

(1980) 07 BOM CK 0006

In the Bombay High Court

Case No : Writ Petition No's. 1772, 1799, 1838, 1885, 1906, 1923, 1925, 1926, 1928, 1996, 1997, 1998, 2005, 2060 to 2065, 2076, 2099, 2100, 2102, 2110 and 2127 of 1980

Paritosh Bhupeshkumar Sheth and Others etc.

APPELLANT

Vs

The Maharashtra State Board of Secondary and Higher
Secondary Education, Pune and Another

RESPONDENT

Date of Decision : 28-07-1980

Acts Referred:

Constitution of India, 1950 — Article 133, 14, 21, 226

General Clauses Act, 1897 — Section 3(31)

Maharashtra Secondary and Higher Secondary Education Boards Act, 1965 — Section 36, 36(1), 38, 42, 43

Maharashtra Secondary and Higher Secondary Education Boards Regulations, 1977 — Regulation 102, 102(3), 102(4), 103, 104

Citation : AIR 1981 Bom 95 : (1981) MhLj 587

Hon'ble Judges : V.S. Deshpande, J; V.A. Mohta, J

Bench : Division Bench

Advocate : M.V. Pranjape, M.P. Vashi, A.V. Bandivadekar, V.T. Walavalkar, J.N. Shah, S.B. Naik, S.R. Chitnis, M.D. Angal, Atul S. Rajadhyaksha, A.M. Dabir, K.N. Paradkar, N.R. Gandhi, D.V. Gangal, B.P. Abhale, N.H. Bhogani, A.G. Pawar, M.B. Katak, Hansaben H. Mehta and C.G. Solshe, for the Appellant; Atul M. Setalvad, R.K. Kulkarni and S.M. Vakharia, for Little and Co., W.S. Devnani, S.C. Deshmukh, A.M. Salik, W.N. Yande, A.C. Agarwal, M.B. Mehre, M.P. Bhatkar and D.P. Hegde, Asst. Government Pleaders, for the Respondent

Judgement

This Judgment has been overruled by : Goa, Daman and Diu Board of Secondary Education Vs. Kumari Hema Laad and Others, AIR 1984 SC 1584 : (1984) 2 SCALE 171 : (1984) 4 SCC 58 : (1985) 1 SCR 430 : (1984) 16 UJ 1108

Deshpande, J.—This group of petitions raises common questions as to the students' rights to (1.) revaluation of their answer papers, and (2) inspection thereof and other documents connected with entries as to their appearing at the examinations, held by the State Board of Secondary and Higher Secondary

Education, hereinafter referred to as "the Board", in or about the month of March, 1980, in accordance with the Maharashtra Secondary and Higher Secondary Education Boards Act, 1965, hereinafter referred to as "the Act", and the Maharashtra Secondary and Higher Secondary Education Boards Regulations, 1977, hereinafter referred to as "the Regulations".

2. Narration of facts of Writ Petition No. 1906 of 1980 will be enough to appreciate the points raised before us. The petitioner appeared for the 12th Standard; Examination in the month of March, 1980 from Ram Narain Ruia College, Bombay, with Science subjects as his optionals. He claims to have had a very brilliant career and had "intended to go for medical course. However, contrary, to expectation of passing the Examination with distinction, and securing 90% marks, he was, to his shock, declared to have merely "passed" on 2nd June, 1980, with only 71.17 per cent marks. He was shown to have secured 80 marks out of 100 in Chemistry, 74 out of 100 in Mathematics and Statistics, 75 out of 100 in Physics and 77 out of 100 in Biology. He does not make any grievance, about his 47 and 68 per cent marks respectively in Hindi and English, He claims to have answered all the questions correctly, admitting of no deductions on any count; and had earlier secured 19 marks out of 20 in practical test of Physics and Biology. He attributes lower percentage of marks to some manipulation, mischief or some mistake.

3. The petitioner's father applied for verification on 3-8-1980, in the three Science, subjects in terms of Regulation No. 104 of the Regulations and paid Rs. 30/- towards the same. Under a cyclostyled reply; "he was informed that no mistake "was found on verification. The petitioner's, father " thereupon asked for inspection of the answer books for verifying if any mischief was played with the petitioner's" papers to frustrate the-contemplated verification. This was denied indicating the same to be impermissible presumably under Regulation 104 (3). The results announced had equally shocked several other examinees and their parents who also ; made identical applications. There was a general feeling of some "foul play" and the suspicion that a, few students in collusion with some "members of the staff had tampered either with seat numbers written on the Answer books or with supple-mentaries, or the marks written on the answer books.

4. Notices before admission were issued to "the Board in a few of the case to verify what "the position is. Mr. C.R. Dalvi learned Advocate of this Court, appeared for the Board at that stage in response thereto and had even brought some answer books , "of the students in compliance with the order of this Court, to impress upon us how elaborate precautions were taken by the Board against possible , errors in the system. An affidavit explaining the procedure was also filed on behalf of the Board in this case at our instance. When, however, one Savkar's Writ Petition No. 1716 of 1980 was taken up for hearing on 23-6-1980, Mr. Dalvi informed this Court that he was declared to have passed, though he was earlier declared to have failed and no mistake was claimed to have been

detected at the time of verification. In the case of Asha Bhaskarraaj Saxena, Writ Petition No. 1838 of 1980 also the petitioner was declared to have secured 60 per cent marks in Mathematics after rule in her petition was granted, though she was earlier declared to have secured only 38 per cent marks and no mistake was detected even when the paper was verified on her application. A former Chairman of the Poona Board was found to have made a startling disclosure in his talk in the "Chakravavyuvh" programme of the Television to the effect that some students were found in the past to have tampered with the seat numbers on the answer papers to the prejudice of the real examinees. Leave to amend the petition was granted to enable the petitioners to plead these facts. Rule was granted making it returnable within a week in view of the obvious urgency. It was agreed that the Board should file an additional affidavit in reply only in one case to meet the points made out after the amendment.

5. On behalf of the Board, the joint Secretary of the Pune Divisional Board has sworn two affidavits. Affidavit in reply dated 10th July, 1980, was filed before the amendment of the petition, while the one dated 17th July, 1980, is after the amendment. It is admitted that when Savkar's answer papers were scrutinised by the deponent on his application to this Court, his papers were discovered to have been tampered with to enable other student to pass off the same as his answer papers. The fact of the ex-Chairman Bhelande's interview at the Television is not disputed. Though the Board could not admit its version as alleged for want of authentic record thereof with it, the fact that some students had succeeded in the past in passing off other student's paper as theirs by tampering with the seat numbers is admitted. The affidavit gives an elaborate account how the secrecy of the question paper is observed and how the performance of the student at the examination hall is supervised, and how the answer papers and supplementary are checked, or tagged or sealed and sent to the examiners and "how steps are taken by the Board to eliminate all possible errors in the process of evaluation of the answer papers by supplying model answers and supervising the examiners" evaluation by the moderators to the extent of 20%. The affidavit also indicates how the Science subject papers are dealt with differently from the non-Science subjects and how the examination of the answer papers in the Science subjects is undertaken under the supervision of the moderators at one centre. Mr. Setalvad placed before us copies of several circulars and orders under which the procedure testified in the affidavit is followed. This, no doubt affords protection to the examinees against possible errors or malpractices so far as it goes.

6. Though at the stage of admission, arguments were concentrated on the right of inspection, and Mr. Paranjape and a few other advocates restricted their petitions to the enforcement of the right of inspection alone, Mr. Apte, Mr. Chopda and others pressed for the right of revaluation though no applications were made seeking such revaluation for want of any provision. It is convenient to dispose of these petitions by a common judgment. We have divided the petitions in two groups. This judgment will cover the cases in which right of inspection

alone is claimed. The common question of the application of principles of natural justice in both the groups of petitions, however, is dealt with in this case only:

7. It will be convenient to take notice of a few undisputed features before dealing with contentions raised.

1. Admittedly some inferior students have succeeded in passing off the answer papers of other brilliant students as their own, in the past, by tampering with number or otherwise, Savkar's case in Writ Petition No. 1716 of 1980, being the latest. Verification process as above contemplated under Regulation 104 (1) has failed to detect such mischief.

2. System evolved does not effectively prevent possible misplacement of the supplementary answer books or being lessened in the course of their passing through several hands.

3. Cyclostyled answers indicating verification of the results, betray casual approach and gross negligence in application of mind which is also demonstrated by the words "if any" in Clause (4) of the reply meant, for verification of supplementary papers and fails to create confidence in the effectiveness of the verification claimed to have" been made.

4. There is no check against possible errors in feeding the computer on which depends the preparation of mark sheets and declaration of the results.

5. Revaluation of 20% of the answer books by the moderators does not adequately ensure against the negligence, casualness and misconduct of the "examiners in examining the remaining 80% of the answer papers.

6. There is no means of verifying if the non-Science, subject papers are evaluated by the examiner himself or by some unauthorised persons at his instance.

8. Mr. Paranjape, Mr. Apte, Mr. Chopda, Mr. Vashi and others, the learned advocates for the various petitioners, contend that last sentence in Clause (1) and entire Clause (3), of Regulation 104 of the Regulations is void on three grounds: firstly, because, the said Clause is violative of the principles of natural justice; secondly, because the clause is in excess of the Regulation-making powers of the Board u/s 36 of the Act and, thirdly, because the same, is highly unreasonable and the Regulation being in the nature of Bye-laws, the same is liable to be struck down on the ground of such unreasonableness.

9. Now, these Regulations are framed by the Board in exercise of the powers conferred by Sub-section (1) of Section 36 of the Act. The section empowers the State Board to make Regulations. Subsection (1) is couched in the widest possible language and empowers the Board to make Regulations "for the purpose of carrying into effect the provisions of this Act". Regulation 102 of the Regulations deals with the publication of results. Clause (1) authorises the Divisional Board to declare the results. Clause (2) empowers the Divisional Board

to amend such results in such manner as shall be in accordance with the Rule and true position in the event of discovery of any error, malpractice, fraud or improper conduct or other matter of whatsoever nature. Such power to amend the result, however, can be exercised before the expiry of six months from the date of the declaration of the results. Clause (3) empowers the Board, on the recommendation of any Standing Committee, to cancel the result of any particular candidate, without any limitation of time, if the same is found to have been affected by any malpractice, fraud or any other improper conduct of the candidate himself. Regulation 103 provides for supply of mark sheets to the students on the payment of certain fees through the heads of the Junior Colleges.

10. Regulation 104 provides for "verification of marks obtained by a candidate in a subject". Clause (1) reads as follows :--

"Any candidate who has appeared at the Higher Secondary Certificate Examination may apply to the Divisional Secretary for verification of marks, in any particular subject. The verification will be restricted to (1) checking whether all the answers have been examined and (2) that there has been no mistake in the totalling of marks for each question in that subject and transferring marks correctly on the first cover page of the answer-book, and (3) whether the supplements attached to the answer-book mentioned by the candidate are intact. No revaluation of the answer-book or supplements shall be done".

Clause (2) deals with the manner, limitation and the fees for such an application for verification. Clause (3) reads as follows:

"No candidate shall claim, or be entitled to, (revaluation of his answers) or disclosure on inspection of the answer-books or other documents as these are treated by the Divisional Board as most confidential".

Clauses (4) and (5) are consequential and it is unnecessary to quote the same for the purpose of the points under consideration.

11. Coming first to the application of the principles of natural justice, the same involves two-fold features. The first prevents decision by any biased and interested mind. It is agreed that this has no application. The second prevents any one being condemned unheard. Mr. Paranjape, and a few other advocates appearing for the petitioners restricted their arguments to its application to the verification process, contending that adverse verification result involves condemnation of the examinees and preventing their participation therein is violative of the principles of natural justice. Mr. Apte, Mr. Chopda and Mr. Vashi, and a few others, in addition to this contend that denial of revaluation to the examinees, dissatisfied with the results, also amounts to violation of the principles of natural justice. Undisputed right to have the answer papers evaluated correctly, according to the learned Advocates, include the right of (1) verification with the participation "if the examinee and (2) right of revaluation. This alone can according to these advocates, eliminate all possible errors and malpractices. According to them, the failure in examination or passing with lesser

marks than expected, affects future career of the examinees and as such involves civil consequences. Reliance is placed mainly on *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, ; *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, and *Regina v. Aston University Senate*, (1969) 2 QB 538.

12. These contentions appear to us to be devoid of substance for more than one reason. To begin with, application of the principles of natural justice is restricted to judicial and quasi-judicial proceedings. With the expanding encroachment of the administration areas in the day-to-day life, the said principles also are extended to administrative actions involving civil consequences. This is what is exhaustively explained by the Supreme Court in the passages from *Maneka Gandhi's* case and *Mohinder Singh's* case (*supra*) relied on before us. Cancellation of *Maneka Gandhi's* passport involved abridgment of her fundamental rights under Art. 21 while the procedure of doing so without any opportunity to have her say, was found to have involved breach of Article 14 of the Constitution of which right to be heard before any administrative act, is held to be an integral part. Abrupt cancellation of poll in the midst of counting to the prejudice of any succeeding candidate without any opportunity to show cause, is held to involve civil consequences in *Mohinder Singh's* case. These two cases and other cases referred to therein, did not involve any questioning of the process of evaluation of answer papers or determination of its being an administrative act or its involving any civil consequences.

13. No case directly involving these points was in fact brought to our notice. Even the *Aston University* case (1969) 2 QB 538 does not extend the principles of natural justice to the assessment of students' academic record by the Board of Examiners. The principles were held to apply to the consideration of extraneous matters, apart from, the failure in the examination, at the subsequent stage. Student's expulsion was struck down for breach of the principles of natural justice to such enquiry at that stage.

14. Secondly, declaration of a student merely to have "passed" at the examination without any distinction and awarding lesser marks than expected, by itself does not involve his condemnation in any manner. Examinations are, no doubt, aimed at judging the calibre of the examinee, which is assumed to have been reflected in his performance in the answer-books. The evaluation of answer papers thus forms the heart of this process, all other processes from the stage of setting the question papers to the stage of declaring results, including the verification process under Regulation 104, being merely ministerial-and ancillary to the main process of such evaluation. Examinee is entitled to have his papers correctly and properly evaluated, which right can be spelt out from the very power and function of holding examinations entrusted under the Act to the Board. Importance of this right, statutorily conferred, can hardly be underestimated. It is the passing in this examination with distinction, that opens up doors for better . equipments and future prospects in the life, including the

ability to follow any avocation or profession of one's choice.

15. This right to get the papers evaluated properly however, cannot include any right to pass the examination or pass with distinction, it being a matter of mere expectation and hope depending on one's correct or inflated notions of his own calibre. Passing in the examination can never be a matter of right, as there does not exist any such right. Result, of the examination must necessarily depend on the subjective evaluation by the examiner of the objective performance of the examinee, which in turn must depend necessarily on his merits. Mere adverse evaluation cannot involve his condemnation any more than the objective declaration of the worth of the gold piece by the experts therein. Mere such adverse results cannot involve any invasion of examinee's rights, as such, though results brought out by fraud, including the show of evaluation may affect or impair the same right. The right to assessment of paper should not, therefore, be mistaken for any non-existent right to pass hi any examination. Mere possibility of the adverse effects of such results cannot convert this mere expectation into any right.

15A. Thirdly, the evaluation of answer papers cannot be said to be an administrative act in any sense of the term. It neither involves any "lis" as such, or any dispute, nor any judicial, quasi-judicial or even administrative, process of any kind whatsoever. It is bereft of any decision making element. The process does not admit of any dialogue, discussion, arguments, explanation, hearing or participation of any other person than the examiner. It" is rightly considered inadvisable to permit the examinee to have any contact with the examiners. Identity of the examiner is always considered to be a closely guarded secret to prevent possible malpractices, the need of which can be hardly said to be open to doubt. Evaluation is thus a one-man job necessitating undivided concentration. All this prevents application of principles of natural justice.

16. The learned Advocates themselves did not claim any right of participation at the initial stage of evaluation or preparation of result sheets. Right of re-evaluation and participation is claimed only after results are found to be adverse to the examinees. It is difficult to discover any rational basis for claiming participation at the stage of verification, when no right is found to be claimable at the initial calculations and preparation of mark sheet. It is also not possible to see how the right of revaluation can be founded on the principles of "natural justice.

17. Mr. Paranjape conceded that the process of verification involves ministerial function. He, however, contends that the same is of administrative nature which attract the principles of natural justice. The contention appears to us to be untenable. The administrative action involves the process of decision making, affecting the rights and use of discretion and judgment in its implementation. On the other hand, essence of any ministerial function is that its discharge "involves no element of discretion or independent judgment" (see p. 70 under the heading "Ministerial", Chapter 2, "Classification of Functions" of de Smith" Judicial Review

of Administrative Action, Fourth Edition, dealing with distinguishing features of legislative, administrative (or executive), judicial (or quasi-judicial) and ministerial functions. The verification process contemplated under Regulation 104 (1) does not involve any decision or use of discretion.) It is essentially a ministerial process and cannot attract the principles of natural justice.

18. Mr. Setalvad, the learned advocate appearing for the Board, drew our attention to several instances in which principles of natural justice are held inapplicable to the assessment of experts. The case of Mohanlal Chhaganlal Mithaiwala Vs. Vipanchandra R. Gandhi and Another, is illustrative of this,

19. Even if it is assumed that the evaluation process involves any civil consequence, every civil consequence cannot amount to civil consequence. The dividing line between the concept of "civil consequences" and "evil consequences" implicit in any adverse effects is liable to be blurred and one has to guard against mistaking the one for the other. There is a large area of even administrative action involving such adverse effects on monetary benefits, immediate or future prospects, status and hardships to which principles of natural justice are held inapplicable. It is well settled that these principles do not apply for the termination of probationers service on finding him unsuitable, or compulsory retirement of public servant in public- interest to eliminate "dead wood" in accordance with the valid rules in force. The said principles are inapplicable even to the cancellation of examination results on discovery of malpractices and holding fresh examination involving loss of benefits to the successful candidates (See The Bihar School Examination Board Vs. Subhas Chandra Sinha and Others, and also to the reversion of the officers from the officiating promotions on deleting their names from the select list in which the same were included earlier, it all being dependent on the appraisal of their service records by the Selection Committee (See Union of India (UOI) Vs. Mohan Lal Capoor and Others,

20. In Om Capoor's case (supra), held this process of selection by evaluation of service record to be akin to the assessment of the candidates at examination and observed (p.92)

"Candidates are not expected to sit in judgment over evaluation of their own merits and of others. The "Cult of the Quasi as it has been derisively called by those who are skeptical of its extensions beyond certain reasonable and practical limit?, cannot be carried to such absurd lengths as to make it necessary for candidates as an examination to put forward their own assessments of their own merits as against those of rival candidates."

This is only illustrative of how "adverse effects" or "evil consequences" test is not decisive in such matters.

21. Mathew, J., affirmed the same, in his concurring judgment, in the following pithy words (page 104).

"On a balance of all the relevant factors. I do not think it expedient to extend the horizon of natural justice involved in the audi alteram partem rule to the twilight zone of mere expectations, however great they might be."

22. Now, the right of the public servant, of being considered for promotion and selection, is a fundamental right, being the part of the-right to equality before law,, guaranteed under Article 14 of the Constitution, while right to correct evaluation of the answer papers is the creature of the statute under which examinations are held. If principle of natural justice are liable to be- excluded from the evaluation of merits affecting fundamental rights, the same cannot be hold to be applicable to evaluation, of papers affecting incidentally merely a statutory right. We have, therefore, no hesitation in rejecting the arguments based on the supposed violation of principles of natural justice.

23. This is not to mean that "fair play" is eliminated from either of these processes of evaluation or verification or that arbitrary and capricious" acts of the examiners or the Board's officers are immune from any interference. The same are liable to be struck down as void and invalid by this Court, even, if remained undetected, through the machinery devised by the Board. No public servant can afford to act so arbitrarily or capriciously under a system governed by role of law That it is also part of the principles of natural justice, by itself cannot attract wider incidents of the said" principle.

24. Mr. Chopda contends that some of the questions in Chemistry paper of his client admit only of one word answers and evaluation thereof cannot of but be arbitrary when zero marks are recorded against the said answers. Hey therefore, contended that Ms participation in the verification and evaluation of the paper in the event of his allegation being found true, is indispensable, A student can be presumed to be aware, what answers be had recorded or whether such one word answer is correct or incorrect. It is difficult to see how participation is indispensable. But such evaluation may amount to no evaluation if the allegation is true and the student is confident.

25. As to the invalidity of Clause (3) of Regulation 104. Mr. Paranjape contends that prohibition against inspection of the answer papers does not serve any purpose of the Act. The clause, according to him, is void, being ultra vires of the regulation-making power of the Board. He further contends that such prohibition, even if held to be intra vires, is still void because of its being unreasonable. According to him, subordinate legislation, by any statutory body like a Board, is in the nature of Bye-laws and is liable to be struck down as invalid if found to be unreasonable Mr. Paranjape relied on the Division Bench judgment of this Court reported in the case of Sophy Kelly Vs. The State of Maharashtra and Others, in support of his contentions.

26. The ratio of Sophy Kelly"s case does support him On all the three points. This Court struck down Clause (8) of Regulation 46 of the Board"s then existing Regulations framed u/s 35 of this very Act. That the present Regulations were

substituted, in 1977, after the amendment of the Act in the said year, does not make any difference to the point. , Clause (3) of Regulation 49 made it obligatory on the Heads of the Secondary Schools, to send their students' applications for appearing in the examination, without regard to whether students' academic performance justified it or not. The Heads of the Schools complained that this impaired standards of education of their institution. The Court held that Clause (8) of Regulation 49 was ultra vires of the Board's Regulations making power u/s 36 of the Act and also invalid on the ground of its being unreasonable.

27. To take up first the contention as to the clause being ultra vires, it will be convenient to leave out of consideration the prohibition against revaluation in the clause, and the last sentence of Clause (1) of Regulation 104, which is being dealt with in other group of case. This discussion is restricted to the validity of the prohibition against inspection of answer papers and other documents and the confidentiality On which the prohibition is claimed to have been imposed. The sole question is if such a prohibition against inspection serves any of the purposes of the Act. Regulation 104 is a part of the Regulations framed to effectuate the powers of the Board of holding the examination. Section 18 and 19 deal with such powers of the State and the Divisional Boards. This question cannot be decided in the abstract. The glaring deficiencies found in the -working of the system adverted to earlier in paragraph 7 in spite of elaborate precautionary measures against the possible lapses detailed in the affidavit in reply, and the far reaching implications of the said deficiencies on the future of the examinees, shall have to be borne in mind in this context. The nexus or absence thereof, between the purposes of the Act or the purpose of the examination and the prohibition against inspection in the impugned clause, can be discovered only by reference to these factors. The examinee is the person affected by miscalculation of totals, omissions to examine any answer, misplacement of the supplementaries of the answer books and misplacement or tampering with the said record in any manner, if any. Adverse result creates suspicions in his mind about the possible errors in the system and his claim to inspection against this background must be held to be reasonable and calculated to subserve the purposes of the examination as also the overall purposes of the Act. This enables him to verify if his suspicions are ill or well founded. Existence of some overriding factors alone can justify denial of his claim.

28. The confidentiality is claimed to have been based in terms of the clause, on some decision by the Divisional Board. Firstly, the Act or Regulations do not authorise the Divisional Board to treat any answer papers or documents connected with it as confidential. No copy of any such decision of the Divisional Board is filed nor its existence is adverted to in the affidavit in reply with any particulars nor any attempt is made 1,0 explain when and why the Divisional Board recorded any decision to that effect. In the absence of indication of the existence of any decision as to confidentiality or the basis thereof, it is difficult to hold that it serves any purpose of the Act in any manner.

29. No other rational basis for such confidentiality is disclosed in the affidavit nor is it suggested at the hearing nor was any attempt made to explain which purpose of the Act it is intended to subserve. All that Mr. Setalvad could urge in defence is that such documents have always been considered as confidential, and students or others are uniformly denied access thereto. Such confidentiality cannot be found to be serving any purpose of the Act merely because it was acquiesced in the past or accepted without challenge.

30. According to Mr. Setalvad, authority to treat these documents confidential is implicit in the very power to hold examination itself, it being necessary to secure effective achievement of the process. This is too broad a statement to admit of any scrutiny. No such power can, however, be implied unless its indispensability is demonstrable for conducting the examination. Indispensability of treating, the question papers, and names, of the question setters and examiners, confidential, up to a certain stages can easily be appreciated. Their premature disclosure or exposure may defeat the purpose of examinations and make a mockery of its very conception. It is, however, difficult to see any purpose of continuing to keep them confidential at any rate after the declaration of the results.

31. The disclosure made by the ex-Chairman about the past instances of students having passed off some other's papers as theirs by manipulations and repetition thereof in Savkar's case during this year, have not unnaturally exercised the minds of students and their parents and shaken their confidence in the efficacy of the system in ensuring fair results. These instances could not have happened without passive or active complicity of the staff of the Board. Examinees carry inflated notion to some extent or the other, about their ability, calibre, or actual performance and they invariably blame the examiners or the administration for their adverse results. Such instances and the inevitable exaggerated accounts thereof, only make their such feelings and beliefs stronger causing damage to public faith in the system.

32. The strength of the students is growing from year to year with tremendous increase in the burden on the system, while overall reputation of efficiency of administrative set up, in all fields, is generally on wane for various reasons. Actual instances of errors may be very few and may not justify running down or condemnation of the system as a whole. In fact the Board has given an account of the elaborate precautions taken from the stage of setting up of question papers to the stage of declaration of results and their verification. But the glaring deficiencies thereof demonstrated in para 7 above, and the far-reaching adverse implications thereof to the fate of the examinees and the confidence of the public in the system, necessarily go to pinpoint the inadvisability and impracticability of treating these documents confidential any more. Such confidentiality rather than serve any purpose of the Act, actually tends to deepen the suspicions and goes to impair the confidence in the efficacy of the system to achieve the purpose of the Act.

33. On the other hand, access of the student to the answer books would enable

him to verify (1) if the papers are his own, and (2) supplementary answer papers are duly tagged, and (3) all answers are evaluated and (4) totals are correct, and (5) marks of his practicals or internal assessment are included: therein, and (6) his adverse results, are not due to any error or manipulations. This will at once not only make the verification process under Regulation 104 (1) effective and real, but facilitate Board's exercising its powers to trace errors and malpractices and amend the result preventing frustration of the students. The purpose of the Act can be served thus better by permitting inspection than by preventing it. In other words, the confidentiality, rather than serve any purpose of the Act goes to defeat it firstly by making the functioning of the system dependant entirely on the staff and, secondly, by making process under Regulations 102 (3) (4) and 104 (1) ineffective for want of assistance of the examinee himself. Section 36 of the Act does not authorise making of any such. Regulation. Clause (3) of Regulation 104 prohibits disclosure and inspection of answer papers and other documents. This is thus in excess of the regulation making powers of the Board, and is therefore liable to be struck down, as ultra vires.

34. The question then is: is the impugned clause unreasonable and also liable to be declared invalid on that ground. Three points arise for consideration. Firstly, whether Regulations amount to bye-laws and, secondly, whether bye-laws can be declared to be invalid on the ground of the unreasonable and, thirdly whether the impugned Clause (3) of Regulation 104 is in fact so unreasonable. It is held in *Sophy Kelly Vs. The State of Maharashtra and Others*, as seen earlier, that Regulations of this Board amount to bye-laws and bye-laws are liable to be struck down as invalid, if found to be so unreasonable. We have also exhaustively discussed the infirmities of this clause, while holding the same to be ultra vires. A rule or Regulation found to be so ultra vires may not necessarily be also unreasonable. The impugned clause, however, is found by us to be defensive of the corrective powers of the Board under Regulations 102 and 104, and right of verification under Regulation 104 (1) as also destructive of the confidence of public in the efficacy of the system. Unreasonable-ness of the clause is thus writ large on the face of it. Clause (3) of Regulation 104 is, therefore, liable to be struck down even on this ground also.

35. Mr. Setalvad, however, contends that ratio in *Sophy Kelly Vs. The State of Maharashtra and Others*, is no more a good law as it has been impliedly overruled by the judgment of the Supreme Court in the case of the *Trustees of the Port of Madras Vs. Aminchand Pyarelal and Others*, , hereinafter referred to as *Trustees case*. According to Mr. Setalvad, *Trustees case* is an authority for the proposition that these Regulations cannot amount to bye-laws and cannot be declared as void on the ground of unreasonableness.

36. In the *trustees case*, validity of an "Order" prescribing the "scale of rates" by the Trustees of the Madras Port Trust, was in dispute. Sections 42 to 43A of the said Act empowered the Trustees to so prescribe such rates, and the conditions in which to impose the said rates, for handling the goods of the importers at the

Port and extending go-down facilities for their goods, till the clearance thereof by the Customs Authorities for transport to their own place. The Madras High Court struck down the "order" as invalid "holding, firstly, that the same amounted to bye-laws and, secondly, that the, rates fixed thereunder were unreasonable and, therefore, void and, thirdly, the same were also ultra vires of the "scales fixation" powers of the Trustees under the said sections.

37. The Supreme Court reversed these findings of the High Court, though the dismissal of the suit was upheld on quite a different ground. The Supreme Court held that the order prescribing scale of rates did not amount to bye-law -- firstly, because Sections 42 to 43A of the Act contemplated power to fix rates and not to make any bye-laws, as, such power was expressly conferred on it u/s 95 of the Act, by reference to the subjects excluding such "scale of rates" and, secondly, because the impugned "order" did not conform with the attributes and the concept of the Bye-laws defined by Lord Chief Justice Russel in the case of *Kruse v. Johnson* (1898) 2 QB 91 quoted by Halsbury's Laws of England, 3rd Edition, Volume 24, p. 510. According to the Supreme Court, prescribing of scales of rates for services to be rendered at the Port Trust did not amount to bye-laws as it did not involve making of any "Ordinance affecting public or some portion thereof, imposed by some authority clothed with statutory power, or ordering something to be done or not to be done accompanied by some sanction or penalty for its non-observance" conceived under the said definition.

38. Mr. Setalvad drew our attention to Section 38 of the Act which separately empowers the Board to frame the bye-laws- on points enumerated therein, and emphasised how the power of the Board u/s 36 is restricted to framing Regulations on items enumerated therein, as distinguished from bye-laws. Relying on *The Trustees of the Port of Madras Vs. Aminchand Pyarelal and Others*, , it is "urged" that Regulations framed u/s 36, cannot amount to bye-laws, because the same are not framed u/s 38 and also because the same do not stand the test laid down by Lord Chief Justice Russel and approved by the Supreme Court.

39. On careful analysis of the judgment of the Supreme Court in *The Trustees of the Port of Madras Vs. Aminchand Pyarelal and Others*, and the one of this Court in *Sophy Kelly Vs. The State of Maharashtra and Others*, , we are satisfied that the former does not overrule the latter even impliedly. Firstly, observation of any Court as to the concept of bye-laws or any other principle, howsoever weighty and binding can never amount to statutory definition thereof. Secondly, the concept of bye-laws enunciated by Lord Chief Justice Russel in his judgment in *Kruse case* (1898) 2 QB 91 cannot, and in fact is not, intended to be exhaustive.

This is made clear by the Lord Chief Justice himself in the qualifying clause preceding to the passage quoted by Halsbury and referred to in the opening part of para 22 of the Supreme Court judgment in *Trustees case*. This Court has fully quoted the passage in *Sophy Kelly's case* which reads as follows:

".....A bye-law, of the class we are here considering, I take to be an, ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering some thing to be done or not be done, and accompanied by some sanction or penalty for its non-observance."

However, the preceding qualifying clause saying "bye-law of the class we are here considering; I take to be" of the said pas-" sage, is inadvertently omitted from Hals-bury's Volume itself while quoting the judgment from Kruse's case (supra). These words indicate how the conception of bye-laws defined by Lord Chief Justice is restricted to the bye-laws framed by Local Authorities such as County Councils in England or Municipalities in India to whom the regal powers of the State are invariably delegated. The same obviously cannot apply to the bye-laws of other statutory Corporations and other bodies whose functions essentially differ from the functions of the Local Authorities.-Omission of this qualifying clause cannot make any difference to the facts and the point arising in the Supreme Court, as the Port Trust is also a local authority" in the same manner as any County Council or Municipality can be u/s 3(31) of the Central General Clauses Act, 1897. The conception of the bye-law of the County Council may not be different from the bye-law of any local authority such as Port Trust. The same cannot, however, be true of several statutory corporations and Boards, such as the School Board herein brought into existence under recent enactments in India, for carrying out several purpose and discharging function in regard thereto, which could be different in nature and quality from the one discharged by any local authority. Whether Regulation of such Corporation amounts to bye-law, did not fall for consideration in the Trustees case, which by itself is enough to make its ratio inapplicable to the present case.

40. Secondly, it is a moot point if an order merely fixing scale of rates with relevant conditions for their application, amount to statutory or non-statutory rules or bye-laws. The Supreme Court was not called upon to consider it from this point of view.

41. Thirdly, the The Trustees of the Port of Madras Vs. Aminchand Pyarelal and Others, does not lay down that bye-laws can never be struck down on account of their unreasonableness. Madras High Court decision to that effect was overruled on finding that it was misled, by the word "demurrage" in Section 42 (d), into assuming that all the scales of rates were in the nature of demurrage and, therefore, penal, in total disregard of the dominant service element involved therein. Finding in Sophy Kelly Vs. The State of Maharashtra and Others, or in the present case does not suffer from any such infirmity.

42. In Sophy Kelly Vs. The State of Maharashtra and Others, this Court distinguished the statutory rules framed by the Government under its Rule-making powers delegated for implementing the Legislative policy, and the non-statutory rules by the statutory Corporations, Boards or other bodies in pursuance of the statutory powers to that effect to carry out the purposes for which they are created. It is their such character and not the nomenclature of

Regulation or Bye-Laws that counts. An earlier judgment of this Court in the case of *Mulchand Gulabchand Vs. Mukund Shivram Bhide and Another*, was relied on to hold that such non-statutory rules were amenable to wider scrutiny of the Court. This Court also relied on the definition of the word "Bye-law" in *Orders on the Common Law and the observations of Lindley, L. J. in London Association of Shipowners and Brokers v. London and India Docks Joint Committee* (1892) 3 Ch 242, to equate the Regulations framed by a Corporate Body with the Bye-laws. This is how this Court held that the impugned Regulation 49 (8) therein amounted to bye-law and also that the same was unreasonable.

43. Thus the question whether Regulations, of a Statutory Body like the Board other than the local authority, amount to bye-laws or not cannot be decided by the test laid down by the Supreme Court in *The Trustees of the Port of Madras Vs. Aminchand Pyarelal and Others*, while holding that "Scales of rates" framed by a local authority such as the Port Trust were not such bye-laws. Ratio of *Sophy Kelly's* case AIR 1938 Bom 156 on this point, directly dealing with the earlier Regulations of this very Board and based on weighty precedents, still holds good. The bye-laws of even local authorities are liable to be struck down on account of their being unreasonable even according to *Trustees* case, if the same stand the test laid down by Lord Chief Justice Russell and quoted with approval in second part of para 23 of the said case at page 1942. This Court relied on the relevant portion of the same passage at page 201 in *Sophy Kelly's* case to hold Regulation 49 (8) to be unreasonable. *Sophy Kelly's* case is not thus overruled even on this point. Clause (3) of Regulation 104 in this case suffers from still worse infirmities discussed earlier. Our reasons are not based on any misconception as in the *Trustees* case. It is true that the Board is as representative autonomous body as the Port Trust is and its regulation-making powers u/s 36 of the Act are different from the bye-laws making powers u/s 38. Both such features present in *Trustees* case are not held to be conclusive in that case, the same being few of the many determining factors in *Trustees* case. *Sophy Kelly's* case is based on distinction between statutory Rules and other Rules in respect of which Court's scrutinising powers are held to be larger. This aspect of the matter also remains untouched in *Trustees* case. The *Trustees* case no doubt lays down that a bye-law cannot be held to be ultra vires merely because the Court considers the same to be unnecessary. This is not why *Sophy Kelly's* case held Regulation 49 (8) to be ultra vires. We hold Clause (3) of Regulation 104 to be ultra vires, not because it is unnecessary, but because it does not serve any purpose and is rather defensive of the same. The *Trustees* case this cannot be said to have overruled the ratio of *Sophy Kelly's* case (supra).

44. Following the ratio of *Sophy Kelly's* case AIR 1938 Bom 158 we hold that Regulations 102 and 104 of the Regulations amount to Bye-laws and the said Bye-laws are liable to be struck down in view of the same being unreasonable. We uphold the contention of the petitioners and declare Clause (3) of Regulation 104 as being unreasonable to the extent to which it prohibits disclosure and inspection of the answer books and other connected documents on the ground of

confidentiality.

45. Mr. Setalvad contends that invalidation of Sub-clause (3) of Regulation 104 by itself cannot entitle the examinee to claim inspection of papers in the absence of any positive provision enabling him to so inspect. This contention is plausible. The Board's obligation to hold examinations and make incidental arrangements therefor, and examinee's right to appear at the examination and get the papers evaluated properly are all, no doubt, the creatures of the Act and the Regulations framed thereunder. The remedies for the redressal of the grievances arising out of the various examination processes shall have to be traced in the Act and Regulations themselves. This would be so, no doubt, so far as it goes.

46. We, however, do not think that mere absence of any positive provision for inspection can be decisive of examinees' claim thereto. The Board itself is conscious of the fallibility of its system, as the fallibility of any other human system, and the possibility of the inadvertent or deliberate errors and malpractices. It has, therefore, provided correctives against such error in Regulations 102 and 104. Right of verification and power of correction of the results, conferred under these regulations, must be assumed to have been intended to be effective. Experience of a few years, however, has revealed several deficiencies in the functioning of the system and demonstrated how the said system of verification and power of correction can become ineffective. Entire reliance on the Board's administration even for the ministerial part of these functions- may reduce these provisions to a dead letter. These rights and powers can be better effectuated by enabling the examinee himself to have inspection of the paper. Such a right indeed is implicit in the right of verification. The power to correct the errors and amend result contemplated under Regulations 104 and 102 also imply an obligation to facilitate tracing of such errors and malpractices and provide effective machinery for their detection. This includes an implied obligation to give inspection of the answer papers to the interested person such as the examinee. The malpractices involved in passing off papers written by one as that of others and manipulations and tampering and the frauds involved therein cannot be effectively detected and remedied unless, among others,- the examinee himself is enabled to inspect the answer papers. This is indispensable even for verifying his claims to the presence or absence of any examinee. The right of inspection thus is the integral part of right of verification and obligation to trace and correct the errors as implied in Regulations 102 and 104. Doctrine of implied power and obligation and right and duties make up for the absence of positive provisions.

47. It is true that such right of inspection does not seem to have been recognised under any system of examinations in India and its recognition is bound to unsettle the age old practice followed and notions entertained. The decision is bound to have effects on examination in several other fields, apart from the one contemplated by the Board or Universities. Consequences on administration also are bound to be far-reaching, necessitating setting up some

additional machinery, and may prove to be time consuming and expensive. We, however, find that such right of inspection has now become indispensable for effectuating the underlying purpose of examination. None of these considerations appear to us to be, therefore, relevant.

48. Mr. Setalvad drew our attention to the wide opportunities of manipulations and malpractices to which production of answer papers for inspection may open. Such possibilities cannot be denied indeed. But such possibilities and need for safety and security and preventing of malpractices cannot by itself justify absolute confidentiality and denial of inspection. Such inspection can be subjected to reasonable conditions necessary to ensure preservation of answer papers, their safety and prevention of malpractices. This can also be subjected to payment of incidental charges to avoid additional financial burden on the Board to which also our attention was drawn. A balance can be struck between the competing claims of the examinees and the administration. The Board can also consider if the verification process itself can be carried on in the presence of the students, and officer and moderators standing under effective security arrangement, to avoid waste of time and make verification more effective and meaningful.

49. It was faintly suggested that students" are bound by the regulations, having offered themselves for examination under the same with the knowledge of their implication. Suffice it to say that the impugned clause will be deemed to be non-existent once it is found to be void by the court. Any question of its being binding on the students cannot really arise.

50. Prayers in the petitions are very wide, and cannot be granted in their entirety. We declare Clause (3) of Regulation 104 to be void to the extent to which it denies claim for disclosure and inspection and strike down the portion of the rule reading "or disclosure or inspection of the answer-books or other documents as these are treated by the Divisional Board as most confidential." We direct the Board to give inspection of the answer-papers asked for and take consequential action under clauses (4) to (6) of the Regulation 104 when found necessary.

51. We accordingly make the rule absolute as above, in Writ Petition No. 1906 of 1980 and also in Writ Petitions Nos. 1722, 1799, 1838, 1885, 1923, 1925, 1926; 1928, 1996, 1997, 1998, 2005, 2010, 2061, 2062, 2063, 2064, 2065, 2076, 2099, 2100, 2102, 2110, and 2127 of 1980.

52. In the circumstances of the case, there will be no order as to costs.

53. We direct the Board to give inspection of their answer books to the petitioners and consider their objections and dispose of the same of in accordance with clauses (4) to (6) of Regulation 104.

54. Mr. Setalvad fairly makes a statement at the Bar that the applications of students for verification made within the prescribed time will be disposed of in

accordance with these directions in the judgment, even though they have not come to this Court,, subject to the result of his appeal to the Supreme Court.

55. Mr. Setalvad orally applies for leave to appeal to the Supreme Court under Article 133 of the Constitution.

56. Leave refused.

57. Operation of this order, however, will be stayed for one week from the date on which we sign the judgment.

Thursday, the 7th August, 1980 On motion made by Mr. Setalvad, appearing for respondent No. 1, in the presence of the advocates for the petitioners, the stay extended up to 20th August, 1980.

58. Ordered accordingly.