

IN THE HIGH COURT JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6727 of 2010

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Shikshan Mandal, through the
Secretary Dr.R.G.Prabhune & ors. ...Petitioners

vs.

State of Maharashtra & Ors. ...Respondents

Mr.A.V.Anturkar i/b. Sugandh B.Deshmukh, for
Petitioners.

Mr.S.R.Nargolkar, Add. GP for State.

WITH
WRIT PETITION NO.6846 OF 2011
WITH
WRIT PETITION NO.3061 OF 2011
WITH
WRIT PETITION NO.3150 OF 2011
WITH
WRIT PETITION NO.5887 OF 2011
WITH
WRIT PETITION NO.6019 OF 2011
WITH
WRIT PETITION NO.6107 OF 2010
WITH
WRIT PETITION NO.6248 OF 2010
WITH
WRIT PETITION NO.6348 OF 2010
WITH
WRIT PETITION NO.6481 OF 2010
WITH
WRIT PETITION NO.6846 OF 2010
WITH

WRIT PETITION NO.7282 OF 2010
WITH
WITH
WRIT PETITION NO.7608 OF 2010
WITH
WRIT PETITION NO.7622 OF 2010
WITH
WRIT PETITION NO.7623 OF 2010
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WRIT PETITION NO.7672 OF 2010
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WRIT PETITION NO.7730 OF 2010
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WRIT PETITION NO.8184 OF 2010
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WRIT PETITION NO.8450 OF 2010
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WRIT PETITION NO.8457 OF 2010
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WRIT PETITION NO.8460 OF 2010
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WRIT PETITION NO.8465 OF 2010
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WRIT PETITION NO.8467 OF 2010
WITH
WRIT PETITION NO.8469 OF 2010
WITH
WRIT PETITION NO.8557 OF 2010
WITH
WRIT PETITION NO.8848 OF 2010
WITH
WRIT PETITION NO.9317 OF 2010

...

Sandeep Koregave for Petitioner in WP3061 & 3152 of 2011,
WP 7672 of 2010, WP 7623 of 2010, WP 7622 of 2010.

MS.Ujwala S. Waychal i/b V.S.Deokar for Petitioner in WP
5887 of 2001.

Mr.Rakesh Reddy for Petitioner in WP 9317 of 2010.

Mr.Neel G.Helekar for Petitioner in WP 6019 of 2010.

Mr.Suresh S.Pakale with Mr.avinash R.Belge & Mr.Kiran K.Phakade for Petitioner in W.P. No.6107 of 2010.
Mrs.Ujjawala. A. Mahajan for Petitioner in WP 8848 of 2010.
Mr.S.R.Nargolkar, Addl. G.P. for State.

...
CORAM: D.K.Deshmukh,
Anoop V.Mohta,
K.K.Tated, JJJ.

DATED: 16th March, 2012

JUDGMENT: (PER D.K.DESHMUKH, J.)

1. This Bench has been constituted by the Hon'ble the Chief Justice , because a Division Bench of this Court by order dated 26th October, 2010 referred following questions to a Larger Bench:

(i) Do the provisions of Secondary Schools Code acquire statutory force because of reference made to those provisions in the Regulations framed under the Maharashtra Secondary and Higher Secondary Education Boards Regulations, the M.E.P.S. Act and the judgment of the Supreme Court in the case of M.G.Pandke v/s. Municipal Council Hinganghat, 1993 Supp(1) SCC 708?

(ii) From the point of view of making application for starting a school do the Marathi medium school constitute a different class which can be treated differently by the State Government?

(iii) Does the Applicant have to indicate whether he wants grant in aid from the State

Government or not at the time when he makes an application for permission to start a school and if `Yes` , then can schools be classified on the touch- stone whether they are seeking grant- in-aid or not?

(iv) If the Bombay Primary Education Act does not apply to the entire State of Maharashtra, which is the law governing establishment of primary schools in the area to which the Bombay Primary Education Act does not apply?

(v) Are all the provisions of the 2009 Act enforceable in the absence of any Rules being framed by the State Government under that Act?

(vi) Can an application be made under the Secondary Schools Code for recognition of a school without first seeking permission of the Department to start a school?

2. Before the Division Bench, that made the Reference, there were petitions challenging the order passed by the State Government rejecting applications filed by the Petitioners for establishing either Primary or Secondary School. One reason which was common to all the petitions before the Division Bench given by the State Government for rejecting the applications was that the Government has taken a policy decision to cancel or reject all applications which have been received by the Government for establishing Marathi Medium Primary or Secondary Schools. At the hearing of these Petitions, the learned Addl. Government Pleader placed before the Division Bench a judgment of the

Division Bench of this Court dated 8th April, 2010 in Writ Petition No.345 of 2010 and submitted that in view of the directions issued by the Division Bench now it is not necessary for any person who wishes to establish Primary or Secondary School on no grant-in-aid basis to seek any permission to establish a school from the State Government. On this being pointed out to the Petitioners before the Division Bench, it was submitted on behalf of the Petitioners that the finding recorded by the Division Bench, in its judgment in Writ Petition No.345 of 2010 that no permission is required to be obtained from the State Government for establishing a school, cannot be said to be a correct finding. It was submitted that even according to the Division Bench which passed the order in Writ Petition No.345 of 2010 it is necessary for every school to obtain recognition from the department. It was submitted that recognition to a school can be given according to the provisions of the Schools Code and according to the provisions of the Schools Code it is only a school which has been permitted by the State Government to be established can apply for such recognition. In other words, a school which has not been permitted by the State Government to be established cannot apply for recognition. It appears that the submission was made that the Division Bench which issued the directions did not consider the

provisions of the School Code. When the Division Bench issued the aforesaid directions and when the Reference to a Larger Bench was made, though the Rights of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as “Rights to Education Act” for the sake of brevity) had come into force, Rules under that Act were not yet framed. Ultimately, during the pendency of this Reference Rules called “Maharashtra Right to Children to Free and Compulsory Education Rules, 2011” came into force. The Rights to Education Act and the Rules framed thereunder apply to a child of the age of 6 to 14 years. Therefore, it can be said that so far as the subject of establishment and recognition of Primary Schools are concerned, it is now governed by the provisions of the Rights to Education Act and the Rules framed thereunder and so far as establishment of Secondary School are concerned, it is governed by the provisions of the Secondary Schools Code. It is an admitted position before us that the Right to Education and the Rules framed thereunder and the Secondary Schools code apply to the entire State of Maharashtra.

3. Question No.1, which has been referred to us relates to the controversy whether the Secondary Schools Code has acquired statutory force because of reference made to the

provisions of the Secondary Schools Code in the Regulations framed under the Maharashtra Secondary and Higher Secondary Education Boards Regulations, the M.E.P.S. Act. This question has to be considered in the light of the judgment of the Supreme Court in the case of M.G.Pandke v/s. Municipal Council Hinganghat, 1993 Supp(1) SCC 708. Perusal of the judgment of the Supreme Court in the case of M.G.Pandke shows that it was an admitted position before the Supreme Court that the Secondary Schools Code by itself is not statutory and is in the nature of executive instructions. However, it was found that because of the provisions of the Regulations framed under the Boards Act, the provisions of the Schools Code are binding. Contention No.1 raised before the Supreme Court, which is referred to in paragraph 12 reads as under:

“(1) Regulation 19(7)(xvi) of Maharashtra Regulations which is a statutory regulation makes it obligatory for the Municipal Council to follow the provisions of the Code. The Code itself may be non-statutory but the mandate to follow the Code flows from Regulations 19(7)(xvi) of the Maharashtra Regulations which is mandatory. The field having been occupied by the Code under the statutory mandate, no bye-law to the contrary could be framed by the Municipal Council.”

4. That question has been considered by the Supreme Court in paragraph 13 of its judgment. It reads as under:

13. When the Code was enforced in the year 1963, the Act and Regulations were holding the field in Vidarbha Division. Under the Act and the Regulations the age of superannuation being 60 years, the Code, while fixing 58 years as the age of superannuation for rest of Maharashtra, permitted the Vidarbha teachers to superannuate on attaining the age of 60 years. The Maharashtra Act which came into force on January 1, 1966 repealed the Act and the regulations. In Baboolal's case (supra) the High Court referred to the repealing and saving section of the Maharashtra Act and came to the conclusion that there was no provision thereunder to save the regulations. Assuming that the Regulations under the Act stood repealed, the Code which was framed by the Maharashtra Government continued to hold the field. It is not disputed by the learned Counsel for the appellants that the Code by itself is not statutory and is in the nature of executive instructions. But he strongly relies on Regulation 19(7)(xvi) of Maharashtra Regulations and contends that the said Regulation makes it obligatory for the Municipal Council Hinganghat to follow the provisions, of the Code. It is for the State Government to frame the Code in whatever manner it likes but once the Code is in operation its provisions have to be followed by the Municipal Council Hinganghat under the mandate of Regulation 19(7)(xvi) of Maharashtra Regulations. We see considerable force in the argument of the learned Counsel. The Code has been framed with the purpose of bringing security of service, uniformity, efficiency and discipline in the working of non-Government High Schools. It has to be applied uniformly to the schools run by various Municipal Councils in the State. It is no doubt correct that the Municipal Councils have the power to frame bye-laws under the Maharashtra Municipalities Act, 1965 but if

the field is already occupied under the mandate of statutory Maharashtra Regulations, the Municipal Council cannot frame bye-laws to the contrary rendering the mandate of the Maharashtra Regulations nugatory. We are of the view that the Municipal Council Hinganghat has out stepped its jurisdiction in framing bye-law 4 of the bye-laws. We, therefore, direct that the conditions of service of the appellants shall be governed by the Code as enforced by Regulation 19(7)(xvi) of the Maharashtra Regulations. Bye-law 4 of the bye-laws shall not be applicable to the appellants.

5. Thus, the Supreme Court has held that in view of the provisions in the Regulations framed under the Boards Act, a recognised school is under an obligation to comply with the provisions of the Secondary Schools Code. In so far as the State Government is concerned, an affidavit has been filed on behalf of the State Government by Mr. Sumit Mullick, Principal Secretary to Government, School Education and Sports Department, dated 5th August, 2011. What is stated in paragraph 2 of that affidavit is relevant. It reads as under:

“2. With regard to the Question No.(i), I say that the judgment of the Hon’ble Court Apex Court in the case M.G.Pandke Vs. Municipal Council, Hinganghat, the provisions of Secondary Schools Code have statutory status in view of the provisions of Maharashtra Secondary Education Board Regulations, 1966 (Maharashtra Regulations) framed under Section 37 of the said Act. This position in law

is binding on everybody. In the light of this Judgment, I submit that the provisions of Secondary Schools Code have statutory status. The State Government is actively considering to constitute a Committee to update the provisions of Secondary Schools Code. At that time, providing express statutory status to the Code shall be considered.”

6. It is, thus, clear that even according to Government of Maharashtra the provisions of the Secondary Schools Code has statutory status. Question No.(i) referred to us is, thus, accordingly answered.

7. So far as Question No.(ii) is concerned, the stand taken by the State Government in paragraph 4 of its affidavit dated 1st March, 2012 is relevant. It reads as under:

“4. It is submitted that Marathi Medium Schools do not constitute different class and are not treated differently by the State Government from the point of view of making Application for starting a School.”

8. Thus, the State Government does not differentiate between the Marathi Medium School and other language School, be it a Primary School or a Secondary School, in so far as making of application for establishing a school is concerned. Question No. (ii) is answered accordingly.

9. So far as Question No.(iii) is concerned, what is stated in paragraphs 6, 7, 8 & 9 of the aforesaid affidavit is relevant. It reads as under:

“6. It is submitted that the Applicants do not have to indicate whether they are desirous of obtaining Grant-in-Aid from the State Government. The prescribed format in which applications are to be made, does not contain any clause or column requiring information as to whether the school will need Grant-in-Aid or not. It is, therefore, clear that the Schools are not classified on the touch-stone as to whether they are seeking Grant-in-Aid or not.

7.It is respectfully submitted that on the day when the said Referring Judgement was passed on 26th October, 2010, the State Government had not framed the Rules under the Right to Free and Compulsory Children's Education Act, 2009. Consequently, the said Act could not be given effect to. However, the State Government has now framed Rules in that behalf and the same have been published in the Official Gazette of the Government of Maharashtra on 11th October, 2011 and the said Rules have been brought into force immediately on that day. In view of Section 29 (1) (f) of the said Act, the State Government is obliged to provide Free and Compulsory Education preferably in the mother tongue of the students. Consequently, the State Government will have to give preference to the Schools imparting instructions in Marathi / other vernacular language over English Medium Schools. In any case, it has been the Policy of the State Government to grant permission and recognition to English Medium Schools but not to grant any Grant-in-

Aid to English Medium Schools. The Policy of the State Government not to give any Grant-in- Aid to English Medium Schools has been continued from 1973 onwards. The State had also formulated a Policy not to give any Grant-in-aid to Marathi / Other Vernacular Medium Schools initially in the year 2001. However, by subsequent Policy decision contained in several Government Resolutions, the Policy was modified. Lastly, it was decided that all Schools, except the English Medium Schools will be given Grant-in-Aid on step by step basis, meaning thereby that eligible schools will be given Grant- in-Aid of 20% in the 1st year, 40% in the 2nd year, 60% in the 3rd year, 80% in the 4th year and full Grant-in-Aid will be extended from 5th year onwards. However, from the view of making an application for starting a School, Marathi Medium Schools did not constitute different class and were not treated differently by the State Government.

8. It is submitted that a perusal of the Government Resolution dated 20th July, 2009 clearly indicates that the same was issued at the time when the Parliament was deliberating on Right to Free and Compulsory Children's Education Act, 2009. In so far as the provisions of the Act, and also the definition and concept of "neighbourhood school" are concerned, the same were being discussed and it was not clear as to what would be the requirement of Law, in so far as compulsory education is concerned and the corresponding duty of the State to provide compulsory education is concerned. The Government Resolution infact, is in two parts , which are distinct from each other. The first part of the Government Resolution deals with the Grants to be given to the existing Schools, in view of the fact that permissions were given from 2001 onwards on " Permanent" No Grant-in-Aid basis, the institutions had made representations and had requested that the word "Permanent" should be deleted and if found eligible, the

grants should be made available to these Schools also. The first part of the Government Resolution directs that the word 'Permanent' should be deleted from the Orders granting permission to start schools. The first part also deals with the Modus-Operandi regarding grant being given to the existing schools. It was directed that the schools shall be considered for grant-in-aid from the academic year 2012- 13. A Committee was also set up to decide the eligibility criteria and evaluation standard on the basis of which schools should be evaluated for receiving grants. It was also made clear that all schools will not be entitled to receive grants even after completion of 5 years. The Government Resolution makes it clear that schools will be first evaluated and if found eligible as per the evaluation standards and criteria, would be entitled to receive grant-in-aid. The second part of Government Resolution is independent of the first part and deals with another issue. This Hon'ble Court had restrained the Government from giving any permissions from the year 2003 onwards and this Order of the Honourable Court was vacated in the year 2007. Consequently, the Government had invited Applications for permission to start new schools by Circular dated 29th April, 2008. However, before these Applications could be considered, draft of the said Act of 2009 was circulated and hence, the Government took a policy decision not to entertain any application made pursuant to the Circular dated 29th April, 2008, in so far as the Marathi Medium Schools are concerned. It was decided that a Master Plan be prepared, so as to ascertain whether or not, there is any need for Vernacular Medium Schools, more particularly the Marathi Medium Schools, in view of the fact that several Marathi Medium Schools had to be closed down. This was resulting into reduction in divisions of existing schools and the teachers being rendered surplus. Till such teachers are accommodated/ appointed in other Schools, the State Government has to bear expenditure towards the salary of these surplus teachers. Hence, it was necessary to formulate a policy and consequently Applications were not considered by

the State Government. However, it is categorically submitted that though the State Government intends to extend the Grant-in-Aid to eligible existing Schools, whether or not, the Schools will need Grant-in-Aid will not be a criteria for considering the Applications for permissions/recognition to new Schools. In Clause (5) of the said Government Resolution dated 20th July, 2009, a Committee has been established to fix the evaluation standards for considering the eligibility of Schools for receiving grants. The said Committee has made its recommendations and the recommendations have been accepted by the State Government and Government Resolution dated 15th November, 2011 has been issued by the Government of Maharashtra in its Department of School Education. Hence, the Schools will be considered from the year 2012-13 for Grant-in-Aid after being evaluated and only if found eligible.

9. I say and submit that the Applicant need not indicate at the time of making an Application for permission to start a School, as to whether Grant-in-Aid is needed from the State Government or not. The Second Part of the issue would arise only if the answer to the first part of the Issue was in the affirmative. In the present case, therefore, the Second part of the question does not arise at all. In view of the enactment of Right of Free and Compulsory Children's Education Act, 2009, the Right to establish an Educational Institution has been regulated by "Law", as envisaged by the Constitution of India. The said Law also imposes reasonable restrictions and the same are valid and legal. A Master Plan that was proposed by Government Resolution dated 20th July, 2009 was / is in consonance with the Master Plan required to be prepared as per the provisions of the Act of 2009. It is further submitted that Rules of 2012 framed under the Act of 2011 are being suitably amended to make it clear that the criteria of School Mapping shall be applicable only for recognition of new Schools and that the School Mapping shall not be the criteria or issue for

determining whether the recognition is to be granted to the existing Schools under Section 18 of the Act of 2009.

10. It is clear from the statements made in the abovesaid affidavit that in the application which is to be made for permission to start a school, the Applicant is not required to indicate whether the school will seek grant-in-aid or not. Question No.(iii) is answered accordingly.

11. So far as Question No.(iv) is concerned, a clear stand has been taken by the State Government that after enactment of the Rights to Education Act and the Rules framed thereunder, In so far as establishment of Primary school in the entire State of Maharashtra is concerned, it is governed by the provisions of the Rights to Education Act and the Rules framed thereunder. So far as Question (v) is concerned, that question no longer survives for consideration as now admittedly Rules under the Rights to Education Act have been framed.

12. So far as Question No.(vi) is concerned, it is common ground before us that now establishment and recognition of Secondary School will be governed by the provisions of the

Secondary Schools Code, which we have held to be binding on all recognised schools, and therefore, recognition to the schools will be governed by that Code and it is clear from the provisions of the Secondary Schools Code that it is only those schools which have been permitted by the Government to establish can apply for recognition. Therefore, it is necessary for the person who wants to establish a Secondary School to apply to the Department for permission to establish a school.

13. It was submitted before us that in so far as evaluation and recognition of the existing Primary School as also the question of grant of permission to establish a Primary School are concerned, existence of Mapping/Maste Plan is necessary. In the affidavit dated 1st March, 2012 filed on behalf of the State Government in paragraph 10 following statement has been made,

“10. In so far as, the time period for Mapping is concerned, it is submitted that the State Government has proceeded to complete the Master Plan by carrying out the Mapping in right earnest. However, taking into consideration the fact that the Act of 2009 was brought into force on 1st April, 2010 and that the Rules were framed on 11th October, 2011 and in view of the topographic variations in Maharashtra, Mapping process has taken longer time than expected. However, the State Government has already prepared and notified the

Draft Master Plan and invited objections and suggestions over the same. The State Government has received, as many as about 1,300 objections and suggestions. Considering the voluminous objections and suggestions received, substantial time was also required to consider the same. The State Government has considered the said objections and suggestions and has prepared a detailed report about the same and the same was placed before the Cabinet of Ministers. The Cabinet of Ministers, however, has directed that the remarks/suggestions from the Planning Department, Finance Department and the Department of Law and Judiciary be obtained on the proposal. The file was, therefore, forwarded to the concerned departments and the process of finalisation of Master Plan is expected to take another three months. “

14. It is, thus, clear that the State Government proposes to finalise the Master Plan within a period of three months and then take up the applications that may be made for establishment of the Primary School and for evaluation and recognition of the Primary School for consideration.

15. The Office will now place these matters before the appropriate Division Bench for further orders.

(D.K.DESHMUKH, J.)

(ANOOP V. MOHTA, J.)

(K.K.TATED, J.)