

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NOS. 18475-18476 OF 2013

State of Kerala & Anr.

.....Petitioners

Vs.

Mythri Vidya Bhavan English M. Sch. & Ors.

.....Respondents

WITH

SLP(C) Nos. 4531-4532/2014, SLP(C) No. 4530/2014, SLP(C) Nos. 23142-23146/2013, SLP(C) Nos.23138-23140/2013, SLP(C) Nos. 29655-29658/2013, SLP(C) Nos. 29781-29783/2013, SLP(C) Nos. 29560-29561/2013, SLP(C) Nos. 33438-33439/2013, SLP(C) Nos. 29660-29662/2013, SLP(C) Nos. 83-86/2014, SLP(C) Nos. 31934-31936/2013, SLP(C) Nos. 79-80/2014, SLP(C) No. 39339/2013, SLP(C) No. 37208/2013, SLP(C) Nos. 76-77/2014, SLP(C) No. 81/2014, SLP(C) No. 82/2014, SLP(C) Nos. 4534-4536/2014

JUDGMENT

Madan B. Lokur, J.

1. The fundamental right to free and compulsory education to all children between the age of 6 and 14 years postulates good quality education and not just education for the sake of providing education. Regulation of such education is permissible by law and not by

executive fiat. Unfortunately, in this batch of petitions, the State of Kerala seeks to impose its authority over schools that provide apparently quality education, which is perceived to be a threat to the public education system in the State.

2. The challenge by the State of Kerala in this batch of petitions is to the judgment and order dated 14th September, 2012 passed by a Division Bench of the High Court of Kerala. In our opinion, all these petitions deserve to be dismissed.

Brief background

3. Without going into any great detail into the history (which is replete with litigation – as if schools have nothing better to do) leading up to these petitions, it needs to be said that the affiliation of schools by the Central Board of Secondary Education (CBSE) is governed by its Affiliation Bye-laws. Clause 3(i) of the Bye-laws mandates formal prior recognition by the State/Union Territory Government. Additionally, the application for affiliation should be forwarded by the State Government or there should be a No Objection Certificate (NOC) to the effect that the State Government has no objection to the affiliation of the school with the CBSE.

4. Apparently with this in mind, the State of Kerala issued certain guidelines on 13th June, 2007 limiting consideration of applications for

grant of an NOC to 5 northern districts in the State. The Government Order (G.O.) was challenged by the management of some schools and it was set aside by the High Court.

5. Against the decision rendered by the High Court, petitions for special leave to appeal were filed by Kerala which were taken up for consideration on 18th July, 2011. By that time, Kerala had come out with a new policy dated 10th June, 2011 which made the petitions infructuous. The relevant extract of the order passed by this Court on 18th July, 2011 reads as follows:

“Delay condoned.

The State Government has filed these SLPs challenging the order of the High Court directing consideration of the applications filed by the respondents for grant of ‘no objection certificate’ for seeking affiliation with Central Board of Secondary Education (for short ‘CBSE’) for a new institution/existing institutions. The State Government had earlier rejected the request with reference to the Policy of the State Government then in force.

When the matter came up today, both sides submitted that the State Government has now made a new Policy contained in G.O.(MS) No.137/2011/G. Edn. dated 10.6.2011 which reads as under:

“Government are pleased to accord sanction for issuing No Objection Certificate for getting CBSE/ICSE affiliation to schools, which totally fulfils the norms and conditions prescribed by CBSE/ICSE and having own land and basic facilities.

Further guidelines will be issued by the Department in due course.”

In view of the said Policy, it is submitted that these SLPs by the State Government have become infructuous as the State Government will have to consider the applications of the

respondents with reference to the said new Policy dated 10.6.2011 and pass appropriate orders within three months from today.

It is needless to say that if the respondents-applicants are aggrieved by any order passed on such consideration, they will be entitled to challenge the same in accordance with law.

.....”

6. It is significant to note that the last line of the G.O. dated 10th June, 2011 stated that further guidelines would be issued by the concerned department in due course.

7. These further guidelines as postulated by the G.O. dated 10th June, 2011 came to be issued on 7th October, 2011. These (new) guidelines were not supplementary but a completely extra set of guidelines that prescribed norms for the grant of an NOC to new schools for affiliation to CBSE and for existing schools for renewal of affiliation under the CBSE Affiliation Bye-laws. According to learned counsel for the schools, this was quite unexpected and unnecessary

8. Be that as it may, the management of several schools objected to some of the guidelines. The objections were to the following guidelines:

“iv. The institution should have minimum 3 acres of land, out of which at least 2 acres shall be in the actual location where the school is functioning in a contiguous manner. It should have adequate playground also. There should be a library and adequate number of laboratories.

vi. The medium of instruction must be English. However Malayalam will be compulsorily taught as a paper with a prescribed text book and a proper academic evaluation as instructed by State Government from time to time.

viii. The school shall appoint only qualified and eligible staff and must pay the salary and allowances and other benefits to the employees of the school. Employees in the CBSE/ICSE school shall be offered the same pay scales as in Government Schools for equivalent categories. The pay shall start at the minimum of the scale and employees shall be eligible for DA and increments as is allowed in Government Schools from time to time.

xiv. The school should have been in existence for a period of five years as on the date of application for NOC and should have at least 300 students in its rolls. The UIID enrolment should be completed and UIID numbers of the students enrolled in the school shall be furnished.”

9. These guidelines were challenged by some schools by way of writ petitions in the High Court. A learned Single Judge of the High Court heard the writ petitions challenging the G.O. of 7th October, 2011 and by an interim order passed on 20th April, 2012 stayed the operation of guidelines (iv) and (xiv).

10. Kerala filed a writ appeal challenging the order of the learned Single Judge and upon hearing learned counsel, the Division Bench was of the view that the decision in the writ appeal would render all the pending writ petitions before the learned Single Judge infructuous. Therefore, with the consent of all the parties to the litigation, it was decided that all the writ petitions and the writ appeal should be heard by the Division Bench so that there is some finality to the dispute.

11. By the impugned judgment and order dated 14th September, 2012, the High Court struck down clause (iv) and (xiv) of the guidelines dated 7th October, 2011 and it is under these circumstances that the present petitions have been filed by Kerala and taken up for consideration.

12. At the outset, we may note that although initially four guidelines were under challenge before the learned Single Judge but before us it was stated by learned counsel for school managements that they do not press the challenge to guidelines (vi) and (viii). We are, therefore, concerned only with guidelines (iv) and (xiv) pertaining to a school seeking affiliation requiring minimum 3 acres of land and a minimum 300 enrolled students.

Requirement of minimum 3 acres of land

13. According to Kerala, a school seeking an NOC for affiliation to the CBSE must have 3 acres of land out of which 2 acres should be contiguous and in the actual location of the school. We have not been shown any basis for this mandate, applicable to all schools across the board.

14. On the other hand, the CBSE appears to have done its homework in framing the Affiliation Bye-laws and making a realistic assessment of the requirements of schools depending on their location.

15. In Chapter IV of the Kerala Education Rules, 1959 (for short 'KER'), we have been informed by learned counsel for Kerala that it is provided that Upper Primary Schools with or without Lower Primary Section (that is up to and including Standard V and VI), the land requirement (as informed) is 1.2 to 2 hectares (3 to 5 acres); for Secondary Schools the land requirement is 1.2 to 2 hectares (3 to 5 acres) and for Higher Secondary Schools the land requirement is 1.2 hectares (3 acres). Hence the minimum requirement is of 3 acres of land. However, the KER provides that every school should normally have a minimum site area as indicated above.

16. Contrast this with the CBSE Affiliation Bye-laws. Under these Bye-laws, the minimum land requirement varies from location to location. The requirement generally for an educational institution to apply to the CBSE for affiliation is that the school must have 2 acres of land but there are certain exceptions. For example, in cities with a population exceeding 25 lakhs the land should not be less than 1 acre with adequate building and arrangement with other institution/organization for imparting physical and health education and for conducting games to the satisfaction of the CBSE. In hilly areas, the land should not be less than 1 acre and the norms as prescribed by the Planning Commission would be applicable for determining hilly areas.

17. Similarly, in schools located within the Municipal limit of the capital cities, islands, North Eastern States and Jammu & Kashmir the minimum land requirement shall be 1 acre. In other words, the CBSE has introduced a degree of flexibility depending upon the location of the school. Unfortunately, Kerala has not even thought of providing any such flexibility. It appears to us that the rigid requirement of Kerala indicates that it is imposed upon the schools that seek affiliation with the CBSE only with a view to unnecessarily burden them with an onerous and arbitrary condition, since Kerala believes it has the authority to do so.

18. Keeping all this in mind, we had required Kerala by an order dated 6th December, 2016 to inform us the number of schools run by the State Government or aided by the State Government or affiliated with the State Board that do not comply with the guidelines of 7th October, 2011. In response, Kerala filed an evasive affidavit to the effect that since the guidelines do not apply to such schools, there is no compulsion on such schools to comply with them. This is remarkable – guidelines are framed by Kerala for application by schools other than those run by the State Government or aided by the State Government or affiliated with the State Board. There is no reason given for this distinction drawn by Kerala which appears to be completely arbitrary.

19. It was submitted on behalf of Kerala that nevertheless the State Government was well within its rights and authority to provide for a minimum of 3 acres of land for the grant of an NOC. While this may be so, the requirement must have some rational basis but we are unable to find any such rational basis. Even in the counter affidavit filed before the learned Single Judge it is stated by Kerala that restrictions have been placed on CBSE schools to prevent their mushrooming growth which would affect the public education system in the State. No details have been given for arriving at this conclusion. But the very fact that there is a mushroom growth of CBSE schools is an indication that the public education system in Kerala as managed by the State Government leaves something to be desired in terms of the quality of the education. How does the restriction imposed by Kerala benefit the children of the State?

20. As mentioned above, the CBSE has done its homework well and has taken a pragmatic view of the requirement of land. We can take judicial notice of the fact that in metropolitan and capital cities as well as in hilly areas, it would be difficult to get 3 acres of land or even 2 acres of land. Similarly, due to the terrain it would perhaps be difficult to get adequate land in the North Eastern region of the country as well as in Jammu & Kashmir. This realism deserves to be contrasted with

non-realistic inflexibility of Kerala which too has some hilly areas where perhaps it might be difficult to find 3 acres of land. It is this lack of pragmatism and arbitrary rigidity that has weighed with the High Court as well as with us in coming to the conclusion that guideline (iv) requiring a minimum of 3 acres of land for obtaining an NOC for getting affiliation in accordance with the Affiliation Bye-laws of the CBSE is arbitrary and was deservedly struck down by the High Court.

Minimum enrolment of 300 students

21. The second challenge is with reference to the minimum strength of students being 300 in a school that seeks affiliation with the CBSE in terms of guideline (xiv).

22. At this stage, it may be mentioned that in *Queen Mary Public School v. State of Kerala*¹ the High Court held that the requirement of 500 students on the rolls for affiliation of the school from Standard I to Standard X is contrary of the CBSE Affiliation Bye-laws and is not rational or sustainable. Notwithstanding this, Kerala has insisted on the number of students on the rolls being at least 300 for the issuance of an NOC. Since there is no such requirement under the CBSE Affiliation Bye-laws - this is merely an unwarranted imposition by Kerala on school managements.

¹ (2007) 4 KLT 706

23. The question of affiliation with the CBSE would arise only when the school reaches at least Standard VI. In this regard, clause 15.1(a) of Chapter III of the Affiliation Bye-laws is relevant and this provides as follows:

“15.1.(a) The schools fulfilling the norms of Affiliation given in Chapter-II may apply ‘On-line’ to the Board for approval of Middle Class Syllabus/provisional affiliation for secondary/upgradation of Senior Secondary Classes on the prescribed from alongwith prescribed fee given in Appendix II before 30th June of the Year preceding the year in which Class VI/IX/XI as the case may be is proposed to be started. Application Forms, procedural details and Affiliation Bye-Laws for submission of applications ‘on line’ are available on the Boards website www.cbse.nic.in. Application submitted by post or by any other means will not be processed.

All the applications which are received by CBSE on or before 30th June every year may be processed together within a period of six months thereof. The order of granting or refusing the affiliation shall be communicated to the applicants on or before 31st December of that year.”

24. The High Court took the view that progressive stages of affiliation has a rational basis while the prescription of having a minimum of 300 students for obtaining an NOC does not have any such basis. Again, we do not find any reason for this requirement in the counter affidavit filed by Kerala in the High Court except that it has the authority to make such a prescription.

25. The illustration given by the High Court in this regard is apposite. The Right of Children to Free and Compulsory Education Act, 2009 (the RTE Act) requires a student-teacher ratio of 30:1. A

school having 30 children in one class and having one division will have only 180 students upto and including Standard VI. Such a school cannot, therefore, obtain provisional affiliation for secondary or senior secondary classes. Actually, such a school would not be eligible for affiliation till Standard X when it has 300 students – and it can never reach that stage since Standard IX and X can be started only if the school has CBSE affiliation. Kerala is, therefore, expecting an impossibility from such schools that strictly conform to the provisions of the RTE Act.

26. On the other hand, under the KER the minimum effective strength per standard in Lower Primary/Upper Primary and High Schools is 25 students (it would now have increased to 30 students). It is only for schools seeking CBSE affiliation that it is prescribed that the number of students should not be less than 300. We do not see how, if the number of students is less than 300, it will detract from the quality of education imparted to the students. In other words, the requirement of a minimum strength of 300 students is a completely arbitrary figure arrived at by Kerala and which has no rational nexus with quality education or the CBSE Affiliation Bye-laws.

27. According to learned counsel for Kerala, if a school does not have a minimum of 300 students, it would be difficult for that school to

pay the required wages of the staff and the teachers except by charging exorbitant fees. There is no material on record to substantiate such a conclusion and it is based merely on the *ipse dixit* of the State. In the absence of any material on record justifying the fixation of a minimum of 300 students in a school seeking an NOC for affiliation to the CBSE, we must hold the requirement as arbitrary and we do so.

28. Another issue raised by the management of schools is with regard to the compulsory unique identification (UID) for enrolment of students. We leave this issue open, as suggested by learned counsel, to await the decision of Constitution Bench of this Court which is presently seized of the requirement of UID.

29. For the aforesaid reasons, we find no merit in these petitions which are accordingly dismissed. The interim applications stand disposed of.

.....J
(Madan B. Lokur)

New Delhi
May 2, 2018

.....J
(Deepak Gupta)