SUPREME COURT OF INDIA

State of Kerala

Vs.

K. Prasad

Civil Appeal No. 2913 of 2007

(Arijit Pasayat and D.K.Jain)

09/07/2007

JUDGEMENT

D.K. JAIN, J.

1. Leave granted.

2. Challenge in this Appeal by the State of Kerala is to the common judgment rendered by a Division Bench of the Kerala High Court in Writ Appeals No.545 and 546 of 2004, reversing the view of the learned Single Judge in regard to the up gradation of two aided schools in the State. By the impugned order, the Division Bench has directed the State to treat both the schools at par with the two other schools which had been upgraded in the past.

3. As noted above, both the respondent schools are aided schools. They made representations to the State (one of them pursuant to the direction of the High Court) praying for upgradation of the

schools from primary to secondary level. However, the request was declined by the State authorities because of lack of funds. The validity of the said decision was questioned by the respondents in the High Court mainly on the ground that they had been discriminated against inasmuch as the privilege given to two similarly situated schools had been denied to them. The argument did not find favour with the learned Single Judge, who came to the conclusion that since the schools could be upgraded only as per the procedure laid in Chapter V of the Kerala Education Rules, 1959 (for short 'the Rules') no positive direction could be issued to the State to upgrade the schools by ignoring the statutory provisions, particularly when there was no challenge to the validity of the Rules. Learned Single Judge held that merely because two schools had been upgraded without following the Rules, no legal right had accrued in favour of the writ petitioners' schools to have them upgraded without following the mandatory rules. The plea of financial constraints urged by the State was also found to be a valid round for rejection of the representations. Aggrieved, the matter was carried in appeals to the Division Bench. Accepting the plea of discrimination, the Division Bench directed the State authorities to give same treatment to the respondents herein as was given to the two other schools. The State was, thus, directed to grant upgradation to the respondent schools.

4. It is this common judgment which is questioned in this appeal.

5. Learned counsel appearing for the appellant has submitted that upgradation of an aided and unaided school has to be strictly in accordance with the procedure prescribed in the Rules and since the case of the respondents did not fit in the criteria and the procedure contemplated in the Rules, direction for upgradation of the schools was unwarranted. It is urged that merely because two aided schools had been upgraded by relaxing the Rules, as a special case, because of the directions of the Court, it could not be said that the respondents had been discriminated against, particularly when a policy decision had been taken by the State that no aided school shall be upgraded till the financial position of the State improves. It is, thus, pleaded that the impugned direction is not only against the specific provisions, it will also put unbearable heavy financial burden on the State Exchequer if the same is required to be given effect to, which, as observed in Secretary, State of Karnataka & Ors. Vs. Umadevi & Ors. , may prove to be counter productive. It is also asserted that the impugned direction, in fact, amounts to amendment of the existing government policy by a judicial order, which is not permitted. In support, reliance is placed on a decision of this Court in Principal, Madhav Institute of Technology and Science vs. Rajendra Singh Yadav & Ors. Wherein a direction contrary to the government policy in vogue at the relevant time was disapproved. It is also pointed out that several special leave petitions, filed by the school managements against the decisions of the High Court declining to issue directions for upgradation of their schools have already been dismissed

6. On the other hand, learned counsel for the respondents, while supporting the direction of the Division Bench has submitted that two other similarly situated schools having been upgraded by the government during the relevant period, the stand of the State regarding financial stringency is per se arbitrary as equals have been treated as unequals and as such Article 14 of the Constitution is violated.

7. Having heard learned counsel for the parties, we are of the view that on facts in hand respondents' plea of discrimination, which found favour with the Division Bench, is clearly untenable and, therefore, the impugned direction cannot be sustained.

8. Chapter V of the Rules embodies rules for the regulation of opening and recognition of schools in the State of Kerala. Rule 2 lays down the procedure for determining the areas where new schools are to be opened or the existing schools are to be upgraded. The Rule, insofar as it is relevant for our purpose, reads as under:"2. (1) The Director may, from time to time, prepare two lists, one in respect of aided schools, and other in respect of recognised schools indicating the localities where new Schools of any or all grades are to be opened and existing Lower Primary Schools or Upper Primary Schools or both are to be upgraded. In preparing such lists he shall take into consideration the following:

(a) The existing schools in and around the locality in which new schools are to be opened or existing schools are to be upgraded;

(b) The strength of the several standards and the accommodation available in each of the existing schools in that locality;

(c) The distance from each of the existing schools to the area where new schools are proposed to be opened or to the area where existing schools are to be upgraded;

(d) The educational needs of the locality with reference to the habitation and backwardness of the area; and

(e) Other matters which he considers relevant and necessary in this connection.Explanation: - For the removal of doubts it is hereby clarified that it shall not be necessary to prepare the two lists simultaneously and that it shall be open to the Director to prepare only one of the lists.

(2) A list prepared by the Director under Sub-rule (1) shall be published in the Gazette, inviting objections or representation against such list. Objections, if any, can be filed ainst the list published within one month from the date of publication of the list. Such objection shall be filed before the Assistant Educational Officers or the District Educational Officers as the case may be. Every objection filed shall be accompanied by a chalan for Rs.10/ remitted into the Treasury. Objections filed without the necessary chalan receipt shall be summarily rejected.

(3) The Assistant Educational Officer and the District Educational Officer may thereafter conduct enquiries, hear the parties, visit the areas and send their report with their views on the objections raised to the Director within two months from the last date of receipt of the objections. The Director, if found necessary, may also hear the parties and finalise the list and send his recommendation with the final list to Government within two months from the last date of the receipt of the report from the Educational officers.

(4) The Government after scrutinising all the records may approve the list with or without modification and forward the same to the Director within one month from the last date for the receipt of the recommendations of the Director. The list as approved by the Government shall be published by the Director in the Gazette.

(5) xxx xxx xxx.

(5A) xxx xxx xxx.

(6) xxx xxx xxx."

9. Rule 2A of the Rules provides for inviting applications for opening of new schools and upgrading of existing schools. For the sake of ready reference, the relevant provision is also reproduced hereunder:"2A. (1) After the publication of the final list of the areas where new school of any or all grades are to be opened or existing Lower Primary Schools or Upper Primary schools or both are to be upgraded the Director shall, by a notification in the Gazette call for applications for opening of new schools of any or all grades and for raising of the grade of existing Lower Primary Schools or Upper Primary Schools or both in the areas specified.

(2) Applications for opening of new schools or for raising of grade of existing schools shall be submitted only in response to the notification published by the Director. Applications received otherwise shall not be considered. The applications shall be submitted to the District Educational Officer of the area concerned in form No.1 with 4 copies of the application and enclosures within one month from the last date of publication of the notification under sub-rule (1).

(3). On receipt of the applications for permission to open new schools or for upgrading of existing schools, the District Educational Officer shall make such enquiries as he may deem fit as to the

correctness of the statements made in the applications and other relevant matters regarding such applications and forward the applications with his report thereon to the Director within one month from the last date for submitting applications under sub-rule (2).

(4) The Director on receipt of the applications with the report of the District Educational officer shall forward the applications with his report to Government within one month from the last date for forwarding the report by the District Educational Officer.

(5) The Government shall consider the applications in the light of the report of the District Educational Officer and the Director and other relevant matters which the Government think necessary to be considered in this connection and shall take a final decision and publish their decision in the Gazette with the list containing necessary particulars within one month from the last date for forwarding the report by the Director.

(6) xxx xxx xxx.

(7) xxx xxx xxx.

(8) xxx xxx xxx."

10. The two Rules, quoted above, lay down a comprehensive procedure for opening of new schools in particular areas; their recognition and upgradation. It is manifest that a decision in this behalf has to be primarily by the government on an application made for that purpose under Rule 2A. The Rules also lay down the guidelines which are to be taken into consideration for preparing the list in terms of sub rule (1) of Rule 2. On the lists being finalized, after their publication and consideration of objections, if any, the same have to be sent to the government for its approval, with or without modification. Nevertheless the decision by the government whether opening of new school is to be sanctioned or whether an existing school is to be allowed to be upgraded has to be taken on consideration of the matters enumerated in clauses (a) to (e) of Rule 2(1) of the Rules. Similarly, an application for either opening of new school or for upgradation of an existing aided school can be submitted only after the Director publishes a final list of areas where new schools are to be opened or existing schools are to be upgraded under sub rule (4) of Rule 2. Any application received otherwise cannot be considered. In view of such comprehensive procedure laid down in the statute, an application for upgradation has necessarily to be made and considered strictly in a manner in consonance with the Rules. It needs little emphasis that Rules are meant to be and have to be complied with and enforced scrupulously. Waiver or even relaxation of any Rule, unless such power exists under the Rules, is bound to provide scope for discrimination, arbitrariness and favouritism, which is totally opposed to the rule of law and our constitutional values. It goes

without saying that even an executive order is required to be made strictly in consonance with the Rules. Therefore, when an executive order is called in question,while exercising the power of judicial review the Court is required to see whether the government has departed from such Rules and if so, the action, of the government is liable to be struck down.

11. This Court in Shrilekha Vidyarthi (Kumari) Vs. State of U.P. held that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 and basic to the rule of law, the system which governs us, arbitrariness being the negation of the rule of law. Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary in whatever sphere must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all powers must be for public good instead of being an abuse of power.

12. Having examined the instant matter on the touchstone of the aforementioned settled principles, we find it difficult to hold that the decision of the appellant not to sanction up gradation of respondent schools because of paucity of funds was either arbitrary or unreasonable or manifestly erroneous to warrant interference by the Court. There is no denying the fact that opening of new schools or up gradation of aided schools does involve considerable financial commitment for the State. Moreover, insofar as the present cases are concerned, indubitably, applications for upgrading the existing schools had not been invited by the Director as stipulated in sub rule (2) of Rule 2A and, therefore, the representations made by the respondents for upgrading their schools could not be considered by the government unless it was shown that the Director or the State Government were not finalizing the list in terms of Rule 2A for some extraneous considerations, which was not the case of the respondents. Thus, in the absence of gazette notification, calling for applications for rising of the grade of an existing school, the question of consideration of respondent�s applications/representations did not arise. In fact, sub rule (2) of Rule 2A puts a complete embargo on consideration of an application which is submitted otherwise than in response to notification under sub rule (1) of Rule 2A. We are constrained to observe that the Division Bench of the High Court has failed to keep all these aspects in mind while issuing the impugned directions.

13. We may now deal with the plea of the respondents that they have been discriminated against. It is true that Article 14 of the Constitution embodies a guarantee against arbitrariness but it does not assume uniformity in erroneous actions or decisions. It is trite to say that guarantee of equality being a positive concept, cannot be enforced in a negative manner. To put it differently, if an illegality or irregularity has been committed in favour of an individual or even a group of individuals, others, though falling in the same category, cannot invoke the jurisdiction of the writ courts for enforcement of the same irregularity on the reasoning that the similar benefit has been denied to them. Any ction for enforcement of such claim shall tantamount to perpetuating an illegality, which cannot be permitted. A claim based on equality clause has to be just and legal.

14. Dealing with such pleas at some length, this Court in Chandigarh Administration & Anr. Vs.

Jagjit Singh & Anr. , has held that if the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the authority to repeat the illegality or to pass another unwarranted order. The extra-ordinary and discretionary power of the High Court under Article 226 cannot be exercised for such a purpose. This position in law is well settled by a catena of decisions of this Court. [See: Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain & Ors. and Ekta Shakti Foundation Vs. Govt. of NCT of Delhi]. It would, thus, suffice to say that an order made in favour of a person in violation of the prescribed procedure cannot form a legal premise for any other person to claim parity with the said illegal or irregular order. A judicial forum cannot be used to perpetuate the illegalities.

15. Adverting to the facts of the two cases, stated hereinabove, we are of the considered view that having been made aware of the fact that the relied upon orders of upgradation had been passed in utter disregard of the statutory rules, the Division Bench fell in grave error in importing the theory of discrimination, particularly when respondents' applications seeking upgradation, were per se not as per the prescribed procedure.

16. We are, therefore, of the opinion that the Division Bench was not justified in directing the State Government to accord the same treatment which had been given to two other schools, which had been upgraded ignoring the statutory rules and upgrade the respondents' schools. In this view of the matter, decision of the High Court is clearly unsustainable and deserves to be set aside.

17. In the result, the appeal is allowed; the judgment of theDivision Bench is set aside and both the writ petitions are dismissed. There will, however, be no order as to costs.