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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.3.2019

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.7627 of 2019

C.P.Sivakumar
President of Parent Teacher Association &
Kedar Panchayat President
Old Bazaar Street
Kedar - 605 402
Villupuram District

.. Petitioner

Vs.

1.The State of Tamil Nadu
Rep. by its Secretary to Government
Department of Education
Fort St. George
Chennai - 600 009

2.The Director of School Education
Office of the Directorate of School Education
College Road
Nungambakkam
Chennai - 600 006

3.The Chief Educational Officer
Master Plan Complex
Villupuram - 605 602
Villupuram District

.. Respondents

PRAYER: Writ petition filed under Article 226 of the Constitution of India, for a Writ of Mandamus directing the respondents herein to upgrade the Government Girls High School situated in Kedar Village in Villupuram Taluk, Villupuram District as per the representation made by the petitioner dated 2.1.2015.

For Petitioner : Ms.R.Hemalatha

For Respondents : Mr.K.Karthikeyan, Govt. Advocate
for R1 to R3



O R D E R
(Order of the court was made by S.MANIKUMAR, J.)

Public interest litigation has been filed for a writ of mandamus, directing the respondents herein to upgrade the Government Girls High School situated in Kedar Village in Villupuram Taluk, Villupuram District as per representation made by the petitioner dated 2.1.2015.

2. Short facts leading to the filing of the writ petition are that in Kedar, Villupuram Taluk, Villupuram, a Government Girls High School is functioning. On 2.1.2015, public of Kedar collected and contributed a sum of Rs.2,00,000/- for upgradation of the High School to that of Higher Secondary School. Head Master of the school has submitted an application on 2.4.2018, for upgradation of the school.

3. Petitioner has contended that their village is a most backward village, and the female children are going to the school, in the neighbourhood area. Within the radius 10 Kms there is no Girls school. Female children, reach the school daily by cycles, which is very difficult for them. Even buses running in the village, are less and they do not satisfy the need of the female school going children.

4. Petitioner has submitted that in the present school, more than 477 students are studying. School building is wholly owned by the State Government. Present infrastructure could accommodate, more than 800 students.

5. Petitioner has contended that the present school should be upgraded as a Higher Secondary School, for the reason that, there is no other school, within the radius of 10 Kms. If the present school is upgraded and 11th and 12th standards are imparted, condition of the village school going children, would be improved, in a much better way, and the female school going children, need not go to faraway, for higher education.

6. It is the further contention of the petitioner that due to non up-gradation of the present school, their study is restricted upto 10th standard only. If the present government school is upgraded upto 12th standard, then there is every possibility of more students joining in 11th and 12th standards. During the academic year 2015-2016, the school has achieved 100% result.

7. Petitioner has contended that during the academic year 2016-2017, good number of girls were studying. In the said school 1.5 Acres of land is there, and the same can be utilised



for ground and playing materials are worth several lakhs. Petitioner has further contended that the Chief Educational Officer, Villupuram District/namely, the third respondent, in his proceedings in Na. Ka. No.1787/A2/2018 dated ..3.2018 has sent a letter to all the nearby schools to elicit their opinion from them for upgradation of the school, within 28.3.2018.

8. Based on the avements, Ms.K.Hemalatha, learned counsel for the petitioner sought for the relief, as prayed for. In support of her contention, she relied on a decision of a Hon'ble Division Bench of this court in W.P. No.14632 of 2017 dated 15.12.2017 [A.Perumal vs. State of Tamil Nadu and two others], wherein at Paragraph Nos.4 to 6, the Hon'ble Division Bench held as follows:

4. Firstly, the Government Order, which was stated to have laid down the guidelines was issued far back in the year 1997. The scheme and the pattern of education and the aspirations of the students has changed in these 20 years manifold. Therefore, the Government should be proactive in the matter, and no archaic Rules and Regulations shall be adhered to, in rejecting the request for upgradation of the School made by the Villagers, especially, when they have voluntarily come forward to contribute Rs.2,00,000/- in the year 2009, by depositing the same in the Government account. We also feel that strict interpretation cannot be given for the distance rules between two schools.

5. Secondly, with regard to accommodation and infrastructural facilities, it is the Government, which has to provide accommodation and infrastructural facilities, and that cannot be cited as reason for not according upgradation of the High School into Higher Secondary School, in the petitioner's Village. If adequate infrastructural facilities are provided, with modern facilities, automatically, the strength of the students will also increase. Therefore, the Government should not approach the issue merely based on 'Number Game', but should have far reaching thought process in the matter to provide good quality education. Therefore, we do not agree with the stand taken by the third respondent in the counter affidavit, for rejecting the request for upgradation of High School situated in the petitioner's Village.

6. With the above observations, we direct the respondents to accept the contribution given by the public, viz., a sum of Rs.2,00,000/- which



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remittance has been accepted in the counter affidavit, and pass appropriate orders for release of additional funds and ensure that the School is upgraded into Higher Secondary School with effect from the academic session 2018 onwards. It goes without saying that, necessary infrastructural facilities, such as provisions of class room, allotment of teachers, shall also be done well in advance.

9. Heard Ms.R.Hemalath, learned counsel for the petitioner and Mr.K.Karthikeyan, learned Government Advocate, appearing for respondents 1 to 3.

10. Judicial notice can be taken that in the State of Tamil Nadu, government schools are functioning on the basis of executive instructions issued under Article 162 of the Constitution of India. In respect of Private schools, there is an Act, namely, Tamil Nadu Recognised Private Schools Regulation Act, 1973 and rules have been framed. As per section 3 of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973, the government may regulate the different stages of education and courses of instruction in private schools. As per Section 5 of the said Act, the educational agency of every private school proposed to be established on or after the date of the commencement of this Act shall make an application to the competent authority for permission to establish such school by the 30th September of the year preceding the year of opening of the school. The said section reads thus:

"5. The educational agency of every private school proposed to be established on or after the date of the commencement of this Act shall make an application to the competent authority for permission to establish such school by the 30th September of the year preceding the year of opening of the school.

(2) Every such application shall:-

(a) be in the prescribed form:

(b) be accompanied by such fee as may be prescribed and

(c) contain the following particulars, namely;

(i) the name of the private school, its locality, the name and address of the educational agency;

(ii) the need for the private school in the locality;

(iii) the course for which such private school proposes to prepare, train or guide its pupils for appearing at any examination conducted, by or under the authority of the Government;

(iii-a) the extent of the playground available to pupils and the adequacy of the playground with



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reference to the strength of the pupils in the school

(iv) the amenities available to pupils and teachers;

(v) the equipment, laboratory, library and other facilities for instruction;

(vi) the sources of income to ensure the financial stability of the private school;

(vii) the situation and the description of the buildings in which such private school is proposed to be established; and (viii) such other particulars as may be prescribed;

(3) (a) The Educational Agency of every private Higher Secondary School proposed to introduce new groups or change of groups or courses shall make an application to the competent authority before the commencement of the academic year of introduction.

(b) Every such application shall

i. be in the prescribed form

ii. be accompanied by such fee as may be prescribed in the Rules.

11. Sections 5-A to 11-A of the said Act, relevant for the purpose as to how permission is granted, are extracted hereunder:

5-A. (1) The educational agency of every higher secondary school which is a private school and in existence on the date of publication of the Tamil Nadu Recognised Private Schools (Regulation) Amendment Act, 1987, in the Tamil Nadu Government Gazette, shall, before the expiry of six months from that date, make an application to the competent authority for permission to continue to run such school.

(2) Every such application shall be in the prescribed form;

(a) be accompanied by such fee, as may be prescribed; and

(b) contain the following particulars, namely:-

(i) the name of the higher secondary school, and the name and address of the educational agency;

(ii) the need for the continuance of such higher Secondary school in the locality;

(iii) the course for which such higher secondary school prepares, trains or guides its pupils for appearing at any examination conducted by or under the authority of the Government;

(iv) the extent of the playground available to pupils and the adequacy of the playground with reference to the strength of the pupils in the school;

(v) the amenities available to pupils and teachers;



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(vi) the equipment, Laboratory, library and other facilities for instruction;

(vii) the situation and the description of the buildings in which such higher secondary school is being run; and

(viii) such other particulars as may be prescribed.

6. On receipt of an application under sub section (1) of section 5 or sub-section (1) of section 5-a, as the case may be, the competent authority;

(a) may, after considering the particulars contained in such application, grant or refuse to grant the permission; and

(b) shall communicate its decision giving reasons therefor to the applicant within a period of four months from the date of such receipt in complete shape by the competent authority;

provided that the permission shall not be refused under the section unless the applicant has been given an opportunity of making the representations;

7. Deleted

8. (1) (a) whenever there is any change in the constitution of the educational agency that agency shall apply to the competent authority for approval of such change.

b. Whenever the management of any private school is proposed to be transferred, the educational agency and the person representing it, to whom the management is proposed to be transferred may, before such transfer, apply jointly to the competent authority for approval of the transfer;

c. On any transfer of the management of private school without approval having been obtained for such transfer under clause (b), the transferee shall, if he desires to run it as such, without altering its status and adversely affecting the service conditions of the staff employed in it, apply to the competent authority within three months of the date of the transfer, for approval of the transfer.

d. An application under clause (a), clause (b), or clause (c) shall be in such form and contain such particulars as may be prescribed.

(2) On receipt of an application under subsection

(1), the competent authority shall--;

(a) if it is satisfied after making such inquiry as it deems fit, that the educational agency



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will continue to maintain and manage or, as the case may be, that the transferee will maintain and manage, the private school in accordance with the provisions of this Act and the rules made there under, approve the change or, as the case may be the transfer, subject to such conditions as it may impose; and

(b) Communicate its decision to the applicant within a period of three months from the date of such receipt.

9. Any minority whether based on religion or language may establish and administer any private school without permission under section 4.

10. Every minority school established and administered after the date of the commencement of this Act shall send to the competent authority a statement containing the particulars specified in clause sub section (2) of section 5 within such time as may be prescribed.

10-A. The educational agency of every higher secondary school which is a minority school in existence immediately before the date of publication of the Tamil Nadu Recognised Private Schools (Regulation) Amendment Act, 1987, in the Tamil Nadu Government Gazette shall send to the competent authority a statement containing the particulars specified in the clause (c) of sub-section (2) of section 5 within such period as may be prescribed.

Chapter III

Recognition of Private School

11. (1) on receipt of an application by:-

(a) any private school in respect of which permission has been granted under section 6 or

(b) any minority school; which should reach the competent authority in a complete shape before the 31st December of the year in which the school was established, the competent authority may, after satisfying itself, that proper arrangements have been made for the maintenance of academic standard in the school, that the provisions of this Act are complied with and that the prescribed conditions have been satisfied grant a certificate, recognizing the private school for the purposes of this Act.

(2) The Certificate under sub-section (1) shall be granted within such period as may be prescribed.

11-A. The competent authority shall, before passing orders on an application for recognition under section 11, also take into consideration:-

(a) The adequacy of schools already existing in the locality;



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(b) the need for the private school in the locality;

(c) the number of pupils studying in such school;

(d) the extent of the playground available to pupils and the adequacy of the playground with reference to the strength of the pupils in the school;

(e) the amenities available to pupils and teachers;

(f) the equipment, laboratory, library and other facilities for instruction and training and

(g) such other factors as may be prescribed.

12. As regards the conditions of service in education department, rules are framed under Article 309 of the Constitution of India. Teaching staff are governed by Elementary Education Subordinate Service Rules, High school staff are governed School Education Subordinate Service Rules, Head masters, District Educational officers, Chief Educational officers and Directors are governed by Tamil Nadu Educational Service Rules. Tamil Nadu Higher Secondary Educational Service Rules (Higher secondary schools, including Headmasters) and Non-teaching staff are governed by Tamil Nadu Ministerial Service Rules, New Act 16. That apart, there are code of regulations for Nursery and Primary Schools, Matriculation Schools, Anglo Indian Schools, Grand in Aid Code 1956 (Inspection) Code, Tamil Nadu Education Rules, 1892. Insofar as discipline and conduct are considered, they are governed by the Tamil Nadu Conduct Rules, 1973. Thus it could be seen that when private schools, matriculation schools, Anglo Indian Schools etc. are governed by an Act, namely Tamil Nadu Recognised Private School Act and the Rules framed thereunder and Code of Regulations, Government Schools are governed by executive orders, issued periodically, under Article 162 of the Constitution of India.

13. Article 162 of the Constitution of India, dealing with extent of executive power of the State, reads thus:-

"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof Council of Ministers.

14. G.O.Ms.No.235, School Education Department, dated



24.05.1997, which governs the issue relating to upgradation of schools, is extracted,

Government Of Tamil Nadu

ABSTRACT

EDUCATION - SCHOOL EDUCATION - Upgradation of High/Higher Secondary Schools - Permanent Criteria and norms for Upgradation of High/Higher Secondary Schools - Orders - Issued.

SCHOOL EDUCATION DEPARTMENT

G.O.Ms.No. 235
5-97.

Dated 24-

Read:

1. G.O.Ms.No. 981 Education, Science and Technology Department, Dated 21-5-82.
2. Government letter No.31480/E1/83-5 Education, Science Technology department, Dated 9-5-83.
3. Government Letter No. 150722/E1/85-2 Education, Dated 15-7-85.
4. Government Letter No. 706799/E1/89-7 Education, Dated 13-8-86.
5. Government Letter No. 7017/E1/89-2 Education, dated 19-4-89.
6. From the Director of School Education letter Rc.No. 11215/W13/96, dated 31-1-97.

ORDER:

In Government order first read above as subsequently amended in the Government letter second to fifth read above, Government have constituted a High Level Committee to scrutinize the various proposals received for the Upgradation of High/Higher Secondary Schools and to make recommendations to Government for Upgradation of High/Higher Secondary Schools.

2. While constituting the High Level Committee, the Government have permitted the committee to evolve the criteria and Higher Secondary Schools. Accordingly, the committee evolved criteria and norms every year as and when they met but they are not of permanent nature. Government therefore consider it essential, to formulate uniform and permanent type of criteria/norms for upgrading of High and Higher Secondary Schools. Accordingly, the Director of School Education in his letter sixth read above has submitted the permanent type of criteria and norms for Upgradation of High and Higher Secondary Schools, based on the present requirements to cater to the educational needs of the area, high and higher secondary schools and requested



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approval of the same.

3. The Government, after careful examination, direct that the criteria and norms as detailed in the annexure I and II to this order be followed for upgradation of Government/Panchayat Union/Corporation/Municipality Middle schools into High Schools and for upgradation of High schools into Higher Secondary Schools from 1997 acadmic year.

4. This order issued with the concurrence of the Finance Department vide its U.O.No.2390/FS/P/97 dated 16-5-97.

// BY ORDER OF THE GOVERNOR //

M.A.GOWRISHANKAR,
SECRETARY TO GOVERNMENT,

To

The Director of School Education, Chennai - 6.
The Joint Secretary to Government (School Education)
School Education Department, Chennai-9.

Copy to:

The Finance Department, Chennai-9.
The Adi Dravidar and Tribal Welfare Department,
Chennai-9.
The Municipal Administration and Water Supply
Department, Chennai-9.
The Senior Personal Assistant to Minister(Education),
Chennai-9.
The School Education Department(HS), Chennai.

ANNEXURE - I.

NORMS FOR UPGRADATION OF GOVERNMENT/PANCHAYAT UNION/
CORPORATION/MUNICIPALITY MIDDLE SCHOOLS INTO HIGH
SCHOOLS EVERY YEAR.

The number of schools to be selected for the year may be fixed by the Government depending upon the budget provision.

The schools should possess five acres of play area for Boys High School and Co-education High School and three acres of play area for Girls High School.

The schools should have remitted the Public contribution fixed by Government from time to time fully.

Priority to be given to the schools located in hill areas.

Priority to be given to the schools located in area where the population of Adidravidas is high.

The proposals for upgradation of Girls schools may be given due consideration.

The strength in Standard VIII should not be less than 50 pupils-relaxation in strength may be



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considered in the case of Adi-dravida schools.

Priority to be given to the schools where the feeder schools and the High Schools already functioning in that area do not meet the demand of the population of school age children of that area.

The school should have adequate buildings, accommodation and other infrastructure facilities.

The minimum distance between one high school and another high school for the purpose of upgradation shall be 5 kms.

ANNEXURE - II

CRITERIA AND NORMS FOR UPGRADATION OF HIGHER SECONDARY SCHOOLS.

The number of schools to be selected for the year may be fixed by the Government depending upon the budget provision of the respective year.

The schools, other than in urban areas shall have five acres of land and Schools in urban areas shall have three acres of land inclusive of play ground area.

The schools should have adequate buildings, accommodation and other infrastructure facilities.

The strength in Standard X of the proposed school should not be less than 100. However, this may relaxed in respect of Adi-dravida schools.

First priority shall be given to the schools which have remitted the public contribution fixed by the Government from time to time in full.

Priority shall be given for the opening of Girls institutions.

The minimum distance between one higher secondary school and higher secondary school for purpose of upgradation shall be 8 kms.

Priority shall be given to area where existing Higher Secondary school do not meet the demand of the local needs.

Priority shall be given to the schools in Hill area.

Priority to be given to the schools located in area where population of adi-dravida is high.

Opening of Girls Higher Secondary Schools shall be considered only by upgrading existing Girls High School and not by separation from existing co-education Higher Secondary Schools.

15. A Constitution Bench of the Hon'ble Supreme Court in Lalit Mohan Deb v. Union of India reported in (1973) 3 SCC 862 : 1973 SCC (L&S) 272, at Paragraph 9, held as follows:

"9. It is true that there are no statutory rules regulating the selection of assistants to the



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selection grade. But the absence of such rules is no bar to the administration giving instructions regarding promotion to the higher grade as long as such instructions are not inconsistent with any rule on the subject."

16. Though the said decision is rendered with reference to Article 309 of the Constitution of India, there is no reason, as to why, the same should be applied to executive instructions issued by the Government, under Article 162 of the Constitution of India.

17. In *Hochtief Gammon v. State of Orissa* [(1975) 2 SCC 649 : 1975 SCC (L&S) 362 : AIR 1975 SC 2226], the Hon'ble Mr. Justice A. Alagiriswami, writing the judgment for a three-Judge Bench of this Court, explained the limitation on the powers of the executive in the following words,

"13. The executive have to reach their decisions by taking into account relevant considerations. They should not refuse to consider relevant matter nor should they take into account wholly irrelevant or extraneous consideration. They should not misdirect themselves on a point of law. Only such a decision will be lawful. The courts have power to see that the executive acts lawfully."

18. In *Asif Hameed v. State of Jammu and Kashmir* reported in 1989 Supp. (2) SCC 364, on the aspect of separation of powers, the Hon'ble Supreme Court held as follows:

"17. Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the



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aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint.

18. Frankfurter, J. of the U.S. Supreme Court dissenting in the controversial expatriation case of *Trop v. Dulles* [356 US 86] observed as under:

"All power is, in Madison's phrase, "of an encroaching nature". Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint....

Rigorous observance of the difference between limits of power and wise exercise of power – between questions of authority and questions of prudence – requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow want of wisdom to prevail to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the executive branch do."

19. When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative



action, the court is not an Appellate Authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers.

23. In the State of Himachal Pradesh v. A Parent of a Student of Medical College, Simla [(1985) 3 SCC 169] this Court held as under: (SCC pp. 174-75, para 4)

"... The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging, for otherwise it is difficult to see why, after the clear and categorical statement by the Chief Secretary on behalf of the State Government that the Government will introduce legislation if found necessary and so advised, the Division Bench should have proceeded to again give the same direction. This the Division Bench was clearly not entitled to do. It is entirely a matter for the executive branch of the government to decide whether or not to introduce any particular legislation. Of course, any member of the legislature can also introduce legislation but the court certainly cannot mandate the executive or any member of the legislature to initiate legislation, howsoever necessary or desirable the court may consider it to be. That is not a matter which is within the sphere of the functions and duties allocated to the judiciary under the Constitution.... But at the same time the court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law-making activities of the executive and the legislature."

24. The legislature of Jammu & Kashmir having not made any law pertaining to medical education the field is exclusively to be operated by the executive under Article 162 of the Constitution of India read with Section 5 of Jammu & Kashmir Constitution. When the Constitution gives power to the executive government to lay down policy and procedure for admission to medical colleges in the state then the High Court has no authority to divest the executive of that power. The State Government in its executive power, in the



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absence of any law on the subject, is the competent authority to prescribe method and procedure for admission to the medical colleges by executive instructions but the High Court transgressed its self-imposed limits in issuing the aforesaid directions for constituting statutory authority. We would make it clear that the procedure for selection laid down by the executive as well as the selection is always open to judicial review on the ground of unreasonableness or on any other constitutional or legal infirmity."

19. In *Secretary, A.P.D. Jain Pathshala v. Shivaji Bhagwat* More reported in 2011 (13) SCC 99, the Hon'ble Supreme Court, at Paragraph 25, held thus,

"25. Article 162 of the Constitution, no doubt, provides that subject to the provisions of the Constitution, the executive power of a State shall extend to the matters upon which the legislature of the State has competence to legislate and are not confined to matters over which legislation has been already passed. It is also well settled that so long as the State Government does not go against the provisions of the Constitution or any law, the width and amplitude of its executive power under Article 162 cannot be circumscribed; and if there is no enactment covering a particular aspect, the Government could carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf."

20. In *Accountant General, State of Madhya Pradesh v. S.K.Dubey* reported in 2012 (4) SCC 578, the Hon'ble Supreme Court, at Paragraphs 30 and 31, held as follows:

"30. The moot question that falls for determination in this appeal is: whether in the absence of any express rule in the State Rules, was it open to the State Government of Madhya Pradesh to have provided by way of an executive Order dated 5-4-2002 that the service rendered by the respondent as President of the State Commission would be counted as pensionable service? The incidental question is: whether such order is inconsistent with Section 16(2) or the State Rules?

31. Subject to the provisions of the Constitution, the executive power of a State extends to the matters with respect to which the legislature of the State has power to make laws. This is what is provided in Article 162 of the Constitution. In other words, the executive power of the State executive is coextensive with that of the State Legislature.



21. In the light of the dictum of law laid down by the Hon'ble Apex Court, we are bound to consider, as to whether the respondents, while rejecting the request of the petitioner, for upgradation of the school, has taken into consideration, the norms and criteria for upgradation. Government Order No.235, School Education Department, dated 24.05.1997, stipulates certain conditions, which are extracted in the foregoing paragraph.

22. State is empowered to issue executive instructions in the matter of legislative competence. Entry 25 of List III of Seventh Schedule of the Constitution of India, empowers the State to legislate on the subject, "Education". Therefore, the powers of the State Government in issuing executive instructions under Article 162 of the Constitution of India, cannot be questioned nor the executive instructions issued in the matter of upgradation, cannot be indirectly set aside or ignored though may be archive.

23. In the abovesaid Government Order, the Government have fixed norms and criteria for upgradation of High School and Higher Secondary Schools, in an area and the number of schools to be selected in a year, may be fixed, depending upon the budget allocation. Though the learned counsel for the petitioner relied on a decision of this Court in W.P. No.14632 of 2017 dated 15.12.2017 [A.Perumal vs. State of Tamil Nadu and two others], by which, an order of rejection for upgradation has been set aside, on the grounds inter alia that the abovesaid Government Order is archive, in the light of the decisions of the Hon'ble Supreme Court, on the exercise of powers by the State in issuing executive instructions, under Article 162 of the Constitution of India, the same is binding on the department. In the absence of any rules, being framed, we are of the view that though G.O.Ms.No.235, has been issued in the year 1997, the same holds field in the matter of upgradation of a high school into that of higher secondary school and when the said Government Order is in force, then the educational department is bound to consider executive institution, whenever applications for upgradation, are made. If an application for upgradation has to be considered, dehors the executive instructions, such a situation would create vaccum in the matter of upgradation of high school into that of higher secondary school and it may also lead to arbitrariness, in considering the applications by the competent authority.

24. In the light of the above discussion and decisions of the Hon'ble Supreme Court on the competence of the legislature to issue executive instructions of the State, we are not inclined to indirectly set aside the Government Order No.235,



School Education Department, dated 24.05.1997, or not to give effect to the said Government Order. Accordingly, writ petition is dismissed. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

Asr/skm

To

1. The Secretary to Government
The State of Tamil Nadu
Department of Education
Fort St. George
Chennai - 600 009
2. The Director of School Education
Office of the Directorate of School Education
College Road
Nungambakkam
Chennai - 600 006
3. The Chief Educational Officer
Master Plan Complex
Villupuram - 605 602
Villupuram District

+1cc to Mr. R.Hemalatha, Advocate, S.R.No. 29512
+1cc to the Government Pleader, S.R.No. 29807

W.P.No.7627 of 2019

GJ II(CO)
GN(01/08/2019)