

((1))

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

BENCH AT AURANGABAD

WRIT PETITION NO.256 OF 2013

- 1) Bhimashankar Shikshan Prasarak Mandal,
Taka, Tq. Ausa, District Latur,
through its President
- 2) Bhimashankar Vidhyalay, Taka,
through its Headmaster ... PETITIONERS

VERSUS

1. The State of Maharashtra,
through Secretary,
School Education Department,
Maharashtra State,
Mantralaya, Mumbai
2. The Zilla Parishad, Latur,
through its Chief Executive Officer
3. The Education Officer (Secondary),
Zilla Parishad, Latur.
4. The Zilla Parishad Primary School
Taka, Tq. Ausa, District Latur ... RESPONDENTS

.....
Miss Sheetal V. Salunke, Advocate holding for
Shri V.D. Salunke, Advocate for petitioners
Shri R.V. Dasalkar, A.G.P. for respondent No.1.
Shri V.B. Jadhav, Advocate holding for
Shri V.D. Hon, Advocate for respondents No.2 to 4
Shri P.D. Bachate, Advocate appointed as amicus curiae
to assist the Court

.....

((2))

CORAM: T.V. NALAWADE AND
 SUNIL K. KOTWAL, JJ.

DATED : 16th February, 2018

O R D E R (PER SUNIL K. KOTWAL, J.) :

1. The petitioner No.1 Bhimashankar Shikshan Prasarak Mandal, a registered Trust and Society as well as petitioner No.2 Bhimashankar School have filed this petition under Article 226 of the Constitution of India for issuance of a writ of mandamus for directions to respondents No.1 to 3 to close down 5th Standard classes started by respondent No.4 Zilla Parishad Primary School, Taka as well as to quash the resolution dated 5.7.2012, passed by the respondent No.2 Zilla Parishad, Latur to start 5th to 7th Standard classes at respondent No.4 Zilla Parishad Primary School, Taka.

2. Contention of the petitioners is that, by issuing Government Resolution dated 10.8.1977, the Government had resolved that the secondary schools will be permitted to have 5th to 7th Standards from 1977-78 onwards and wherever such schools are permitted to have these Standards, the Zilla Parishad or the Nagar Parishad will close down these divisions from their primary schools with exception where the strength of the students is quite large. Contention of the petitioners is that, at village Taka, Taluka Ausa, since beginning, there is Zilla Parishad

Primary School from 1st to 7th Standards. From the year 1977, the Government also granted permission to the petitioners to run 5th to 7th Standard Primary School in the same village. Thereafter, the respondent No.4 closed down 5th to 7th Standard classes from the year 1998 in their school. In the year 1992, Government granted permission to run Savitribai Phule Kanya Shala in the same village having 5th to 10th Standard classes. The population of this village is about 3500. However, on 5.7.2012, the Zilla Parishad passed resolution and decided to reopen 5th Standard classes in that school. Accordingly, in July 2012, respondent No.4 started 5th Standard classes. According to petitioners, this act of respondent No.4 has created unhealthy competition in between the petitioners and respondent No.4 school and the strength of students of 5th Standard classes in the petitioners school has come down. According to petitioners, in view of above referred Government Resolution, the decision of the Zilla Parishad to start 5th Standard classes in Zilla Parishad school is illegal and, therefore, the petitioners are constrained to file this petition for issuance of a writ of mandamus for directions to close down 5th Standard classes started by respondent No.4 school.

3. Miss Salunke, learned counsel for the petitioners has drawn our attention towards above referred Government

Resolution of the year 1977 as well as ratio of **Ranojirao Shikshan Sanstha, Mhasave Vs. State of Maharashtra & others**, reported in **[2005(4) Bom.C.R. 475]**, wherein this Court directed the Zilla Parishad to close down the 5th Standard classes in view of Government Resolution dated 10.8.1977.

4. Learned A.G.P. for the State placed reliance on Government Resolution dated 10.8.1977. However, he submitted to the orders of the Court.

5. Mr. Bachate, learned counsel who is appointed as amicus-curiae by this Court, has drawn our attention towards amended Article 21-A of the Constitution of India as well as towards Sections 3 and 6 of the Right of Children to Free and Compulsory Education Act, 2009 and submitted that, in view of this changed legal position of law, the above referred Government Resolution dated 10.8.1977 is contrary to the fundamental right and right given under the Statute to citizens and, therefore, it cannot be used. He has also drawn our attention to the case of **State of Tamil Nadu & ors. Vs. K. Shyam Sunder & ors.** reported in **[(2011) 8 SCC 737]**, wherein the Apex Court ruled that, right of a child should not be restricted only to free and compulsory education, but should be extended to quality education without any discrimination on the ground of child's economic, social and cultural background.

6. We have gone through the Government Resolution dated 10.8.1977, where, in clause (3), it has been laid down that the secondary schools will be permitted to have 5th to 7th Standards from 1977-78 onwards and wherever such schools are permitted to have these standards, the Zilla Parishads or Nagar Parishads will close down these divisions from their primary schools with exception where the strength of students is quite large. However, it cannot be ignored that, by the Constitution 86th Amendment Act, 2002, with effect from 1.4.2002, Article 21-A of Constitution of India is amended, which mandates that, State shall provide free and compulsory education to all children of age of 6 to 14 years in such a manner as the State by law determine. The Right of Children to Free and Compulsory Education is provided as part of fundamental rights under Article 21-A of the Constitution of India.

7. Under Section 3(1) of the Right of Children to Free and Compulsory Education Act, 2009, every child of the age between 6 to 14 years including a child referred to in clauses (d) and (e) of Section 2, shall have the right to free and compulsory education in his neighbourhood school till completion of his or her elementary education. Under Section 2(f) of this Act, "elementary education" means the education from 1st to 8th Standard. The Right of Children to Free and Compulsory

Education Act, 2009, Section 6 provides that, "for carrying out the provisions of this Act, the appropriate Government and the local authority shall establish, within such area or limits of neighbourhood as may be prescribed a school where it is not so established, within a period of three years from the commencement of this Act. Under Section 9 of this Act, it is the duty of every local authority to provide free and compulsory elementary education to every child and to ensure availability of a neighbourhood school as specified in Section 6 and the local authority shall ensure that the child belonging to weaker section and the child belonging to disadvantage group are not discriminated against and prevented from pursuing and completing elementary education on any grounds.

8. In the case at hand, as pointed out by learned counsel for respondents No.2 to 4, on the basis of representation dated 16.6.2012, submitted by villagers i.e. parents of the students, and the resolution dated 6.5.2012, passed by the Gram Sabha, Taka in the Gram Sabha meeting, the Committee of Zilla Parishad has considered the necessity of reopening those classes for the students of the small village Taka. These students were already taking education in 1st to 4th Standard in the same Zilla Parishad school and they wish to continue their further elementary education in the same school. Therefore, the

constitutional right awarded under Article 21-A of the Constitution of India as well as Right of free education at least up to elementary standard, provided under the Right of Children to Free and Compulsory Education Act, 2009 cannot be curtailed by the Government. Government Resolution dated 10.8.1977 cannot be used now and on the contrary, it has become the duty of respondents to take steps in accordance with Article 21-A of the Constitution of India and aforesaid Act of 2009.

9. In this changed position of law, the respondent No.2 Zilla Parishad is certainly justified while ignoring the Government Resolution dated 10.8.1977, which is against the fundamental right and also the Statute. Policy of the Government cannot be against the constitutional right provided under Article 21-A of the Constitution of India and also the Act made to enforce such right. Therefore, we do not find any illegality in the order of respondent No.2 while granting permission to the respondent No.4 to start 5th to 8th Standards for providing free elementary education to the nearby students in the said village. In view of this changed position of law, the ratio of "Ranojirao Shikshan Sanstha Mhasave Vs. State" (cited supra) is not applicable in the case at hand.

10. A bare glance at Section 9 of the Right of Children to

Free and Compulsory Education Act, 2009 (hereinafter referred to as the "Act of 2009") indicates that the responsibility of providing free compulsory elementary education to every child is cast on every Local Authority. Even Section 45 (6-C) of the Maharashtra Village Panchayats Act provides that every Panchayat shall supervise primary school situated within the area of its jurisdiction. Thus, the legislature has taken care of the primary school education even at Grampanchayat level. Article 45 of the Constitution of India has taken care of education of all children in India until they complete the age of 6 years.

11. The most important aspect is that, a conjoint reading of Section 12 and Section 2 (n) of the Act of 2009 indicates that the children admitted in the Zilla Parishad or other Government aided school can only get free elementary education in view of Section 12 (1) (a) (b) of this Act. However, if Section 12 (1) (c) is read together with Section 12 (2), it make clear that only 25% of the students studying in private school, who belong to weaker section and dis-advantaged group get free elementary education, as the reimbursement is provided only to the extent of those 25% students of the strength of that class. If all Zilla Parishas Classes of 5th to 7th Standards are closed as per the Government Resolution of 1977, the students who belong to dis-advantaged group but who cannot be accommodated within the quota of 25%

for which the facility of reimbursement is available under the Act of 2009, would be deprived of the free education, which is the object of the Act of 2009. In other words, from those remaining 75% students in that class, the school would be at liberty to recover the fees, though out of them many may belong to weaker section and dis-advantaged group. Further, for giving this benefit there cannot discrimination between poor and affordable class.

12. As per the contention of the petitioners, due to opening of 5th Standard Class in the village Taka, the strength of the students of that class in private school has come down. This indicates that the quality of education rendered by Zilla Parishad School is much better than those unaided private schools, which attracted the children of the villagers towards Zilla Parishad school, where free elementary education is provided to all students. In the circumstances, by closure of 5th to 7th Standards in Zilla Parishad Schools, the aim and object of the Act of 2009 to provide free and compulsory education to the children, would be frustrated.

13. It is unfortunate that, private educational institutions are flourishing and the institutions of local body, which need to remain in existence, are being closed down. For the

circumstance like low strength in schools of local bodies, only those local bodies can be blamed. In most of the cases, such situation is created due to want of proper administration/supervision. In most of the cases, there is no discipline and no devotion in both teaching and non-teaching staff. So, the State is directly and indirectly responsible for such situation. In present economics, poor cannot afford to send their children to private schools.

14. In India, 'education' was never treated as trade or business. In landmark case of **T.M.A. Pai Foundation & others Vs. State of Karnataka**, the Bench of 11 Judges of Supreme Court has reiterated that 'Education' can be called an occupation and not trade or business where profit is motive.

15. In many cases like present one, the private institutions argue their case on the basis of legitimate expectation principle. When fundamental right is involved, such argument is not tenable.

16. The aforesaid discussion shows that, schools of 'State' need to be created for discharging constitutional duty and the existing schools imparting elementary education cannot be closed. The standards of these schools need to be improved to see that they are able to compete with private institutions. We

hold that, the petition is devoid of merits and so, it is liable to be dismissed. Hence, we pass the following order:-

ORDER

- (i) Writ Petition is dismissed.
- (ii) No order as to costs.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

fmp/