

## KERALA HIGH COURT

Aldo Maria Patroni

Vs.

E.G. Kesavan

O.P. No. 909 of 1963

(M.S. Menon, C.J., M. Madhavan Nair and P. Govindan Nair, JJ.)

01.10.1964

### JUDGMENT

#### **M.S. Menon, C.J.,**

1. This is a petition by the Bishop of Calicut and the Provincial of the Jesuit Province of Kerala. It invokes Article 226 of the Constitution and challenges the validity of Ext. P-7, an order of the Director of Public Instruction, Trivandrum, dated the 1st May 1963.

2. The order allowed an appeal by the first respondent, a teacher in the St Joseph's Boys' High School, Calicut, under rule 44 in Part A of Chapter XIV of the Kerala Education Rules, 1959. That Part deals with the conditions of service of aided school teachers; and rule 44 provides that the appointment of headmasters by the managers of aided schools "shall ordinarily be according to seniority", and that a teacher aggrieved by an appointment has a right of appeal to the Education Department of the State.

3. In Writ Appeal No. 43 of 1962 (Ker) this Court held - affirming the decision in. O.P. No. 329 of 1962 (Ker) - that in the absence of any indication in the Rules as to which officer of the Education Department should hear and dispose of the appeals under rule 44, the officer competent to deal with such appeals should be considered to be the Head of the Department, that is, the Director of Public Instruction, Trivandrum. It is in pursuance of that decision that the Director of Public Instruction heard the appeal of the first respondent and allowed it by Ext. P-7 dated the 1st May 1963.

4. Both the first respondent and the fourth respondent were teachers in the St. Joseph's Boys' High School, Calicut. The manager appointed the fourth respondent, a member of the Society of Jesus, as the headmaster of the school in preference to the first respondent who was senior to him in the service of the school. The Director of Public Instruction came to the conclusion that there was no justification for departing from the ordinary rule of appointment of headmasters according to seniority and directed by Ext. P-7 that the first respondent, and not the fourth respondent, should be the headmaster of the school.

5. According to the Director of Public Instruction the word "ordinarily" in R. 44 was inserted

only to enable the appointment of "a qualified hand from outside, if there is none to be promoted". This is clearly wrong. All that the rule stipulates is that when other things are equal seniority shall prevail.

6. The contention of the petitioners is that they have an exclusive right to administer the institution under Article 30(1) of the Constitution and that the order of the Director of Public Instruction constitutes a violation of that right. Clause (1) of Article 30 provides that at minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice; and clause (2) that the State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language. The word "minority" is not defined in the, Constitution; and in the absence of any special definition we must hold that any community, religious or linguistic, which is numerically less than fifty per cent, of the population of the State is entitled to the fundamental right guaranteed by the article.

7. The Christians, at the 1961 census, amounted only to 21.22 per cent, of the population of the State. The Roman Catholics with whom We are concerned form a section of that community.

8. The St. Joseph's Boys' High School, Calicut, has always been a Catholic school. A brief history of the school is available in. Ext. P-12. The following paragraphs are extracts from that publication :

"The history of St. Joseph's Boys' High School, the school so dear to all Josephites of Calicut, dates back to the late seventies and early eighties of the last century. This school which had hitherto been catering to the educational needs of the Anglo-Indian community only, had from June 1936 taken the momentous step towards Indianization in view of bringing the benefits of a truly Catholic Education within the reach of the many thousands of Indian Catholics in the Diocese of Calicut.

Although the foundations of this school are somewhat lost in the remote past as to prevent us from affirming with much certainty its earliest recognizable outlines, nevertheless as far as can be ascertained, it seems to be certain that it began at first as a Parish School and was opened in the parochial house about the year 1796. The School was superseded in 1861 by one conducted by the Christian Brothers who worked it up so efficiently as to give it before long a decent standing among the educational institutions on the Malabar Coast. In 1883, the Management of the School passed into the hands of the Jesuit Fathers of the Calicut Mission who continued to run it on traditional lines with the Ordinary of the Diocese as its official manager. In 1908, it was made into a High School and in September of the same year it came for the first time to be recognized as an institution under the Code of Regulations for European Schools, in June 1948, the revised course of studies according to the new scheme of education in Indian Schools was introduced.

Attached to the School which has undergone several changes for the better, and within its premises, is the Boarding - house with ample accommodation and a decent play-ground before it. It is meant to house boys hailing from the surrounding places, making provision for both Catholics and non-Catholics. The Improvements recently made serve as a good substitute for the home. The boarders are directly under the care of the Fathers who live in their midst and are constantly in touch with them. The School is under the management of the Roman Catholic Diocese of Calicut. The staff consists of the Fathers of the Society of Jesus and other qualified

teachers and pundits. The strength of the staff has considerably increased of late and more Fathers have been put on the staff in order to ensure better discipline and teaching. Though the chief aim of the School is to provide education for the Catholic students, it will always be open to all classes of boys irrespective of caste or creed. Moral teaching is imparted to non-Catholics. There has been an increase in the number of students in recent years and it is hoped that the number will keep on steadily increasing. For the spiritual advancement of the Catholic boys, the Sodality of the Blessed Virgin Mary has been existing for a long time and it has well served its purpose in stimulating religious favor and zeal. The little Crusaders, too, have been doing their little bit."

9. It is clear from the above that for eighty years and over the management of the school has been in the hands of the Jesuit Fathers of the Calicut Mission. It is also not disputed that there has been no headmaster since 1883 who has not been a member of the Society of Jesus.

10. The Society of Jesus was founded by St. Ignatius Loyola. That was in 1540. St. Francis Xavier, one of the original Fathers of the Society and the great apostle of modern times; Acquaviva in the Court of Akbar the Belgian Jesuits who arrived in Calcutta in 1834; and the French Jesuits who arrived in Madras in 1837; mark the milestones of the Society's early contact with this country.

11. The members of the Society have for their end the spiritual perfection not only of themselves but of all men. They have hence been active in the field of education and their outstanding success in India, as elsewhere, has been in that field. It is that success that has made them one of the most esteemed of the religious orders in the Roman Church, and produced the desire for admission to their institutions.

12. "The Jesuits in India" by Professor M. Ruthnaswami shows that there was a Jesuit school at Mylapore in 1576, at Tuticorin in 1580, at Cochin in 1587 and at Madura in 1595. According to him the emphasis of the Order on the founding of schools was partly due to the Zeverian policy of "Through the children to the grown-ups", and the fact that Christianity being a religion of the Book required its adherents to be literate in order to earn their prayers and to understand its truths.

13. Two decisions of the Supreme Court afford considerable assistance for the decision of the case before us. They are *In re The Kerala Education Bill*<sup>1</sup>, and *Sidhrajibhai v. State of Gujarat*<sup>2</sup>. The effect of those decisions, in so far as it is material to the current controversy, can be stated in the form of four propositions :

<sup>1</sup>1957, AIR 1958 SC 956

<sup>2</sup> AIR 1963 SC 540

(1) A school established by a minority - whether before or after the Constitution - will come within the ambit of Article 30(1) of the Constitution, even though what it imparts is a general education and its students are drawn not merely from the minority community but from other communities as well.

(2) The right guaranteed under Article 30(1) is a right that is absolute and any law or executive direction which infringes the substance of that right is void to the extent of the infringement.

(3) The absolute character of the right will not preclude regulations in the true interests of efficiency of instruction, discipline, health, sanitation, morality, public order and the like, as such regulations are not restrictions on the substance of the right guaranteed by the Constitution.

(4) The fundamental right enshrined in Article 30(1) is intended to be effective and should not be whittled down by any regulative measure conceived in the interest not of the minority educational institution but of the public or the nation as a whole.

14. The post of the headmaster is of pivotal importance in the life of a school. Around him wheels the tone and temper of the institution; on him depends the continuity of its traditions, the maintenance of discipline and the efficiency of its teaching. The right to choose the headmaster is perhaps the most important facet of the right to administer a school; and we must hold that the imposition of any trammel thereon - except to the extent of prescribing the requisite qualifications and experience - cannot but be considered as a violation of the right guaranteed by Article 30(1) of the Constitution. To hold otherwise will be to make the right "a teasing illusion, a promise of unreality".

15. One of the rules of the school, as can be seen from Ext. P-8, is :

"Catholic Parents should see that their children go to daily Mass, unless for special reasons they obtain exemption from the Headmaster."

The rule gives some indication of the special position of the headmaster in the school with which we are concerned.

16. By Ext. P-7, the order impugned in the petition, the Director of public Instruction has abrogated the appointment by the management of the fourth respondent as the headmaster of the school on the sole ground that he is junior in the service of the school to the first respondent, and appointed the first respondent in his place. This, as we see it, is a violation of the right under Article 30 (1) of the constitution, and should be struck down on that account.

17. The word "ordinarily" in R. 44 gives a certain amount of elasticity to that rule. It may be possible to say that one of the "extraordinary" circumstances visualised by the rule is the appointment of headmasters in institutions like the one before us. And in view of that we do not think it necessary to strike down the rule; it should suffice if we point out, as we have done, the ambit of the right guaranteed under Article 30(1) of the Constitution, and leave it to the Government to clarify the position by an appropriate amendment or instructions in that behalf.

18. In the view we have taken we need not consider the other contentions raised by the petitioners in support of the petition, and they are not considered in this judgment. Counsel for the first respondent submitted that this petition is not maintainable in view of the decision in Writ Appeal No. 43 of 1962 (Ker) of this Court. We have gone through the judgment in that case and have come to the conclusion that the contention cannot be accepted.

19. The petition is allowed as above. No costs.  
Petition allowed.

