SUPREME COURT OF INDIA

Secretary,Muslim Educationl.Association

Vs.

State of Kerala

C.A.No.4346 of 2010

(G.S. Singhvi and Asok Kumar Ganguly JJ.)

07.05.2010

JUDGEMENT

A.K.Ganguly, J.

1. Leave granted.

2. The appellant is the Secretary of Cannanore District Muslim Educational Association, Karimbam (hereinafter referred to as the `Appellant'), which is a Society registered under the Societies Registration Act (Central Act 21/1860). The Appellant had established Sir Syed College in 1967 1 and it was imparting degree courses along with some pre-degree courses in various streams constituting 11 batches of a total of 80 students in each batch.

3. The Respondents, took a policy decision to abolish the Pre-degree Courses conducted in the colleges and enacted the *Pre-degree Courses (Abolition) Act, 1997*.

4. Subsequently, the respondents decided that those colleges which were running classes up to High School may be allowed to add classes up to the 12th standard in place of pre-degree courses. Those colleges which did not have any classes till the High school level were to be allowed to run High Schools and were also to be allowed Higher Secondary courses. Notice inviting applications from the management of schools, both government as well as private, and from colleges were issued for the first time for the academic year 1997-1998 vide notification dated 2.04.97.

5. The policy decision of the Government in this regard was upheld by the High Court by judgment dated 29.8.2002 in W.A.No.2716/2000.

6. The mode of implementation of this policy was the subject matter of a series of litigations where the Respondents were accused of discrimination. The Appellant before us has a similar grievance.

7. Writ Petition(C) No. 11167 OF 2006 was filed by the appellant challenging the non-sanctioning of the Higher secondary courses to its school. The other connected Writ Petitions which were disposed of by the impugned judgment were filed by the management or the teachers of the neighbouring schools, challenging the grant of a High school to the Appellant.

8. The Appellant had been applying for Higher Secondary courses ever since 1996. However, its applications were not considered by the respondents in light of the policy that the Government was allowing only those applicants who already had existing High Schools. Since many of the managements did not have 3 High Schools to start higher secondary courses, the Government issued a preliminary notification on 25.06.1998 for starting High Schools at a certain number of designated places as per Chapter V Rule(2) Sub-rule(2)of the *Kerela Education Rules, 1959*. The ward to which the Appellant belonged i.e. ward No. 15 of Taliparamba Municipality was also included in the earlier notification dated 13.06.2000 but it was excluded subsequently as the Government received some objections. An O.P. No. 29989/99 was filed by the Government wherein the High Court directed that the case of the Appellant be considered. Pursuant to this direction, the Appellants were given an assurance that they will be given the High School as and when the financial position of the Government improves.

9. Then by an order dated 31.05.2003, ten schools were given the sanction to open aided High Schools but the appellant was denied the same facility.

10. After repeated representations before the respondents, the appellant was sanctioned a High School and a Higher Secondary School in ward No. 15 of Taliparamba Municipality after a decision to that effect was taken in a meeting dated 08.10.03 of the Council of Ministers, as a special case.

11. But the said decision for sanction of Higher Secondary classes was not implemented in the light of the decision of the High Court in W.P.(C). No. 29124/03 wherein the High Court had directed the Respondents that newer Higher Secondary schools were not to be sanctioned by them without further orders from the Court.

12. Subsequently, in partial implementation of the order of 08.10.03, it started a High School from 9.8.2004 pursuant to the said order and the classes commenced during the academic year 2004-05 and the School became a complete High School during the academic year 2006-07.

13. In view of repeated representations of the appellant Association, the State Cabinet on 13.10.2005 decided to grant three batches of Higher Secondary courses to the appellant in the aided sector, subject to getting the permission of this Court. For this purpose, the Government filed I.A. No.1816/06 in W.P.(C) No.22532/04 and connected cases. But, High Court dismissed the said application, on the ground that the aggrieved persons may approach the Court.

14. Thereupon a Writ Petition was filed by the appellant seeking mainly the relief that the High Court may issue a writ in the nature of mandamus or any other appropriate writ, order or direction directing the respondents to sanction an aided Higher Secondary school to the appellant herein, as was done in the case of other aided college managements, so that the higher secondary school can commence functioning during the academic year 2006-07 itself.

15. Alleging discrimination in general, it was the specific contention of the Appellant in the Writ Petition that while other managements were being granted High Schools and Higher Secondary Schools simultaneously or immediately, one after the other, the appellant herein was not sanctioned Higher Secondary School after the sanction of the High School. It also prayed that the order of 08.10.03 by which the Government had already granted Higher Secondary courses to the appellant may be implemented.

16. The question before the High Court was whether the Higher Secondary school was to be sanctioned to the Appellant as per the old policy and the subsequent orders or in view of the new policy as per the G.O.(P)No.107/07/G.Edn dated 13.6.2007, which was produced by the Respondents before the High Court along with a memo, containing the norms for sanctioning new schools, courses etc. Respondents in their Counter Affidavit had contended before the High Court that in view of the various allegations of discriminations against it, it is planning to review the entire matter afresh by appointing a Committee. It was urged before the High Court in its affidavit that vide the order dated 19.8.2006, it had formed a Committee to look into the allegations of irregularities in the sanctioning of the High Schools and Higher secondary schools. It was also urged that by the order dated 22.8.2006, the Government was to set up a Committee to review the irregularity in the sanctioning or the upgradation of several schools in the aided sector in violation of the procedure prescribed in the Kerela Education Rules after the period of 1.1.2003. It further contended that in view of the above, the old sanction for a Higher Secondary school given to the appellant did not hold good anymore and the respondents contended that the appellant's case would be considered afresh after it would formulate new norms as per the findings of the above appointed Committees. Thus, it subsequently passed the new G.O. dated 13.6.2007.

17. The Hon'ble High Court while dismissing the appellants' Writ Petition held that the earlier orders governing grant of Higher Secondary Schools was no longer valid and has been replaced by the new order G.O.(P) No.107/07/G.Edn dated 13.6.2007 and the Appellant does not have any statutory right to get the sanction of running Higher Secondary classes

18. It also held that the Government did not owe a corresponding duty to the appellant to sanction the school as per the previous order and that "...the Government cannot be tied down to a policy permanently. It should be conceded freedom to change it from time to time".

19. The High Court shared the apprehension that if it orders the Government to sanction a Higher Secondary School to the appellant herein, it may impinge upon the budgetary

allotment of Government funds. This, it held that sanction of this course, was a Government function on which a Court cannot step in.

> "In coming to this finding the Hon'ble High Court relied on a decision of the Court of Appeal in *R. v. Cambridge Health Authority, ex p B*[1] where the Court of Appeal refused to interfere with the validity of a decision of the Health Authority of not alloting funds for the treatment of a child. High Court also referred to the decision in the case of *State of H.P. and another v. Umed Ram Sharma*[2]."

20. The respondent No. 4 before this Court moved an application for impleadment as a necessary party in the W.P.(C) No. 11167 OF 2006 before the High Court and which was allowed by the High Court. In its Counter Affidavit, the Respondent No. 4 had challenged the Writ Petition on the ground that the sanctioning of the High School to the Appellant itself is illegal and has been made in violation of the Rules in Chapter V of the Kerela Education Rules. It was also contended that the sanction of the Higher Secondary school to the Appellant would prejudice other schools in the nearby area and would also not be necessary as the number of existing schools are enough for that area. This issue was heard with the other connected Writ Petitions.

21. In the connected writ petitions, the main challenge was with respect to the sanction of a High School to the Appellant on the ground that it was done in violation of the Rule 2A of Chapter V of the Kerela Education Rules. These writ petitions were filed either by the managers or the teachers of the schools. They contended that in case of an already existing statutory provision governing a particular field, the implementation of a new scheme under the provision can only be done by amending the existing provision; in this case, Rule 2, Chapter V of the Kerela Education Rules.

22. The High Court while rejecting the Writ Petition upheld the government's right to change its policy and also opined that the government cannot be tied to any policy. After coming to this conclusion, the High Court held that in the context of the changed policy of the government, it is not proper for the Court to interfere.

23. This Court is of the opinion that so far as the right of the government to change its policy is concerned, the High Court's conclusion is correct.

> "The High Court is equally right in holding that the government cannot be tied down to any policy. But unfortunately, the High Court did not examine the impact of the government policy on the admitted facts and circumstances of the case. This Court is of the opinion that High Court especially the Writ Court cannot take a mechanical or strait jacket approach in this matter."

24. It appears that the appellant is a religious minority. As a religious minority, it has a fundamental right to establish and administer educational institutions of its choice in view of the clear mandate of Article 30. Apart from the fundamental right of the appellant to

establish and administer an educational institution, the right of the appellant to get the sanction of running a Class XII School was also accepted by the government to the extent that the government applied to the High Court for its permission to seek an order for implementation of its decisions dated 08.10.03 and 13.10.05 whereby sanction was given to the appellant to run Higher Secondary Courses. Those decisions of the government to sanction higher secondary courses in favour of the appellant could not be implemented in view of the order of the High Court dated 05.04.06 to the effect that the High Court wanted the aggrieved persons to approach the Court. In the background of these facts, the writ petition was filed and during the pendency of the writ petition came the revised policy of the government. In that policy, it has been made very clear that there is no need to sanction or upgrade government or aided schools in the normal course.

25. The High Court should have appreciated the facts of the case and come to the conclusion that the appellant's case does not come under the normal course. But the High Court refused to do so and took, as noted above, a mechanical approach.

26. The High Court in support of its decision relied on the judgment of the Court of Appeal in Cambridge Health Authority (supra). That was a case of refusal to allocate funds for the treatment of a minor girl who was 10= years old. The child was suffering from non-Hodgkins Lynphona with common acute Lymphoblastic Leukaenia. It was thought that no further treatment was possible except giving the child palliative drugs. The child's father sought further medical opinion and experts advised a second bone marrow transplant, which could only be administered privately and not in a National Health Service hospital, and that too with 10 to 20% chances of success. In the background of these facts the child's father requested the health authority to allocate funds amounting to #75,000 for the proposed treatment which the health authority refused. The father of the child applied for a judicial review of the decision of the health authorities. The question was what the Court should do in such a situation?

27. The learned single judge quashed the decision of the health authority and directed it to reconsider its decision. Then on appeal against the decision of the learned single judge, the Court of Appeal allowed the appeal. Sir Thomas Bingham, Master of Roll, presiding over the Court of Appeal held that the learned Single judge failed to recognize the realities of the situation. Considering the constraints of budget on the health authority, the Master of Roll held:- "Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make. In my judgment, it is not something that a health authority such as this authority can be fairly criticised for not advancing before the court"

(See at page 137, placitum `F')

28. But the facts of this case do not have even a remote resemblance to the facts in Cambridge Health Authority (supra). In this case the government was willing to sanction the higher secondary classes to the appellant-institution and to the effect applied to the High

Court for getting the necessary permission and that application of the government was disposed of by the Court in the manner indicated above. In between came the change of policy but financial crunch was never the reason for denying the prayer of the appellant to run the higher secondary course.

29. While dismissing the Writ Petition, the High Court also relied on the decision of this Court in the case of Umed Ram (supra).

30. In Umed Ram (supra), the Respondents, who were poor harijans in the State of Himachal Pradesh wrote a letter to the High Court of Himachal Pradesh complaining about the incomplete construction of the road and also complained of the fact that such construction has been stopped in collusion with the authorities causing immense hardship to the poor people and that is why the Court's intervention was prayed for. The Court treated the said letter as a writ petition and directed the superintending engineer of PWD to complete the work in the course of the financial year.

31. The superintending engineer before the High Court gave an estimate that for the purposes of the widening of the road, Rs. 95,000/- was required but only Rs. 40,000/- was available in the course of the current financial year. Before this Court, Government challenged those directions of the High Court questioning the High Court's jurisdiction under Article 226 of the Constitution to direct the State Government to allot particular funds for expenditure in addition to the funds already allotted and thus regulate the residual financial matters of the State.

32. The Government raised questions on the basis of Articles 202-207 of the Constitution pointing out the Government's exclusive domain in financial matters as indicated in those articles. The three judge bench of this court considered the matter in detail and ultimately upheld the High Court's directions as not transgressing the limit, in view of the provisions of Articles 38, 19 and 21 of the Constitution. [See para 39, pg. 82-83]

33. Therefore, this decision does not support the conclusion reached by the High Court in this case.

> "On the other hand, the decision in Umed Ram (supra) upheld the power of the Court to act in public interest in order to advance the constitutional goal of ushering a new social order in which justice, social, economic and political must inform all institutions of public life as contemplated under Article 38 of the Constitution."

34. Paragraph 21 of the judgment in Umed Ram (supra) which has been quoted by the High Court does not constitute its ratio. The High Court, therefore, with great respect, failed to appreciate the ratio in Umed Ram (supra) in its correct perspective.

35. While dismissing the writ petition the Hon'ble High Court with respect, had taken a rather restricted view of the writ of Mandamus. The writ of Mandamus was originally a

common law remedy, based on Royal Authority. In England, the writ is widely used in public law to prevent failure of justice in a wide variety of cases.

36. In England this writ was and still remains a prerogative writ. In America it is a writ of right.

> "(Law of Mandamus by S.S. Merrill, Chicago, T.H. Flood and Company, 1892, para 62, page 71)."

37. About this writ, SA de Smith in `Judicial Review of Administrative Action', 2nd edn., pp 378 & 379 said that this writ was devised to prevent disorder from a failure of justice and defect of police and was used to compel the performance of a specific duty.

38. About this writ in 1762 Lord Mansfield observed that `within the past century it had been liberally interposed for the benefit of the subject and advancement of justice'.

39. The exact observations of Lord Mansfield about this writ has been quoted in Wade's `Administrative Law, Tenth Edition' and those observations are still relevant in understanding the scope of Mandamus.

> "Those observations are quoted below:- "It was introduced, to prevent disorder from a failure of justice, and defect of police.
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> Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.....The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied.
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> Writs of mandamus have been granted, to admit lecturers, clerks, sextons, and scavengers & c., to restore an alderman to precedency, an attorney to practice in an inferior court,& c." (H.W.R. Wade & C.F. Forsyth: Administrative Law, 10 th Edition, page 522- 23)."

40. De Smith in Judicial Review, Sixth Edition has also acknowledged the contribution of Lord Mansfield which led to the development of law on Writ of Blooer, (1760) 2 Burr, runs as under:

> "a prerogative writ flowing from the King himself, sitting in his court, superintending the police and preserving the peace of this country".(See De Smith's Judicial Review 6th Edition, Sweet and Maxwell page 795 para 15- 036."

41. Almost a century ago, Darling J quoted the The Revising Barrister etc. {(1912) 3 King's Bench 518} which explains the wide sweep of Mandamus. The relevant observations are:

"..Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable...."

(See page 529)

42. At page 531 of the report, Channell, J said about Mandamus:

"It is most useful jurisdiction which enables this Court to set right mistakes."

43. *Circle, D. Ward, Kanpur and another*[3], a three-judge Bench of this Court commenting on the High Court's jurisdiction under Article 226 opined that this Article is deliberately couched in comprehensive language so that it confers wide power on High Court to `reach injustice wherever it is found'.

44. Delivering the judgment Justice Subba Rao (as His Lordship then was) held that the Constitution designedly used such wide language in describing the nature of the power. The learned Judge further held that the High court can issue writs in the nature of prerogative writs as understood in England; but the learned Judge added that the scope of these writs in India has been widened by the use of the expression "nature".

45. Learned Judge made it very clear that the said expression does not equate the writs that can be issued in India with those in England but only draws an analogy from them. The learned Judge then clarifies the entire position as follows:

"..It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constituion with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself...."

(See para 4, page 85)

46. Same view was also expressed subsequently by this *Ors.*[4]. Speaking for the Bench, Justice A.P. Sen, after an exhaustive analysis of the trend of Administrative Law in England, gave His Lordship's opinion in paragraph (29) at page 1697 thus:

"29. Much of the above discussion is of little or academic interest as the jurisdiction of the High Court to grant an appropriate writ, direction or order under Article 226 of the Constitution is not subject to the archaic constraints on which prerogative writs were issued in England. Most of the cases in which the English courts had earlier

enunciated their limited power to pass on the legality of the exercise of the prerogative were decided at a time when the Courts took a generally rather circumscribed view of their ability to review Ministerial statutory discretion. The decision of the House of Lords in Padfield's case (1968 AC 997) marks the emergence of the interventionist judicial attitude that has characterized many recent judgments."

47. In the Constitution Bench judgment of this Court in *Life Insurance Corporation of India vs. Escorts Limited and others*[4], this Court expressed the same opinion that in Constitution and Administrative Law, law in India forged ahead of the law in England (para 101, page 344).

48. This Court has also taken a very broad view of the writ of Mandamus in several decisions. In the case of The Comptroller and *Auditor General of India, Jagannathan and another*[5], a three-Judge Bench of this Court referred to Halsbury's Laws of England, Fourth Edition, Volume I paragraph 89 to illustrate the range of this remedy and quoted with approval the following passage from Halsbury about the efficacy of Mandamus:

> "..is to remedy defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right, and it may issue in cases where, although there is an alternative legal remedy yet that mode of redress is less convenient beneficial and effectual." (See para 19, page 546 of the report)

49. In paragraph 20, in the same page of the report, this Court further held:

> "...and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it property and lawfully exercised its discretion"

50. In a subsequent judgment also in *Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Ors.*[6], this Court examined the development of the law of Mandamus and held as under:

> "21. .....mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor De Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter common law, custom or even contract."
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> (Judicial Review of Administrative Act 4th Ed. P. 540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into water-tight compartment. It should remain flexible to

meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available `to reach injustice wherever it is found'.

Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition." (See page 1613 para 21).

51. The facts of this case clearly show that appellant is entitled to get the sanction of holding higher secondary classes. In fact the Government committed itself to give the appellant the said facility. The Government's said order could not be implemented in view of the court proceedings. Before the procedural wrangle in the court could be cleared, came the change of policy. So it cannot be denied that the appellant has a right or at least a legitimate expectation to get the permission to hold Higher Secondary classes.

52. The appellant is a minority institution and its fundamental right as a religious minority institution under Article 30 also has to be kept in view.

53. It is therefore really a case of issuance of mandamus in the appellant's favour. Merrill on Mandamus has observed that it would be a monstrous absurdity if in a well-organized government no remedy is provided to a person who has a clear and undeniable right. It has been also observed where a man has a jus ad rem (a right to a thing) it will be `absurd, ridiculous and shame to the law, if Courts have no remedy and the only remedy he can have is by mandamus.' [See para 11, pages 4-5]

54. For the reasons aforesaid this court cannot uphold the judgment passed by High Court in W.P. No.11167 of 2006. The judgment is set aside and this court directs the respondent state to sanction Higher Secondary course in the appellant's institution from the next academic session with this rider that the appellant must follow the extant statutory procedures for the appointment of teachers in the Higher Secondary section.

55. The appeal is allowed. Parties are left to bear their own costs.

[1]*(1995)2 All ER 129*
[2]*(1986) 2 SCC 68*
[3]*AIR 1966 SC 81*
[4]*AIR 1988 SC 1681*
[5]*(1986) 1 SCC 264*
[6]*AIR 1987 SC 537*
[7]*AIR 1989 SC 1607*