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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.6542 OF 2017

1. Al Hira Education and Welfare
Society, New S.T. Colony,
Kat Kat Gate, Aurangabad
Through its Vice President,
Age: 56 years, Occ: Service,
R/o. Sadaf Colony, Kat Kat
Gate, Tq. And Dist. Aurangabad.
2. Al Irfan Secondary School,
At village Sulibhujan,
Tq. Khultabad, Dist. Aurangabad.
Through its Principal. ..PETITIONERS

VERSUS

1. Union of India
Through its Secretary,
Humen Resources Development,
C Wing Shastri Bhawan,
New Delhi 110 115.
2. The Secretary,
Central Board of Secondary
Education, Shiksha Kendra,
2, Community Centre,
Preet Vihar,
New Delhi 110092
3. The State of Maharashtra
Through it's Chief Secretary,
School and Education and
Sport Department, Mantralaya,
Mumbai 400 001.
4. The Education Officer,
(Primary)
Zilla Parishad,
Tq. and Dist. Aurangabad.

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5. Deputy Director of Education,
Aurangabad Division Aurangabad
Tq and Dist. Aurangabad. ..RESPONDENTS

Mr S.R. Kolhare, Advocate for petitioners;
Mr D.G. Nagode, Advocate for respondent Nos.1 & 2;
Mr A.S. Shinde, A.G.P. for respondent Nos. 3 & 5;
Ms Pooja Deelip Patil, Advocate with Mr. Deelip
Patil Bankar, Advocate for respondent No.4

**CORAM : PRASANNA B. VARALE &
S. M. GAVHANE, JJ.**

DATE : 12th JULY, 2018

ORAL ORDER :

Heard Mr. Kolhare, learned Counsel
appearing for the petitioners, Mr. Nagode, learned
Counsel for respondent Nos. 1 and 2, Mr. Bankar
Patil, learned Counsel for respondent No.4 and Mr
Shinde, learned A.G.P. for respondent Nos. 3 and 5.

2. The petitioner is an educational
institute imparting education to the secondary
classes having 6th standard to 11th standard.
Learned Counsel appearing for the petitioners
invited our attention to the certificate issued by

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the competent authority affording status of minority institute. Same is placed on record at Exhibit-A. Learned Counsel then submitted that the school being run by the petitioner institute is affiliated to the Central Board of Secondary Education (for short, 'CBSE'). The proposal was submitted to the CBSE and provisional affiliation is granted to the petitioner institute is the submission of learned Counsel.

3. In support of this submission, learned Counsel appearing for the petitioners invited our attention to the placed on record at Exhibit-C-2 to submit that the provisional affiliation granted to the petitioner is extended by communication dated 17th May, 2017. Learned Counsel then submitted that the document of provisional affiliation itself shows that the petitioner institute is to abide by the conditions of the board insofar as infrastructural facilities as well as appointment of teaching and non teaching staff.

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4. Learned Counsel appearing for the petitioners then invited our attention to the letter of appreciation placed on record at Exhibit-F to submit that the students taking education in the petitioner institute are showing their performance in the examination and performance of students is appreciated. Learned Counsel also invited our attention to the certain certificates to submit that the students taking education in the petitioner school are also giving their excellent performance in the extracurricular and sports activities. Learned Counsel then submitted that the petitioner institute is faced with the notice dated 17th April, 2017. He submits that on the allegations that the petitioner institute is running illegal school, notice is clamped upon the petitioner institute. He submits that the notice issued to the petitioner is clearly unsustainable.

5. Learned Counsel appearing for the petitioners then submits that the State Government

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in the notice informed that by exercising the powers under the provisions of Right to Education Act, the State Government is issuing notice, whereas the petitioner institute being a minority institute and running courses which are affiliated to CBSE, the State Government had no role to play in the affairs of the petitioner institute either academic affairs, such as admission of the students or any other ancillary activities. Learned Counsel further submits that the notice is issued on the presumption that the petitioner is running illegal school when there is no such requirement for the petitioner to obtain any permission from the State Government, when the petitioner is affiliated to CBSE. He then submits that the issue of applicability of Right to Information Act to minority institutions is no more *res integra*.

6. Learned Counsel appearing for the petitioners in support of this submission invited our attention to the various judgments. He then submitted that in the latest decision of this Court

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in the matter of ***Federation of Linguistic and Religious Minority Education Institution and others vs State of Maharashtra and others,*** reported in 2017(3) *Mh.L.J.* 52, the Division Bench of this Court in clear and unambiguous words observed that interference of the State Government in the academic affairs of the minority institute is not permitted. Thus, ultimate submission of learned Counsel is, to allow the petition by quashing and setting aside the notice dated 17th April, 2017 impugned in the petition.

7. Mr. Bankar Patil, learned Counsel appearing for respondent No. 4 opposes the petition. He submits that the Education Officer (Primary), Zilla Parishad submitted communication dated 29th May, 2017 to the Director of Education (Primary), Pune. Mr. Bankar Patil, learned Counsel, by inviting our attention to the copy of the said communication which is placed on record annexed to the reply at annexure-4, submitted that there are many deficiencies found in the petitioner

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school. He then submitted that after issuing notice to the petitioner school, an inquiry was conducted. He then submitted that in the inquiry, it revealed that the institute has not appointed appropriate strength of teachers as per staffing pattern. The petitioner institute also failed to maintain the record. The institute was running hostel without any permission. The petitioner institute failed to submit any report of fees being charged by them. The petitioner institute admitted certain foreign/NRI students without verifying record. Then there is also one ground referred to in the said communication that on 12th January, 2016 an unfortunate incident took place in the school premises. In the school premises, a quarrel took place between students and same resulted in death of one student. Because of such incident, there is atmosphere of apprehension and displeasure amongst parents against teachers. He vehemently submitted that all these grounds referred to in the report are serious grounds.

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8. Mr. Bankar Patil, learned Counsel appearing for respondent No.4, relying on the judgment of this Court in the matter of ***Federation of Linguistic and Religious Minority Education Institution and others*** (supra) relied by the petitioners, submits that the Hon'ble Apex Court observed that liberty being enjoyed by the minority institute is not absolute liberty but the State Government can exercise its authority to regulate the school and there is no prohibition for the State Government as regulatory authority, if the State Government is appraised of certain serious deficiencies in the administration of the school.

9. On the backdrop of above referred rival submissions, we are of the opinion that learned Counsel appearing for the petitioners made out a case. In our opinion, there is considerable merit in the submission of learned Counsel for the petitioners that notice issued to the petitioner institute is thoroughly on an erroneous premises

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and under impression that the State Government possess certain powers to intervene in the academic affairs of the petitioner institute by taking recourse to Right to Education Act.

10. There is also merit in the submission of learned Counsel for the petitioners that insofar as the courses being run by the petitioner institute and the students admitted by the petitioner institute, who are appearing for the examinations, these examinations are conducted by the CBSE. It is the board who grants affiliation to the petitioner institute. It is the board who conducts examinations and declare results. None of the course being run by the petitioner school is under the Board of Secondary and Higher Secondary of the State Government. As such, State Government has no role to play in these affairs. Learned Counsel for the petitioners also justified in submitting that the inquiry report submitted to the Education Authority by the Education Officer (Primary) refers to all those grounds and none of these grounds find

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place in the impugned notice. As such, no recourse can be taken to this inquiry report to deny the petitioner institute the access to the course.

11. It will be useful for our purpose to refer to the latest judgment of Division Bench of this Court in the matter of **Federation of Linguistic and Religious Minority Education Institution and others** (supra). Relying upon the above referred judgment, learned Counsel for the petitioners submits that in the said petition, State Government was drawing support from the provisions of Right to Education Act. Division Bench observed in paragraph Nos. 10, 11 and 12 thus :

"10] In the affidavit in reply filed by the State, at paragraphs 24 and 25, it is stated as follows :

"24. I submit that the Petitioner has contended that the Right to Education Act and the Rules there, are not applicable to the Petitioner Nos. 2 to 12, being non-aided minority Institutions. I submit that the interpretation

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of the provisions of the said Act and Rules and the law laid down by the Hon'ble Supreme Court in the case of Society for Unaided Private Schools of Firsthand V/s. Union of India and Others is being misinterpreted and misconceived by the Petitioners. I submit that the Hon'ble Supreme Court in the case of Society for Un-aided Private Schools of Rajasthan V/s. Union of India and Others have upheld the validity of the Right to Education Act, 2009. The Hon'ble Supreme Court has only held that the provisions of Section 12 (1) (c) and Section 18(3) of the said Act, is not applicable to the Petitioner's Schools. This does not mean that the Right to Education Act, is not applicable to the Petitioners' Schools in regard to making application, granting permission and recognition to such Schools.

25. In view of the aforesaid facts and circumstances petitioners schools were running without obtaining the reorganization and illegally continuous schools hence they are violated the provisions of RTE 2009 Act. Sub Section (5) of Section 18 therefore, they have no leave locus to file Writ Petition."

11] The aforesaid affidavit in reply, it appears, was filed on 2 May, 2014 when the decision in *Pramati Educational and Cultural Trust* (supra) was yet to be delivered. Possibly, that is the reason why reliance was

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placed upon the decision in the case of *Society for Unaided Private Schools of Rajasthan vs. Union of India & Ors.*, (2012) 6 SCC 1), in which, it was held that the provisions of RTE will not apply only in case of un-aided minority institutions, meaning thereby that the provisions of RTE might apply to aided minority institutions.

12] However, in the case of *Pramati Educational and Cultural Trust* (supra), the Constitution Bench at paragraphs 54, 55 and 56 has observed thus :

"54. Under Article 30(1) of the Constitution, all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Religious and linguistic minorities, therefore, have a special constitutional right to establish and administer educational schools of their choice and this Court has repeatedly held that the State has no power to interfere with the administration of minority institutions and can make only regulatory measures and has no power to force admission of students from amongst non-minority communities, particularly in minority schools, so as to affect the minority character of the institutions. Moreover, in *Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr.*

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(supra) Sikri, C.J., has even gone to the extent of saying that Parliament cannot in exercise of its amending power abrogate the rights of minorities. To quote the observations of Sikri, C.J. in *Kesavananda Bharati Sripadagalvaru v. State of Kerala & Anr.* (supra) (SCC p.339, para 178):

"178. The above brief summary of the work of the Advisory Committee and the Minorities Sub committee shows that no one ever contemplated that fundamental rights appertaining to the minorities would be liable to be abrogated by an amendment of the Constitution. The same is true about the proceedings in the Constituent Assembly. There is no hint anywhere that abrogation of minorities' rights was ever in the contemplation of the important members of the Constituent Assembly. It seems to me that in the context of the British plan, the setting up of Minorities Sub-committee, the Advisory Committee and the proceedings of these Committees, as well as the proceedings in the Constituent Assembly mentioned above, it is impossible to read the expression "Amendment of the Constitution" as empowering Parliament to abrogate the rights of minorities."

(emphasis supplied)

Thus, the power under Article 21A of the Constitution vesting in the State cannot extend to making any law which will abrogate the right

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of the minorities to establish and administer schools of their choice.

55. When we look at the 2009 Act, we find that Section 12(1) (b) read with Section 2(n) (ii) provides that an aided school receiving aid and grants, whole or part, of its expenses from the appropriate Government or the local authority has to provide free and compulsory education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent. Thus, a minority aided school is put under a legal obligation to provide free and compulsory elementary education to children who need not be children of members of the minority community which has established the school. We also find that under Section 12(1) (c) read with Section 2(n)(iv), an unaided school has to admit into twenty-five per cent of the strength of class I children belonging to weaker sections and disadvantaged groups in the neighbourhood. Hence, unaided minority schools will have a legal obligation to admit children belonging to weaker sections and disadvantaged groups in the neighbourhood who need not be children of the members of the minority community which has established the school. While discussing the validity of clause (5) of Article 15 of the Constitution, we have held that members of communities other than the

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minority community which has established the school cannot be forced upon a minority institution because that may destroy the minority character of the school. In our view, if the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the 2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution is ultra vires the Constitution. We are thus of the view that the majority judgment of this Court in *Society for Unaided Private Schools of Rajasthan v. Union of India & Anr.* (supra) insofar as it holds that the 2009 Act is applicable to aided minority schools is not correct.

56. In the result, we hold that the Constitution (Ninety-third Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (Eighty-Sixth Amendment) Act, 2002 inserting Article 21-A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid. We also hold that the 2009 Act is not ultra vires Article 19(1) (g) of the Constitution. We, however, hold that the 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the Constitution. Accordingly, Writ

Petition (C) No.1081 of 2013 filed on behalf of Muslim Minority Schools Managers' Association is allowed and Writ Petition (C) Nos.416 of 2012, 152 of 2013, 60, 95, 106, 128, 144-45, 160 and 136 of 2014 filed on behalf of non-minority private unaided educational institutions are dismissed. All IAs. Stand disposed of. The parties, however, shall bear their own costs."

12. It will not be out of place to state that the State Government took a stand relying upon the judgment of Hon'ble Apex Court in the matter of ***Society for Unaided Private Schools of Rajasthan vs Union of India and others*** reported in **2012(6) SCC 1** and judgment of the Division Bench in the matter of ***Federation of Linguistic and Religious Minority Education Institution and others*** (supra), in clear and unambiguous words stated that in view of ruling in ***Pramati Educational and Cultural Trust (Registered) and others vs Union of India and others*** reported in **2014(8) SCC 1**, we are unable to accept the defence of the State Government relying upon the judgment in the matter of

Society for Unaided Private Schools of Rajasthan

(supra). There cannot be dispute on the submission of Mr. Bankar Patil, learned Counsel for respondent No.4, that minority institutions even though have certain liberties, liberty of these institutions cannot be treated as an absolute liberty and Hon'ble Apex Court recognized the power of the State Government in taking regulatory measures. Though there is no dispute about the fact that the State Government can enjoy power as a regulatory authority, the facts in the present matter clearly show that the notice issued to the petitioner institute is not on the ground of serious deficiencies or any ground which is referred to in the communication forwarded by the Education Officer (Primary) to the Director of Education, but it is only on the ground that the State Government by drawing support from the Right to Education Act is issuing notice to the petitioner institute to close down the school.

13. As such, we are of the opinion that there is considerable merit in the submission of learned

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Counsel for the petitioners that such a notice is clearly unsustainable and if notice is unsustainable, the only result is to quash and set aside the same.

14. Resultantly, we allow the petition. The notice dated 17th April, 2017, impugned in the petition, is quashed and set aside. At the same time, we make it clear that in case, the State Government is of the opinion that there are certain serious deficiencies and the State Government in exercise of its powers is willing to take regulatory measures, the State Government can take such measures by issuing notice afresh to the petitioner.

15. With above observations, the petition is disposed of.

(S. M. GAVHANE)
JUDGE

(PRASANNA B. VARALE)
JUDGE