

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

WRIT PETITION NO. 6718 OF 2016

Brahmanpuri Shikshan Prasarak Mandal,
Brahmanpuri, Tq. Shahada, Dist. Nandurbar
Through its President
Arun Dattatray Patil

..PETITIONER

VERSUS

State of Maharashtra and Others

..RESPONDENTS

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Mr. S.U. Chaudhari, Advocate for petitioner.
Mr. S.P. Tiwari, A.G.P. for respondent – State.
Mr. A.D. Shinde, Advocate for respondent nos. 5 and 6.

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**CORAM : S.V. GANGAPURWALA AND
R.G. AVACHAT, JJ.**

DATED : 06th DECEMBER, 2018

ORDER :

The petitioner challenges the permission granted to Respondent no.6 – school to shift it from Khed (Digar) to Brahmanpuri.

2. Mr. Chaudhari, the learned Counsel for the petitioner submits that the petitioner institution is running the school from 1st to 10th standard at village Brahmanpuri since 1981. At the time when writ petition was filed, the school had 750 students. 85% of the students are from backward

class. There are 19 teachers and 8 non-teaching staff. The learned Counsel submits that when the respondent was constructing school building, the petitioner got the knowledge of the steps being taken by Respondent no.6 to shift the school from Khed (Digar) to Brahmanpuri. The petitioner raised an objection for transfer of Respondent no.6 – school. However the objection was not considered. Respondent no.6 – school initially was started at Kochare in the year 2004. In the year 2010 it was shifted to Khed (Digar) and now in the year 2013 the proposal is submitted to transfer the said school at Brahmanpuri. The learned Counsel submits that the transfer of school is governed by Government Resolution dated 31st July, 2013. However, Respondent no.6 played a fraud upon the authorities and made the authorities to believe that Government Resolution dated 17th February, 2009 is applicable. According to the learned Counsel, the resolution, as on the date of the application, would be applicable. Permission was not granted. The date when the permission is granted to the respondent to shift the school, Government Resolution dated 31st July, 2013 would be applicable. For transfer of school, all the conditions as laid down in Government Resolution dated 31st July, 2013 will have to be complied with. The distance between Khed (Digar) and Brahmanpuri is 8.8 kms. It is beyond the permissible limit of 5 kms. This aspect has been lost sight of by the authority while granting permission to transfer the school. The

respondents, even while submitting the certificate of transfer, have played a fraud with the authorities. This shows the intention of Respondent no.6 to play fraud on the authorities. The learned Counsel submits that the restriction with regard to the area is mentioned so as to avoid unhealthy competition. Because of start of Respondent no.6 – school at Brahmanpuri, the staff of the petitioner is required to be declared as surplus. The strength of the students has reduced. Moreover, as proper procedure is not adhered to, permission to transfer is required to be set aside. The Secretary also directed the Education Officer and the Deputy Director of Education to verify that the conditions contained in Government Resolution dated 31st July, 2013 are followed. However, same has been conveniently ignored by the authority to favour Respondent no.6. Therefore, permission of transfer be set aside.

3. Mr. Shinde, the learned Counsel for Respondent no.6 submits that Gram Panchayat at Khed (Digar) has passed a resolution permitting the transfer of Respondent no. 6 – School. Gram Panchayat of Brahmanpuri had also passed a resolution allowing the transfer of Respondent no.6 – school to Brahmanpuri. The learned Counsel submits that the strength of students of Respondent no. 6 – School at Khed (Digar) was insufficient and it was necessary to shift the school. The criteria of distance as is provided

under Government Resolution dated 31st July, 2013 is the distance between the school where it was initially being run and the school building where it has been shifted. The distance is not qua the villages, but qua the places of the buildings. The learned Counsel for the respondent submits that for higher secondary school the distance should not be more than 10 kms. Respondent no.6 – school is for 5th to 10th standard. For 5th to 10th standard, the distance can be within 10 kms. and if the distance between two places is considered i.e. school of Respondent no.6 at Khed (Digar) and Brahmanpuri, the distance is only 4.8 kms.

4. The learned Counsel for Respondent no.6 relies on the judgment in the case of *Ameet Navinchandra Patel and Ors. Vs. President, Arya Vidya Mandir Society and Ors.* reported in *2008 (Supp.) Bom.C.R. 868*, to submit that it is more than four and half years respondent no.6 is running the school at Brahmanpuri and it would be inequitable to grant permission to shift the school. The learned Counsel further submits that the condition of distance is not mandatory. It is merely guideline which can be relaxed. The learned Counsel relies on the judgment of the Full Bench of this Court in the case of *Shikshan Prasarak Mandal, Pune Vs. State of Maharashtra and Others* reported in *2009 (5) Mh.L.J. 969*. The learned Counsel submits that strength of students in the petitioner – school has not reduced

because of start of Respondent no.6 – school at Brahmanpuri and in such circumstances this Court cannot interfere. Reliance is placed on the order dated 24th October, 2016 passed by this Court in Writ Petition No. 8016 of 2015 and order dated 05th April, 2018 in Writ Petition No. 5241 of 2013.

5. The learned Counsel further submits that the petitioner school itself had applied for transfer from Brahmanpuri and accordingly the petitioner school has been transferred to Khed (Digar). The petitioner does not have locus standi to challenge the order of transfer. The learned Counsel further submits that the petitioner, who has signed the petition is not the President of the institution nor any resolution is passed authorizing him to file the petition.

6. We have considered the submissions canvassed by the learned Counsel for the respective parties. Respondent no.6 – school is transferred from Kochare to Khed (Digar) under the requisite orders from the competent authority. As a matter of record, we had asked the learned A.G.P. to place on record the number of students in the petitioner – school and Respondent no.6 – school. The data with regard to the strength of students in the petitioner – school and Respondent no.6 – school from the year 2014-15 till 2018-19 is produced by the Education Office. It would

appear that the strength of students in the petitioner – school has not been much affected by the transfer of Respondent No.6 – school.

7. No doubt, when the school is transferred, the procedure and the conditions / guidelines are required to be complied with. As on the date, when the permission has been granted to transfer Respondent No.6 – school, Government Resolution dated 31st July, 2013 was applicable. Government Resolution dated 31st July, 2013 laid down certain requirements such as distance and building to be owned by the school. So also the parameters as laid down under Right to Education Act has to be satisfied. As far as compliance of other conditions is concerned, the same is not much disputed by the petitioner. The petitioner harps upon the violation of condition no. 2(ii) viz. distance. According to the petitioner, the distance between two villages i.e. Khed and Brahmanpuri is 8.8 kms. and Clause 2(ii) has been violated. Apart from above, we do not find any other infirmity agitated by the petitioner with regard to the permission to transfer Respondent no.6 – school. The Full Bench of this Court in the case of ***Shikshan Prasarak Mandal, Pune*** (supra) has observed thus :-

“30. In the light of the above stated principles and the fact that we have already expressed the view that there is no material conflict between the two Division Bench judgments of this court in the eye of law as well as in view of the fact that the Government as yet has not

framed a statutorily backed scheme on the basis of the master plan indicated in the judgment of the Division Bench of this court in Gramvikas Shikshan Prasarak Mandal (supra), the condition of 5 kms. radius may not be enforceable in its absolute terms. In fact, the condition as noticed in the judgment of the Division Bench in the case of Gramvikas Shikshan Prasarak Mandal (supra) itself provides relaxation in certain cases. This having been stated as mere guideline to be followed by the State administration, it further provides enough leverage for the authorities to exercise their discretion while enforcing the condition of 5 kms. depending on the facts of a given case. It is expected of the authorities to evaluate every application in accordance with the Secondary Code, policy and the constitutional mandate. In order to truly achieve the constitutional mandate, the State Government has to apply this condition justly, fairly and liberally but with due caution. It will be for the authorities concerned to determine depending upon the population of the area and need of the students community to provide access to basic education while at the same time, discouraging concentration of schools in the same area avoiding unhealthy competition. The purpose of imposition of condition of 5 kms. radius cannot be said to be so sacrosanct to the extent that it will override larger public interest where the authorities feel the need of granting permission for a new school. There it can hardly be treated as an impediment for successful implementation and enforcement of the constitutional obligation placed upon the State to ensure free primary and secondary education. We have noticed with some emphasis that the condition of not permitting a new school within the radius of 5 kms. of existing school itself has provided for relaxation. That

relaxation has to be construed liberally to achieve the greater object of imparting education as constitutional obligation of the State and a fundamental right of the students. This condition in stricto sensu cannot be construed as an absolute mandate without any exception. The performance of the constitutional and fundamental duty by the State would have to be placed at a much higher pedestal than the policy of the State which has statutory backing. In view of the above analysis, though no specific question has been formulated in the order of reference, we will prefer to state our conclusion as follows:

i) Condition No.4 (relating to restriction of grant of permission for opening a new school within 5 kms. of an existing school) is not mandatory in absolute terms as it has an inbuilt element of relaxation. This condition as of now exists as a guideline and does not have any statutory backing. The competent authority while evaluating an application for grant of permission shall have to decide it on the facts of each case, keeping in view the population, need and strength of students and while avoiding unnecessary concentration of schools in an area discouraging unhealthy competition but ensuring implementation of its constitutional obligation to provide education and recognizing rights of children to free and compulsory elementary education.

ii) We are of the considered view that there is no patent legal conflict between the two Division Bench Judgments of this court as they do not in any terms lay down a binding precedent and can be read harmoniously with reference to the facts of each case.”

8. The said condition of distance, as is stated, has not to be construed with mathematical precision. Be that as it may, according to Respondent No.6, the distance between the plot where Respondent No.6 – school was situated and the new plot is less than 5 kms. Now, the

petitioner has started construction of school building at new place at Brahmanpuri. However, as yet the permission is not granted to transfer the school to the new place. According to the petitioner, the building is hardly 200 mtrs. away from the existing building of the petitioner at Brahmanpuri. Be that as it may, transfer of the petitioner – school is not the subject matter in the present writ petition. It is for the authority to consider the application.

9. Considering the fact that the procedure as is laid down in the relevant Government Resolution has been followed, the report has been called for and based on the report, the permission has been granted, we are not inclined to interfere in the matter. Clause 2(vi) gives powers to the authority to take further course of action if the school does not comply with the conditions of transfer and if Respondent no.6 fails to comply with any terms and conditions of transfer. The authorities are entitled to take further course of action. Writ Petition is disposed of. No costs.

(R.G. AVACHAT, J.)

(S.V. GANGAPURWALA, J.)

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