

N. KUNHICHEKKU HAJI(d) BY LRS

v.

STATE OF KERALA AND ORS.

MARCH 22, 1995

[K. RAMASWAMY AND S. SAGHIR AHMAD, JJ.]

Education :

Kerala Education Rules :

Rules 2 and 2-A—Establishment and Upgradation of new Schools—Application for upgradation—Notification—Applicant's name not in the list—Subsequent orders upgrading the school from primary to upper Primary—Challenged on the ground that once rejected not to be considered again—Held: Not vitiated—Procedure adhered to—Need for encouraging educational incentives—No violation of statutory steps.

Practice & Procedure:

Limitation—Not bringing on record the legal representatives within limitation—Larger interest to be taken into account—Procedural cob-webs and technicalities not to subsume substance.

The appellant was running a primary school. Government invited applications for establishing new schools or upgradation of existing schools. Appellant made an application for upgradation of his primary school into upper primary school. Government sanctioned the same, but in the schedule the name of the appellant for upgradation of his school did not find a place. Subsequently Government issued orders in which appellant's name found a place. This order was challenged on the ground in a Writ Petition on the ground that since the applications have already been dismissed by its earlier notification, the Government had no jurisdiction or power to grant sanction subsequently. The impugned order was quashed by a Single Judge and on appeal it was confirmed by the Division Bench. Hence this appeal.

Allowing the appeal, this Court

HELD:1. From the recital of the G.O. it is seen that certain applica-

tions have been deferred for detailed consideration; at a later stage the Director of Public Instructions had considered such application in detail and had recommended the sanction of schools in those places taking into consideration the educational need existing in that locality. In consequence the sanction of the upgradation of appellant's school was granted.

[956-H, 959-A]

2.1 Government have granted permission in the public interest upgrading the school to avoid drop out of school going children. It is known that Kerala has the highest literacy percentage. Even then Malappuram District was found to be a backward district in education and the Government felt that the District needs encouragement for educational incentives. As a consequence, the educational need was found to be genuine. Therefore, when the Government had found it necessary that there exists need for upgradation of the existing school into upper primary school, the Government must be allowed to exercise its statutory power unless it is malafide or colourable exercise of power and is justified on extraneous facts in granting upgradation. [957-F-H, 958-A]

2.2 The High Court did not record any finding that the impugned G.O. is vitiated by any malafide exercise of the power. After the Director of Public Instructions examined the matter and made recommendation, the Government had issued the revised G.O. Since the procedural steps required under Sections 2 and 2(A) of the Rules have been adhered to, there is no violation of the statutory steps required in this behalf. [958-H, 959-A]

3. The fact that the Government is coming forward to transpose itself as an appellant would clearly indicate that there is an acute educational need for upgrading primary school in the locality as upper primary school. Moreover, children have fundamental right to education. Therefore, larger interest of young children should be taken into consideration in meeting the procedural cob-web and the technicalities should not subsume substance. Considered in that perspective, it cannot be said that the appeal stands abated on account of the fact that the legal representatives of the appellant have not been brought on record within limitation. [958-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2044 of 1979.

From the Judgment and Order dated 6.2.1979 of the Kerala High Court in W.A. No. 299 of 1977.

T.L. Viswanatha Iyer and E.M.S. Anam with him for the Appellant.

M.A. Firoz for the State.

N.Sudhakaran for the Respondent.

G. Viswanatha Iyer, P.V. Surendran, Dileep Pillai and P. Kesava Pillai with him for the Intervenor.

The following Order of the Court was delivered :

This appeal arises from the judgment of the Division Bench of the High Court of Kerala in W.A. No. 299/77 dated 6.2.79. The admitted facts are that the appellant was running a primary school at Kanmanam by name A.M.L.P. School. As per the procedure prescribed in Rule 2 of Chapter V of the Kerala Education Rules, objections have been called on the need to establish new schools or upgradation of existing schools. The notification was issued on July 4, 1975 inviting applications for establishing new schools or upgradation of the existing schools. Pursuant thereto, the appellant made an application for upgradation of his primary school into upper primary school. The Government had sanctioned on 18.10.1975 but in the Schedule the name of the appellant for upgradation of his school did not find place. The Government in G.O.Ms. No. 116/76, dated 21.6.1976 issued orders in which the appellant's name as item 5 finds place for upgradation of his school as upper primary school. The respondent had challenged the order of the Government giving sanction for upgradation by filing the O.P. under Art.226 contending inter alia that since the applications have already been dismissed by issuing the notification on 18.10.1975, the Government have no jurisdiction or power to grant sanction under the impugned G.O. That was found favour with the learned Single Judge and accordingly it was quashed. On appeal, it was confirmed. Thus this appeal by special leave.

It would be seen that the judgment of the High Court was suspended by this court. In consequence the appellant has been continuing to run the upgraded school ever since the sanction was given by the Government on 21.6.1976. The question is whether the sanction for upgradation of the school was properly given by the Government. It would be seen from the recital of the G.O. that certain applications have been deferred for detailed consideration; at a later stage the Director of Public Instructions had

considered such application in detail and had recommended to sanction the schools in those places taking into consideration of the educational need existing in that locality. In consequence the sanction of the upgradation of appellant's school was granted. In the counter affidavit filed in the High Court, it was specifically stated that the distance between the respondent school and that of the appellant is about 2-1/2 kms. The G.O. further shows that :

"The Government felt that the area Kananham is in need of a U.P. school. As no particular school was notified for opening of the new school or upgrading of existing school the question of hearing petition regarding his objections against the upgrading of A.M.L.P.S. Kanmanam did not arise. However, the Assistant Education Officer, Tanur made a spot enquiry when the objections from the Manager, A.M.U.P.S. Kanhirakole was received.

The Manager's statement that the very survival of this U.P. School primarily depends upon the feeder schools cannot be believed. At present the pupils coming from Kanmanam area to Kanhirakole have to cross a flooded field which is very inconvenient for the little children of tender age. Due to this inconvenience many of the pupils who have complete L.P. School studies in the feeder schools discontinue their studies. The fact that there will be fall in the number of strength in Kanhirakole school cannot be a reason to ignore the inconvenience of the children of Kanmanam area."

In that Order, Government have granted permission in the public interest upgrading the school to avoid drop out of school going children. It is known that Kerala has the highest literacy percentage. Even then Malappuram District was found to be a backward district in education and the Government felt that the District needs encouragement for educational incentives. As a consequence, the educational need was found to be genuine. It is also to be noted that in the counter affidavit filed in this Court and the High Court, it was stated that due to 2-1/2 kms. distance young children are dropping out since there is no direct route except crossing the fields which the children found it difficult to travel from the village to the school run by the respondent. Therefore, when the Government had found

it necessary that there exists need for upgradation of the existing school into upper primary school, we think that the Government must be allowed to exercise its statutory power unless it is malafide or colourable exercise of power and is justified on extraneous facts in granting upgradation.

Shri Vishwanatha Iyer, learned senior counsel has contended that the appellant died in 1983 and an application was made in 1994 to bring the legal representatives on record, and there is no proper explanation for the inordinate delay. Therefore, there is not pending appeal in the eye of law since the appeal stands abated. Technically the contention is correct. But the question is whether the respondent has any personal interest in the matter. Since there exists public need for catering the educational interest of the young children, the technicalities should not stand in the way for consideration of the matter in issue. Moreover, the Government itself has come forward to transpose itself as an appellant. No doubt they did not file any appeal against the order of the Single Judge before the Division Bench, nor filed any appeal in this Court. The fact that the Government is coming forward to transpose itself as an appellant would clearly indicate that there is an acute educational need for upgrading primary school in the locality as upper primary school. Moreover, children have fundamental right to education. Therefore, larger interest of young children should be taken into consideration in meeting the procedural cob-web and the technicalities should not subsume substance. Considered in that perspective, we reject the contention of the respondent that the appeal stands abated on account of the fact that the legal representatives of the appellant have not been brought on record within limitation. The appeal is accordingly allowed and they are transposed as legal representatives.

It may be mentioned that G.O. dated October 18, 1975 recites that incomplete or defective applications stood rejected as noted by the High Court. The recitals in the impugned G.O. clearly mentions that some applications including that of the appellant were kept back for further examination. The Government also found that there was need for establishing new schools or upgrading the existing schools. The educational need thereby sought to be served by granting upgradation of the appellant's school. The High Court also did not record any finding that the impugned G.O. is vitiated by any malafide exercise of the power. After the Director of Public Instructions examined the matter and made recommendation, the

Government had issued the revised G.O. Since the procedural steps required under Sections 2 and 2(A) of the Rules have been adhered to, we do not find any violation of the statutory steps required in this behalf. Therefore, the appeal is allowed. The orders of the High Court are set aside. Consequently the Writ Petition stands dismissed. In the circumstances, the parties are directed to bear their own costs throughout.

All the applications shall be treated to have been disposed of in the light of this judgment.

G.N.

Appeal allowed.