(1986) 10 KL CK 0050

High Court Of Kerala

Case No: O.P. No. 5633 of 1986

Dr. Philippose Mar Theophllus		APPELLANT
	Vs	
State of Kerala and Others		RESPONDENT

Date of Decision: Oct. 15, 1986

Acts Referred:

- Constitution of India, 1950 - Article 226
- Kerala Education Act, 1958 - Section 2(2), 7
- Succession Act, 1925 - Section 112, 213

Citation: (1986) 23 KLJ 1069

Hon'ble Judges: M.P. Menon, J

Bench: Single Bench

Advocate: K.V. Kuriakose and K Surendramohan, for the Appellant; M.B. Kurup, C.S. Narayanan and S. Ananthasubramanian, for the Respondent

Final Decision: Allowed

Judgement

M.P. Menon, J.

Has there been a change in the management of the Mar Athnasius High School, Nedumbassery, involving a change of ownership also What is the true scope of the power of the Director of Public Instruction, in granting previous permission for effecting such change, under Rule 5A of chapter III of the Kerala Education Rules These are the two questions arising for consideration in this writ petition. The second is clearly a question of law. The first may broadly fit into the scheme of a question of fact; but as will presently be seen, a decision on it, on the peculiar facts of this case, is connected with decisions on some questions of law also. Any person of body of persons permitted to establish and maintain a private school (which includes an aided school like the one here) is the "educational agency" of the school, under Sec.2 (2) of the Kerala Education Act. Under Sec.7 any educational agency may appoint a person to be the manager of the school "under this Act", subject to the

approval of such officer as Government may authorise for the purpose. The manager so approved shall be responsible for the conduct of the school in accordance with the provisions of the Act. The properties of the school Shall be in his possession and control, and it shall be his duty to maintain records and accounts, as prescribed Chapter III of the Rules deal with management of private schools. Rule (1) classifies private educational institution as (i) those under individual educational agency and (ii) those under Corporate Educational Agency. Where the right to conduct the school is vested in an individual in his own right or as the representative of a joint family, the "agency" will be individual; and in all other cases, it will be corporate. Corporate agencies will include cases, among others, where the right is vested in an "institution of trust" or in "an ecclesiastical office of any religious denomination", Rule 2 insists that in the case of Corporate agencies, the constitution of the educational agency "to the extent and in so far as it relates to the management of any school" must be subject to rules approved by the Director prescribing, among other things, matter specified in the rule. The rules also requires that any subsequent change in such rules could operate only after obtaining the Director''s approval. Rule 3 provides that the educational management of an aided school may be vested by the educational agency in a "Manager" who shall be responsible to the Department for the management of the institution. Under Rule 4, Educational officers shall be competent to approve appointment of managers and also changes in the personnel of Managers. Rule 5 requires the changes in the personnel of the Managers shall immediately be reported to the Educational officer and approval obtained; and the Note to the Rule makes explicit, what is implicit in Rule 5A. that the provisions of Rule 4 and Rule 5 do not apply to change of management involving change of ownership Rule 5A reads:-

5A Change of management involving change of ownership (1) Notwithstanding anything contained in these rules, no change of Management of any aided school involving change of ownership shall be effected except with the previous permission of the Director. The Director may grant such permission unless the grant of such permission will, in his opinion, adversely affect the working of the institution and the interests of the staff and the person to whom the Management is transferred.

(2) Any person aggrieved by an order under sub-rule (1) may, within 30 days from the date of receipt of the order, prefer an appeal to the Government.

Rule 6 stipulates that all correspondence relating to the management of the school is to be carried on by the Manager or a person appointed by him and approved by the Manager. Rule 7 authorises the Director to declare a Manager unfit to hold the office under certain circumstances and to require the educational agency to appoint another in his place. Rule 8 prohibits certain classes of persons from being appointed as Managers, and Rule 5 deals with the duties and powers of Managers.

2. The provisions of the Act and the Rules thus show that every aided school shall have a Manager, responsible for running the institution in accordance with the Act

and the Rules, and answerable to the Department. In the case of institutions under individual management, the proprietor himself can be the manger, if approval is obtained; but in the case of Corporate managements, the choice and appointment of managers are to be governed by the rules (or constitution) required to be framed under Rule 2, Chapter III. The Education Act itself is a piece of legislation "for the better organisation and development of educational institutions". The service conditions of teachers in aided schools are those prescribed by the Government; payment of their salary is also Government''s responsibility. Prescriptions of the courses of study, preparation of the curricula, opening and recognition of schools, admission and transfer of pupils, organisation of instructions, maintenance of discipline, approval of standards for promotion, inspection of schools, payment of maintenance grant etc. are also governed by the Act and the Rules made thereunder. The State has thus considerable interest in the proper management of aided schools, and that is why the statutory provisions insist on the appointment of a proper person as the manager, for approval of such appointment or change in personnel by the department, and for prior permission in certain cases of change in management. Examining Rule 5 A of Chapter III, in particular, it is important to notice that it is couched in negative terms: no change of management invoking change of ownership shall be effected at all, except with the previous permission of the Director. Ordinarily the Director is expected to grant the permission where there is a change of ownership, because it is the scheme of the Act and the Rules that the manager should be chosen by the owner of the institution; but it will still be within the Director''s discretion to refuse permission if the interests of the institution and of the staff are likely to be adversely affected. Again, it is important to remember that the power of the Director under the Rule is attracted only when there is a change of management involving change of ownership. In any proceedings under Rule 5A, therefore, the Director (or the Government functioning as appellate authority) has first to find whether there has been a change of ownership of the institution in question, and consequently a case for grant of permission for change in management; if they are not satisfied about a change of ownership, they cannot act at all, under the Rule.

3. The dispute relating to the Nedumbassery school here is in a way connected with the controversy between two factions of the Orthodox (Jacobi) Syrian Christian Community which has been raging for some time past. The dispute had first raised its head years ago. Attempts were being frequently made, sometimes successfully also, to settle it through negotiations, by the use of the good offices of eminent personalities, and more often than not, through litigations. It is unnecessary to trace the entire history: a brief survey of the same is to be found in the decision of the Supreme Court reported in Moran Bassehos catholicos v. Avira (1958 KLT 721). The rival factions were (or are) popularly known as the Patriarch party and the Catholicose party. The members of the community always owed some kind of spiritual allegiance to the Patriarch of Antioch, but there has been considerable

controversy about the extent and nature of his power. One of the factions (Patriarch party) believed that only the Patriarch could exercise function like the consecration of morone, ordination of Metropolitans, granting of staticons, and allotting edavagais to Metropolitans. They also believed that Patriarch was entitled to receive payment of Ressissa. The Catholicose party on the other hand believed that most of these things were within the competence of the Catholicose with headquarters at Kottayam. To this faction, the Patriarch of Antioch was more or less a symbol only like the head of the Commonwealth is, in modern times. For the present purposes, it is not even necessary to precisely define or appreciate the full nature of the controversy; it is enough to notice that the 1958 decision of the Supreme Court had originated from an original Suit filed in the District Court of Kottayam, in the year 1938. The suit was dismissed in 1913, but an appeal against the same was allowed by the Travancore High Court, in 1946. There was an application for review before the T.C. High Court, which was dismissed in 1951. The Supreme Court, in a Special Leave appeal, however, allowed the review and remanded the matter to the High Court. The Kerala High Court rendered another judgment in the appeal, on 31-12-1956, allowing the same, and it was that decision which was reversed by the Supreme Court in Moran Mar Basselios 1958 KLT 721. In effect, this final decision was in favour of the Catholicose party. The Patriarch. it appears to have been suggested, had only a limited power of general supervision over the spiritual government of the Church, but had no right to interfere with the internal administration of the church even in spiritual matters. Those powers or rights vested in the Catholicose who had power to ordain Metropolitans, and to consecrate Morone, "thereby reducing the power of the Patriarch over the Malankara church to a vanishing point".

4. I should not be understood as making any authoritative or binding analysis even on the scope of the Supreme Court decision, because that is a matter in controversy before many subordinate Courts now, because of some recent developments. My attempt is only to broadly refer to the background of the present dispute which is confined to the ownership and management of the school. It is common ground that for about a decade and a half after the Supreme Court decision and as a direct result of the same, the rival groups had functioned as a united body under the leadership of the Catholicose, forgetting earlier differences It is not suggested by any one that from 1958 till about 1974 or 1975, the Patriarch at Antioch was ordaining any Metropolitans for the Malankara churches; during the said period, all the priests, bishops or metropolitans, not to speak of the members of the community in general, were accepting the leadership and authority of the Catholicose. It is said that trouble again started some time in 1974 or 1975 when the then Patriarch ordained a few Metropolitans for some of the Malankara dioceses; but the dispute regarding the Nedumbassery school raised its head only another decade later, under circumstances to which I shall now turn.

5. The school was initially established as a Middle School in the year 1939 by Rev. Fr. Thomas Varghese. It was later upgraded as a High School, and by this time, Fr. Varghese had also become an Auxiliary Bishop. Subsequently he became the Metropolitan of Angamali, known as His Grace Geevarghese Mar Gregorius. In 1948 he is said to have executed Ext. P8 will where under the school and some other properties connected with the institution were to pass, on his death, to the Metropolitans of Angamali ordained and accepted by the Patriarch of Antioch, from time to time. The legatees were to administer the same as trustees for the public good. It appears that the properties were being treated by the testator, during his life-time, as personally belonging to him Mar Gregorius passed away on 6th November, 1966; and by this time, the Church had again became united consequent on the 1958 decision of the Supreme Court, under the Catholicose of Kottayam. The 1948 will bequeathing the school and properties to the Angamali Metropolitan to be ordained and accepted by the Patriarch was thus overlooked, forgotten or treated as ineffective it is not claimed that the Patriarch had appointed any such Metropolitan till 1975 by which time alone a split had again developed. Therefore, on the passing away of Mar Gregorius in November, 1966 the Catholicose, as the head of the religious denomination, temporarily took over the administration of the Angamali diocese and its establishments, including the school in question. The Catholicose first appointed Fr. Varghese Kocheril as Manager of the school, and this change was approved by the DEO on 7-2-67, as evidenced by Ext P2. A few weeks later, the petitioner herein (Dr. philippose Mar Theophilus) was appointed by the Catholicose as Metropolitan of Angamali: and as evidenced by Ext.P4 the management of the school was then transferred from Fr. Kocheril to the petitioner, with the approval of the DEO, with effect from 1-4-1967. Ex..P5 discloses that on 6-1-1973 the Dy. Director of Public Instruction had, in exercise of his power under Rule 2 of Chapter III of the K.E.R., approved the Constitution of the educational agency of the Angamali Diocese, which laid down the rules regarding the management of the school. Some time in 1975, the 4th respondent (Thomas Mar Dionysius) was appointed as Metropolitan of the Angamali Diocese by the Patriarch of Antioch. Even then, no claim was made by the 4th respondent or by his supporters to the school, its ownership or management on the strength of the will. What is seen from the records is that by Ext. P6 letter dated 16-9-1985 the 4th respondent wrote to the petitioner that he was the Metropolitan duly appointed for the Angamali Diocese by the Patriarch, that under the 1948 will of Mar Gregorius he was the person entitled to "the trusteeship of the properties" and that he had therefore "assumed" the powers of the Manager of the school. The letter also "ordered" the petitioner not to enter into the premises of the school or to exercise any power of management. And as per Ext. P7 of the same date, the 4th respondent also wrote to the D.P.I. informing him of the will of Mar Gregorius and the assumption of management by him on that basis and requesting him in exercise of his power under Rule 5A of Chapter III, K.E.R. to recognise him "as the managing agency of the school of the trust" and to direct the DEO not to approve of anything

done by the petitioner as Manager of the school. As will be seen from clarifications subsequently made, the case of the 4th respondent was that though the will was registered in 1948 and he himself had become entitled to the school thereunder from 1975, the existence of the will had been suppressed by the Catholicose party, and that the same had been brought to light only a few days before the writing of Exts. P6 and P7 letters when some teachers, students and others of the locality made some representations to him, in connection with the affairs of the institution-

6. Rule 5A of Chapter III does not contemplate any change in management except with the previous permission of the Director. Though the 4th respondent had asserted, in Exts. P6 and P7, that he had assumed management of the school even without waiting for any such permission, the fact remained that nothing of that sort had happened, and that Ext. P7 itself was intended to be treated as an application for permission, under the Rule. At any rate, that was how it was treated by the D. P. I., when passing Ext P9 order the eon. The said order was passed after giving notice to all the parties concerned, and after hearing them. After briefly referring to the history of the case and the contentions advanced on behalf of the two Metropolitans (or factions), the Director rejected Ext. P7 for the reasons stated in the last paragraph of Ext. P9. It will be useful to extract that paragraph:-

Now the contention of the petitioner is that according to the will executed by the founder managerviz. Geevarghese Mar Gregorius, only a Metropolitan ordained and accepted by Patriarch of Antioch alone can be the manager of the School. Hence the petitioner''s request is to appoint him as the Manager taking into consideration the will executed in 1948. The petitioner has also produced a copy of a letter from the Patriarch of Antioch dated 8-9-1975 appointing him as the Metropolitan of the Diocese of Kerala and Angamaly and at the same time informing that by his Bull dated 21-8-1975, he has stripped Philipose Mar Theophilose from all authorities, dignities, privileges and status as Metropolitan. The "simple question" to be decided here is as to who is the legal Metropolitan of Angamaly Diocese. I am afraid that it is far beyond the scope of this office to decide this issue. It is not disputed that the present Manager is in possession and management of the school since 1967 and that he has the approval of the Educational authorities concerned. The petition before me is filed under Rule 5A of Chapter III K.E.R. White 5A of Chapter III K.E.R. provides for the previous permission of the Director for change of management of any aided school involving change of ownership, Rule 5A does not empower the Director of Public Instruction to adjudicate the ownership of a school, It only gives him the discretion either to grant or to refuse the prior permission for transfer of management involving change of ownership. Taking into consideration the general interest of the staff and the institution, this claim of ownership that is claimed in the petition does not fall within the purview of 5A Chapter III of K.E.R. Even if the interpretation of the rule empowers the Director to adjudicate on such ownership, I do not consider that I would be justified in interfering with the orders passed as far back as 1967 and 1973 which were not questioned till now. The petition is dismissed.

The 4th respondent preferred an appeal before Government, against Ext. P9 order, under sub rule (2) of Rule 5A; and as per Ext. P10 dated 1-9-86. Government allowed the appeal. The grounds or reasons for allowing the appeal are to be found in the last three paragraphs of Ext. P10, and I shall extract them also:-

It is seen that in 1973, a constitution for the school was drafted and got the school recorded as belonging to the Angamali Doicese. a Corporate Educational Agency, when the split in the Church was imminent. A school which belongs to an Individual Educational Agency cannot become a School belonging to a Corporate Educational Agency, merely because the Manager managed to get a constitution approved under Rule 2 of Chapter III, as if the school belonged to a Corporate Educational Agency. There must be evidence of valid and legal transfer from one agency to the other, which is absent in the instant case. When the split in the church was complete and the appellant was appointed as Metropolitan of the Angamali Diocese by the Patriarch in 1975, the respondent has ceased to be the trustee under the will and hence lost his right to continue as Manager of the school. But this fact was not known to the appellant till 1985, till he was informed of the "will" by the staff of the school.

While taking all the above facts into account, it is clear that Thomas Mar Dionysius who is duly consecrated and approved by the Patriarch of Antioch as the Metropolitan of Angamali Diocese is the legal claimant to be the rightful owner and manager, as per the "Will" executed by the founder of the school. The constitution drafted and got approved as the school is under the Corporate Educational Agency is liable to be cancelled. It is also established that the school does not belong to the Diocese of Angamali, whether of the appellant or the 1st respondent, but that it belongs to the trust created by the will of late Mar Gregorios. of which the present trustee is the appellant. So the appellant has to be recognised and approved as the Manager of the School concerned, after accepting the change of ownership, from the Diocese to the Trust.

In the circumstances stated above and also in the interest of the school, teachers, pupils and the benefactors of the Trust contemplated in the Will Government are pleased to admit the appeal petition filed by Thomas Mar Dionysius Metropolitan, Mar Ignatius Seminary, Kothamangalam and set aside the proceedings of the DPI read as first paper above. The Director of Public Instruction will take necessary action for issue of orders transferring the management of the Mar Athanasius High School, Nedumbassery to Thomas Mar Dionysius Metropolitan, Mar Ignatius Seminary, Kothamangalam with immediate effect.

7. This writ petition is directed against Ext. P10 Government Order.

8. One of the grounds urged for challenging Ext. P10 is that the Minister for Education who heard and decided the appeal under Rule 5A (2) was biased in favour of the Patriach group. There is no doubt that absence of bias, pecuniary or

otherwise, is one of the twin and basic requirements of natural justice. The Minister himself has filed a counter-affidavit admitting that he has been awarded the title of "Commander" by the Patriarch, and that he had visited the Patriarch at Antioch for his blessings, as he is the ""Supreme Spiritual head" of the community to which he belongs. All the other allegations regarding bias are denied, and it is asserted

that my faith and belief in the churches headed by the Patriarch of Antioch had not influenced me in the discharge of my official duties...

It is also added that he had decided the appeal on merits "as a statutory appellate authority, with utmost care, diligence and having regard to the facts and circumstances of the case".

9. I would have gone deeper into the allegation and scrutinised the relevant facts more minutely, if the petitioner had raised the objection regarding bias before the minister himself, at the time of hearing. That admittedly was not done, though the parties were apparently represented by counsel at that hearing also. It is averred in the writ petition that on the occasion of the first posting of the appeal on 4-6-86, it was represented to the Minister''s Private Secretary that it was desirable that the appeal was not heard by the minister because he was "an ardent number of the Patriarchal faction". But the appeal was not heard on 4-6-86; it was heard by the Minister only on 17-6-86. And on that occasion, it in admitted, no kind of objection whatsoever was raised. The Private Secretary to the Minister is not a party to the present Proceedings. The Minister himself has denied this version of the petitioner. Even otherwise, whispering something into the ears of a Private Secretary, cannot be equated to the raising of an objection before the Minister, when the matter was being heard by him.

10. Mr. Kuriakose contends that actual existence of bias need not be established, and that a reasonable suspicion would be sufficient. That is no doubt so, but it is equally well-settled that an objection regarding bias could be waived. In Manak Lal Vs. Dr. Prem Chand, the Supreme Court said:-

The alleged bias in a member of the Tribunal does not render the proceedings invalid if it is shown that the objection against the presence of the member in question had not been taken by the party even though the party knew about the circumstances giving rise to allegations about the alleged bias and was aware of his right to challenge the presence of the member in the tribunal. It is true that waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right take the objection in question.

Counsel would however point out that in The Andhra Pradesh State Road Transport Corporation, Hyderabad and Another Vs. Sri Satyanarayana Transports (Private) Ltd., Guntur and Others, the Court had struck a different note, but the suggestion does

not appear to be well founded. That was a case where a batch of writ petitions were filed against a composite scheme for nationalising ten bus routes and it was established before the High Court that the Transport Minister had reason to be hostile to one of the writ petitioners. That particular petitioner (Ramakotiah) had not raised the objection at the hearing given by the Minister, but the Supreme Court held that that by itself would not preclude it from examining the question, because the other petitioners had not waived any of their rights or objections In paragraph (10) of the decision, Gajendragadkar C J. had specifically referred to this aspect and said that "if the controversy had been confined to Ramakotiah, he would have been precluded from raising the said contention in the writ proceedings", suggesting thereby that their lordships were not prepared to non-suit the other litigants, because of the laches or waiver on the part of one out of many. Wade (1) has stated the rule in clear terms:-

The right to object to a disqualified adjudicator may be waived and this may be so even where the disqualification is statutory. The Court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts which entitle him to object. If, after he or his advisers know of the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged. In the past this rule has been strictly applied, so much so that the practice was to refuse certiorari to quash the decision unless it was specifically shown in the affidavits that the applicant had no knowledge of the disqualifying facts at the time of the proceedings. But in one case, where the litigant had appeared in person before the justices, certiorari was granted even though he knew the facts at the trial, since he did not know that he was entitled to raise his objection then, and there can be no waiver of rights of which the person entitled is unaware

De Smith echoes the same view (2) by stating that "objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity", and adds that in deciding whether to grant the remedy sought for, the court will be entitled in its discretion to take into account the conduct of the party impugning the decision. It is also worthwhile to remember in this connection that for nearly three decades, this court has been consistently taking the view that a litigant who fails to raise a question of jurisdiction before the appropriate authority at the earliest, should not be allowed to raise it before this court in proceedings under Article 226 for the first time, even if the absence of jurisdiction is patent (see Dist Co-operative Wholesale Society v. Dy. Registrar 1975 KLT 589, and the decisions referred to therein); and the principle should apply with greater force in the case of an objection which, unlike total want of jurisdiction, could be waived by conduct. Clearly the petitioner was aware of all the facts relating to the alleged disqualification of the Minister, and of his right to object, at least by 4-6-86, when something is said to have been mentioned to the Private Secretary.

11. Under the circumstances I decline to go into the petitioners contention bused on bias on the part of the Minister,

12. The next question is whether Ext, P10 is vitiated by errors of law, either in understanding the scope of Rule 5A or in appreciating the legal effect of the 1948 will.

13. In Kuruvilla v. D E O. and others (1970 KLT S N 37) Eradi J (as he then was) had indicated that the powers of the educational authorities in the matter of approving change of management under Rule 3 to 5 of Chapter III K.E.R. were of a limited nature and that disputes regarding election of Managing Board etc. were to be resolved through adjudication before the ordinary civil courts. And in Mar Aprem Metropolitan v. D E O. and another (1975 KLT S.N. 34) Chandrasekhara Menon J had said:-

If there is any serious dispute as to who is the Educational Agency as such or who represents the Educational Agency, the Educational Officers are not competent to decide those questions. The Rule making authority has rightly not invested the Educational Officers with the jurisdiction to decide those questions which may involve taking of evidence and considerations of complicated legal questions. The provision in Rule 2 of Chanter III that the constitution of the Educational Agency to the extent and in so far as it relates to the schools must be subject to rules approved by Director and the fact that such constitution has in this case been approved by the Director after dispute as to who represents the Educational Agency has arisen will not invest the District Educational Officer with power to decide the question who is the real Metropolitan of the Chaldean Church who alone could represent the Educational Agency concerned.

True that the above two decisions were not directly dealing with the scope of Rule 5A, but they were attempting generally to delimit the scope of the Educational authorities'' power in the matter of granting approvals and permissions under the Rules in Chapter III. There were, however, observations by a Division Bench of this court in some subsequent decisions that the Educational authorities could not decline to exercise their duties under the statute in every case by directing the parties to first approach civil courts; and the matter was again considered by another Division Bench, in Sathyanesan v State of Kerala (1984 KLT 773) where Bhaskaran CJ said that though it was open to the Educational authorities to decide such questions "to the best of their resources and ability", the final decision in disputes relating to ownership etc. had to come from the civil courts; the decision of the statutory authorities on civil rights could only be subject to the decisions of the ordinary courts of the land. This view was repeated in Iysha Narayanan v. State of Kerala ILR (1985) 1 Ker 348, a case where the court had specifically found that the statutory authorities had proved themselves unequal to the task they had been called upon to perform. Said the Court:

When the right to the ownership of a school is seriously in dispute, a proper decision thereon can be rendered only by examining a large volume of evidence, oral and documentary, which the parties will be interested in adducing. The Educational Officers and the Secretary to Government would be unequal to the task of adjudicating such a dispute. Ext.P-7 and P-12 are illustrative of the accidents involved in entrusting the final decision to them Of course, if the statute provides that they, and they alone, could decide the matter, that policy will have to be given effect to. But as we said, the statute in this case does not confer any such exclusive jurisdiction on them, except for the purposes of administering the Act. The civil courts'' power remains untouched.

The case law thus suggests that abdication of jurisdiction (under Rule 5A) by the statutory authorities in every case, on the ground that the dispute is a fit one for the civil court, cannot be justified; it also suggests that there would be cases where the disputes involve complicated questions of fact and law beyond their reach. In each case arising under Rule 5A, therefore, the D.P.I. (or Government) will have to decide whether a case of change of ownership is involved, so as to justify grant of approval for a consequent change of management. If possible they should decide the question in all cases, at least for the limited purposes of the Act and Rules. But where the problems are far too complex, requiring the taking of evidence and the determination of difficult legal questions, they can certainly hold their hands and await appropriate decisions from civil courts, if they are satisfied that there would be no vacuum in the management of the school in the meanwhile. After all, what is important is that there should be some one to function as Manager under the control of the Educational authorities; and that that some one should be one chosen by a person who is prima facie at least, the owner of the institution, The question of real ownership and a final determination of the same, in so far as they amount to recognition of civil rights are obviously out of bounds for the D.P.I. and the Government.

14. Examining Ext.P9 order of the Director in the above background, it is easy to see that he declined to grant "previous permission" for four reasons:-

(i) the rival claims of the two Metropolitans (petitioner and 4th respondent) to the Diocese of Angamali was something beyond the scope of his office to decide;

(ii) irrespective of the 1948 will and its implications, the petitioner was in actual possession and management of the school from 1967;

(iii) the department itself had upheld the petitioner''s claim to be Manager under Exts. P2, P4 and P5 and it was inappropriate, while exercising power under Rule 5A, to set aside all those orders years later, even if it was necessary to examine the question of ownership on merits;

and (iv) someone recognised by the Department was in management from 1967 till 1985, and nothing had been brought out to show that that arrangement could or

should not continue for some more time.

15. Comparing Ext. HO GO. with Ext. P9 order of the D.P.I., it can be seen that so far as the Government was concerned, it was prepared to treat the problem as a simple one. The will of 1948 had to operate, at least from 1975 when the 4th respondent was ordained as Angamali Metropolitan by the Patriarch. The school really belonged to an individual educational agency, and Ext. P5 rules whereunder the Department had recognised the institution as belonging to a corporate agency were bad, and deserved to be cancelled, particularly in view of the fact that approval for them was obtained in 1973 when the split in the church was ""imminent". The 4th respondent was unaware of the will till 1985; but once he came to know of it and staked his claim on its basis, effect had to be given to the testator''s wishes. The school really belonged to a "trust created by the will of late Mar Gregorius" and the 4th respondent was its "present trustee".

16. I should at once say that there is substance in the petitioner''s grievance that Ext.P10 fails to take note of most of the objections he had raised in Ext. P11. against Ext. P7 application. In paragraph (2) of Ext.P11. the petitioner had asserted that since the right to conduct the school was always vested in and exercised by an ecclesiastical office, the educational agency concerned had to be treated as a corporate one, within the meaning of Rule (1) of Chapter III. Paragraph (5) had squarely raised the plea that any dispute regarding the right to hold the ecclesiastical office in question was vested in the Civil Courts, and not in the authorities functioning under Rule A. The right of the Patriarch to interfere in the spiritual or temporal affairs of the religious denomination and its dioceses was vehemently disputed in paragraph (6). In paragraph (7), it had been alleged that the 1948 will had never taken effect, that it had totally been ignored by the denomination and that it was a "document dead at the moment of its creation", It cannot be assumed that these contentions were totally irrelevant, or that a decision regarding change of ownership and management under Rule 5A could have been rendered without examining them. To that extent, one should characterise Ext. P10 as arbitrary.

17. What the Government has done in Ext. P10 is to direct that effect should be given to Ext.P8 will, could an authority functioning under Rule 5A do so? Section 213 of the Indian Succession Act provides that no right under a will can be established by a legatee in a court of justice, without obtaining letters of administration with a copy of the will annexed. And in Kesavan v. Philomina 1982 KLT 85 this Court has held that the Section would apply to proceedings before Tribunals also. Admittedly, no letters of administration had been obtained by the 4th respondent (or any one else) by the time the matter was heard by the Minister on 17-6-86 An order for grant of such letters was passed by the competent court only on 18-7-1986, and even that did not amount to grant of letters of administration. Before deciding to give effect to the will, should not the Government have at least examined these aspects?

18. u/s 112 of the Succession Act, where a bequest is made to a person by a particular description, and there is no person in existence at the time of the testator''s death who answers to the description, the bequest is void. The bequest in Ext.P8 will was to a Metropolitan chosen by the Patriarch. Was there any such person in existence in November, 1966 when the testator in this case breathed his last? There can be no doubt that this was another question the Government was bound to examine if its intention was to go by the will.

19. It is more or less admitted that from the time of the testator''s death to this day, the property was in the possession of strangers or aliens, and not the legatees entitled to hold it under the will. The persons in possession had dealt with it, as could perhaps be spelt out from Exts P1 to P5, as if they were its rightful owners. Grant of probate or letters of administration in respect of a will are decisive only as regards question relating to the genuineness of the will and the right of the person chosen by the testator to represent his estate. It does not fore-close a dispute as to the title of the property bequeathed. (See John Simon v. George John - AIR 1955 TC 177). In this view was not the Government bound to enquire whether the 4th respondent, even if he was the rightful claimant to the school under the will, had not lost his title thereto, by lapse of time? It is significant. in this context, that in Ext. P6 letter of the 4th respondent the petitioner is characterised as a "trespasser.".

20. The Director had serious doubts as to whether it was competent for him, in the limited nature of the questions arising in proceedings under Rule 5A, to ignore Exts, P2, P4 and P5, all orders passed by the Department under other provisions of the statute and remaining unchallenged for years together. In Ext. P10 however the Government had no hesitation in holding that Ext. P5 constitution was "liable to be cancelled". Before reaching such a conclusion, should not have the Government considered the question whether a constitution approved by the Department in 1973, in exercise of power under Rule 2 of Chapter III, could be collaterally attacked in proceedings under Rule 5A, and that too, after such long lapse of time ?

21. The case of the 4th respondent in Ext. P7 application was that the property bequeathed under the will was a ''public trust": he himself was the trustee, and the beneficiaries were the staff, students, parents and public, The finding in Ext. P10 is also to the effect that the school "belongs to a trust created by the will". Now, under Rule 1 of Chapter III, K.E.R., such an institution could not have been treated as an individual educational agency, as has been attempted in Ext. P10. Again, the right to conduct the school was. even according to the will, vested in an ecclesiastical office, and for this reason also, the educational agency concerned should have been treated as corporate. And if this is the true position, a "constitution" under Rule (2) is also a must. It is difficult to see why and how the Government could have chosen to treat the educational agency as individual and to cancel Ext. P5 constitution, when on its own findings, the right to conduct the school was part of a trust and the trustee was to be one holding an ecclesiastical office.

22. Ext. P10 doubts the validity of Ext.P5 constitution for the reason that it was got approved when the split in the church was imminent. If such considerations are relevant, will it not be equally necessary to keep in mind that Ext.P8 will was itself executed at a time when the 1946 decision of the Travancore High Court in favour of the Patriarch party was holding the field, that, that testator''s idea was probably to leave the management of the school to Metropolitans who were to be ordained in terms of the law then in vogue and that a different picture had emerged after the Supreme Court decision of 1958? The counter-affidavit of the 4th respondent concedes:-

It may be said that the period from 1958 to 1975 was a period of the ''United Church'', the two factions having sunk their differences during the period.

Though it is not admitted in so many words, there seems to have been little dispute that the Catholicose at Kottayam was the religious head of the ''united church'' during the period, and that Mar Gregorius himself had accepted such leadership, probably indicating thereby that he was always ready to be guided by the law as finally laid down by the courts, I am not making any inference one way or other: all that I am doing is to suggest that if the historical background is relevant for understanding Ext.P5, it may probably be relevant for understanding Ext.P8 also.

23. The conclusion in Ext. P10 is that with the appointment of the 4th respondent as Metropolitan in 1975 by the Patriarch, the split in the church became complete and the petitioner lost his right "to be trustee under the will". The implication is that till 1975 at least, the petitioner was the lawful trustee "under the will". How Was he ever consecrated by the Patriarch And can the intent, efficacy and operation of a will rest on such shifting circumstances?

24. Again, could any court or statutory authority have recognised a power in the Patriarch to appoint Metropolitans for Malankara dioceses after 1958, in view of the Supreme Court decision The answers to most of the above questions must depend on a careful consideration of complicated questions of fact and law, and that was apparently why the D.P.I. felt that he was unequal, to the task. At any rate, he was not able to make up his mind and definitely hold that a change in ownership had taken place either in 1985 or in 1975. He also found that there was no vacuum in the management of the school and that the arrangement his Department had consistently approved and given effect to could continue for some time more, till those interested in disturbing it approached a competent court of law and got appropriate declarations in their favour. In my opinion, the Government committed a grave error of law when it attempted, through Ext. P10, to give effect to the 1948 will without examining relevant questions connected with the nature of its jurisdiction under the rule, the provisions of the Succession Act the significance of Rules 1 and 2 of Chapter III K.E.R., and the others referred to earlier.

I therefore set aside Ext. P10, leaving the 4th respondent free to get his right, if any, established through the ordinary courts of the land and then move the D.P.I. again under Rule 5A. It may also be necessary to clarify that in paragraphs (18) to (25) above, my attempt has only been to raise a few questions, and not to express any opinion about their answers.

Allowed as above. No costs.