximately Rs. 155,57,00,000/- will be required if the Government had come-forward with the sanctioning of new/additional batches numbering 641 during the academic year 2013-2014. The teaching and non teaching posts to be created will be 13 and the total financial commitment as per the prevailing pay and allowances will be around Rs. 50 lakhs per annum for the 13 posts. If additional batches are sanctioned in the same subject combination existing at present in the school, the number of posts to be created will be drastically less and the net result will be considerable financial gain to the Government. It is stated in paragraph 11 that as per the new notification only 694 valid applications have been received, out of which 408 are under consideration by the Government, but it may vary at the final stage. Thus, it is stated that approximately the financial burden of the Government will be eased by 53 crores.

23. Before going into the validity of the Government Order, we will have to refer to the background of the cases.

Background

24. Plus Two courses were sanctioned initially in some schools in the State after the abolition of Pre-degree way back in 1996-97. The crucial question raised now being one inter-related to the Government Order Ext. P1 dated 11.6.2013, we

will refer to the details furnished in the counter affidavit filed by the Government in the earlier round of litigation, viz. in W.P.(C) No. 16080/2013, produced as Ext. P4 in W.P.(C) No. 13851/2014. We will extract hereunder the relevant paragraphs, viz. Paragraphs 5, 7, 8, 9, 12 and 13;

"5. It is submitted that Government as a matter of policy decided to ensure a Higher Secondary School in each Panchayats in the State in a phased manner. In the first phase in 2010, it was decided to sanction Higher Secondary Courses in existing Government/Aided High Schools in the seven northern districts of the State. Now the Government as per Ext. P2 Government Order has ordered to grant Higher Secondary Schools in Panchayats all over Kerala where there are no existing Higher Secondary Schools either in Government or in aided sector. There are 148 Grama Panchayats in the State where there are no Higher Secondary Schools either in Government or in aided sector. As per Ext. P2 order Government inter alia decided to sanction 2 Higher Secondary Batches each in Panchayats where there are no Higher Secondary Schools either in Government or in aided sector. The total Higher Secondary Schools batches so sanctioned will be 296. Out of this 194 batches will be in Thiruvananthapuram, Kollam, Pathanamthitta, Alappuzha, Kottayam and Idukki Districts. The remaining 102 batches will be in the northern Districts beginning Ernakulam. Apart from that the Higher Secondary Course will be sanctioned and additional batches will be granted in 8 northern Districts. This is a measure intended to reduce the imbalance in the existing facilities for higher studies of students who pass out SSLC from those Districts.

7. It is submitted that from the study conducted, it is seen that there are acute shortage of seats in Higher Secondary School in northern Districts. The data available with the Department also shows that the shortage of seats in northern Districts is too high. At the same time there are surplus/excess seats available in 6 southern Districts viz. Thiruvananthapuram, Kollam, Pathanamthitta, Kottayam, Alappuzha and Idukki. It is submitted that during the academic year 2012-2013, 20% marginal increase in seats and 32 additional batches in Government Higher Secondary School and increase 3 seats each in Science batches, 8 seats each in Humanities and commerce batches in Government Higher Secondary Schools (total 63 students in science batches and 68 students in Humanities & Commerce batches) were sanctioned to accommodate the S.S.L.C. Pass-outs in Higher Secondary Schools. On account of this 74075 additional seats were available for admission in 2012-2013 academic years. 8. However, the complaints were received by various quarters that increasing seats in the existing batches is adversely affecting the class room decorum and quality of teaching. In this context it is pertinent to note that Government had appointed a four member Experts Committee headed by Prof. P.O.J. Labba as per G.O.(Rt) No. 4398/20120/G.Edn. Dated 12.10.2012 for studying and suggesting measures regarding problems in Higher Secondary Education Sector and the Committee submitted their report suggesting the necessity of maintaining teacher-student ratio as 1: 40 for improving the quality of education in Higher Secondary Schools. It was

pointed out that due to the overcrowding of the students in each class it is difficult to introduce novel academic and extra curricular activities and to carry out continuous evaluation in an infallible manner. The above committee report is also under active consideration of the Government and the Government decision to sanction 678 additional batches weighed with the recommendation of the above Committee also.

9. It is submitted that during the year 2012-2013 academic year around 80% of the total applicants got admission for the Higher Secondary Course on the strength of 20% marginal increase in seats. In order to provide similar percentage of higher secondary seats without the marginal increase, 678 additional batches are required.

12. It is submitted that on an overall assessment of educational facilities available for higher studies after 10th standard, it was noticed by the Government that the number of seats available in the Higher Secondary and Vocational Higher Secondary Schools in the northern Districts are much less than the number of students who have passed 10th standard. In northern Districts, the total number of seats available for various Courses is less than the number of students who became eligible for higher studies after S.S.L.C. Examination, 2013. In Malappuram District the shortage is 13673. In Thrissur District there is shortage of 2291 seats and in Kozhikode it is 4801. In Ernakulam District 39199 students became eligible for higher studies. However, the seats available for various courses is only 38869. In Palakkad District, 38249 students became eligible for higher studies. The total number of seats available for various Courses is only 32300. So there is a shortage of 5949 seats in Palakkad District alone. In Wayanad, Kannur and Kasargod Districts the shortage is 1731, 2592 and 3457 respectively.

13. In 6 southern Districts of the State, there is surplus seats for various Courses, whereas in 8 northern Districts there is shortage of seats. In order to reduce this imbalance, the Government decided to sanction Higher Secondary Courses to aided/Government High Schools in the northern Districts. At the same time Government as a general policy decided to sanction Higher Secondary School in the Panchayat all over Kerala where there are no existing Higher Secondary Schools. Such a decision was taken by the Government having a concrete vision that a Higher Secondary School should be there in a neighbour place at least one in Panchayat. A true copy of the list of Panchayats where there are no existing Higher Secondary Schools is produced herewith and the same may be marked as Ext. R1(b). This decision was taken after considering all the aspects of the matter and the objective assessment, with reference to the prevailing circumstances. In the southern Districts there is no need to sanction more Higher Secondary Schools at present, since the educational facilities available there are sufficient to meet the requirements of the area."

In paragraph 14 the details of the constitution of the committee which has gone into the matter are given and we extract the said paragraph also hereinbelow:

"It is submitted that the applications received pursuant to Ext. P3 Notification will be scrutinized by a Committee, of which the second respondent is the Chairman and Joint Director (Academic), Directorate of Higher Secondary Education as Convener, Director of Public Instructions, Joint Director (Exam), Directorate of Higher Secondary Education, the Director, the State Council for Educational Research and Training (SCERT) and the Director, the State Institute of Educational Management and Training (SIEMAT) are the members. The recommendation of the Committee regarding sanctioning of Course, number of batches and combination of Courses will be forwarded to the Government. In Ext. P14 G.O. and Exhibit P14(a) notification of the second respondent, the norms and guidelines to apply for the sanction of Plus Two courses are laid down. The committee and the Government will consider the application only in accordance with the prescribed norms and guidelines."

25. Thus, the stand of the Government in the earlier round of litigation which ultimately culminated in the judgment by the Division Bench, produced as Ext. P5 in W.P.(C) No. 13851/2014, can be summarised thus:

(a) The policy decision of the Government is to ensure a Higher Secondary School in each Panchayats in a phased manner.

(b) In 2010 as the first phase, it was decided to sanction Higher Secondary Courses in existing Government/aided High Schools in seven northern districts of the State.

(c) In 2013-2014 as per Ext. P2 Government Order, (Ext. P1 herein) the Government has ordered to grant Higher Secondary Schools in Panchayats all over Kerala where there are no existing Higher Secondary Schools either in Government or in aided sector;

(d) There are 148 Grama Panchayats in the State where there are no Higher Secondary Schools either in Government or in aided sector.

(e) Two Higher Secondary batches will be sanctioned in the said Panchayats and the total batches so sanctioned will be 296, out of which 194 will be in Trivandrum, Kollam, Pathanamthitta, Alappuzha, Kottayam and Idukki districts and the remaining 102 batches will be in the northern districts beginning from Ernakulam.

(f) Higher Secondary Courses and additional batches will be sanctioned in 8 northern districts, beginning from Ernakulam.

(g) The said measure is intended to reduce the imbalance in the existing facilities for higher studies of students who pass out SSLC from those districts.

(h) A detailed study was conducted in the matter. This reveals that shortage of seats in northern districts is too high and there are surplus/excess seats in six southern districts.

(i) The increase in seats in the existing batches has led to complaints that it is

adversely affecting the class room decorum and quality of teaching.

(j) The Government therefore appointed a four member Expert Committee headed by Prof. P.O.J. Labba as per Government Order dated 12.10.2012 for studying and for suggesting measures regarding problems in Higher Secondary Education Sector. It suggested the necessity to maintain a teacher-student ratio as 1: 40 for improving the quality of education in Higher Secondary Schools.

(k) The above report is under active consideration of the Government and the Government decision to sanction 678 additional batches weighed with the recommendation of the above Committee.

The judgment of the Division Bench in W.A. No. 1341/2013 and connected case (Ext. P4 produced in W.P.(C) No. 13909/2014 and Ext. P5 in W.P.(C) No. 13851/2014)

26. Paragraph 7 will show that it was contended by the State before the Division Bench that Ext. P1 order (Ext. P14 therein) was passed after conducting a detailed study and after taking into consideration the requirement of Plus Two courses in the State and it is a policy decision. The Division Bench has analysed Ext. P1 order (Ext. P14) in paragraph 16 and we reproduce the same hereinbelow:

"16. 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 20 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 S.S.L.C., 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."

With regard to the norms provided in the said Government Order, in paragraph 17, the following aspects have been highlighted:

"17. 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."

Finally, the Division Bench concluded that Chapter V of the Kerala Education Rules is not applicable as it has not been extended to Higher Secondary Schools, especially in the absence of an amendment of the rules in the K.E.R.

27. The contention raised therein by the parties who challenged the Government Order dated 11.6.2013, (Ext. P1 herein), that it was issued without having any study, has been answered against them as evident from the findings in paragraph 30 of the judgment. The Bench, in paragraph 30 has held as follows:

"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."

It was further held that the decision taken by the Government to sanction additional batches and schools in 8 northern districts is also based on the finding that there is deficiency. Reference is made to the affidavit filed on 7.9.2013 by the Advocate General producing details of the schools, the number of students passed the SSLC Examination with reference to each Panchayat, the district-wise details and other particulars. A statement was also filed indicating the local bodies which do not have any Higher Secondary Schools. Finally, it was held as follows:

"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 learned single Judge."

28. Thus, the Government Order was upheld, as it was supported by ground realities. While considering the plea that limiting of the benefit of additional batches in northern districts is not justified, the Division Bench in paragraph 31 has observed as follows:

"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."

Finally, the following direction was issued:

"In the result,

i) W.A. 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) W.A. No. 1375 of 2013 is dismissed."

29. The relevant Government file leading to the Cabinet decision to issue the impugned Government Order and the notification issued by the Director of Higher Secondary Education, has been made available by the learned Advocate General. It shows the following aspects:

30. The Director of Higher Secondary Education, by letter No. ACD.C3/16830/HSE dated 19.5.2014 has forwarded to the Secretary to Government, General Education Department, a report containing the recommendation for starting Plus Two schools and for sanctioning additional batches, after consideration of the applications in tune with the norms and guidelines prescribed in the matter. It is accompanied by the lists of schools identified by the Committee. The report of the Committee appointed, has also been appended. The Chairman of the same was the Director of Higher Secondary Education and the Convener was the Joint

Director (Academic). There were four other members, viz. Director of Public Instruction, Director, SCERT, Director, SEEMAT and Joint Director, DHSE. The matter was placed before the Cabinet for taking a decision on the same. The Cabinet took a decision on 21.5.2014 not to approve the proposal as of now. It was decided to invite applications for additional batches.

31. Vehement arguments were raised by the learned counsel for the petitioners to contend, as already noticed, that the said decision has been taken without the support of any relevant data; without conducting any study and hastily. It was also contended that the stand taken in the counter affidavit that the financial aspects were considered by the Government, is also not correct as the Finance Department has not provided any data before the Cabinet. In the additional affidavit filed by the Government on 2.7.2014, the stand taken is that the main reason which was weighed with the Government is the additional financial commitment of the Government consequent on the sanctioning of new Higher Secondary course over and above the additional batches. It is stated that while deliberating the question, the financial implication was also presented before the Cabinet by the Minister for Education, on the basis of the feedback received from the officers concerned. It is stated that "as and when posts are created and the staff appointed, they are entitled to be given salary and other allowances at the rate admissible/decided by the Government from time to time. When new higher secondary courses are granted, the number of posts to be sanctioned will be greater than the number of posts required when additional batches are sanctioned." It is stated that the financial commitment in this account can be calculated by simple arithmetic. In paragraph 4, the averment in the reply affidavit filed by the petitioner in W.P.(C) No. 15444/2014 that a decision was taken by the Cabinet on 25.6.2014 for sanctioning additional batches is denied and it is stated that the final decision in the matter will be taken only after getting clearance/direction from this Court.

32. The question to be considered, therefore, is whether the change of circumstance pleaded by the Government can be taken as amounting to a policy decision and if so, it is supportable or could be justified.

33. We will now come to the actual policy evolved by the Government. As reflected in Ext. P1 produced in W.P.(C) No. 13851/2014, the policy decision was to start Higher Secondary Schools in 148 Grama Panchayats where there are no Higher Secondary Schools either in Government or aided sector. The said decision was taken after noticing that the students in those Grama Panchayats are finding it difficult to pursue higher secondary education. It was also noticed that in 8 districts (from Ernakulam to Kasaragode), there is deficiency of Plus One seats. Counting 50 students per batch, the total deficiency will be 678 batches. The Government therefore decided that in 148 Grama Panchayats, one school per Panchayat with two batches (Science and Commerce) can be sanctioned, totaling 296 batches and the remaining 382 batches will be distributed in 8 districts starting from Ernakulam towards north by sanctioning

two additional batches in each Government/aided High Schools by upgrading them and to sanction one batch in the existing Government/aided Higher Secondary schools.

34. As is clear from paragraph 5 of the counter affidavit filed by the Government in W.P.(C) No. 16080/2013 which we have quoted already, the policy of the Government is to ensure a Higher Secondary School in each Panchayats in the State in a phased manner. The policy to provide such courses in existing government/aided schools also was taken, by implementing it from 2010 as a first phase. Therefore, Ext. P1 order provided such step as a second phase, viz. a continuing one.

35. The ground realities which led to the decision, have been earmarked already. In northern districts, there is acute shortage of seats whereas in six southern districts there are surplus/excess seats. This was projected in the table Ext. R1(a) provided along with the counter affidavit, Ext. P4.

36. In the counter affidavit filed in these writ petitions or in the additional affidavit there is no averment that the position has been changed as far as the northern or southern districts are concerned. The decision taken by the Government as of now in the impugned order to sanction additional batches throughout the State is therefore not supported by any material. The policy has not been given a go-bye. It can be seen that the said decision has been taken at the ipse dixit and therefore it is not a sound and reasonable one. The petitioners have attacked the said decision as totally arbitrary and unreasonable. The only data before the Government when the decision was taken, as we have seen from the files, was the recommendation by the Director of Higher Secondary Education to sanction upgradation of schools in Grama Panchayats and to sanction additional batches along with the list of schools. No other data was available or called for. Nothing else is mentioned in the counter affidavit, as we have already noticed and files are silent on these crucial aspects.

37. Therefore, can it be said that the decision now reflected to provide Higher Secondary batches in the existing Higher Secondary Schools is justified on the basis of any ground realities? When such a situation is absent, we are of the considered view that it cannot be termed as a policy change which is justifiable on the basis of ground realities. The Panchayats which are having no Higher Secondary Schools, are waiting for sanction of Higher Secondary schools and the said policy decision of the Government has been upheld by this Court in the earlier round of litigations. The relevant findings extracted by us above, will show that this Court was of the view that the said decision is supported by materials and was justified by the study conducted. Thereby, when a policy decision has been taken by the Government on the basis of the study conducted and on the basis of ground realities, this Court refused to interfere with the same.

38. Herein, the situation is to the contrary. None of the ground realities have been pleaded so as to justify the sanction of additional batches throughout the

State except the averment that financial commitment has led to the same. No study has been conducted admittedly. The recommendation by the Director of Higher Secondary Education is dated 19.5.2014 and the decision of the Government not to accept the same and to sanction additional batches is on 24.5.2014. It is evident that in between no data has been collected, no materials were compiled, and no new committee was appointed. None of them have been produced or pleaded in the counter affidavit. Therefore, we will have to take that such a study is totally absent and no data was analysed while taking the decision. Such a decision taken therefore can easily be characterised as irrational and unsound.

39. On the question of discrimination also, the said aspect is relevant. When Higher Secondary Schools are not there in 148 Grama Panchayats admittedly, in respect of areas where there are surplus seats, if a decision is taken to increase the batches to the latter category, viz. to the existing Higher Secondary schools without providing any facilities to the Panchayats where there are no Higher Secondary Schools, it will result in discrimination. It is especially so, since the Government was of the view, when they issued Ext. P1, that students in those Panchayats are struggling to pursue higher secondary education. It may also be a factor that sanctioning of additional batch in urban and semi urban areas and depriving of the same to the schools in Grama Panchayats, will result in total discrimination to the students there. That aspect also will loom large while considering the validity of the decision to sanction additional batches throughout the State.

40. The important aspect raised in the counter affidavit, going by the arguments of the learned Advocate General, is the financial commitment which the Government will have to face. Of course, in the counter affidavit the financial outlay is shown as 155 crores. Actually, any note prepared showing the details has not been produced, but now it is explained that it is a matter of simple arithmetic which was presented before the Cabinet.

41. What is discernible is that the Government is prepared to take additional burden for sanctioning of additional batches in various schools including in southern districts. With regard to such a measure, as we have already found, the same is not supported by any data or study. When expenditure is to be incurred, even for such a measure which is unsupported by materials, can the Government take recourse to the plea of financial constraints for sanctioning new batches in 148 Grama Panchayats. It is also clear from the affidavits that the Finance Department has not projected any such stand as contended by the learned counsel for the petitioners. Starting of Plus Two course in Government and aided schools in a phased manner is a policy decision which is in vogue from 2010 onwards.

42. One of the aspects pointed out is that the financial outlay projected is unrealistic and it is not a sound reason to justify the stand. What is pointed out is that normally when Higher Secondary Schools are started, certain percentage of

existing teaching staff will be promoted from High Schools who have the required qualification. The Government has been insisting appointment of guest teachers on daily wage basis till regular posts are sanctioned, which may continue for a long time. It is a matter of common knowledge that when new schools are started, for the smooth running of the institutions, guest teachers are being appointed on daily wage basis after the admission process is over, for which there are Government Orders. The appointment of regular teachers will depend upon various factors including finalisation of the staff fixation and other steps in respect of individual schools. It is also a fact that in many of the schools even now, posts have not been created for appointment of non teaching staff in certain categories.

43. The process of fixing staff pattern and approval of appointment of the teachers is a lengthy one. Initially, staff pattern will have to be approved depending upon the number of students. Thereafter, selection process will have to be started for appointment which will have to be placed for consideration or approval before the Director of Higher Secondary Education. It is a time consuming process, as is well-known to all concerned.

44. It is in this background we will have to consider whether the Government was right in taking shelter under financial commitments not to approve the proposal of the Director of Higher Secondary Education. It cannot be denied that the expenditure involved is not required to be met within a short period or it is imminent. Assuming that the financial health of the State is not so rosy as on 24.5.2014 (even though no such materials have been made available to the court), we are of the view that taking shelter under such a reason, after the entire process for sanctioning of Higher Secondary Schools based on the decision of a Division Bench of this Court in Ext. P5 judgment had reached the final stage, cannot be supported. According to us, the same is unreasonable, irrational and arbitrary. Of course, it is upto the Government to adjust their requirements and to fix priority, but still it is now well settled that such decisions should be sound and supported by sufficient materials.

45. For another noticeable reason also the stand of the Government cannot be accepted. In Ext. P6 order, in paragraph 3, what is projected as a reason is that the Government has reviewed the matter and has taken a decision not to sanction new Higher Secondary schools for the academic year 2014-2015. The reason that there are financial constraints which led to the decision, is not stated therein. It is settled law that the validity of an order must be judged by the reasons so mentioned and cannot be supplemented by other reasons in the shape of affidavit or otherwise. A Constitution Bench of the Apex Court in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, , has laid down the above principle in paragraph 8 which we extract below:

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the

reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

Herein also, only in the affidavit such a reason has been projected and the order does not expressly states such a reason at all. The files also do not disclose any such reason. Therefore, the stand now adopted can only be held as unsustainable.

46. In fact, in the recommendation made by the Director of Higher Secondary Education along with the report dated 19.5.2014, sanction is sought for issuing orders to appoint guest teachers on daily wage basis in new schools and in schools where additional batches are sanctioned. It is also pointed out that the said recommendation is made as the conduct of schools should be smooth when sanction orders are issued. The fact that staff pattern will have to be approved and appointments can be made only after proper selection process, is also clear from the said recommendation.

47. Thus, in a matter like this where immediate expenditure is not involved on the part of the Government and it is spread over to a long span of period, can it be said that the said reason is a sound one which influenced the Government to take a relook of the matter. Even though in the impugned order it is stated that the Government wants to have a relook of the matter, as we have already noticed, such relevant factors which persuaded the Government to have a relook have not been explained along with the materials. Apart from the same, the financial health of a State or financial constraints are not a permanent feature and it may vary from time to time.

48. As regards these aspects, learned Advocate General vehemently submitted that the petitioners cannot contend that such a decision taken by the Government can be termed as arbitrary. Our attention was invited by both sides to several decisions of the Supreme Court.

49. First we will come to the decisions relied upon by the learned Advocate General. In *Narmada Bachao Andolan Vs. State of Madhya Pradesh and Another*, , in paragraphs 34 and 35 the following principles have been reiterated:

"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.

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."

We notice that in paragraph 35 their Lordships have stated that the Government has the power and competence to change the policy "on the basis of ground realities". The above decision of the Apex Court was relied upon by the Division Bench in Ext. P5 judgment which we have quoted already. At that point of time the argument of the State was that the decision to start Higher Secondary Schools in 148 Grama Panchayats is based on ground realities. After analysing all the materials, we find that when the decision was taken to issue the impugned order, no new ground realities have been there before the Government. Therefore, as held by the Apex Court, while a decision is attacked as arbitrary or irrational, this Court, even in a policy matter, can interfere in exercise of the power of judicial review.

50. The next decision relied upon by the learned Advocate General is Tata Iron and Steel Co. Ltd. etc. Vs. Union of India and others and Industrial Development Corporation of Orissa Ltd., (paragraph 68). Tata Iron & Steel Co. Ltd.'s case Emphasis was laid on the following observations therein:

"Courts of law have to be very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policy making, unless the policy is inconsistent with the Constitution and the laws..... On matters affecting policy and those that require technical expertise, we have shown deference to, and followed the recommendations of, the Committee which is more qualified to address these issues."

In that case, the question arose under the Mines and Minerals (Regulation and Development) Act, 1957 regarding the right of renewal of mining lease. The Government took the decision based on the decision of a committee to analyse the entire gamut of issues which consisted of high level functionaries drawn from various governmental/institutional agencies who were equipped to deal with the entire range of technical and long-term considerations involved. It is in that context the said findings were rendered. Herein, the situation is different.

51. The next decision is that of the Apex Court in State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc., (paragraph 25). We extract the same hereinbelow:

"25. Now we revert to the last submission, whether the new State policy is justified in not reimbursing an employee, his full medical expenses incurred on such treatment, if incurred in any hospital in India not being a Government hospital in Punjab. Question is whether the new policy which is restricted by the financial constraints of the State to the rates in AIMS would be in violation of Article 21 of the Constitution of India. So far as questioning the validity of governmental policy is concerned in our view it is not normally within the domain of any Court, to weigh the pros and cons of the policy or to scrutinize it and test

the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitutional statutory or any other provision of law. When Government forms its policy, it is based on 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."

In fact, therein also the Apex Court analysed the principles and was of the view that when expert opinion is there to support the Government policy, it will be beyond judicial review. Here, what is argued by the learned counsel for the petitioners is that there was no further study or existence of any expert opinion to upset the earlier decision of the Government which culminated in Ext. P1 notification. The said aspect is therefore relevant.

52. The next decision relied upon is that of a Division Bench of this Court in Cannanore District Muslim Educational Association's case (2008 (2) KLT 879) wherein it was held that the courts will not interfere in the executive decision of the Government unless they are illegal and ultra vires. Therein, the relevant principles were laid down in detail. Learned counsel for the petitioners submitted that the said judgment has been reversed by the Apex Court in Secretary, Cannanore District Muslim Educational Association, Kanpur Vs. State of Kerala and Others, .

53. We will now refer to the decisions relied upon the learned Senior Counsel Smt. V.P. Seemanthini. Learned Senior Counsel, placing reliance upon various judgments, submitted that the State is having an obligation to provide opportunities for the students to pursue education in the light of Articles 21, 41 and 45 of the Constitution. The first decision referred to is K. Krishnamacharyulu and Others Vs. Sri Venkateswara Hindu College of Engineering and Another, . Our attention was invited to the following sentence in paragraph 4:

"We are of the view that the State has obligation to provide facilities and opportunities to the people to avail of the right to education."

54. The next decision relied upon is Paschim Banga Khet Mazdoor Samity and others Vs. State of West Bengal and another, . There, the matter was raised under Articles 21 and 32 of the Constitution of India, in a case where the allegation was one of denial of emergency medical aid to Government hospitals and the issue was considered in the light of the constitutional obligation of the State and the legality of the justification sought on the basis of financial constraints. We extract hereunder the relevant portion from paragraph 16:

"16. It is no doubt true that financial resources are needed for providing these

facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints.(See *Khatris and Others Vs. State of Bihar and Others*,). The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life. In the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept in view."

55. In *State of Maharashtra Vs. Manubhai Pragaji Vashi and others*, also the very same principle was reiterated and in paragraph 13, while considering the legality of the findings of the High Court, it was observed thus:

"The High Court has further referred to the plea of paucity of funds pleaded by the State and has held that paucity of funds can be no reason for discrimination, placing reliance on the decision of this Court in *Municipal Council, Ratlam Vs. Vardichan and Others*, . This reasoning of the High Court is also fully justified and no exception can be taken to the said proposition as well. We hold so."

56. Reliance is also placed by the learned Senior Counsel on the decision of the Apex Court in *Ashoka Kumar Thakur Vs. Union of India (UOI) and Others*, (paragraphs 420 and 422) wherein the Apex Court considered Article 21-A of the Constitution which provides a mandatory obligation to the State to provide free and compulsory education to all children aged 6 to 14. Learned Senior Counsel submitted that the same parameters should be applied as far as Higher Secondary education is also concerned, since the bench mark is now at degree level.

57. Learned Advocate General submitted that Article 21-A may not apply to the situation herein. Of course, in paragraph 284 of the above decision, the Apex Court has held that "the fundamental stress has to be on elementary education and if that is done, as a consequence there would be reduction in the need for spending more money on higher education and that stress on primary and elementary education would be a leap forward towards higher education. In paragraph 345, it was held as follows:

"Ground reality cannot be lost sight of that with the limited availability of jobs and the spiraling increase in population, secondary or matriculation examination can be no longer be considered to be an appropriate benchmark. It has to be at the most graduation."

Of course, their Lordships were laying down this proposition in the context of interpretation of Central Educational Institutions (Reservation in Admission) Act, 2006.

58. Learned Senior Counsel relied upon the decision of the Apex Court in *Brij Mohan Lal Vs. Union of India (UOI) and Others*, , especially paragraph 137. In the context of Articles 21 and 39A of the Constitution of India, viz. To provide the citizens equal justice and free legal aid, it was held by the Apex Court that "the plea of financial limitations or constraints can hardly be justified as a valid excuse to avoid performance of the constitutional duty of the Government, more particularly, when such rights are accepted as basic and fundamental to the human rights of citizens." It is contended that as far as the facility for providing education also is concerned, the said interpretation placed on Articles 21 and 39A could be adopted as regards Articles 41 and 45 also. It is submitted that, when the Government is aware that in 148 Grama Panchayats there are no Higher Secondary Schools, financial constraints cannot be pleaded which will amount to discrimination as far as the students from those Panchayats are concerned. Reliance is placed on paragraphs 106 and 107 of the judgment of the Constitution Bench of the Apex Court in *In Re: Special Reference No. 1 of 2012*, . It was pointed out that the Apex Court has held that when an action of the Government is challenged, arbitrariness is a sure test for the court to interfere and the principles relevant are extracted hereunder:

"107. From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as *State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc.*, has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It should conform to the norms which are rational informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India."

Significantly, it was held that "a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment." We are of the view that the said principles are important as far as the present context is concerned.

59. Sri Benny Gervasis, learned counsel appearing for some of the petitioners pointed out that the scope of judicial review has been widened and every one of the changes made by the Government under the pretext of a new policy, cannot survive if it does not satisfy certain well-known tests. Our attention was invited to *Shimnit Utsch India Pvt. Ltd. and Another Vs. West Bengal Transport Infrastructure Development Corporation Ltd. and Others*, to contend that any

action taken by the Government, if it cannot be justified based on overriding public interest and not conforming to the principles of *Wednesbury* (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*-(1948) 1 KB 223) reasonableness, the same is liable to be interfered with. We extract paragraph 64 hereinbelow:

"64. It is true that the State or its tendering authority is bound to give effect to essential conditions of eligibility stated in a tender document and is not entitled to waive such conditions but that does not take away its administrative discretion to cancel the entire tender process in public interest provided such action is not actuated with ulterior motive or is otherwise not vitiated by any vice of arbitrariness or irrationality or in violation of some statutory provisions. It is always open to the State to give effect to new policy which is wished to pursue keeping in view "overriding public interest" and subject to principles of *Wednesbury* {(1948) 1 KB 223} reasonableness."

Therefore, arbitrariness or irrationality and unreasonableness will be factors which this Court can consider while exercising judicial review of a policy decision also.

60. Sri. Bechu Kurian Thomas, relying on the judgment in *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Others*, , submitted that the impugned action of Govt. under the guise of change in policy was liable to set aside. There the Hon"ble Supreme court was considering the cases challenging the withdrawal of benefits of subsidy and exemption in purchase tax, which was upheld by Madras High Court. While considering the appeal, it was held that the discretion to change the policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. Para 9 of the judgment reads as follows:

"9. While the discretion to change the policy in exercise of the executive power, when not trammled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness."

We have already found that there is nothing in the files to disclose any reason for a change in policy.

61. The decision of the Division Bench in W.A. No. 1030/2001 was referred to by Smt. V.P. Seemanthini, learned Senior Counsel to point out that the factors considered therein by the Division Bench are different. Therein, we notice that a challenge was made with regard to the sanction of additional batches and in the course of the pendency of the writ petitions, various directions were issued by interim orders, viz. to direct the District Level Committees to consider various applications. In fact, when the matter reached this Court, admission processes have already been completed in respect of additional batches sanctioned also. It is not the situation herein. The Bench noticed that in the Writ Appeals, the Division Bench had passed interim orders directing the Government to reconsider all the applications submitted in respect of various schools afresh, in tune with the educational need of the locality and in the light of the norms issued by the Government. The Division Bench noticed that some of the applications were allowed also. The State took up the stand that it was not possible to grant Plus Two to the various applicants due to financial constraints and the Government, therefore, encouraged the starting of higher secondary schools in the private sector. Ultimately, this Court refused to interfere with the same, since already classes have started. There is no parallel to the position available herein. Further, herein, from 2010 onwards the Government has decided to start Plus Two course in Government and aided sectors. As of now, the decision taken by the impugned order is to sanction additional batches in Government and aided schools also. Therefore, the said decision may not apply to the facts of this case.

62. Even though learned Advocate General stressed the fact that the notification Ext. P1 was issued in the year 2013-2014, we cannot subscribe to the said argument that it is confined to one particular academic year. The policy of the Government to start Plus Two course in various schools is a continuing one and it is not for one academic year alone. Therefore, the justification sought in the counter affidavit that the judgment Ext. P3 was rendered by the Division Bench on 11.4.2014 and by the time the recommendation of the Director of Higher Secondary Education, after completion of the process, reached the Government the said academic year is over, is not an answer. Further, after the decision of the Division Bench, various procedures have been undertaken and the Committee had gone into the consideration of applications and finally they have prepared the list after following various norms, which are not disputed.

63. When a power is exercised on the basis of certain facts which do not exist or when considerations are so irrational, we are of the view that going by the principles discussed in various decisions above, the power of judicial review is not limited.

64. Even though Shri T.T. Muhamood, learned Special Government Pleader submitted that since the admission of students in Higher Secondary Schools is by the process of taking a district as a unit, and hence the decision to sanction

additional batches as of now cannot be faulted, that too by relying upon the operative portion of the judgment, Ext. P4 by the Division Bench, the same will not help the stand of the Government. What is directed in Ext. P4 is to proceed with the process of sanctioning new schools in 148 Grama Panchayats along with the sanction of additional batches and starting of Higher Secondary schools in northern districts as specified in Ext. P1 itself. This is clear from paragraph 30 and the operative portion of the judgment.

65. The findings therein are significant and the State cannot withdraw from the obligation to provide facilities to the students within a reasonable distance. Lastly, in paragraph 31, while considering the plea that in certain other districts also, apart from northern districts, there will be deficiency of batches in existing Higher Secondary schools, it was observed thus:

"..... 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 the operative portion of the judgment also, the said aspect was directed. Learned Advocate General and learned Special Government Pleader relied upon the above direction to justify the sanction of additional batches in southern districts along with the districts in north and to justify the impugned Government Order, Ext. P6 produced in W.P. (C) No. 13851/2014.

66. We are of the view that the said portion of the findings in the judgment cannot be segregated from the earlier portion whereby this Court upheld the sanction of Plus Two schools in 148 Grama Panchayats on the basis of real educational need in the locality concerned. What is intended is that after the first step is over (to sanction Plus Two courses as well as sanction of additional batches in northern districts and upgradation of Government/aided High Schools in northern districts), if there is any genuine requirement, the Government can consider sanction of the same.

67. Therefore, the justification sought for issuance of Ext. P6 Government Order on that score will fall to the ground. Further, the implementation of such a direction should necessarily be preceded by assessing ground realities. It is so, since this Court directed that such exercise will be done "if there is a genuine requirement for starting Plus Two course." Such data have not been assessed or addressed, evidently, as we have already noticed. Therefore, we reject the said contention also.

68. The stand taken by the Government is totally contrary to the stand taken before this Court as evident from Ext. P3 counter affidavit filed in the earlier cases. This Court permitted the Government to proceed in tune with the Government Order, Ext. P14 produced therein, and all the exercises have been completed by the Committee of experts. The same cannot be unsettled, that too

without any relevant materials coming into picture. The direction by this Court in Ext. P4 (produced in W.P.(C) NO. 13909/2014) could not have, therefore, been ignored. The said exercise had to be completed. As rightly pointed out by the learned counsel appearing for some of the petitioners, Shri George Poonthottam, what is provided in Ext. P6 is not a change of policy, since the policy as such is in tact which is to provide Higher Secondary schools in 148 Grama Panchayats and in the State and additional batches in northern districts. The said policy being in tact and the present Government Order is issued to sanction additional batches alone in Government and aided schools, what is drastically changed is the process alone and not the policy, which according to us, is faulty and irrational. If that be so, it cannot be stated that a new policy itself has come into play for the Government to justify the said action. That change of course in the midway cannot also be justified and as we have already held, the plea of financial constraints is also not supported.

69. In paragraph 2 of W.P.(C) NO. 13851/2014, it is stated by the petitioner that this year 4,42,678 students have cleared SSLC and only 3,26,780 Plus-one seats are available in the State. It is further stated that even if the seats available in Vocational Higher Secondary Schools, Polytechnic, etc. are added, 77,158 students will not get any chance for higher studies. Besides, about 23000-25000 students from CBSE/ICSE syllabus would switch over to State syllabus for Plus-one admission. Thus, the dearth of seats may go beyond a lakh. The above data have not been denied in the counter affidavit.

70. For all these reasons, we allow the writ petitions and quash the impugned Government Order Ext. P6 produced in W.P.(C) No. 13851/2014 dated 24.5.2014 and Notification No. Acd.C.3/21437/HSE/2014 dated 26.5.2014 issued by the Director of Higher Secondary Education (Ext. P5 in W.P.(C) No. 13909/2014). Since the process of admission for the Higher Secondary courses this year is already underway, (we understand that the same has started by 30.6.2014) we issue the following directions:

- i) The process of providing Higher Secondary courses in 148 Grama Panchayats will be expedited, so that students will be able to get admission this year.
- ii) The process of sanctioning additional batches in northern districts beginning from Ernakulam and upgrading schools as already provided in Ext. P1, will also be taken simultaneously and orders will be issued accordingly. After completing the above process in tune with the directions in Ext. P5 judgment of the Division Bench, if there is genuine requirement for granting additional batches in any other areas, the same can also be considered by the Government depending upon the educational need.

The Writ Appeals are closed in the light of the above directions. No costs.