KERALA HIGH COURT

Benedict Mar Gregorios

Vs

State of Kerala

(Gopalan Nambiyar, J.)

13.07.1974

JUDGEMENT

Gopalan Nambiyar, J.

(1.) These writ petitions challenge the provisions of the kerala University Act, 1974 (Act 17 of 1974). The petitioners are the owners of private colleges, inasmuch as the legal title to the colleges vests in them. The colleges receive aid out of State funds. As observed by a Full Bench of this Court in V. Rev. Mother Provincial v. State of Kerala (1969 KLT. 749), although the legal title to the colleges vests in the petitioners it may be difficult to predicate that the beneficial interest in the properties of the colleges also vests in them.

(2.) THE petitioner in O. P. No. 3801 of 1974 is the archbishop of Trivandrum, who owns three colleges; the one in O. P. No. 3871 of 1974 is the Bishop of Quilon owning two colleges; the one in O. P. No. 3948 of 1974 is the Vicar-General of the Archdiocese of Changanacherry owning two colleges; the one in O. P. No. 4025 of 1974 is the Metropolitan of Marthomite church owning four colleges; and the one in O. P. No. 4065 of 1974 is the superior of the Christ Monastery of the C. M. I. Fathers, Irinjalakuda, owning one college. This is the second or perhaps the third round of battle against the attempt of the State to control and regulate the management and administration of the private colleges of the State: The first round was fought in the reference made in the advisory jurisdiction of the Supreme Court in In re Kerala Education Bill, 1957 (AIR. 1958 S. C. 956). The Supreme Court sustained some of the provisions of the Bill proposed to be enacted as an Act and held that certain Sections offended, in particular, Art. 30 (1) of the constitution. After many years, the proposed legislation took shape as the kerala University Act, 1969. Its vires was challenged before a Full Bench of this Court. It was ruled in V Rev Mother Provincial v. State of Kerala (1969 klt. 749) that certain Sections of the Act were bad as contravening Art. l? (1) (f), and also Art. 30 (1) of the Constitution, as far as minority institutions are concerned. The decision was confirmed by the Supreme Court (vide State of Kerala v. Mother Provincial (AIR 1970 S. C. 2079). Then came the university Act of 1974, herein impugned. Arguments were addressed only in the five writ petitions that we have mentioned. No arguments were addressed in O. P No. 4004 of 1974, and its fate was left to rest upon the decision of these specified writ petitions.

(3.) ART. 30 (1) of the Constitution guarantees to all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. ART. 30 (2) forbids discrimination against a minority institution in the matter of granting aid. Although the ARTicle, unlike some of the other ARTicles of the Constitution dealing with fundamental rights is couched in terms absolute and unqualified, it has now been settled by the decisions of the highest Court that such is not its effect or purport, and that regulations on the right in the interest of the efficiency of instruction, discipline health, sanitation, and the like, are permissible. We might well quote the observations of the *Supreme Court in Rev. Sidhajbhai Sabhai and others versus State of Bombay and another*[1] Observed the Court: "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. " (pp. 849, 850) (AIR. p. 544) We would stress that what is permissible is only regulation of the rights and not any restriction thereon; and that the regulation can only be in the interest of the efficiency of instruction and other like matters noticed by the Court. This aspect was noticed in the Full Bench decision in 1969 KLT. 749 referred to earlier. The full Bench observed: "art. 30 (1) is not a charter for maladministration; regulation, so that the right to administer may be the better exercised for the benefit of the institution is permissible; but the moment you go beyond that and impose, what is in truth, not a mere regulation but a restriction on the right to administer, the article comes into play and the interference cannot be justified by pleading the interests of the general public; the interests justifying interference can only be the interests of the institution concerned. " (para 15) On appeal from the above decision the Supreme Court in state of Kerala v. Mother Provincial (AIR. 1970 SC. 2079) observed: "administration means 'management of the affairs' of the institution. This management must be free of control so that the founders or their nominees can mould the institution as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of this management can be taken away and vested in another body without an encroachment upon the guaranteed right. There is, however, an exception to this and it is that the standards of education are not a part of management as such. These standards concern the body politic and are dictated by considerations of the advancement of the country and its people. Therefore, if Universities establish the syllabi for examinations, they must be followed subject, however, to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment of teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the state to regulate education, educational standards and allied matters cannot be denied.

The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others. " (paras 9 & 10) In *D. A. V. College, Jullundur v. State of Punjab*[2] the impugned Act contained provision for the constitution of a governing body of a College consisting of not more than 20 persons approved by the Senate and including two representatives of the University and the principal of the College ex-officio. It was held that the provision for the constitution of this governing body and for the approval of the appointment of staff by the Vice-Chancellor were unwarranted interference with the right of management. In *S. K. Fatro v. State of Bihar*[3] *the* National Christian Council which was managing a school founded at Bhagalpur was required by the educational authorities to constitute a managing committee composed of two persons elected as President and Secretary of the School, whose election was approved by the President of the Board of Secondary Education. It was held that the school in question was a minority institution and that the impugned order was invalid. The decision of the Supreme Court in St. *Xaviers college v. State of Gujarat*[4] contains a detailed analysis and review of all the decisions rendered under Art. 30 (I) of the Constitution. Chief Justice Ray stated thus: "an educational institution runs smoothly when the teacher and the taught are engaged in the common ideal of pursuit of knowledge It is, therefore, manifest that the appointment of teachers is an important part in educational institutions. The qualifications and the character of the teacher are really important. The minority institutions have the right to administer institutions. This right implies the obligation and duty of the minority institutions to render the very best to the students In the right of administration, checks and balances in the shape of regulatory measures are required to ensure the appointment of good teachers and their conditions of service. The right to administer is to be tempered with regulatory measures to facilitate smooth administration. The best administration will reveal no trace or colour of minority. A minority institution should shine in exemplary eclecticism in the administration of the institution. The best compliment that can be paid to a minority institution is that it does not rest on or proclaim its minority character. " (page 1398, para 30) xx xx xx "autonomy in administration means right to administer effectively and to manage and conduct the affairs of the institutions. The distinction is between a restriction on the right of administration and a regulation prescribing the manner of administration. The right of administration is day to day administration. The choice in the personnel of management is a part of the administration. The university will always have a right to see that there is no maladministration. If there is maladministration, the university will take steps to cure the same. There may be control and check on administration in order to find out whether the minority institutions are engaged in activities which are not conducive to the interest of the minority or to the requirements of the teachers and the students. In (1971) I SCR. 734: (AIR. 1970 S. C. 2079) (Supra) this Court said that if the administration goes to a body in the selection of whom the founders have no say, the administration would be displaced. This Court also said that situations might be conceived when they might have a preponderating voice. That would also affect the autonomy in administration. The provisions contained in s. 33 A (1) (a) of the Act have the effect of displacing the management and entrusting it to a different agency. The autonomy in administration is lost New elements in the shape of representatives of different types are brought in. The calm waters of an institution will not only be disturbed but also mixed. " (pp. 1399,1400, para 41) xx xx xx "this Court has consistently held that it is not only permissible but also desirable to regulate everything in educational and academic matters for achieving excellence

and uniformity in standards of education. " (p. 1401) "administration connotes management of the affairs of the institution. The management must be free of control so that the founders or their nominees can mould the institution as they think fit and in accordance with their ideas of how the interest of the community in general and the institution in particular will be best served. " (p. 1413) xx xx xx "the right to administer educational institutions can plainly not include the right to maladminister. Regulations can be made to prevent the housing of an educational institution in unhealthy surroundings as also to prevent the setting up or continuation of an educational institution without qualified teachers. The State can prescribe regulations to ensure the excellence of the institution. Prescription of standards for educational institutions does not militate against the right of the minority to administer the institutions. Regulations 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 (see observations of Shah, J. , in rev. Sidhrajbhai Sabhai, (1963) 3 SCR. 837 at p. 850: (AIR. 1963 SC. 540) (supra). Further, as observed by Hidayatullah, C. J. , in the case of Very Rev. Mother Provincial (supra) the standards concern the body politic and are dictated by considerations of the advancement of the country and its people. Therefore, if universities establish syllabi for examinations they must be followed, subject however to special subjects which the institutions may seek to teach, and to a certain extent the State may also regulate the conditions of employment to teachers and the health and hygiene of students. Such regulations do not bear directly upon management as such although they may indirectly affect it. Yet the right of the State to regulate education, educational standards and allied matters cannot be denied: The minority institutions cannot be allowed to fall below the standards of excellence expected of educational institutions, or under the guise of exclusive right of management, to decline to follow the general pattern. While the management must be left to them, they may be compelled to keep in step with others. " (pp. 1421 & 1422, para 90). "balance has, therefore, to be kept between the two objectives, that of ensuring the standard of excellence of the institution and that of preserving the right of the minorities to establish and administer their educational institutions. Regulations which embrace and reconcile the two objectives can be considered to be reasonable. " (page 1423, para 94) "so far as this aspect is concerned, I am of the view that it is permissible for the State to prescribe reasonable regulations like the one to which I have referred earlier and make it a condition precedent to the according of recognition or affiliation to a minority institution. It is not, however, permissible to prescribe conditions for recognition or affiliation which have the effect of impairing the right of the minority to establish and administer their educational institutions. Affiliation and recognition are, no doubt, not mentioned in Art. 30 (1), the position all the same remains that refusal to recognize or affiliate minority institutions unless they (the minorities) surrender the right to administer those institutions would have the effect of rendering the right guaranteed by Art. 30 (1) to be wholly illusory and indeed a teasing illusion. It is, in our opinion, not permissible to exact from the minorities in lieu of the recognition or affiliation of their institutions a price which would entail the abridgement or extinguishment of the right under Art. 30 (1). " (page 1425, para 98) "another conclusion which follows from what has been discussed above is that a law which interferes with a minority's choice of qualified teachers or its disciplinary control over teachers and other members of the staff of the institution is void as being violative of Art. 30 (1). It is, of course, permissible for the State and its educational authorities to prescribe the qualifications of teachers, but once the teachers possessing the

requisite qualifications are selected by the minorities for their educational institutions, the State would have no right to veto the selection of those teachers. The selection and appointment of teachers for an educational institution is one of the essential ingredients of the right to manage an educational institution and the minorities can plainly be not denied such right of selection and appointment without infringing Art. 30 (1). " (pp. 1426 and 1427, para 103) "although disciplinary control over the teachers of a minority educational institution would be with the governing council, regulations, in my opinion, can be made for ensuring proper conditions of service of the teachers and for securing a fair procedure in the matter of disciplinary action against the teachers. Such provisions which are calculated to safeguard the interest of teachers would result in security of tenure and thus inevitably attract competent persons for the posts of teachers. Such a provision would also eliminate a potential cause of frustration amongst the teachers. Regulations made for this purpose should be considered to be in the interest of minority educational institutions and as such they would not violate Art. 30 (1). " (page 1427, para 105) "the opinion expressed by this Court in Re Kerala education Bill (supra) was of an advisory character and though great weight should be attached to it because of its persuasive value, the said opinion cannot override the opinion subsequently expressed by this Court in contested cases. It is the law declared by this Court in the subsequent contested cases which would have a binding effect. The words "as at present advised "as well as the preceding sentence indicate that the view expressed by this Court in Re Kerala Education Bill in this respect was hesitant and tentative and not a final view in the matter. It has been pointed out that in Re Levy of Estate duty 1944 FCR. 317: (AIR. 1944 FC. 73), Spens, C. J. , referred to an observation made in the case of Attorney-General for Ontario v. Attorney-General for Canada, 1912 AC. 571 that the advisory opinion of the court would have no more effect than the opinion of the law Officers. I need not dilate upon this aspect of the matter because I am of the opinion that the view expressed by this Court in subsequent cases referred to above by applying the general principles laid down in the Re Kerala Education Bill is correct and calls for no interference. " (page 1429, para 108). Mathew, J. (on behalf of himself and Chandrachud, J.)stated: "no right, however absolute, can be free from regulation. The Privy Council said in Commonwealth of Australia v. Bank of New south Wales 1950 AC 235, 310 that regulation of freedom of trade and commerce is compatible with their absolute freedom; that S. 92 of the Australian commonwealth Act is violated only when an Act restricts commerce directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. Likewise, the fact that trade and commerce are absolutely tree under Art. 30 (1) of the Constitution is compatible with their regulation which will not amount to restriction. " (page 1441, para 173) "the question to be asked and answered is whether the particular measure is regulatory or whether it crosses the zone of permissible regulation and enters the forbidden territory of restrictions or abridgment. So, even if an educational institution established by a religious or linguistic minority does not seek recognition, affiliation or aid, its activity can be regulated in various ways provided the regulations do not take away or abridge the guaranteed right. Regular tax measures, economic regulations, social welfare legislation, wage and hour legislation and similar measures may, of course have some effect upon the right under Art. 30 (1). But where the burden is the. same as that borne by others engaged in different forms of activity, the similar impact on the right seems clearly insufficient to constitute an abridgment. If an educational institution established by a religious minority seeks no recognition, affiliation or aid, the State may have no right to prescribe the curriculum, syllabi or the qualification of the teachers. 175. We find it impossible to subscribe

to the proposition that State necessity is the criterion for deciding whether a regulation imposed on an educational institution takes away or abridges the right under Art. 30 (1). If a legislature can impose any regulation which it thinks necessary to protect what in its view is in the interest of the State or society, the right under Art. 30 (1) will cease to be a fundamental right. It sounds paradoxical that a right which the Constitution makers wanted to be absolute can be subjected to regulations which need only satisfy the nebulous and elastic test of State necessity. The very purpose of incorporating this right in Part III of the Constitution in absolute terms in marked contrast with the other fundamental rights was to withdraw it from the reach of the majority. To subject the right today to regulations dictated by the protean concept of State necessity as conceived by the majority would be to subvert the very purpose for which the right was given. 176. What then are the additional regulations which can legitimately be imposed upon an educational institution established and administered by a religious or linguistic minority which imparts general secular education and seeks recognition or affiliation? 177. Recognition or affiliation is granted on the basis of the excellence of an educational institution, namely, that it has reached the educational standard set up by the university. Recognition or affiliation is sought for the purpose of enabling the students in ah educational institution to sit for an examination to be conducted by the University and to obtain a degree conferred by the university. For that purpose, the students should have to be coached in such a manner so as to attain the standard of education prescribed by the university. Recognition or affiliation creates an interest in the university to ensure that the educational institution is maintained for the purpose intended and any regulation which will subserve or advance that purpose will be reasonable and no educational institution established and administered by a religious or linguistic minority can claim recognition or affiliation without submitting to those regulations. That is the price of recognition or affiliation; but this does not mean that it should submit to a regulation stipulating for surrender of a right or freedom guaranteed by the constitution, which is unrelated to the purpose of recognition or affiliation. In other words, recognition or affiliation is a facility which the university grants to an educational institution, for the purpose of enabling the students there to sit for an examination to be conducted by the university in the prescribed subjects and to obtain the degree conferred by the university, and therefore, it stands to reason to hold that no regulation which is unrelated to the purpose can be imposed. If, besides recognition or affiliation, an educational institution conducted by a religious minority is granted aid, further regulations for ensuring that the aid is utilized for the purpose for which it is granted will be permissible. The heart of the matter is that no educational institution established by a religious or linguistic minority can claim total immunity from regulations by the legislature or the university if it wants affiliation or recognition; but the character of the permissible regulations must depend upon their purpose. As we said, such regulations will be permissible if they are relevant to the purpose of securing or promoting the object of recognition or affiliation. There will be borderline cases where it is difficult to decide whether a regulation really subserves the purpose of recognition or affiliation. But that does not affect the question of principle. In every case, when the reasonableness of a regulation comes up for consideration before the Court, the question to be asked and answered is whether the regulation is calculated to subserve or will in effect subserve the purpose of recognition or affiliation, namely, the excellence of the institution as a vehicle for general secular education to the minority community and to other persons who resort to it. The question whether a regulation is in the general interest of the public has no relevance, if it does not advance the excellence of the institution as a vehicle for general secular education as, ex-

hypothesi, the only permissible regulations are those which secure the effectiveness of the purpose of the facility, namely, the excellence of the educational institutions in respect of their educational standards. This is the reason why this Court has time and again said that the question whether a particular regulation is calculated to advance the general public interest is of no consequence if it is not conducive to the interests of the minority community and those persons who resort to it. " (pp. 1442 and 1443) We hope we shall not lay ourselves open to the charge of disrespect or discrimination if we restrain our temptation to quote from the judgments of Reddy, J. , Beg, J. and Dwivedi, J. lest we should encumber this judgment in regions where the exposition of the law has been clear enough. ;

Cases Referred.

1([1963] 3 s. C. R. 837) = AIR. 1963 S. C. 540
2(AIR. 1971 SC. 1737)
3(AIR. 1970 S. C. 259)
4(AIR. 1974 SC. 1389)