

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1424 of 2004

in

SPECIAL CIVIL APPLICATION No 6470 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA  
and  
HON'BLE MR.JUSTICE M.C.PATEL

- =====
1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
  2. To be referred to the Reporter or not? : YES
  3. Whether Their Lordships wish to see the fair copy : YES  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the concerned : NO  
Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals?

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VIDYA MANDIR VALI VIDHYARTHI HITA RAKSHAK SAMITI

Versus

STATE OF GUJARAT  
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Appearance:

MR SHALIN N MEHTA for Appellant  
MR PR ABICHANDANI, AGP for Respondents No. 1-2  
RULE SERVED BY DS for Respondent No. 3-5  
MR SK JHAVERI for Respondents No. 5-6  
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CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA  
and  
HON'BLE MR.JUSTICE M.C.PATEL

Date of decision: 31/08/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

The appellant - Vidya Mandir Vali Vidhyarthi Hita Rakshak Samiti filed writ petition i.e. Special Civil Application No.6470 of 2004 before this court under Article 226 of the Constitution with the following reliefs:

(A) Your Lordships may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction, commanding the respondents No.1, 2, 3 and 4 herein to order/direct the respondents No.5 and 6 herein to strictly follow, adhere to and implement for the academic year 2003-04 and in each subsequent academic year hereafter, the Circular dated 8.9.2003 issued by the present respondent No.3 Gujarat Council of Education, Research and Training pertaining to admission to standards I to VII in primary schools, aided or unaided, in the State of Gujarat;

(B) Your Lordships may be pleased to pass a cease and desist order to restrain the respondents No.5 and 6 herein from deviating from the admission policy contained in the Circular dated 8.9.2003 issued by the respondent No.3 Gujarat Council of Education, Research and Training and from adopting the benchmark of a minimum of 50 marks for passing in each subject in standards III to VII in primary schools instead of benchmark of a minimum of 35 marks for passing in each subject;

(C) Your Lordships may be pleased to permanently restrain the respondents No.5 and 6 herein from hitherto giving admission to students in standards III to VII in primary schools run by the respondents No.5 Trust by adopting the benchmark of a minimum of 50 marks for passing in each subject;

(D) Your Lordships may be pleased to issue a

writ of mandamus or any other appropriate writ, order or direction, commanding the respondents No.5 and 6 herein to review and reassess the results of 100 students who have been declared as "fail" by adopting the benchmark of a minimum of 35 marks for passing in each subject and to declare such students as successful in light of the Government benchmark of 35 marks;

(E) Pending admission and final hearing of the present petition, Your Lordships may be pleased to restrain the respondents No.5 and 6 from giving admission to students in standards III to VII in primary schools run by the respondent No.5 Trust by considering the benchmark of a minimum of 50 marks for passing in each subject;

(F) Pending admission and final hearing of the present petition, Your Lordships may be pleased to direct the respondents No.5 and 6 herein to strictly adhere to, follow and implement the admission policy contained in the Circular dated 8.9.2003 issued by the present respondent No.3 Gujarat Council of Education, Research and Training which stipulated a benchmark of a minimum of 35 marks for passing in every subject and be further pleased to declare the 100 students in whose case the benchmark of 50 marks has been wrongly followed, as successful and as eligible for admission to higher standard; &

(G) Your Lordships may be pleased to pass any other appropriate order as deemed fit in the interest of justice.

2. The learned Single Judge (Coram: Jayant Patel, J.), by his judgment and order dated 15th July, 2004, dismissed the writ petition. Aggrieved by the same, the appellant - petitioner has filed this appeal before this court. The respondent no.3 - Gujarat Council of Education, Research and Training issued circular dated 8th September, 2003 (Annexure-A to the petition) to all the Principals of the primary schools including the private schools and District Primary Education Officers

as well as District Education Officers and the Administrative Officers for its implementation. A copy of the same was forwarded to the Director, Primary Education, Gandhinagar - respondent no.2. As per the said circular, rules for promotion to the higher class are framed and under Rule 2 of the said Rules, admission by way of promotion is required to be given to the students who have secured minimum 35% marks. However, the private respondent no.5 - Trust was not following the said circular and giving admission on promotion to the students who have secured minimum 50% passing marks in each subject from Standards III to VII in the primary schools run by it. Before approaching this court, the petitioner approached the concerned authorities by way of proper representations but the same remained undecided. Therefore, at last the appellant - petitioner filed Special Civil Application No.6470 of 2004 before this court and prayed that a writ of mandamus or any other appropriate writ, order or direction be issued to the respondents no.1, 2 and 3 to direct the respondents no.5 and 6 to strictly follow, adhere to and implement, for the academic year 2003-04 and in each subsequent year thereafter, the circular dated 8th September, 2003 (Annexure-A to the main petition) issued by the respondent no.3 - Council pertaining to admission to Standards III to VII in primary schools, aided or unaided, in the State of Gujarat and it is also prayed that the direction be issued to the respondents no.5 and 6 to review and reassess the results of 100 students who have been declared "fail" by adopting 35% as minimum passing marks in each subject and to declare them as successful in light of the Government Circular (Annexure-A).

3. It was submitted by learned counsel Shri Mehta for the appellant - petitioner that one of the requirements of the circular dated 8th September, 2003 (Annexure-A) issued by the respondent no.3 - Council is that minimum passing marks should be 35% in each subject for admission by way of promotion to Standards III to VII. Another requirement under Clause 22 of the said circular is that any primary school desirous of adopting its own policy for admission to Standards III to VII for promoting its policy would be subject to the conditions that

- (1) prior to change in policy, the parents of  
the student must be taken in confidence,
- (2) the details of such new policy should be  
given to the respondents - authorities  
well in advance and

(3) there should be proper and meaningful

consultation by the District Primary Education Officer and District Education Officer with the District Education and Training Centre with the approval of the State Government in respect of new admission policy to be framed by any school.

It was submitted by Mr. Mehta that respondent no.5 Trust, however, decided minimum 50% passing marks instead of 35% marks in each subject without consulting the parents and without seeking approval of the State Government and following that standard of 50% minimum passing marks, it had failed about 100 students who have got 35% marks or more than that but less than 50% marks, which is against the circular at Annexure-A issued by respondent no.3. Therefore, the criteria laid down by the respondent no.5 - Trust for its schools of having 50% passing marks should be declared bad in law and illegal. Mr. Mehta also submitted that the learned Single Judge committed an error in dismissing his petition by holding that if any school, with a view to maintain the standard of education, provides any higher criteria which itself takes care of minimum criteria prescribed by the statutory authority, then it cannot be said that the said criteria would be operating harsh or violative of Articles 14 or 21 of the Constitution of India.

4. However, Mr. Jhaveri, learned counsel appearing for private respondents no.5 and 6 submitted that the impugned circular at Annexure-A dated 8th September, 2003 issued by respondent no.3 - Council has no force of law, since it was not issued either by the State Government or the Director of Primary Education under the provisions of Bombay Primary Education Act, 1947 (for short 'the Act'). Alternatively, Mr. Jhaveri submitted that the petitioner could not have straightaway approached this court after making representation to the authority because the authority has so far not taken any action in the matter. He submitted that any action taken by the authority is appealable under Section 40A(8) of the Act. Mr. Jhaveri also submitted that the Board has powers under Section 59 of the Act but it does not include constitution of such research council - respondent no.3. He also submitted that under Section 54, the State Government has power to give to District School Board, all such directions as it may consider necessary in regard to any matter connected with primary education including the admission by promotion and the District School Board shall have to comply with such directions issued by the State

Government. It does not include Research Council respondent no.3. Mr. Jhaveri also submitted that to run a private school is a fundamental right guaranteed under Article 19(1)(e) of the Constitution and relying on the majority judgment of the Hon'ble Supreme Court in the case of MODERN SCHOOL vs. UNION OF INDIA AND OTHERS reported in (2004) 5 SCC Page 583, Mr. Jhaveri submitted that it being a private school, it is subject to reasonable restriction. Therefore, if the respondent no.5 - Trust has decided to keep 50% minimum passing marks for Standards III to VII in the schools run by it, then this court cannot interfere with such criteria laid down by the Trust because it is for the betterment of the students.

5. However, learned AGP Shri Abichandani, on the written instructions received from respondent no.4, stated that the Government has not received any proposal from the respondent no.5 - Trust seeking approval of its policy of 50%.

6. Having heard the learned counsel for the parties, we are of the considered opinion that respondent no.3 Council is duly constituted by the Government itself and when it had issued circular at Annexure-A dated 8th September, 2003 for its implementation to all the Principals of the schools, the District Primary Education Officers, District Education Officers and the Administrators, then the same is binding to all the private schools also irrespective of the fact that whether it is religious minority or not. Copy of the said circular was already forwarded to the Director, Primary Education, Gandhinagar. It is unfortunate that though before approaching this court, the petitioner has made several representations to the competent authority, the same could not be decided immediately. Therefore, the petitioner had to approach this court by way of writ petition.

6.1 Clause 22 of the said circular provides that for making any change after consultation of the parents, the approval has to be sought for. However, Mr. Jhaveri submitted that this criteria of 50% marks was very much there since 1998 with the consultation of the parents of the students studying in their schools. Therefore, there was no question of seeking any approval. It may be that the respondent no.5 - Trust may be having this criteria of 50% passing marks since 1998 but after issuance of the circular at Annexure-A in 2003, it was incumbent upon the respondent no.5 to seek the approval of the State Government which is admittedly, not done. Rule 2 of the

Rules of admission by promotion to the higher class from Class III to Class VII mentioned in the said circular makes it clear that admission by promotion is required to be given to the students who had secured minimum 35% marks in each subject. If that is the requirement for giving admission by promotion to Class III to VII, then, the respondent no.5 is bound to follow the said circular. It cannot say no to the circular simply on the ground that it was at the most administrative instructions issued by the authority which is not empowered under the Bombay Primary Education Act. No private school without the approval of the competent authority can have its own different criteria for promotion to the higher classes. At least, up to Standard VII, no school can have different criteria for minimum marks. Otherwise, minimum marks of 35%, as laid down by the Government, frustrates the idea of giving education to more and more students of the State as primary education is very much needed for the students who are to get more than 35% of marks. It is true that respondent no.5 may be having 50% of minimum passing marks for admission by promotion to Class III to VII for the betterment of students but that is against the said circular. The judgment of the Hon'ble Supreme Court in the case of MODERN SCHOOL vs. UNION OF INDIA AND OTHERS reported in (2004) 5 SCC Page 583 is sought to be relied upon by learned counsel Shri Jhaveri for respondents no.5 and 6. Mr. Jhaveri read out para 41 of the said judgment which is a minority view of Hon'ble S.B. Sinha, J. Hence, no reliance can be placed on it. Similarly, judgment of the Hon'ble Supreme Court reported in AIR 2004 SC Page 1861 will have no application to the facts of this case. Therefore, we have refrained ourselves from dealing with the same in detail. Suffice it to say that, it was a case arising out of admission to professional (Engineering) colleges where AICTE prescribed two modes of admission. As stated earlier, in the instant case, the criteria of minimum passing marks of 35% is changed by respondent no.5 - Trust for its schools to 50% marks for the primary schools from Standards III to VII for which there is a circular issued in 2003 and no school can be allowed to act against the circular issued by the authority which is duly constituted by the State Government. In view of the above discussion, we are of the considered opinion that the learned Single Judge committed grave error in dismissing the writ petition by holding that if any school, in order to maintain the standard of education provides any higher criteria, which itself takes care of minimum criteria prescribed by the statutory authority, it cannot be said that the said criteria would be operating harsh or violative of Articles 14 or 21 of the

Constitution.

7. In view of the above discussion, this appeal is allowed and writ petition i.e. Special Civil Application No.6470 of 2004 filed by the appellant - petitioner is accepted and the respondents no.1 to 4 are directed to issue necessary directions to the respondents no.5 and 6 to strictly follow, adhere to and implement the circular dated 8th September, 2003 for the academic year 2003-04 and onwards issued by the respondent no.3 - Council for giving admission to the students from Standards III to VII in all the primary schools run by Respondent No.5 - Trust in the State of Gujarat at the earliest, preferably within one week from the date of receipt of this judgment. This judgment was pronounced in the open court and a copy of it be given to learned AGP Shri Abichandani for the respondents no.1 to 4 for its immediate implementation. There shall be no order as to costs.

( B.J. Shethna, J. )

( M.C. Patel, J. )

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