

\$~7&8

* IN THE HIGH COURT OF DELHI AT NEW DELHI

DECIDED ON: 17.02.2011

+ W.P. (C) 2611/2001 & W.P. (C) 3625/2002

W.P. (C) 2611/2001

GURDWARA SHRI GURU SINGH SABHA & ANR. Petitioners

versus

UNION OF INDIA & ORS. Respondents

W.P. (C) 3625/2002

GURDWARA SHRI GURU SINGH SABHA & ANR. Petitioners

versus

GOVT.OF NCT OF DELHI & ORS. Respondents

Appearance: Mr. M. Tarique Siddique with Ms. Rakhshan Ahmed,
Advocates for the petitioners in both cases.

Mr. Sushil D. Salwan with Mr. Aditya Garg, Advocates for GNCTD
in both cases.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE G. P. MITTAL

- | | | |
|----|--|-----|
| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be
reported in the Digest? | YES |

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% Heard the counsel.

2. On the previous date of hearing, counsel for the parties had submitted that the judgment of the Supreme; Court reported as *Sindhi Education Society & Anr. v. Chief Secretary, GNCTD & Ors.* (2010) 8 SCC 49 covers the dispute in these cases. The counsel had also stated that they

would be furnishing brief written submissions in support of their contentions.

3. Briefly the petitioners in these proceedings question the Circulars including the one issued on 7.12.2001 by the Directorate of Education, GNCTD in furtherance of its powers under Rule 64 (1) (b) of the Delhi School Education Rules framed under the Delhi School Education Act, 1973. The petitioners claim to be aided Institutions. They assert that by virtue of Article-30 even though they are recipients of aid, the directions contained in the Circulars make inroads into the powers of management and administration vis-à-vis their ability to recruit the Teachers and personnel of their choice.

4. During the course of proceedings, it was noticed that nearly an identical challenge had been considered by the Division Bench of this Court which had upheld the Rules in its judgment in L.P.A. No.33-36/2006 i.e. Govt. of NCT of Delhi v. Sindhi Education society by its judgment dated 30.11.2006. However, the Division Bench was of the opinion that the question which had arisen before it was of public importance and, therefore, granted certificate to appeal to the appellants. In these circumstances, the appeal was preferred before the Supreme Court.

5. The Supreme Court by its judgment and order dated 8.7.2010 in Civil Appeal No.5489/2007 - *Sindhi Education Society & Anr. v. Chief Secretary, GNCTD & Ors.* (2010) 8 SCC 49 - allowed the appeal. It would be relevant to extract the material portions of the judgment which are as follows: -

“57. It is not necessary for us to examine the extent of power to make regulations, which can be enforced against linguistic minority institutions, as we have already discussed the same in the earlier part of the Judgment. No doubt, right conferred on minorities under Article 30 is only to ensure equality with the majority but, at the same time, what protection is available to them and what right is granted to them under Article 30 of the Constitution cannot be diluted or impaired on the pretext of framing of regulations in exercise of its statutory powers by the State. The permissible regulations, as afore-indicated, can always be framed and where there is a mal-administration or even where a minority linguistic or religious school is being run against the public or national interest, appropriate steps can be taken by the authorities including closure but in accordance with law.

The minimum qualifications, experience, other criteria for making appointments etc are the matters which will fall squarely within the power of the State to frame regulations but power to veto or command that a particular person or class of persons ought to be appointed to the school failing which the grant-in-aid will be withdrawn, will apparently be a subject which would be arbitrary and unenforceable. Even in T.M.A. Pai's case (supra), which view was reiterated by this Court in the case of Secy. Malankara Syrian Catholic College (supra), it was held that the conditions for proper utilisation of the aid by the educational institution was a matter within the empowerment of the State to frame regulations but without abridging or diluting the right to establish and administer educational institutions. In that case, while dealing with the appointment of a person as Principal, the Court clearly stated the dictum that the freedom to choose the person to be appointed as Principal has always been recognised as a vital facet to right to administer the educational institution. It being an important part of the administration and even if the institution is aided, there can be no interference with the said right. The power to frame regulations and control the management is subject to another restriction which was reiterated by the Court in P.A. Inamdar's case (supra) stating that it is necessary that the objective of establishing the institution was not defeated.

58. At last, what is the purpose of granting protection or privilege to the minorities in terms of Article 29, and at the same time, applying negative language in Article 30(2) in relation to State action for releasing grant-in-aid, as well as the provisions of DSE Act, 1973 and the rules framed thereunder? It is obvious that the constitutional intent is to bring the minorities at parity or equality with the majority as well as give them right to establish, administer and run minority educational institutions. With the primary object of Article 21A of the Constitution in mind, the State was expected to expand its policy as well as methodology for imparting education. DSE Act, as we have already noticed was enacted primarily for the purpose of better organisation and development of school education in the Union Territory of Delhi and for matters connected therewith or incidental thereto. Thus, the very object and propose of this enactment was to improve the standard as well as management of school education. It will be too far fetched to read into this object that the law was intended to make inroads into character and privileges of the minority. Besides, in the given facts and circumstances of the case, the Court is also duty bound to advance the cause or the purpose for which the law is enacted. Different laws relating to these fields, thus, must be read harmoniously, construed purposively and implemented to further advancement of the objects, sought to be achieved by such collective implementation of law. While, you keep the rule of purposive interpretation in mind, you also further add such substantive or ancillary matters which would advance the purpose of the enactment still further. To sum up, we will term it as "doctrine of purposive advancement". The power to regulate, undisputedly, is not unlimited. It has more restriction than freedom particularly, in relation to the management of linguistic minority institutions. The rules, which were expected to be framed in terms of Section 28 of the DSE Act, were for the purpose of carrying out the provisions of the Act. Even, otherwise, it is a settled principle of law that Rules must fall within the ambit and scope of the principal legislation. Section 21 is sufficiently indicative of the inbuilt restrictions that the framers of the law intended to impose upon the State while exercising its power in

relation to a linguistic minority school.

59. To appoint a teacher is part of the regular administration and management of the School. Of course, what should be the qualification or eligibility criteria for a teacher to be appointed can be defined and, in fact, has been defined by the Government of NCT of Delhi and within that specified parameters, the right of the linguistic minority institution to appoint a teacher cannot be interfered with. The paramount feature of the above laws was to bring efficiency and excellence in the field of school education and, therefore, it is expected of the minority institutions to select the best teacher to the faculty. To provide and enforce the any regulation, which will practically defeat this purpose would have to be avoided. A linguistic minority is entitled to conserve its language and culture by a constitutional mandate. Thus, it must select people who satisfy the prescribed criteria, qualification and eligibility and at the same time ensure better cultural and linguistic compatibility to the minority institution. At this stage, at the cost of repetition, we may again refer to the Judgment of this Court in T.M.A. Pai's case (supra), where in para 123, the Court specifically noticed that while it was permissible for the State and its educational authorities to prescribe qualifications of a teacher, once the teachers possessing the requisite qualifications were selected by the minorities for their educational institutions, the State would have no right to veto the selection of the teachers. Further, the Court specifically noticed the view recorded by Khanna, J. in reference to Kerala Education Bill, 1957 case (supra), and to Clauses 11 and 12 of the Bill in particular, where the learned Judge had declared that, it is the law declared by the Supreme Court in subsequently contested cases as opposed to the Presidential reference, which would have a binding effect and said:

123. ...The words "as at present advised" as well as the preceding sentence indicate the view expressed by this Court in relation to Kerala Education Bill, 1957, in this respect was hesitant and tentative and not a final view in the matter.

What the Court had expressed in para 123 above, appears to have found favour with the Bench dealing with the case of T.M.A. Pai (supra). In any case, nothing to the contrary was observed or held in the subsequent Judgment by the larger Bench.

60. The concept of equality stated under Article 30(2) has to be read in conjunction with the protection under Article 29 and thus it must then be given effect to achieve excellence in the field of education. Providing of grant-in-aid, which travels from Article 30(2) to the provisions of the DSE Act and Chapter VI of the Rules framed thereunder, is again to be used for the same purpose, subject to regulations which themselves must fall within the permissible legislative competence. The purpose of grant-in-aid cannot be construed so as to destroy, impair or even dilute the very character of the linguistic minority institutions. All these powers must ultimately, stand in comity to the provisions of the Constitution, which is the paramount law. The Court will have to strike the balance between different facets relating to grant-in-aid, right to education being the fundamental right, protection available to religious or linguistic minorities under the Constitution and the primary object to improve and provide

efficiency and excellence in school education. In our considered view, it will not be permissible to infringe the constitutional protection in exercise of State policy or by a subordinate legislation to frame such rules which will impinge upon the character or in any way substantially dilute the right of the minority to administer and manage affairs of its school. Even though in the case of Mohinder Kaur (supra), the Bench of this Court held, that upon restoration of the minority character of the institution, the provisions of the Act and the rules framed thereunder would cease to apply to a minority institution. We still would not go that far and would preferably follow the view expressed by larger Bench of this Court in T.M.A. Pai's case (supra) and even rely upon other subsequent Judgments, which have taken the view that the State has the right to frame such regulations which will achieve the object of the Act. Even if it is assumed that there is no complete eclipse of the DSE Act in the Rules in the case of minority institutions, still Rule 64(1)(b), if enforced, would adversely effect and dilute the right and protection available to the minority school under the Constitution.

61. Now, we will revert back to the facts of the present case. There is no dispute to the fact that the Appellant-school is a linguistic minority institution and has been running as such for a considerable time. Admittedly, it was receiving grant-in-aid for all this period. Its minority status was duly accepted and declared by the Judgment of the Delhi High Court in the case of this b very institution and which has attained finality. In this very Judgment, the Court also held, that certain provisions of DSE Rules, 1973 would not apply to this minority school. Thereafter, vide letter dated, 12th March, 1985, the Managing Committee was required to give an undertaking that it would make reservation in service for Scheduled Castes and Schedule Tribes, to which the school had replied relying upon the Judgment of the Delhi High Court in its own case. However, vide letter dated, 21st March, 1986, Secretary (Education), Government of NCT, Delhi had informed the Appellants that the circular requiring Government aided schools to comply with the provisions relating to reservation was not applicable to the minority institutions. In face of the Judgment of the Court, such a requirement was not carried out by the Appellant-school and the controversy was put at rest vide letter dated, 21st March, 1986 and the institution continued to receive the d grant-in-aid. However, in September, 1989, again, a letter was addressed to all the government aided schools including the Appellant stating that it was a precondition for all agencies receiving grant-in-aid, not only to enforce the requirement of providing reservation in the posts but even not to make any regular appointments in the general category till the vacancies in the e reserved category were filled up. This was challenged before the High Court. At the very outset, we may notice that we entirely do not approve the view expressed by the learned Single Judge of the Delhi High Court in the case of Sumanjit Kaur (supra) insofar as it held, that the regulation would be unconstitutional since they are likely to interfere with the choice of the medium of instruction as well as minority character of the institution by compelling the appointments to the teaching faculty of the persons, who may be inimical towards the minority community.

62. We are of the considered view that the learned Single Judge as well as the Division Bench erred in law in stating the above proposition as it is contra legam. The Preamble of our Constitution requires the people of India to constitute into a "Sovereign Socialist Secular Democratic Republic". 9 Secularism,

therefore, is the essence of our democratic system. Secularism and brotherhoodness is a golden thread that runs into the entire constitutional scheme formulated by the framers of the Constitution. The view of the learned Single Judge and the Division Bench in the case of *Sumanjit Kaur* (supra), runs contra to the enunciated law. We are afraid that while deciding a constitutional matter in accordance with law, the Court would not be competent to raise a presumption of inimical attitude of and towards one community or the other. We do not approve the view of the High Court that a provision of an Act or a Circular issued thereunder could be declared as unconstitutional on such presumptuous ground. However, to the extent that it may interfere with the choice of medium of instructions as well as minority character of the institution to some extent is a finding recorded in accordance with law. The Division Bench while entertaining the appeal against the Judgment of the learned Single Judge, had primarily concentrated on the point that the selection of the teacher was valid and not violative of the Rules and accepted the findings recorded by the learned Single Judge, resulting in grant of relief to the Appellants. Further, in our considered view and for the reasons afore-recorded, the Judgment of the Division Bench in the present case while dismissing the Writ Petition filed by the Appellants before that Court cannot be sustained in law. Further, in the Judgment under appeal the Division Bench was right in not accepting the reason given by the learned Single Judge founded on other persons being inimical towards minority. It was expected of the Division Bench to critically analyse other reasons given by the learned Single Judge in the case of *Sumanjit Kaur* (supra), which had been followed in the present case. We could have had the benefit of the independent view of the Division Bench as well. Reasoning is considered as the soul of the Judgment. The Bench referred to the fact that the view in the Kerala Education Bill, 1957 case (supra) was tentative but still erred in ignoring paragraph 123 of the T.M.A. Pat's case (supra) as well as the other Judgments referred by us, presumably, as they might not have been brought to the notice of the Bench. The discussion does not analyse the various principles enunciated in regard to the protection available to the linguistic minorities under Article 29 of the Constitution and the result of principle of equality introduced by Article 30(2) of the Constitution. For the detailed reasons recorded in this Judgment, we are unable to persuade ourselves to accept the view of the Division Bench in the Judgment under appeal.

63. A linguistic minority has constitution and character of its own. A provision of law or a Circular, which would be enforced against the general class, may not be enforceable with the same rigors against the minority institution, particularly where it relates to establishment and management of the school. It has been held, that founders of the minority institution have faith and confidence in their own committee or body consisting of the persons selected by them. Thus, they could choose their managing committee as well as they have a right to choose its teachers. Minority institutions have some kind of autonomy in their administration. This would entail the right to administer effectively and to manage and conduct the affairs of the institution. There is a fine distinction between a restriction on the right of administration and a regulation prescribing the manner of administration. What should be prevented is the mal-administration. Just as regulatory measures are necessary for maintaining the educational character and content of the minority institutions, similarly, regulatory measures are necessary for ensuring Orderly, efficient and sound administration. Every linguistic

minority may have its own socio, economic and cultural limitations It has a constitutional right to conserve such culture and language. Thus, it would have a right to choose teachers, who possess the eligibility and qualifications, as provided, without really being impressed by the fact of their religion and community. Its own limitations may not permit, for cultural, economic or other good reasons, to induct teachers from a particular class or community. The direction, as contemplated under Rule 64(1) (b), could be enforced against the general or majority category of the Government aided school but, it may not be appropriate to enforce such condition against linguistic minority schools. This may amount to interference with their right of choice and, at the same time, may dilute their character of linguistic minority. It would be impermissible in law to bring such actions under the cover of equality which in fact, would diminish the very essence of their character or status. Linguistic and cultural compatibility can be legitimately claimed as one of the desirable features of a linguistic minority in relation to selection of eligible and qualified teachers.

64. *A linguistic minority institution is entitled to the protection and the right of equality enshrined in the provisions of the Constitution. The power is vested in the State to frame regulations, with an object to ensure better organisation and development of school education and matters incidental thereto. Such power must operate within its limitation while ensuring that it does not, in any way, dilute or impairs the basic character of linguistic minority. Its right to establish and administer has to be construed liberally to bring it in alignment with the constitutional protections available to such communities. The minority society can hardly be compelled to perform acts or deeds which per se would tantamount to infringement of its right to manage and control. In fact, it would tantamount to imposing impermissible restriction. A school which has been established and granted status of a linguistic minority for years, it will not be proper to stop its grant-in-aid for the reason that it has failed to comply with a condition or restriction which is impermissible in law, particularly, when the teacher appointed or proposed to be appointed by such institution satisfy the laid down criteria and/or eligibility conditions. The minority has an inbuilt right to appoint persons, which in its opinion are better culturally and linguistically compatible to the institution.*

65. *To frame policy is the domain of the Government. If, as a matter of policy, the Government has decided to implement the reservation policy for upliftment of the socially or otherwise backward classes, then essentially it must do so within the frame work of the Constitution and the laws. The concept of reservation has been provided, primarily, under Article 16 of the Constitution. Therefore, it would be the requirement of law that such policies are framed and enforced within the four corners of law and to achieve the laudable cause of upliftment of a particular Section of the society. In regard to the ambit and scope of reservation, this Court in the case of M. Nagaraj v. Union of India², (2006) 8 SCC 212 held as under:*

39. Reservation as a concept is very wide. Different people understand reservation to mean different things. One view of reservation as a generic concept is that reservation is an anti-poverty measure. There is a different view which says that reservation is merely providing a right

of access and that it is not a right to redressal Similarly, affirmative action as a generic concept has a different connotation. Some say that reservation is not a part of affirmative action whereas others say that it is a part of affirmative action.

40. Our Constitution has, however, incorporated the word "reservation" in Article 16(4) which word is not there in Article 15(4). Therefore, the word "reservation" as a subject of Article 16(4) is different from the word "reservation" as a general concept.

41. Applying the above test, we have to consider the word "reservation" in the context of Article 16(4) and it is in that context that Article 335 of the Constitution which provides for relaxation of the standards of evaluation has to be seen. We have to go by what the Constitution-framers intended originally and not by general concepts or principles. Therefore, schematic interpretation of the Constitution has to be applied and this is the basis of the working test evolved by Chandrachud, J. in the Election case.

66. Thus, the framework of reservation policy should be such, as to fit in within the constitutional scheme of our democracy. As and when the Government changes its policy decision, it is expected to give valid reasons and act in the larger interest of the entire community rather than a Section thereof. In its wisdom and apparently in accordance with law Government had taken a policy decision and issued the circular dated, 21st March, 1986 exempting the minority institutions from complying with the requirements of the Rule 64(1)(b) of the DSE Rules. Despite this and Judgment of the High Court there was a change of mind by the State that resulted in issuance of the subsequent circular of September, 1989. From the record before us, no reasons have been recorded in support of the decision superseding the circular dated, 21st March, 1986. It is a settled canon of administrative jurisprudence that state action, must be supported by some valid reasons and should be upon due application of mind. In the affidavits filed on behalf of the State, nothing in this regard could be pointed out and in fact, none was pointed out during the course of arguments. Absence of reasoning and apparent non-application of mind would give colour of arbitrariness to the State action. This aspect attains greater lucidity in light of the well accepted norm that minority institution cannot stand on the same footing as a non-minority institution.

67. Besides that, State actions should be actio quaelibet it sua via and every discharge of its duties, functions and governance should also be within the constitutional framework. This principle equally applies to the Government while acting in the field of reservation as well. It would not be possible for the Courts to permit the State to impinge upon or violate directly or indirectly the constitutional rights and protections granted to various classes including the minorities. Thus, the State may not be well within its constitutional duty to compel the linguistic minority institution to accept a policy decision, enforcement of which will infringe their fundamental right and/or protection. On the contrary, the minority can validly question such a decision of the State in law. The service in an aided linguistic minority school cannot be construed as "a service under the

State" even with the aid of Article 12 of the Constitution. Resultantly, we have no hesitation in coming to the conclusion that Rule 64(1)(b) cannot be enforced against the linguistic minority school. Having answered this question in favour of the Appellant and against the State, we do not consider it necessary to go into the constitutional validity or otherwise of Rule 64(1)(b) of the Rules, which question we leave open.

68. For the reasons aforesaid, we allow the appeal and hold that Rule 64(1)(b) and the circular of September, 1989 are not enforceable against the linguistic minority school in the NCT of Delhi. There shall be no Order as to costs."

6. In the present cases, the petitioners have sought for declaration that Rule 64 (1) (b) and 1 (e) as well as Rule 47 and the consequential Circulars are not binding upon them and to that extent they seek a declaration that they are void. Having regard to the judgment of the Supreme Court, however, Mr. Siddiqui, Advocate who appears on behalf of the writ petitioners submits that the challenge would be confined to the extent it seeks relief of declaration vis-à-vis Rule 64 (1) (b) and other consequential Circulars including the one dated 7.12.2001. Learned counsel for the GNCTD agrees that the judgment of the Supreme Court covers the issue.

7. In the light of the above submissions, the writ petitions are allowed in terms of the judgment of the Supreme Court; Rule 64 (1) (b) and the consequential Circulars impugned in these petitions are declared to be not binding upon the writ petitioners in these cases.

8. W.P. (C) 2611/2001 & W.P. (C) 3625/2002 are allowed in the above terms.

S. RAVINDRA BHAT, J

G. P. MITTAL, J

FEBRUARY 17, 2011

/vks/