
(2016) 09 BOM CK 0123

In the Bombay High Court

Case No : Writ Petition No. 1595 of 2014

Federation of Linguistic and Religious Minority Education
Institutions

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 19-09-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 30
Maharashtra Self-Financed Schools (Establishment and Regulation) Act, 2012 —
Section 3, Section 6, Section 7
Right of Children to Free and Compulsory Education Act, 2009 — Section 1

Citation : (2017) 2 ALLMR 706 : (2017) 3 MhLJ 52

Hon'ble Judges : Dr. Manjula Chellur, CJ. and M.S. Sonak, J.

Bench : Division Bench

**Advocate : Mr. Sidheshwar Biradar i/b. Vitthal Devkhile, Advocate, for the
Petitioners; Mr. Nitin Deshpande Addl. G.P. with Mr. Vishal Thadhani AGP, for the
Respondents**

Final Decision : Dismissed

Judgement

Dr. Manjula Chellur, C.J.—; Heard the learned counsel for the parties.

2. Rule. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

3. The challenge in this petition is to the rejection of the proposals submitted by the petitioner nos. 2 to 12 for commencing a Minority Unaided Primary English School. The communication dated 31 October 2013 (at page 139 of paper book) addressed to one of the petitioners is placed on record. The learned counsel for the petitioners states that same communications have been addressed to the remaining petitioners except the petitioner no. 1. The petitioner no. 1 is a Federation of Linguistic and Religious Minority Education Institutions, which is established to espouse the cause of Religious and Linguistic Minority Education Institutions. The communication dated 31 October 2013 makes reference to the

Government Circular dated 30 September 2013 (Exhibit "G" at page 134 of the paper book), which clarifies that the proposals received in pursuance of the earlier circular dated 28 September 2010 will not be considered or will be rejected, since, the circular dated 28 May 2010 does not survive in view of the provisions of Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the "RTE"), which came into force with effect from 1 April 2009.

4. Mr. Sidheshwar Biradar, the learned counsel for the petitioners by relying upon the decision of the Hon'ble Supreme Court in the case of *Pramati Educational and Cultural Trust (Registered) and Ors. v. Union of India and Ors.* (2014) 8 SCC 1 submitted that the provisions of RTE are inapplicable to Minority Educational Institutions and therefore, the proposals submitted by the petitioners were required to be considered by the State in terms of the Maharashtra Self-financed Schools (Establishment and Regulation) Act, 2012 (hereinafter referred to as the "State Act of 2012") after excluding the provisions of RTE which have been referred to in the State Act of 2012. Mr. Biradar submitted that even the affidavit filed by the State Government in opposition to the present petition makes no reference to the decision in the case of *Pramati Educational and Cultural Trust* (supra), possibly since such affidavit was filed on 2 May 2014 and the decision in the case of *Pramati Educational and Cultural Trust* (supra) was delivered on 6 May 2014. Mr. Biradar submits that the proposals submitted by the petitioners are required to be considered in the light of the law laid down by the Supreme Court in the case of *Pramati Educational and Cultural Trust* (supra).

5. Mr. Nitin Deshpande, the learned Additional Government Pleader however contended that the rejection of the proposals submitted by the petitioners were in accordance with the law as prevalent on 31 October 2013 and therefore there is no illegality in the issuance of impugned communication dated 31 October 2013 or for that matter the circular dated 30 September 2013.

6. In this case, we must clarify, at the outset, that we are concerned only with Minority Educational Institutions, who have been guaranteed protection under Article 30 of the Constitution of India. We may also clarify that the learned counsel for the petitioners has not questioned the applicability of the State Act of 2012, in the matter of consideration of proposals to open Primary Schools, except to the extent such provisions make reference to the provisions of RTE. It is the case of the petitioners that the provisions of RTE do not apply to the Minority Institutions in view of the law laid down by the Supreme Court in the case of *Pramati Educational and Cultural Trust* (supra).

7. In this case, the State by circular dated 28 May 2010 invited proposal for opening of New English Medium Primary School on permanent non-aided basis from the academic year 2010-2011 onwards. In response, the petitioner nos. 2 to 12 who claim to be minority institutions, applied for establishment of New English Medium Primary Schools at the locations indicated. Several other institutions also applied for commencement of English Medium Primary Schools

in pursuance of the circular dated 28 May 2010 and the advertisements issued in pursuance thereof. In all, the State Government received about 7475 proposals.

8. By circular dated 30 September 2013 however the State Government issued directions for non consideration of or rejection of all such proposals received in pursuance of circular dated 28 May 2010, by observing that the circular dated 28 May 2010 and the proposals invited thereby were not consistent with the provisions of RTE, which had already come into force w.e.f. 1 April 2009. As noted earlier, the State Government relying upon such subsequent circular dated 30 September 2013 intimated the petitioner nos. 2 to 12 that their proposals cannot be considered/stand rejected.

9. Although, we find no fault in the circular dated 30 September 2013, in so far as the same applies to non-minority institutions, the position with regard to minority institutions is required to be considered separately. This is because the Constitutional Bench of the Supreme Court in case of *Pramati Educational and Cultural Trust (supra)* has held that the provisions of RTE are inapplicable to minority institutions.

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 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. Union of India and Others* is being misinterpreted and mis-conceived by the Petitioners. I submit that the Hon"ble Supreme Court in the case of *Society for Un-aided Private Schools of Rajasthan v. 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 placed upon the decision in the case of *Society for Unaided Private Schools of Rajasthan v. Union of India and 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 and Anr. (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 and Anr. (supra)* (SCC p.339, para 178):

"178. The above brief summary of the work of the Advisory Committee and the Minorities Subcommittee 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 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 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* and *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."

13. In view of the ruling in case of *Pramati Educational and Cultural Trust* (supra), we are unable to uphold the defence raised by the State Government, relying upon the decision in the case of *Society for Unaided Private Schools of Rajasthan* (supra). Even otherwise, it is quite doubtful whether the said decision would have assisted the defence raised by the State Government, since, in this case, we are concerned with minority institutions commencing unaided English Medium Schools.

14. We are therefore of the opinion that the rejection to the proposals submitted by the petitioner nos. 2 to 12 vide the impugned communications was not proper, particularly since such rejections failed to take into consideration the law as declared by the Supreme Court in case of *Pramati Educational and Cultural Trust* (supra). We therefore hold that the impugned communications, by which the proposal submitted by the petitioner nos. 2 to 12 came to be rejected are

unsustainable and the same are hereby set aside. The respondents are directed to reconsider the proposals submitted by the petitioner nos. 2 to 12 in accordance with the provisions of the State Act of 2012, save and except to the extent the State Act of 2012 makes reference to the provisions of the RTE. The State, whilst considering such proposals shall abide by the law laid down by the Supreme Court in the case of Pramati Educational and Cultural Trust (supra). This exercise shall be completed within a period of four months from today.

15. Rule is made absolute to the aforesaid extent.