A FATHER THOMAS SHINGARE AND ORS.

v.

STATE OF MAHARASHTRA AND ORS.

DECEMBER 14, 2001

B [K.T. THOMAS AND S.N. PHUKAN, JJ.]

Education :

Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987.

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Sections 2(a), 3, 4 and 7—Capitation Fee—Minority unaided Educational Institution—Amounts collected under the heads "School Maintenance" and "Capitation Fee"—Complaint filed against Principal and six others alleging the said collection as demand or collection of "Capitation Fees"—Held, D *State cannot impose any restriction on the right of minorities to administer Educational Institutions, unaided by State except to the limited extent for ensuring excellence in education—However, if the institution indulges in nefarious activities by collecting money for making huge profit, legislature is empowered to curb such activities—In the instant case, State having not fixed any upper limit* E *of fees for any unaided minority institution, no offence could be made out—Criminal complaint quashed—Constitution of India, 1950—Article 30.*

Section 2(a)—Capitation Fee—What amounts to—Held, any demand or collection of amount in cash or kind in excess of the prescribed rates of fees.

F *Words and Phrases:*

"Capitation Fee"; "Prescribed"—Meaning of—In the context of Section 2(a) of the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987.

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Appellant, a minority unaided school, collected Rs. 120 in the month of July, 1993 and Rs. 180 in the month of November, 1993 as "School Maintenance" and Rs. 600 in the account of "Computer Fees" in the month of July, 1993. Respondent No. 2, father of a student filed a criminal complaint under Section 7 of the Maharashtra Educational Institutions H **(Prohibition of Capitation Fee) Act, 1987 against the school. Magistrate**

took cognizance of the offence and ordered process to be issued against the Principal and six office bearers of the school. The accused persons unsuccessfully filed appeals before the Sessions Court and the High Court. Thereafter, they filed appeal before this Court. During the pendency of the appeal, the Principal of the school alongwith other office bearers filed a writ petition before this court for a declaration that the provisions of the Act in so far as they applied to the unaided educational institutions run by religious minority were *ultra vires* to Article 30 of the Constitution.

On behalf of the appellants it was contended that no restriction can be imposed by the Government on the strength of any statutory provision on the functions of unaided minority educational institutions because any such restriction would be violative of Article 30(1) of the Constitution of India; fee being one of the approved means for raising funds to meet the expenses of the educational institutions including payment of salary to the teaching and non-teaching staff of the school, fixation of any ceiling regarding the amount of fees to be collected from students can amount to scuttling the right envisaged in Article 30(1) of the Constitution which itself was a fundamental right.

Disposing of the appeal and writ petition, the Court

HELD : 1. The complaint instituted by respondent No. 2 cannot be sustained as no offence under Section 7 of the Maharashtra Educational Institutions (Prohibition of Capitation Fees) Act, 1987 could be established. Thus, the criminal proceedings lodged against the accused persons are quashed. [646-C]

2. The State cannot impose any restriction on the right of the minorities to administer educational institutions so long as such institutions are unaided by the State, except to the limited extent that regulations can be made for ensuring excellence in education. It is a question of fact in each case whether the limit imposed by the Government regarding approved fees would hamper the right under Article 30(1) of the Constitution in so far as they apply to any unaided educational institution established and administered by the minorities. If the legislature feels that the nefarious practice of misusing school administration for making huge profit by collecting exorbitant sums from parents by calling such sums either as fees or donations, should be curbed, the legislature would be within its powers

A to enact measures for that purpose. Similarly, if the management of an educational institution collects money from persons as *quid pro quo* for giving them appointments on the teaching or non-teaching staff of such institution, the legislature would be acting within the ambit of its authority by bringing measures to arrest such unethical practices. No minority can B legitimately claim immunity to carry on such practices under the cover of Article 30(1) of the Constitution. [644-C; 645-E-G]

Unni Krishnan, J.P. and Ors. v. *State of Andhra Pradesh and Ors.*, [1993] 1 SCC 645, followed.

C in Re *The Kerala Education Bill 1957,* AIR (1958) SC 956; *State of Kerala etc.* v. *Very Rev. Mother Provincial, etc.*, [1971] 1 SCR 734 and *Ahmedabad St. Xaviers College Society & Anr.* v. *State of Gujarat & Anr.*, [1975] 1 SCR 173, relied on.

D 3.1. The prescribed rates of fees prescribed under Section 4 of the Act applied to the aided institutions only. So far as unaided schools are concerned the statute conferred an option on the State Government to approve the rates of fees. Such rates need not be uniform and it can be different for different institutions, different classes (or standard), different courses of studies and even different for different areas. This means that E the State Government should have approved a rate of fees in respect of different standards applicable to the appellant school before the school authorities are made liable for collecting capitation fees. Such a fixation of rates of fees is hence *sine qua non* for holding that the authorities of the school have contravened Section 3(1) of the Act. The complainant has not F even averred anywhere in the complaint that the State Government has fixed any such rates of fees for any class or standard for any unaided school, much less for the appellant school. [642-A-D]

3.2. It would not be necessary to make any final pronouncement on the right of the legislature in fixing an upper limit regarding the fees to be G collected from the students by such institutions because the State Government has not fixed any such upper limit of approved rates of fees as for the unaided schools established and administered by the minorities in the State of Maharashtra. That question can be considered only if any such upper limit is fixed by the State in exercise of the powers under the H Act. [646-A; B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1291 A
of 2001.

From the Judgment and Order dated 20.8.99 of the Bombay High Court in Crl. R.A. No. 1815 of 1998.

WITH B

W.P. (C) No. 474 of 2001.

R.K. Jain, H.W. Dhabe, Manoj Swarup, Hiren Dasan, Ajay Gupta, Manish Khandelwal, A.H. Joshi, S.S. Shinde, S.V. Deshpande and Shakil Ahmed Syed for the appearing parties. C

The Judgment of the Court was delivered by

THOMAS, J. Leave granted.

A female child, by name Shalmali, was admitted in a school run by a D religious minority at Aurangabad. Her father, an advocate by profession, filed a criminal complaint before the local Judicial Magistrate against the Principal and six office bearers of the school alleging that they have committed the offence under Section 7 of the Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987, (for short 'the Act'). The Magistrate took E congizance of the offence and ordered process to be issued against all the seven accused who are arraigned in the complaint. Those accused challenged the said order first before the Magistrate himself and later before the Sessions Court and still later before the High Court. At all those levels they failed to get the order quashed. The impugned judgment passed by a single Judge of the High Court of Bombay has upheld the order passed by the Magistrate. F

When the special leave petition, in challenge of the said judgment of the High Court, was pending in this Court the Principal of the school along with three other office bearers filed the writ petition in this Court under Article 32 of the Constitution for a declaration that the provisions of the Act, in so far as G they apply to unaided educational institutions run by a religious minority, are *ultra vires* to Article 30 of the Constitution. Alternately, it is prayed that this Court may declare that the provision of the Act would not apply to "unaided minority institutions".

As we thought it convenient to hear arguments in the appeal as well as H

A in the writ petition together Shri R.K. Jain, learned senior counsel for the appellants and Shri H.W. Dhabe, learned senior counsel for the state of Maharashtra and Shri Shakil Ahmed Syed, learned counsel for the complainants addressed arguments. The school in which the daughter of the complainant was admitted as a student is described as "Little Flower School" at Aurangabad. B Though the complainant did not specifically state in the complaint that the school is an unaided minority school learned counsel for the State of Maharashtra conceded fairly that it is an unaided school run by a religious minority.

The facts alleged in the complaint in brief are the following : The school authorities collected from the complainant a sum of Rs. 120 in the month of C July 1993, and another sum of Rs. 180 in the month of November 1993 in the account of "School Maintenance" and on 13th July 1993 they collected another amount of Rs. 600 in the account of "Computer Fees". The said collection is in contravention of the provisions of the Act as the fees prescribed by the Government under the Act could not exceed Rs. 15 per month. As the com- D plainant did not want his daughter to continue to study in the same school presumably on account of his opposition to the amount of fees collected, he wanted the Principal to issue transfer certificate to his daughter. When that was not given complainant filed a writ petition in the High Court and a direction was issued by the High Court for granting transfer certificate. After the child was taken away from the school her father - the complainant launched the E prosecution by filing the complaint before the Magistrate.

We shall first consider whether the complaint has disclosed the offence under Section 7 of the Act. For that purpose we have to assume that the facts averred in the complaint are true. The offence said to have been committed is F under Section 7 read with Section 3(1) or the Act. Section 7 reads thus :

> "Whoever contravenes any provision of the Act, or the rule made thereunder, shall, on conviction, be punished with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which may extend to five thousand rupees:
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> Provided that any person who is accused of having committed the offence under sub-section (1) of section 3 of demanding capitation fee shall, on conviction, be punished with imprisonment for a term which shall not be less than one year but which may extend to two years and H with fine which may extend to five thousand rupees."

As the offence alleged is on the premise that capitation fee was demanded and collected by the accused we have to see Section 3(1) of the Act which prohibits collection of capitation fee. That sub-section reads thus :

> "*3. Demand or collection or capitation fee prohibited.*
>
> (1) Notwithstanding anything contained in any law for the time being in force, no capitation fee shall be demanded or collected by or on behalf of any educational institution or by any person who is in charge of, or is responsible for, the management of such institution, from or in relation to, any student in consideration of his admission to, and prosecution of any course of study, or his promotion to a higher standard or class in, such institution."

The expression "capitation fee" is defined in Section 2(a) of the Act. Capitation fee means "any amount, by whatever name called, whether in cash or kind, in excess of the prescribed or as the case may be approved, rates of fees regulated under Section 4." The word "prescribed" in that clause refers to the rates fixed as for aided schools. So far as unaided schools are concerned, the question of capitation fee would arise only if there is any "approved" rate of fees. Section 4 of the Act regulates the prescribed as well as approved rates of fees. Sub-section (1) of Section 4 empowers the Government to regulate the tuition fee or any other fee that may be received or collected by any educational institution. Sub-section (2) of Section 4 is important in this context and hence it is extracted below :

> "(2) The fees to be regulated under sub-section (1) shall—
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> (a) in the case of the aided institutions, be such as may be prescribed by a university under the relevant University Law for the time being in force in the State or, as the case may be, by State Government, and
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> (b) in the case of the un-aided institutions, having regard to the usual expenditure excluding any expenditure on lands and buildings or on any such other items as the State Government may notify, be such as the State Government may approve :
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> Provided that, different fees may be approved under clause (b) in relation to different constitutions or different classes or differ-

A ent standards or different courses of studies or different areas.

Thus, what is meant by prescribed rates of fees can only apply to aided educational institutions. So far as unaided schools are concerne the statute conferred an option on the State Government to approved the rates of fees. Such rates need not be uniform as for different institutions. It can as well be B different rates for different institutions and also for different classes (or standard) and even for different courses of studies. It could be different rates in different areas also. This means that the State Government should have approved a rate of fees in respect of different standards applicable to Little Flower School before the school authorities are made liable for collecting capitation C fees. Such a fixation of rates of fees is hence *sine qua non* for holding that the authorities of Little Flower School have contravened Section 3(1) of the Act.

It must be pointed out that the complainant has not even averred anywhere in the complaint that the State Government has fixed any such rates of D fees for any class or standard for any unaided school, much less for Little Flower School, Aurangabad. Hence we asked learned counsel for the State of Maharashtra whether the State Government has fixed any such rate applicable to this particular school. The answer was in the negative.

In such a situation there is no usefulness for the complaint to proceed E further. In our view any further step with this complaint, in the present set up, is only an exercise in futility.

Shri R.K. Jain, learned senior counsel contended that no hurdle can be imposed by the Government even on the strength of any statutory provision, F as for unaided minority educational institutions because any such hurdle would be violative of Article 30(1) of the Constitution of India. By fixing up the rates of fees to be collected from students of such unaided minority schools the legislature cannot restrict the right to administer such schools, according to the learned senior counsel. Fee is one of the approved means for raising funds to meet the expenses of the educational institutions including payment of salary G to the teaching and non-teaching staff of the school. Hence fixation of any ceiling regarding the amount of fees to be collected from students can amount to scuttling the right envisaged in the said Article which itself is a fundamental right, contended the learned counsel.

H Article 30(1) of the Constitution reads thus :

"All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice." A

The earliest pronouncement of this Court regarding the amplitude of Article 30(1) came out when the President of India sought the advice of this Court under Article 143 of the Constitution regarding certain provisions of the Kerala Education Bill, 1957-A Bench of seven Judges headed by S.R. Das, CJ, examined the relevant clauses o the bill *vis-a-vis* Article 30(1) of the Constitution. The only hurdle of the minorities in administering such educational institutions which could be permissible is such regulations as would ensure the excellence of the educational standards. The right to administer cannot encompass the right to mal-administer. While considering the issues learned Judges of the larger Bench vivisected such minority educational institutions into two categories, one consisting of institutions receiving aid from the State and the other consisting of institutions without seeking any aid from the State. What has been considered in respect of former category need not be adverted to now because the Little Flower School, Aurangabad, is admittedly an unaided educational institution. While dealing with the right to administer educational institution by minorities of their choice S.R. Das, CJ, speaking for the majority view, *in re The Kerala Education Bill, 1957,* AIR (1958) SC 956 has observed thus : B C D

"Without recognition, therefore, the educational institutions established or to be established by the minority communities cannot fulfil the real objects of their choice and the rights under Art. 30(1) cannot be effectively exercised. The right to establish educational institutions of their choice must, therefore, mean the right to establish real institutions which will effectively serve the needs of their community and the scholars who resort to their educational institutions. There is, no doubt, no such thing as fundamental right to recognition by the State but to deny recognition to the educational institutions except upon terms tantamount to the surrender of their constitutional right of administration of the educational institutions of their choice is in truth and in effect to deprive them of their rights under Art. 30(1). We repeat that the legislative power is subject to the fundamental rights and the legislature cannot indirectly take away or abridge the fundamental rights which it could not do directly and yet that will be the result if the said bill containing any offending clause becomes law." E F G H

A Clause 20 of the Kerala Education Bill proposed that no fee shall be payable by any pupil for any tuition in primary classes in any private school. Dealing with the question whether the said clause would offend Article 30(1) of the Constitution *vis-a-vis* the unaided minority schools the advice given by their Lordship was that the said clause would offend the fundamental right B albeit Article 45 of the Constitution.

The position remains unchanged till now and hence the legal position is that the State cannot impose any restriction on the right of the minorities to administer educational institutions so long as such institutions are unaided by the State, except to the limited extent that regulations can be made for ensuring C excellence in education.

The said position was reiterated by a six Judge Bench of this Court in *State of Kerala etc.* v. *Very Rev. Mother Provincial, etc.,* [1971] 1 SCR 734. This was again affirmed by a nine Judge Bench of this Court in *Ahmedabad* D *St. Xaviers College Society and Anr.* v. *State of Gujarat and Anr.,* [1975] 1 SCR 173.

Shri H.W. Dhabe, learned senior counsel for the State of Maharashtra contended that it is the look out of the State including the legislature to prevent E "commercialisation of education" and that prohibition of collecting capitation fee has been envisaged by the Act for the purpose of preventing such malady. He invited our attention to the decision of a Constitution Bench of this Court in *Unni Krishnan, J.P. and Ors.* v. *State of Andhra Pradesh and Ors.,* [1993] 1 SCC 645. The judgment authored by Jeevan Reddy, J., was concurred by majority of the Judges of the Bench. While dealing with unaided minority F institutions learned Judge said that they cannot be compelled to charge the same fees as is charged in the Government institutions, for the simple reason that they have to meet the cost of imparting education from their own resources and the main source can only be the fees collected from the students. Nonetheless learned Judges deprecated any kind of commercialisation of education, G and pointed to the reason of collected exorbitant amount in the name of capitation fees or even other fees. Following passage in the said judgment is worth to be noticed in this context :

> "Even so, some questions do arise - whether cost-based education only H means running charges or can it take in capital outlay? Who pays or

who can be made to pay for establishment, expansion and improvement/diversification of private educational institutions? Can an individual or body of persons first collect amounts (by whatever name called) from the intending students and with those monies establish an institution - an activity similar to builders of apartments in the cities? How much should the students coming in later years pay? Who should work out the economics of each institution? Any solution evolved has to take into account all these variable factors. *But one thing is clear: Commercialisation of education cannot and should not be permitted.* The Parliament as well as State Legislatures have expressed this intention in unmistakable terms. Both in the light of our tradition and from the standpoint of interest of general public, commercialisation is positively harmful; it is opposed to public policy. As we shall presently point out, this is one of the reasons for holding that imparting education cannot be trade, business or profession. The question is how to encourage private educational institutions without allowing them to commercialise the education? This is the troublesome question facing the society, the Government and the courts today."

(Emphasis supplied)

It is a question of fact in each case whether the limit imposed by the Government regarding approved fees would hamper the right under Article 30(1) of the Constitution in so far as they apply to any unaided educational institution established and administered by the minorities. If the legislature feels that the nefarious practice of misusing school administration for making huge profit by collecting exorbitant sums from parents by calling such sums either as fees or donations, should be curbed, the legislature would be within its powers to enact measures for that purpose. Similarly, if the management of an educational institution collects money from persons as *quid pro quo* for giving them appointments on the teaching or non-teaching staff of such institution, the legislature would be acting within the ambit of its authority by bringing measures to arrest such unethical practices. Such pursuits are detestable whether done by minorities or majorities. No minority can legitimately claim immunity to carry on such practices under the cover of Article 30(1) of the Constitution. The protection envisaged therein is not for shielding such commercialised activities intended to reap rich dividends by holding education as a facade.

A We do not think it necessary to make any final pronouncement on the right of the legislature in fixing an upper limit regarding the fees to be collected from the students by such institutions because the State Government has not fixed any such upper limit of approved rates of fees as for the unaided schools established and administered by the minorities in the State of Maharashtra. That
B question can be considered only if any such upper limit is fixed by the State in exercise of the powers under Act.

Nonetheless, the complaint instituted by respondent No. 2 cannot be sustained so long as no offence under Section 7 of the Act could be established by him. We therefore quash the criminal proceedings launched by him with the
C said complaint. This appeal and the writ petition are disposed of in the above terms.

S.V.K. Appeal and Petition disposed of.