Rev. Sidhajbhai Sabhai and Others

Vs

State of Bombay and Another

Writ Petition No. 76 of 1957

(Syed Jafar Imam, J. C. Shah, K. Subha Rao, N. Rajgopala Ayyangar JJ)

30.08.1962

JUDGMENT

SHAH, J. -

The petitioners profess the Christian faith and belong to the United Church of Northern India. They are members of the Gujarat and Kathiawar Presbyterian Joint Board-hereinafter called 'the society' - which conducts in the areas which now form the State of Gujarat, forty two primary schools and a Training College for teachers, known as the "Mary Brown Memorial Training College", at Borsad, District Kaira. The teachers trained in the colleges are absorbed in the primary schools conducted by the society and those not so absorbed are employed by other Christian Mission Schools conducted by the United Church of Northern India. The cost of maintaining the Training college and the primary schools is met out of donations received from the Irish Presbyterian Mission, fee from scholars and grant-in-aid under the education Code of the State Government. The primary schools and the college are conducted for the benefit of the religious denomination of the United Church of Northern India and Indian Christians generally, though admission is not denied to students belonging to other communities. The training course in the college is of the duration of two years and originally 25 students were admitted in the First Year and 25 in the Second Year. Till the year 1952 surplus accommodation after admitting students who were to qualify as teachers required for the society's primary schools, was available for other students. The College was recognised by the Government of Bombay for training students for the examination held by the Education Department for granting certificates for trained teachers.

In each District of the State of Bombay there is maintained a District School Board and in a Municipal area a Municipal School Board. These School Boards attend to matters relating to primary education and conduct schools in the areas in which they function. To provide trained teachers for the schools run and conducted by the School Boards, the State maintains Training Colleges for teachers.

In November 1952 the Government of Bombay ordered all private Training Colleges in the State to reserve 60% of "seats for training Boards' School teachers nominated by the Government." The society protested against the order. There, were negotiations between the Education Department of the Government and the society and it was agreed that the society should admit every year 20 students, 10 in each class. Accordingly, in June 1953, 10 students were nominated by the Government and another batch of ten students was nominated in June, 1954. On May 28, 1955, the Government of Bombay issued another order that with effect from the academic year 1955-56, 80% of the seats should be reserved by the Management in non-Government Training Colleges for the District and Municipal School Board teachers to be nominated by the Government. It was recited in

the order that there were 40,000 untrained primary teachers employed by District School Boards and Authorised Municipalities, and some more untrained teachers were likely to be selected and appointed as primary teachers during the next academic year and in order that untrained teachers should have the necessary training as soon as possible, Government had decided to expand the existing training facilities with a view to increasing "the output of trained teachers" by opening new Training Colleges and by directing that 80% of the seats in non-Government Training Colleges should be reserved for School Board teachers with effect from the next academic year (1955-56). On June 13, 1955, the Educational Inspector, Kaira District addressed a letter to the Principal of the College informing him that 80% of the total number of seats in the training college be reserved for school Board teachers "deputed by the Government," and ordered the Principal not to admit private students in his institution in excess of 20% of the total strength in each class without specific permission of the Education Department. The Principal of the College, by letter dated June 15, 1955, expressed his inability to comply with the order. There was correspondence between the society and the Education Department in the course of which the Department insisted that 80% of the seats should be reserved by the College for school Board teachers and that no fresh admissions should be made. By letter dated December 27, 1955, the Educational Inspector, Kaira District informed the management of the College that the action taken by them in refusing admission to the School Board teachers was highly irregular and "against the Government policy", that the management was severely warned for disregarding the orders issued in that connection, and that in view of the management's defiant attitude it had been decided that no grant would be paid to the College for the current year unless the management agreed to reserve 80% seats for School Board teachers from 1956-57 and that the management should maintain only one division of the IInd Year class during the year 1956-57 and that it should not admit fresh candidates to the Ist Year without specific permission from the Director of Education, Poona, failing which severe disciplinary action such, as withdrawal of recognition of the institution would be taken. The society submitted on February 10, 1956 a memorial to the Minister for Education Government of Bombay protesting against the threat to take disciplinary action and to withdraw recognition. By letter dated March 12, 1956, the society was informed that in view of the refusal of the society to reserve seats for the school Board teachers, grant for the current year was withheld. By letter dated March 22, 1956, the society wrote to the Minister for Education requesting that they be permitted to fill twelve places in each year and the remaining places (which amounted to 60% of the total strength) be reserved for School Board teachers. By letter dated March 29, 1956, the Educational Inspector called upon the Principal of the College not to admit private candidates to the 1st year class without obtaining previous permission from the Director of Education, and informed him that the provisional grant of Rs. 8,000/- sactioned to the College was on "the distinct understanding that 80% of the seats are reserved for School Board teachers from 1956-57 and necessary residential accommodation is made available for them." On April 18, 1956, the society was informed that 80% of the seats for the 1st year should be reserved for the School Board teachers annually and the same be continued next year in the IInd year, that due hostel accommodation be provided for those teachers, that the College students should be allowed to observe important festivals of all religions not "involving rituals as part of cultural programmes under community living", and the College should provide some place where all teachers, staff and students can meet and recite common prayers. By letter dated May 9, 1956, the Director of Education informed the society in continuation of letter dated April 18, 1956 that the Society having failed to assure the Government that they will abide by the conditions set out in the earlier letter no deputations of teachers were made to the 1st Year of the college during the year 1956-57 and that the College will not be paid the grant. On June 9, 1956, the Director of Education again wrote to the society calling upon it to admit all the School Board teachers as may be deputed upto 80% of the seats in the 1st year class for the year 1956-57, and to provide adequate

hostel accommodation for them and if the society failed to communicate its willingness to comply therewith within seven days from the receipt of the letter, the Government would be constrained to withdraw recognition accorded to the 1st year class of the training College under Rule 11 for recognition of non-primary training College framed by the Government under G.R. 11 dated November 9, 1949. This letter was written in pursuance of the authority assumed under two sets of Rules framed by the Government of Bombay - (i) Rules for Primary Training Colleges, and (2) Rules for the recognition of the Private Training Institutions. By 5(2) of the first set of Rules, it was prescribed that in non-Governmental Institutions, percentage of seats reserved for Board deputed teachers shall be fixed by the Government and the remaining seats shall be filled by students deputed by private schools or by private students. Rules 11, 12 and 14 of the Rules for the recognition of Private Primary Training Institutions were as follows :-

> "11. The Institution will have to be kept open for all students irrespective of caste or creed. It will be open to Government to reserve seats for Board deputed teachers to such extent as is deemed necessary. The institution will have to give such representation on its staff and students to Backward classes as may be fixed by Government."
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> "12. Women teachers will be admitted in Women's Training Institutions. The Head of such Institutions should be a woman and not less than 50 percent of the Assistant Teachers, should be women. In special cases, men's institutions may be allowed to admit women teachers provided :
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> (i) Separate classes for women are formed.
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> (ii) One trained graduate woman teacher is appointed per class for women teachers opened in the college.
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> (iii) Separate residential arrangement under supervision of a woman teacher are made for women students in the Hostel.
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> (iv) Satisfactory arrangements are made for teaching Home Science as an auxiliary craft to women students.
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> (v) Separate sanitary arrangements are made for women teachers in the college and hostel premises."
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> "14. It will be open to the Department to withdraw recognition or refuse payment of grant to any private training institution for non-fulfilment of any of the conditions mentioned above, for inefficient management and poor quality of teaching, or for failure to comply with any of the Departmental regulation now in force or that may be issued from time to time by the Government, or by the Director of Education on behalf of Government."

The petitioners moved this Court for a writ in the nature of mandamus or other writ directing the State of Bombay and the Director of Education not to compel the society and the petitioners to reserve 80% or any seats in the training College for "the Government nominated teachers" nor to compel the society and the petitioners to comply with the provisions of Rules 5(2), 11, 12 and 14 and not to withdraw recognition of the College or withhold grant-in-aid under Rule 14 or otherwise.

The petitioners are members of a religious denomination and constitute a religious minority. The society of which they are members maintains educational institutions primarily for the benefit of the Christian community, but admission is not denied to students professing other faiths. They maintain a college for training women teachers required for their primary schools. The petitioners claim that their fundamental rights guaranteed by Arts. 30(I), 26(a), (b), (c) and (d) and 19(1)(f) and (g) are violated by letters dated May 28, 1955, December 27, 1955 and March 29, 1956 threatening to withhold the grant-in-aid and to withdraw recognition of the Collage.

It is common ground that the Government of Bombay makes under the Education Code a grant of Rs. 8,000/- annually to the college. This Code is not framed under any Statute but consists of a series of administrative directions issued by the Government of Bombay pertaining to matters educational and sets out regulations for making grants. The Government also holds examinations for granting certificates to successful candidates as trained primary teachers, and scholars receiving training in recognised institutions alone are entitled to appear at the examination. Manifestly, in the absence or recognition by the Government training in the College will have little practical utility. The College is a non-profit making institution and depends primarily upon donations and Government grant for meeting its expenses. Without such grant, it would be extremely difficult if not impossible for the institution to function.

Article 19(I)(f) on which reliance has been placed on behalf of the society does not come to its aid. By that clause all citizens are declared to have the fundamental freedom to acquire, hold and dispose of property. But by the rules and orders impugned no right to acquire, hold or dispose of property is violated. Interference with the right of bare management of an educational institution does not amount to infringement of the right to property under Art. (I)(f). The decision of this Court in The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shiru Mutt ([1954] S.C.R. 1005.) on which reliance is placed by the Society does not lay down any proposition to the contrary. The Court was dealing in that case with the alleged infringement of the rights of a Mahant in a religious institution by the enactment of the Madras Hindu Religious and Charitable Endowments Act, XIX of 1951. It was observed that a Mathadhipati of a Math is not a mere manager and that it would not be right to describe mahantship as a mere office : a superior of a Math has not only duties to discharge "in connection with the endowment but he has a personal interest of a beneficial character which is sanctioned by custom and is much larger than that of a Shebait in the debutter property. x x x x x x Thus in the conception of Mahantship, as in Shebaitship, both the elements of office and property, of duties and personal interest are blended together and neither can be detached from the other. The personal or beneficial interest of the Mahant in the endowments attached to an institution is manifested in his larger powers to create derivative tenures in respect to endowed properties; and these and other rights of a similar character invest the office of the Mahant with the character of proprietary right which, though anomalous to some extent, is still a genuine legal right." The word "property" in Art. 19(I)(f) must doubtless be extended to all those recognised types of interest which have the insignia or characteristics of proprietary rights, and a Mathadhipati has those rights, but it cannot be said that the petitioners in this case have any such proprietary rights as are vested in the Mahant of a Math. Nor does the principle of Sri Dwarka Nath Tewari v. State of Bihar (A.I.R. (1959) S.C. 249.) apply to this case. In Dwarka Nath's case, by an executive order the Government of Bihar purported to divest the trustees of a school of their right to land and building belonging to the school. The Court held that the applicants in whom the land and the building of the school were vested as the Managing Committee of the school could not be divested of their rights by the mere fiat of an official of the Government. No attempt is made by the order of the State to deprive the petitioners of their right to property, and fundamental freedom guaranteed by Art. 19(1)(f) the Constitution is therefore not

violated. Nor is the right of the petitioners to practice any profession, or to carry on any occupation, trade or business guaranteed under Art. 19(1)(g) of the Constitution infringed by the impugned rules and directions.

Article 26 occurs in a group dealing with freedom of religion and is intended to protect the right "to manage religious affairs". By cl. (a) of Art. 26, every religious denomination or any section thereof', has, subject to public order, morality and health, the right to establish and maintain institutions for religious and charitable purposes and in a larger sense an educational institution may be regarded as charitable. But in the view we take of the protection of Art. 30(1), we do not think it necessary to express any opinion on the plea that the right of the petitioners guaranteed by Art. 26 to manage the college is infringed by the impugned rules and orders issued by the Government of Bombay.

Serious inroads are made by the Rules and orders issued by the Government of Bombay upon the right vested in the society to administer the training College. By Rule 5(2) of the Rules for Primary Training Colleges, the Government is authorised to reserve in "non-Governmental institutions" a percentage of seats "for the Board deputed teachers" and the Management of the institution has the right to admit students only for unreserved seats. By Rule 11 of the Rules for recognition of the Private Primary Institutions, authority is again assumed by the Government to reserve seats "for Board deputed teachers." By Rule 14, the Education Department is authorised to withdraw recognition and to refuse to pay grant to any private institution for nonfulfilment of the conditions set out in the Rules, for inefficient management and poor quality of teaching or failure to comply with the regulations in force or that may be issued from time to time by the Government or by the Director of Education on behalf of Government. It is manifest that the right of the Private Training Colleges to admit students of their own choice is severely restricted and enforcement of the restrictions sought to be secured by holding out a threat to without recognition and to refuse to pay grant.

Article 30(1) provides that all minorities have the right to establish and administer educational institutions of their choice, and Art. 30(2) enjoins the State, in granting aid to educational institutions not to discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. Clause (2) is only a phase of the non-discrimination clause of the Constitution and does not derogate from the provisions made in cl. (1). The clause is moulded in terms negative : the State is thereby enjoined not to discriminate in granting aid to educational institutions on the ground that the management of the institution is in the hands of a minority, religious or linguistic, but the form is not susceptible of the inference that the State is competent otherwise to discriminate so as to impose restrictions upon the substance of the right to establish and administer educational institutions by minorities, religious or linguistic. Unlike Art. 19, the fundamental freedom under cl. (1) of Art. 30, is absolute in terms; it is not made subject to any reasonable restrictions of the nature the fundamental freedoms enunciated in Art. 19 may be subjected to. All minorities, linguistic or religious have by Art. 30(1) an absolute right to establish and administer educational institutions of their choice; and any law or executive direction which seeks to infringe the substance of that right under Art. 30(1) would to that extent be void. This, however, is not to say that it is not open to the State to impose regulations upon the exercise of this right. The fundamental freedom is to establish and to administer educational institutions : it is a right to establish and administer what are in truth educational institutions, institutions which cater to the educational needs of the citizens, or sections thereof. Regulation made in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like may undoubtedly be imposed. Such regulations are not restrictions on the substance of the right which is guaranteed : they secure the proper functioning of the institution, in matters educational.

The petitioners do not contend that the absolute terms in which the Art. 30(1) is enunciated deprive the State, especially when it pays grant and affords recognition to it as an educational institution competent to train students for the examinations held by the State, to impose reasonable regulations. But it is contended that these regulations can only be in the interest of the institution-regulations to make it an effective educational institution so as to secure excellence of the training imparted therein - the regulations cannot be made in the interest of outsiders. Counsel for the State of Gujarat (upon which State the duty to defend this petition has since the constitution of the new State of Gujarat, devolved) contended that the right extends to all such regulations as may appear to the Government in the national or public interest, provided that the regulations do not tend to destry the character of the institution as one maintained by the minority. Counsel submits that the State is not bound to make a grant, nor it is bound to recognise the minority institution for examinations held by a State : if the State makes a grant or gives recognition to an institution for the examination held by it, the State is entitled to impose conditions relating to admission of students and to withhold grant and recognition, in the event of the institution failing to carry out the conditions, such regulation being in the national or public interest. Counsel concedes that if the effect of the restrictions is the total destruction of the character of the institution as an institution administered by a minority, the restrictions may be regarded as infringing Art. 30(1) but not otherwise. In support of his argument, reliance is placed upon the affidavit of Dr. D. V. Chickermane who affirmed that "the number of Primary and Basic Schools in the State run by District School or Municipal Boards and others was great," primary schools alone being over 8,900 and the untrained personnel in all the primary schools was about 40,000 which had to be progressively reduced in the interests of the public. It was therefore necessary for the Government and the private Colleges receiving grant-in-aid from Government to Prepare qualified teachers for these schools in large numbers and if the private Training Colleges did not train teachers for the School Boards, it would not be possible for such colleges to absorb all the teachers trained by them in their own schools and the training given to extra teachers would be wasted. Dr. Chickermane further affirmed that in 1955 the Government had decided to step up the programme of training teachers in the Boards Schools for training 2,000 teachers every year, the intention being to remove the untrained element in primary schools in the State as early as possible, and that with this object the Government had decided to depute 1,600 teachers to private Training Colleges and this could be possible only if 80% seats in the private Training Colleges would be reserved for such nominees.

The truth of these statements made in Dr. Chickermane's affidavit is not denied by the petitioners. They however submit that the requirement of the State Government of a large number of trained teachers in the near future is not a ground on which the infringement of the fundamental right of the society under Art. 30(1) to administer its educational institution could be justified.

Restrictions imposed by the Rules and the directions issued upon the right of the society to administer the Training College maintained by it, are manifestly not conceived in the interests of the College. The Additional Solicitor General appearing on behalf of the State, contends that this Court has held in the Kerala Education Bill case ([1959] S.C.R. 995.) that the State may validly impose restrictive measures in national or the public interest on the right of a minority to administer its educational institution notwithstanding the protection of Art. 30(1), provided such measures are not annihilative of the character of the minority educational institutions. The Kerala Education Bill case arose out of a reference made by the President under Art. 143 of the Constitution, and this Court was called upon to report amongst others on the question whether sub-cl. (5) of cl. 3, sub-cl. (3) of cl. 8 and cls. 9 to 13 of the Bill or any provisions thereof, offended cl. (1) of Art. 30 of the Constitution. By the impugned clauses of the Bill establishment of a new school or the opening of a higher class in any private school could be made only in accordance with the provisions of the Act

and the rules made thereunder, and any school or higher class established or opened otherwise than in accordance with such provisions was not to be entitled to recognition by the Government [cl. 3(5)]; all fees collected from the students in an aided school were, notwithstanding anything contained in any agreement, scheme or arrangement, to be made over to the Government [cl. 8(3)]; and the salary of the teachers in aided schools was to be paid by the Government (cl. 9); the Government was authorised to prescribe qualifications of teachers in private schools, and the Public Service Commission was authorised to frame a list of teachers for appointment in aided schools (cls. 10 and 11), the conditions of service relating to scales of pay, pension, provident fund, insurance and age of retirement applicable to teachers of Government schools were to apply to teachers of aided schools, and the Managers of aided schools were without the previous sanction of the Government prohibited from dismissing, removing or reducing in rank or suspending any teachers, and subject to the provisions so enacted the conditions of service of teachers of aided schools were to be such as may be prescribed (cl. 12) : the Government was authorised to take over any aided school if it appeared that the management thereof had neglected to perform the duties imposed by or under the Act or the rules made thereunder or if the Government was satisfied, that was necessary to do so for standardising general education in the State or for improving the level of literacy in any area or for more effectively managing the aided educational institutions in any area or for bringing education of any category under their direct control. The schools were thenceforth to vest in the Government absolutely (cls. 14 and 15). By the provisions of the Bill the power to administer an educational institution was practically taken away from the management. Managers of certain minority schools urged before the Court in that case that the protection of Art. 30(1) to minority educational institutions was in terms absolute, and the State could not competently impose any restrictions upon the exercise of the right of administration or management. On behalf of the State of Kerala it was submitted that by Art. 30(1) the minorities were merely invested with the fundamental right to establish and administer educational institutions of their choice, and that right could be exercised by them so long as they cared to do so on their own resources : fundamental right guaranteed by Art. 30(1) did not extend to getting assistance from the coffers of the state, and if the minority institutions desired to obtain aid from the State they must submit to the terms on which the State offered aid to all other institutions established by other persons.

The Court rejected the extreme contentions advanced by the Managers of the educational institutions and by the State, and observed that the right to administer did not include a right to maladminister, and the minority could not ask for aid or recognition for an educational institution run by them in unhealthy surroundings, without any competent teachers possessing any semblance of qualification, and which did not maintain even a fair standard of teaching or which taught matters subversive of the welfare of the scholars. The constitutional right to administer an educational institution of their choice, it was observed, does not necessarily militate against the claim of the State to insist that in order to grant aid the State may prescribe reasonable regulations to ensure the excellence of institutions to be aided, but the State could not grant aid in such a manner as to take away fundamental right of the minority community under Art. 30(1). It was pointed out that under the Directive Principles of State Policy, under Articles 41 to 46 it was the duty of State to aid educational institutions and to promote the educational interest of minorities and weaker section of the people. Again, in the circumstances prevailing in the country, no educational institution could, in actual practice, be maintained without aid from the State and if it could not get it unless it surrendered its rights, it would, because of pressure of financial necessities, be compelled to give up its right under Art. 30(1). The State could not disregard or override the fundamental right by employing indirect methods of achieving exactly the same result. Even the legislature could not do indirectly what in certainly could not do directly, and the effect of the application of some of those

provisions of the Bill was substantially to override the provisions of Art. 30(1). The Court then entered upon an examination of cls. 9, 10, 11, 12 and 13 and observed that they constituted serious inroads on the right of administration and appeared "perilously near violating that right", but considering that those provisions were applicable to all educational institutions and that the impugned parts of cls. 9, 11 and 12 were designed to give protection and security to the ill - paid teachers who were engaged in rendering service service to the nation and to protect the backward classes, the Court was prepared to treat cls. 9, 11(2) and 12(4) as permissible regulations which the State might impose on the minorities as a condition for granting aid to their educational institutions. But, it was observed, the clauses which authorised the taking over of management, and vested the schools absolutely in the Government, purported, in effect, to annihilate the educational institutions of their choice could not be sustained under Art. 30(1). It was therefore held that notwithstanding the absolute terms in which the fundamental freedom under Art. 30(1) was guaranteed, it was open to the state by legislation or by executive direction to impose reasonable regulation. The Court did not, however, lay down any test of reasonableness of the regulation. The Court did not decide that public or national interest was the sole measure or test of reasonableness : it also did not decide that a regulation would be deemed unreasonable only if it was totally destructive of the right of the minority to administer educational institution. No general principle on which reasonableness or otherwise of a regulation may be tested was sought to be laid down by the Court. The Kerala Education Bill case ((1959) S.C.R. 995.), therefore, is not an authority for the proposition submitted by the Additional Solicitor General that all regulative measures which are not destructive or annihilative of the character of the institution established by the minority, provided the regulations are in the national or public interest, are valid.

The right established by Art. 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Art. 19, it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole. If every order which while maintaining the formal character of a minority institution destroys the power of administration is held justifiable because it is in the public or national interest, though not in its interest as an educational institution, the right guaranteed by Art. 30(1) will be but a "teasing illusion", a promise of unreality. Regulations which may lawfully be imposed either by legislative or executive action as a condition of receiving grant or of recognition must be directed to making the institution while retaining its character as a minority institution effective as an educational institution. Such regulation must satisfy a dual test - the test of reasonableness, and the test that it is regulative of the educational character of the institution and is conducive to making the institution an effective vehicle of education for the minority community or other persons who resort to it.

We are, therefore, of the view that the Rule 5(2) of the Rules for Primary Training Colleges, and Rules 11 and 14 for recognition of Private Training institutions, insofar as they relate to reservation of seats therein under orders of Government, and directions given pursuant thereto regarding reservation of 80% of the seats and the threat to withhold grant-in-aid and recognition of the college, infringe the fundamental freedom guaranteed to the petitioners under Art. 30(1).

The petitioners will therefore be entitled to writs in terms of prayers (a), (b), (c) and (d) insofar as they relate to reservation of seats under orders of Government, subject to the modification that reference to cl. 12 of the rules in the prayers will be deleted in the writ. The petitioners will be entitled to the costs of the petition.

Petition allowed.

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