1954

Satya Dev Bushahri v. *Padam Dev and Others.*

Venkatarama Ayyar J.

Act. To hold that Government servants are, as such and as a class, disqualified to act as polling agents would be to engraft an exception to the statute, which is not there.

Accordingly, we reaffirm the view taken by us that the appointment of a Government servant as polling agent does not, without more, contravene section 123(8). It is scarcely necessary to repeat our observation in the original judgment that "if it is made out that the candidate or his agent had abused the right to appoint a Government servant as polling agent by exploiting the situation for furthering his election prospects, then the matter can be dealt with as an infringement of section 123(8)." In the result, this petition is dismissed; but under the circumstances, without costs.

Petition dismissed.

THE STATE OF BOMBAY
v.
BOMBAY EDUCATION SOCIETY AND OTHERS.
(With Connected Appeals)

1954

May 26.

[MEHR CHAND MAHAJAN C.J., S. R. DAS, GHULAM HASAN, BHAGWATI and JAGANNADHADAS JJ.]

Constitution of India—Articles 29, 30(1), 337 Second Proviso—Government Circular—Prohibiting admission into Schools maintained or aided by State on the ground of language of citizens—Such circular whether ultra vires *of Articles 29(2) and 337 Second Proviso—Article 29(1) and 30(1) of the Constitution—Word "Namely"—Meaning of.*

The Education Society of Bombay (respondent No. 1) has been running a recognised Anglo-Indian School called Barnes High School at Deolali which receives aid from the State of Bombay. J and G are its Directors. English is used in the said school as the medium of instruction. The mother tongue of the Anglo-Indians is English. The State of Bombay issued a circular order on 6th January, 1954, headed "Admission to Schools teaching through the medium of English." The operative portion of the order enjoined that no primary or secondary school shall from the date of the order admit to a class where English is used as the medium

of instruction any pupil other than a pupil belonging to a section of citizens the language of which is English namely, Anglo-Indians and citizens of non-Asiatic descent. One P, a citizen of India and member of Indian Christian Community alleging English to be the mother tongue of his daughter, and one M, a citizen of India and member of Gugrati Hindu Community alleging Gujrati to be the mother tongue of his son, were refused admission to the school for their respective wards on the basis of the aforesaid order dated 6th January, 1954. The Society and its two Directors presented an application under article 226 of the Constitution in the High Court of Bombay praying for the issue of a Writ in the nature of *Mandamus* restraining the State of Bombay and its officers from enforcing the said order and to allow the petitioners to admit in the school any children of non-Anglo-Indian citizens or citizens of the Asiatic descent and to educate them through the medium of English. Similar applications were made by P and his daughter and by M and his son. All these applications were consolidated, heard together and accepted by the High Court which made an order as prayed. The State of Bombay came in appeal before the Supreme Court. *Held*: (1) that the impugned order denying the right of students who are not Anglo-Indians or are of Asiatic descent to be admitted to a recognised Anglo-Indian School (in this case the Barnes High School) which receives aid from the State and which imparts education through the medium of English is void and unenforceable as it offends against the fundamental right guaranteed to all citizens by article 29(2) of the Constitution, because

(a) The language of article 29(2) of the Constitution is wide and unqualified and covers all citizens whether they belong to the majority or minority group.

(b) The protection given by the said article extends against the State or anybody who denies the right conferred by it.

(c) The said article confers a special right on citizens for admission into the educational institutions maintained or aided by the State.

(d) The marginal note referring to minorities does not control the plain meaning of the language in which article 29(2) has been couched.

The word "namely" imports enumeration of what is comprised in the preceding clause. In other words it equates what follows with the clause described before.

(2) Barnes High School at Deolali and other Anglo-Indian Schools have a right to admit non-Anglo-Indian students and students of Asiatic descent inasmuch as article 337 proviso 2 imposes an obligation on the Anglo-Indian Schools to make available at least 40 per cent. of the annual admissions to non-Anglo-Indian students as a condition precedent of their receiving grant from the Government and the impugned order is unconstitutional as it

1954

The State of Bombay v. *Bombay Education Society and Others.*

prevents the Anglo-Indian schools from performing their constitutional obligation and exposes them to the risk of forfeiting their constitutional right to the special grant.

In view of the fundamental right guaranteed to a minority like the Anglo-Indian community under article 29(1) to conserve its own language, script and culture and the right to establish and administer educational institutions of its own choice under article 30(1) there is implicit therein the right to impart instruction in its own institutions to the children of its own community in its own language and the State by its police power cannot determine the medium of instruction in opposition to such fundamental right.

Bhola Prasad v. *The King-Emperor* ([1942] F.C.R. 17, 25), *The Queen* v. *Burah* (L.R. 1878 3 App. Cas. 859), *The State of Madras* v. *Srimathi Champakam Dorairajan* ([1951] S.C.R. 525), *Pierce* v. *Society of Sisters of Holy Names* (268 U.S. 508), *Yusuf Abdul Aziz* v. *State* (A.I.R. 1951 Bom. 470), *Sm. Anjali Roy* v. *State of West Bengal* (A.I.R. 1952 Cal. 825), *The State of Bombay* v. *Narasu Appal Mali* (A.I.R. 1952 Bom. 84), *Srinivasa Aiyar* v. *Saraswathi Ammal* (A.I.R. 1952 Mad. 193), *Dattatraya Motiram More* v. *State of Bombay* (A.I.R. 1953 Bom. 311), *Punjab Province* v. *Daulat Singh* (1946 L.R. 73 I.A. 59), *Robert T. Meyer* v. *State of Nebraska* (262 U.S. 390), *August Bartels* v. *State of Iowa* (262 U.S. 404) and *Ottawa Separate Schools Trustees* v. *Mackell* (L.R. 1917 A.C. 62) referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 64 to 66 of 1954.

Appeals under article 132(1) of the Constitution of India from the Judgment and Order dated the 13th February, 1954, of the High Court of Judicature at Bombay in Special Applications Nos. 259, 288 and 289 of 1954 respectively.

M. C. Setalvad, Attorney-General for India, and *C. K. Daphtary, Solicitor-General for India* (*G. N. Joshi, M. M. Desai, Porus A. Mehta* and *P. G. Gokhale,* with them) for the appellant in all the appeals.

N. A. Palkhivala, J. B. Dadachanji, J. K. Munshi and *Rajinder Narain* for respondents Nos. 1 and 2 in C. A. No. 64.

Frank Anthony, J. B. Dadachanji, J. K. Munshi and *Rajinder Narain* for respondent No. 3.

N. A. Palkhivala, J. B. Dadachanji, J. K. Munshi and *Rajinder Narain* for the respondent No. 1 in C. A. No. 65.

Frank Anthony and *Rajinder Narain* for respondent No. 2.

N. A. Palkhivala, Frank Anthony, J. B. Dadachanji, J. K. Munshi and *Rajinder Narain* for respondent No. 1 in C. A. No. 66.

Frank Anthony, J. B. Dadachanji, J. K. Munshi and *Rajinder Narain* for respondent No. 2.

1954. May 26. The Judgment of the Court was delivered by

DAS J.—These three appeals, filed by the State of Bombay, with a certificate granted by the Bombay High Court, are directed against the Judgment and Order pronounced by that High Court on the 15th February, 1954, on three Civil Applications under article 226. By that Judgment and Order the High Court held that the circular order No. SSN 2054(a) issued by the State of Bombay, Education Department, on the 6th January, 1954, was bad in that it contravened the provisions of article 29(2) and article 337 and directed the issue of a writ prohibiting the State from enforcing the order against the authorities of Barnes High School established and run by the Education Society of Bombay (hereinafter referred as the Society).

The Society, which is the first respondent in Appeal No. 64 of 1954, is a Joint Stock Company incorporated under the Indian Companies Act, 1913. The other two respondents in that appeal—Ven'ble Archdeacon A. S. H. Johnson and Mrs. Glynne Howell are members and Directors of the Society. The Ven'ble Archdeacon A. S. H. Johnson is also the Secretary of the Society. Both of them are citizens of India and are members of the Anglo-Indian Community. The mother tongue of these respondents as of other members of the Anglo-Indian Community is English.

In the State of Bombay there are in all 1403 Secondary Schools. 1285 of these Schools import education through the medium of some language other than English. The remaining 118 Schools have adopted English as the medium of instruction. Thirty out of these 118 Schools are Anglo-Indian Schools. In these thirty Schools there are three thousand Anglo-Indian

1954

The State of Bombay
v.
Bombay Education Society and Others.

Das J.

students forming 37 per cent. of the total number of students receiving instruction in those Anglo-Indian Schools. The rest 63 per cent. consist of non-Anglo-Indian students.

In furtherance of its object the Society in 1925 established and since then has been conducting and running a School known as Barnes High School at Deolali in Nasik District in the State of Bombay. The School is a recognized Anglo-Indian School having Primary, Secondary and High School classes. The School receives considerable aid from the State. The total number of students in the School in December, 1953, was 415, out of which 212 were Anglo-Indians and the remaining 203 belonged to other Indian Communities. In all the classes in the said School English is used as the medium of instruction and has been so used since the inception of the School. The entire staff of the School consist of 17 teachers who, with the exception of one, are trained and qualified to teach only in English, the exception being the teacher who teaches Hindi which is the second language taught in that School.

On the 16th December, 1953, the Inspector of Anglo-Indian Schools, Bombay State, and Educational Inspector, Greater Bombay, sent a circular letter to the Headmaster of Barnes High School intimating that the Government had under consideration the issue of orders regulating admissions to Schools in which the medium of instruction was English. The orders under consideration were stated to be on the following lines, namely, (1) that from the next School year admissions to English medium School should only be confined to children belonging to the Anglo-Indian and European Communities, and (2) that those pupils who, prior to the issue of the orders, were studying in recognized Primary or Secondary English medium Schools, could continue to do so. The letter in conclusion advised the Headmaster not to make any admission for the academic year beginning from January, 1954, of pupils other than Anglo-Indians or Europeans pending further orders which, it was said, would issue shortly.

The contemplated order came on the 6th January, 1954, in the shape of circular No. SSN 2054(a) headed

"Admissions to Schools teaching through the medium of English". In paragraphs 1, 2 and 3 of this circular reference was made to the development of the policy of the Government regarding the medium of instruction at the Primary and Secondary stages of education. It was pointed out that since 1926-27 the University of Bombay permitted pupils to answer questions in modern Indian languages at the Matriculation examination in all subjects except English and other foreign languages and that this had resulted in 1285 out of 1403 schools in the State ceasing to use English as the medium of instruction. It was then stated that in 1948 instructions were issued to all English teaching schools that admissions to such Schools should ordinarily be restricted to pupils who did not speak any of the regional languages of the State or whose mother tongue was English. It was said that in 1951, after a review of the position, a general policy had been laid down to the effect that admission to such schools should be restricted only to four categories of children therein mentioned. Reference was then made to the recommendations of the Secondary Education Commission that the mother tongue or the regional language should generally be the medium of instruction throughout the Secondary school stage, subject to the provision for special facilities for linguistic minorities. In paragraph 4 of the Circular order it was stated that the Government felt that the stage had then been reached for the discontinuance of English as a medium of instruction and that the Government had decided that subject to the facilities to be given to linguistic minorities all special and interim concessions in respect of admission to Schools (including Anglo-Indian Schools) using English as the medium of instruction, should thereafter be withdrawn. Then came the operative part of the order, the relevant portion of which is set out below :

"5. Government has accordingly decided as follows :

Subject to the exceptions hereinafter provided, no primary or secondary school shall from the date of these orders admit to a class where English is used as

1954

The State of Bombay v. *Bombay Education Society and Others.*

Das J.

a medium of instruction any pupil other than a pupil belonging to a section of citizens the language of which is English namely, Anglo-Indians and citizens of non-Asiatic descent."

There were three exceptions made to this general order in favour of three categories of students who, prior to the date of the order, were studying through the medium of English. Provision was made for admission of foreign pupils, other than those of Asiatic descent, belonging to foreign possessions in India, to Schools using English as a medium of instruction or to any other School of their choice. The concluding paragraph of the Order was in the following terms :—

"7. All Schools (including Anglo-Indian Schools) using, English as a medium of instruction should regulate admissions according to this circular. With a view to facilitating the admission of pupils who under these orders are not intended to be educated through the medium of English, these schools are advised to open progressively divisions of Standards using Hindi or an Indian language as the medium of instruction, starting from Standard I in 1954. Government will be prepared to consider the payment of additional grant on merits for this purpose."

The above order was followed by another Circular No. SSN 2054(b) issued on the same date drawing the attention of the heads of all Anglo-Indians Schools to the Circular No. SSN 2054(a) of the same date, and requesting them to regulate thereafter admissions to their Schools in accordance with that circular. It was stated that the orders in that circular were not intended to affect the total grant available for distribution to Anglo-Indian Schools under the Constitution but that the Government would be prepared to consider, in consultation with the State Board of Anglo-Indian Education, whether in consequence of this order, any change was necessary in the existing procedure for the equitable distribution of the total grant among individual Anglo-Indian Schools. In conclusion the attention of the Headmasters was particularly invited to the concluding sentence of paragraph 7 of that circular order, and it was pointed out that

the grants contemplated therein were intended to be in addition to the grants available under article 337.

Major Pinto, who is a citizen of India, belongs to the Indian Christian Community. He claims that his mother tongue, as that of a section of the Indian Christian Community, is English and that his entire family speak and use English at home. Two of his sons were then studying in the Barnes High School and were being educated through the medium of English. On 2nd February, 1954, Major Pinto accompanied by his daughter Brenda approached the Headmaster of Barnes High School seeking admission for her to the said School. He was informed by the Headmaster about the order issued by the State of Bombay on the 6th January, 1954, and was told that, in view of the said order, the Headmaster was compelled to refuse admission to her since she did not belong to the Anglo-Indian Community nor was she of non-Asiatic descent, although she had all the necessary qualifications for admission to the said School.

Dr. Mahadeo Eknath Gujar is also a citizen of India and is a member of the Guzrati Hindu Community. His mother tongue is Guzrati. He desires that his son Gopal Mahadeo Gujar should become a medical practitioner and go abroad for higher medical studies and qualifications and thought that his son should be educated through the medium of English. He found the Barnes High School, which teaches through the medium of English, as suitable for the needs of his son. Accordingly on the 1st February, 1954, Dr. Gujar accompanied by his son approached the Headmaster of Barnes High School seeking admission for his son to the said School but the Headmaster, in view of the Government Circular Order, felt bound to turn down such request as the boy did not belong to the Anglo-Indian Community and was not of non-Asiatic descent, although he had all the necessary qualifications for admission to the school. There have been similar other applications for admission which have had to be rejected on similar grounds.

1954

The State of Bombay
v.
Bombay Education Society and Others.

Das J.

Thereupon the Society and Ven'ble Archdeacon A.S.H. Johnson and Mrs. Glynne Howell in February, 1954, presented before the High Court of Bombay the Special Civil Application No. 259 of 1954 under article 226 of the Constitution praying for the issue of a writ in the nature of *mandamus* restraining the State of Bombay, its Officers, servants and agents from enforcing the said order and from taking any steps or proceedings in enforcement of the same and compelling the respondent to withdraw or cancel the said purported order and to allow the petitioner to admit to any standard in the said school any children of non-Anglo-Indian citizens or citizens of Asiatic descent and to educate them through the medium of English language. Likewise Major Pinto and his daughter Brenda and Dr. Gujar and his son Gopal made similar applications, being Nos. 288 and 289 of 1954 respectively, praying for similar reliefs. The three applications were consolidated on 11th February, 1954, and were heard together and were disposed of by the same Judgment and Order pronounced on the 15th February, 1954. The High Court accepted the petitions and made an order as prayed. The State of Bombay has now come up in appeal against the said Orders.

On the facts of these cases two questions arise namely (1) as to the right of students who are not Anglo-Indians or who are of Asiatic descent to be admitted to Barnes High School which is a recognized Anglo-Indian School which imparts education through the medium of English, and (2) as to the right of the said Barnes High School to admit non-Anglo-Indian students and students of Asiatic descent. The questions, thus confined to the particular facts of these cases, appear to us to admit of a very simple solution, as will be presently explained.

Re (1) : As already indicated Barnes High School is a recognized Anglo-Indian School which has all along been imparting education through the medium of English. It receives aid out of State funds. The daughter of Major Pinto and the son of Dr. Gujar are citizens of India and they claim admission to Barnes High School in exercise of the fundamental right said

to have been guaranteed to them by article 29(2) of the Constitution. The School has declined to admit either of them in view of the circular order of the State of Bombay. The provisions of the circular order, issued by the State of Bombay on the 6th January, 1954, have already been summarised above. The operative portion of the order, set forth in clause 5 thereof, clearly forbids all Primary or Secondary Schools, where English is used as a medium of instruction, to admit to any class any pupil other than a pupil belonging to a section of citizens, the language of which is English namely Anglo-Indians and citizens of non-Asiatic descent. The learned Attorney-General contends that this clause does not limit admission only to Anglo-Indians and citizens of non-Asiatic descent, but permits admission of pupils belonging to any other section of citizens the language of which is English. He points out that one of the meanings of the word "namely" as given in Oxford English Dictionary, Volume VII, p. 16 is "that is to say" and he then refers us to the decision of the Federal Court in *Bhola Prasad* v. *The King-Emperor*(1), where it was stated that the words "that is to say" were explanatory or illustrative words and not words either of amplification or limitation. It should, however, be remembered that those observations were made in connection with one of the Legislative heads, namely entry No. 31 of the Provincial Legislative List. The fundamental proposition enunciated in *The Queen* v. *Burah*(2) was that Indian Legislatures within their own sphere had plenary powers of legislation as large and of the same nature as those of Parliament itself. In that view of the matter every entry in the legislative list had to be given the widest connotation and it was in that context that the worods "that is to say," relied upon by the learned Attorney-General, were interpreted in that way by the Federal Court. To do otherwise would have been to cut down the generality of the legislative head itself. The same reason cannot apply to the construction of the Government order in the present case for the considerations that applied in the case before the

(1) [1942] F.C.R. 17 at p. 25. (2) L.R. (1878) 3 App. Cas. 859.

1954

The State of Bombay
v.
Bombay Education Society and Others.

Das J.

Federal Court have no application here. Ordinarily the word "namely" imports enumeration of what is comprised in the preceding clause. In other words it ordinarily serves the purpose of equating what follows with the clause described before. There is good deal of force, therefore, in the argument that the order restricts admission only to Anglo-Indians and citizens of non-Asiatic descent whose language is English. This interpretation finds support from the decision mentioned in clause 4 to withdraw all special and interim concessions in respect of admission to Schools referred to in clause 4. Facilities to linguistic minorities provided for in the circular order, therefore, may be read as contemplating facilities to be given only to the Anglo-Indians and citizens of non-Asiatic descent.

Assuming, however, that under the impugned order a section of citizens, other than Anglo-Indians and citizens of non-Asiatic descent, whose language is English, may also get admission, even then citizens, whose language is not English, are certainly debarred by the order from admission to a School where English is used as a medium of instruction in all the classes. Article 29(2) *ex facie* puts no limitation or qualification on the expression "citizen". Therefore, the construction sought to be put upon clause 5 does not apparently help the learned Attorney-General, for even on that construction the order will contravene the provisions of article 29(2).

The learned Attorney-General then falls back upon two contentions to avoid the applicability of article 29(2). In the first place he contends that article 29(2) does not confer any fundamental right on all citizens generally but guarantees the rights of citizens of minority groups by providing that they must not be denied admission to educational institutions maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them and he refers us to the marginal note to the article. This is certainly a new contention put forward before us for the first time. It does not appear to have been specifically taken in the affidavits in opposition filed in the High Court and there is no indication in the

Judgment under appeal that it was advanced in this form before the High Court. Nor was this point specifically made a ground of appeal in the petition for leave to appeal to this Court. Apart from this, the contention appears to us to be devoid of merit. Article 29(1) gives protection to any section of the citizens having a distinct language, script or culture by guaranteeing their right to conserve the same. Article 30(1) secures to all minorities, whether based on religion or language, the right to establish and administer educational institutions of their choice. Now suppose the State maintains an educational institution to help conserving the distinct language, script or culture of a section of the citizens or makes grants in aid of an educational institution established by a minority community based on religion or language to conserve their distinct language, script or culture, who can claim the protection of article 29(2) in the matter of admission into any such institution? Surely the citizens of the very section whose language, script or culture is sought to be conserved by the institution or the citizens who belong to the very minority group which has established and is administering the institution, do not need any protection against themselves and therefore article 29(2) is not designed for the protection of this section or this minority. Nor do we see any reason to limit article 29(2) to citizens belonging to a minority group other than the section or the minorities referred to in article 29(1) or article 30(1), for the citizens, who do not belong to any minority group, may quite conceivably need this protection just as much as the citizens of such other minority groups. If it is urged that the citizens of the majority group are amply protected by article 15 and do not require the protection of article 29(2), then there are several obvious answers to that argument. The language of artice 29(2) is wide and unqualified and may well cover all citizens whether they belong to the majority or minority group. Article 15 protects all citizens against the State whereas the protection of article 29(2) extends against the State or any body who denies the right conferred by it. Further article 15 protects all citizens against discrimination generally but article 29(2) is a protection against a particular

1954

The State of Bombay v. *Bombay Education Society and Others.*

Das J.

species of wrong namely denial of admission into educational institutions of the specified kind. In the next place article 15 is quite general and wide in its terms and applies to all citizens, whether they belong to the majority or minority groups, and gives protection to all the citizens against discrimination by the State on certain specific grounds. Article 29(2) confers a special right on citizens for admission into educational institutions maintained or aided by the State. To limit this right only to citizens belonging to minority groups will be to provide a double protection for such citizens and to hold that the citizens of the majority group have no special educational rights in the nature of a right to be admitted into an educational institution for the maintenance of which they make contributions by way of taxes. We see no cogent reason for such discrimination. The heading under which articles 29 and 30 are grouped together—namely "Cultural and Educational Rights"—is quite general and does not in terms contemplate such differentiation. If the fact that the institution is maintained or aided out of State funds is the basis of this guaranteed right then all citizens, irrespective of whether they belong to the majority or minority groups, are alike entitled to the protection of this fundamental right. In view of all these considerations the marginal note alone, on which the Attorney-General relies, cannot be read as controlling the plain meaning of the language in which article 29(2) has been couched. Indeed in *The State of Madras* v. *Srimathi Champakam Dorairajan*(1), this Court has already held as follows :

"It will be noticed that while clause (1) protects the language, script or culture of a section of the citizens, clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens."

In our judgment this part of the contention of the learned Attorney-General cannot be sustained.

(1) [1951] S.C.R. 525 at p. 530.

The second part of the arguments of the learned Attorney-General hinges upon the word "only" to be found in article 29(2). His contention is that the impugned order does not deny admission to any citizen on the ground *only* of religion, race, caste, language or any of them. He maintains with considerable emphasis that it is incumbent on the State to secure the advancement of Hindu which is ultimately to be our National language and he stresses the desirability of or even the necessity, generally acknowledged by educationalists, for imparting education through the medium of the pupil's mother tongue. We have had equally emphatic rejoinder from learned counsel appearing for the different respondents. Characterising the impugned circular as an unwarranted and wanton encroachment on the liberty of the parents and guardians to direct the education and upbringing of their children and wards reliance has been placed on the following observations of McReynolds J. in *Pierce* v. *Society of Sisters of Holy Names*(1) :—

"The fundamental theory of liberty upon which all Governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state ; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

It is also urged that the main, if not the sole, object of the impugned order is to discriminate against, and if possible to stifle the language of the Anglo-Indian Community in utter disregard of the constitutional inhibition. It is pointed out that to compel the Anglo-Indian Schools to open parallel classes in *any* Indian language will not necessarily facilitate the advancement of the Hindi language for the language adopted for such parallel classes may not be Hindi. Further the opening of parallel classes in the same School with an Indian language as the medium of instruction while the pupils in the other classes are taught in English will certainly not be conducive to or promote the conservation of the distinct language, script or culture which

(1) 268 U.S. 508; 69 L. Ed. 1070 at p. 1078.

1954

The State of Bombay v. *Bombay Education Society and Others.*

Das J.

is guaranteed by article 29(1) to the Anglo-Indian Community as a section of the citizens. It is equally difficult, it is said, to appreciate why the salutory principle of imparting education through the medium of the pupil's mother tongue should require that a pupil whose mother tongue is not English but is, say, Guzrati, should be debarred from getting admission only into an Anglo-Indian School where the medium of instruction is English but not from being admitted into a School where the medium of instruction is a regional language, say Konkani, which is not the mother tongue of the pupil. The rival arguments thus formulated on both sides involve questions of State policy on education with which the Court has no concern. The American decisions founded on the 14th amendment which refers to due process of law may not be quite helpful in interpretation of our article 29. We must, therefore, evaluate the argument of the learned Attorney-General on purely legal considerations bearing on the question of construction of article 29(2).

The learned Attorney-General submits that the impugned order does not deny to pupils who are not Anglo-Indians or citizens of non Asiatic descent, admission into an Anglo-Indian School only on the ground of religion, race, caste, language or any of them but on the ground that such denial will promote the advancement of the national language and facilitate the imparting of education through the medium of the pupil's mother tongue. He relies on a number of decisions of the High Courts, e.g., *Yusuf Abdul Aziz* v. *State*(1), *Sm. Anjali Roy* v. *State of West Bengal*(2), *The State of Bombay* v. *Narasu Appa Mali* (3), *Srinivasa Ayyar* v. *Saraswathi Ammal*(4), and *Dattatraya Motiram More* v. *State of Bombay*(5). These decisions, it should be noted, were concerned with discrimination prohibited by article 15 which deals with discrimination generally and not with denial of admission into educational institutions of certain kinds prohibited by article 29(2). It may also be mentioned that this

(1) A.I.R. 1951 Bom. 470.
(2) A.I.R. 1952 Cal. 825.
(3) A.I.R. 1952 Bom. 84.
(4) A.I.R. 1952 Mad. 193.
(5) A.I.R. 1953 Bom. 311.

Court upheld the actual decision in the first mentioned Bombay case not on clause (1) but on clause (3) of article 15. These cases, therefore, have no direct bearing on article 29(2). The arguments advanced by the learned Attorney-General overlook the distinction between the object or motive underlying the impugned order, and the mode and manner adopted therein for achieving that object. The object or motive attributed by the learned Attorney-General to the impugned order is undoubtedly a laudable one but its validity has to be judged by the method of its operation and its effect on the fundamental right guaranteed by article 29(2). A similar question of construction arose in the case of *Punjab Province* v. *Daulat Singh*(1). One of the questions in that case was whether the provision of the new section 13-A of the Punjab Alienation of Land Act was *ultra vires* the Provincial Legislature as contravening sub-section (1) of section 298 of the Government of India Act, 1935, in that in some cases that section would operate as a prohibition on the ground of descent alone. Beaumont J. in his dissenting judgment took the view that it was necessary for the Court to consider the scope and object of the Act which was impugned so as to determine the ground on which such Act was based, and that if the only basis for the Act was discrimination on one or more of the grounds specified in section 298 sub-section (1) then the Act was bad but that if the true basis of the Act was something different the Act was not invalidated because one of its effects might be to invoke such discrimination. In delivering the Judgment of the Board Lord Thankerton at page 74 rejected this view in the words following :

"Their Lordships are unable to accept this as the correct test. In their view, it is not a question of whether the impugned Act is based only on one or more of the grounds specified in section 298 sub-section (1), but whether its operation may result in a prohibition only on these grounds. The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section, and, while the scope

(1) [1946] L.R. 73 I. A. 59.

1954

The State of Bombay v. *Bombay Education Society and Others.*

Das J.

and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of the Act, however laudable, will not obvite the prohibition of sub-section (1)."

Granting that the object of the impugned order before us was what is claimed for it by the learned Attorney-General, the question still remains as to how that object has been sought to be achieved. Obviously that is sought to be done by denying to all pupils, whose mother tongue is not English, admission into any School were the medium of instruction is English. Whatever the object, the immediate ground and direct cause for the denial is that the mother tongue of the pupil is not English. Adapting the language of Lord Thankerton, it may be said that the laudable object of the impugned order does not obviate the prohibition of article 29(2) because the effect of the order involves an infringement of this fundamental right, and that effect is brought about by denying admission only on the ground of language. The same principle is implicit in the decision of this Court in *The State of Madras* v. *Srimathi Champakam Dorairajan* (1). There also the object of the impugned communal G. O. was to advance the interest of educationally backward classes of citizens but, that object notwithstanding, this Court struck down the order as un-constitutional because the *modus operandi* to achieve that object was directly based only on one of the forbidden grounds specified in the article. In our opinion the impugned order offends against the fundamental right guaranteed to all citizens by article 29(2).

Re 2 :—Coming to the second question as to whether the impugned order infringes any constitutional right of Barnes High School, the learned Attorney-General contends that although any section of the citizens having distinct language, script or culture of its own, has under article 29(1) the right to conserve the same and although all minorities, whether based on religion or language, have, under article 30(1), the right

(1) 1951] S.C.R. 525 at p. 530.

to establish and administer educational institutions of their choice, nevertheless such sections or minorities cannot question the power of the State to make reasonable regulations for all Schools including a requirement that they should give instruction in a particular language which is regarded as the national language or to prescribe a curriculum for institutions which it supports. Undoubtedly the powers of the State in this behalf cannot be lightly questioned and certainly not in so far as their exercise is not inconsistent with or contrary to the fundamental rights guaranteed to the citizens. Indeed in the cases of *Robert T. Meyer* v. *State of Nebraska*(1) and *August Bartels* v. *State of Iowa* (2) the Supreme Court of the United States definitely held that the State's police power in regard to education could not be permitted to override the liberty protected by the 14th amendment to the Federal Constitution. That is how those cases have been understood by writers on American Constitutional Law. [See Cooley's Constitutional Limitations, Volume II, page 1345, and Willis, page 64.] The statutes impugned in these cases provided:

(1) That no person should teach any subject to any person in any language other than the English language, and

(2) That languages other than English may be taught only after the pupil had passed the 8th grade.

A contravention of those two sections was made punishable. In the first mentioned case only the first part of the prohibition was challenged and struck down and in the second case both the provisions were declared invalid. The learned Attorney-General informed us that in 29 States in U.S.A. legislation had made compulsory provision for English as the medium of instruction. Those statutes do not appear to have been tested in Court and the Attorney-General cannot, therefore, derive much comfort from the fact that 29 States have by legislation adopted English as the medium of instruction. The learned Attorney-General

(1) 262 U.S. 390; 67 Law. Ed. 1042.
(2) 262 U.S. 404; 67 Law. Ed. 1047.

1954

The State of Bombay v. *Bombay Education Society and Others.*

Das J.

also relies on the case of *Ottawa Separate Schools Trustees* v. *Mackell*(1). That case does not help him either, because in that case the schools were classified as denominational purely on the ground of religion. They were not classified according to race or language. It was contended that the kind of school that the trustees were authorised to provide was the school where education was to be given in such language as the trustees thought fit. Their Lordships of the Judicial Committee rejected this contention with the following observations :—

"Their Lordships are unable to agree with this view. The 'kind' of school referred to in sub-s. 8 of s. 79 is, in their opinion, the grade or character of school, for example, 'a girls' School,' 'a boys' school,' or 'an infants' school,' and a 'kind' of school, within the meaning of that sub-section, is not a school where any special language is in common use."

Where, however, a minority like the Anglo-Indian Community, which is based, *inter alia,* on religion and language, has the fundamental right to conserve its language, script and culture under article 29(1) and has the right to establish and administer educational institutions of their choice under article 30(1), surely then there must be implicit in such fundamental right the right to impart instruction in their own institutions to the children of their own Community in their own language. To hold otherwise will be to deprive article 29(1) and article 30(1) of the greater part of their contents. Such being the fundamental right, the police power of the State to determine the medium of instruction must yield to this fundamental right to the extent it is necessary to give effect to it and cannot be permitted to run counter to it.

We now pass on to article 337 which is in Part XVI under the heading "Special Provisions relating to certain classes." Article 337 secures to the Anglo-Indian Community certain special grants made by the Union and by each State in respect of education. The second paragraph of that article provides for progressive diminution of such grant until such special grant

(1) L.R. [1917] A.C. 62.

ceases at the end of ten years from the commencement of the Constitution as mentioned in the first proviso to that article. The second proviso runs as follows :—

"Provided further that no educational institution shall be entitled to receive any grant under this article unless at least forty per cent. of the annual admissions therein are made available to members of communities other than the Anglo-Indian community."

It is clear, therefore, that the Constitution has imposed upon the educational institution run by the Anglo-Indian Community, as a condition of such special grant, the duty that at least 40 per cent. of the annual admissions therein must be made available to members of communities other than the Anglo-Indian Community. This is undoubtedly a constitutional obligation. In so far as clause 5 of the impugned order enjoins that no Primary or Secondary school shall from the date of this order admit to a class where English is used as the medium of instruction any pupil other than the children of Anglo-Indians or of citizens of non-Asiatic descent, it quite clearly prevents the Anglo-Indian Schools including Barnes High School from performing their constitutional obligations and exposes them to the risk of losing the special grant. The learned Attorney-General refers to clause 7 of the impugned order and suggests that the authorities of Anglo-Indian Schools may still discharge their constitutional obligations by following the advice given to them in that concluding clause. The proviso to article 337 does not impose any obligation on the Anglo-Indian Community as a condition for receipt of the special grant other than that at least 40 per cent. of the annual admissions should be made available to non-Anglo-Indian pupils. The advice, tendered by the State to the Anglo-Indian Schools by clause 7 of the impugned order, will, if the same be followed, necessarily impose an additional burden on the Anglo-Indian Schools to which they are not subjected by the Constitution itself. The covering circular No. SSN 2054(b), which was issued on the same day, throws out the covert hint of the possibility, in consequence of the impugned order of some change becoming necessary in the existing procedure for the

1954

The State of Bombay v. *Bombay Education Society and Others.*

Das J.

equitable distribution of the total grant among Anglo-Indian Schools, although the impugned order was not intended to affect the total grant available for distribution to Anglo-Indian Schools under the Constitution. If, in the light of the covering circular, clause 7 is to be treated as operative, in the sense that a non-compliance with it will entail loss of the whole or part of this grant as a result of the change in the existing procedure for the equitable distribution, then it undoubtedly adds to article 337 of the Constitution a further condition for the receipt by Anglo-Indian Schools of the special grant secured to them by that article. On the other hand if clause 7 is to be treated merely as advice, which may or may not be accepted or acted upon, then clause 5 will amount to an absolute prohibition against the admission of pupils who are not Anglo-Indians or citizens of non-Asiatic descent into Anglo-Indian Schools and will compel the authorities of such Schools to commit a breach of their Constitutional obligation under article 337 and thereby forfeit their constitutional right to the special grants. In either view of the matter the impugned order cannot but be regarded as unconstitutional. In our opinion the second question raised in these appeals must also, in view of article 337, be answered against the State.

The result of the foregoing discussion is that these appeals must be dismissed and we order accordingly. The State must pay the costs of the respondents.

Appeals dismissed.

1954

May 6

AFTAB AHMAD KHAN
v.
THE STATE OF HYDERABAD.

[MUKHERJEA, VIVIAN BOSE and GHULAM HASAN JJ.]

Criminal Procedure Code (Act V of 1898), ss. 233, 235—Scope of s. 233—Law as to joinder of charges—exception thereto enacted in s. 235—Joint trial of distinct offences.

Section 233 of the Code of Criminal Procedure (Act V of 1898) embodies the general law as to the joinder of charges and lays down a rule that for every distinct offence there should be a