
(2014) 01 BOM CK 0263

In the Bombay High Court

Case No : Writ Petition No. 6697 of 2013

Public Education Society

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-01-2014

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1)(g)

Citation : (2014) 5 ABR 117

Hon'ble Judges : S.C. Dharmadhikari, J;R.V. Ghuge, J

Bench : Division Bench

Advocate : V.D. Hon, Advocate holding for Ashwin V. Hon, Advocate for the Appellant; G.K. Thigle-Naik, A.G.P. and V.D. Sapkal, Advocate for the Respondent

Judgement

S.C. Dharmadhikari, J.—Rule. Respondents waive service. By consent, Rule is made returnable forthwith. The petitioner is aggrieved and dissatisfied with an order passed on 1st August, 2013, permitting the respondent No. 4, to shift a secondary school from village Khedle, Taluka Talwada, District Nandurbar to village Gautamnagar, Gondur Road, Walwadi, Dist. Dhule.

2. Petitioner is a trust registered under the Bombay Public Trusts Act, 1950 and a society registered under the Societies Registration Act, 1860. It is registered in the year 1980. It is an educational trust. The petitioner states that the trust is managing and administering the secondary school from Standard 5th to Standard 12th at village Walwadi, Tq. and Dist. Dhule. The school is existing from 1st October, 1982. It is stated that the petitioner has basic amenities and infrastructure and fully complies with the requirement of the Education Department, permitting, managing and administering a secondary school. Thus, all requirements in terms of the applicable policy, permitting establishment and continuation of a secondary school have been fulfilled by the petitioner.

3. Petitioner states that the respondent No. 4 has not been issued any permission for running a school at Walwadi. The petitioner has stated on oath that an advertisement was issued on 9th April, 2012 by the respondent No. 4

and the advertisement is issued in the name of respondent No. 4 school, namely, Adarsh Secondary School, Khedle, Tq. Talwade, Dist. Nandurbar. That was inviting applications for recruiting the staff and for a school at Walwadi. It is then the petitioner realized that the respondent No. 4 has been permitted to transfer the existing school from a distinct district namely Nandurbar to Dhule and particularly in the village of the petitioner where the petitioner's school has been located and is continuing. The petitioner pointed out to the concerned authorities that such an act on their part and in allowing transfer of a school from a distinct district to the subject village in Dhule district would create an unhealthy competition and would not be therefore conducive to the academic and educational interest. However, the concerned Officers did not take any decision and eventually the petitioner was required to approach this Court and when the Writ Petition was pending before this Court a statement came to be made on behalf of the Deputy Director of Education contained in an affidavit that an unauthorized school has been run by the respondent No. 4 and that has been closed down. It is in these circumstances that the Writ Petition was disposed of by the Division Bench of this Court and in the light of the statement made in paragraphs 8 and 9 of the affidavit in reply of the Deputy Director of Education, Nasik. The order of the Division Bench is dated 2nd July, 2013.

4. On 1st August, 2013, the petitioner complained that the respondent No. 4 - trust is said to be registered on a address given in Shindkheda taluka district Dhule but which is managing Adarsh Secondary School, Khedle, Tq. Talwade, Dist. Nandurbar, has been permitted to transfer that school from village Khedle, district Nandurbar to village Walwadi, in Dhule district. That order was passed on 1st August, 2013. It is this order which is challenged in this Writ Petition and on several grounds.

5. It is urged by Mr. V.D. Hon, learned counsel appearing on behalf of the petitioner that education has been held not to be a business and within the meaning of Article 19(1)(g) of the Constitution of India. Time and again, the Hon'ble Supreme Court has clarified that right to establish an educational institution imparting secondary and higher secondary education may be traceable to Article 19(1)(g) of the Constitution of India. It is certainly not a trade or business. Therefore, it is not proper to encourage unhealthy competition and amongst the schools. That would have an adverse impact on the academic atmosphere in view of such circumstances. The existing school functioning in a village, if catering to the requirement of the students and if there is no scope for additional school, then, Mr. Hon submits, that there is a distinct policy of the State in that behalf. In that regard, he invites our attention to the Government Resolutions dated 17th February, 2009 and 9th June, 2010. He submits that therefore, there is clear policy of the State, according to which, if a school is to be transferred from the existing area or village to another location, then, that should not affect adversely the interest of the students and should not inconvenience them. Secondly, if the school is going to be relocated and transferred, the educational atmosphere in the village should not be polluted by

encouraging unhealthy competition and there should be a report in that behalf which must be forwarded to the State. That position must reflect the situation at ground level and that report has to be submitted by the Deputy Director of Education. Mr. V.D. Hon, learned counsel further submits that the State, therefore, was obliged to take into account the objections of the petitioner and when the said objections have not been considered, then, the order passed suffers from non-application of the principles of natural justice.

6. It is submitted that the petitioner was never intimated and heard prior to the transfer and rather, on the earlier occasion, the authority incompetent to take decision on the point of transfer, took it and therefore, the Government withdrew the decision. This time, when it passed an order on 1st August, 2013, what it did was that the State addressed a communication to the Director of Education (Secondary and Higher Secondary), Directorate of Education, Pune, informing him that the State has permitted the transfer of the schools in terms of letter dated 18th January, 2013, received from the Deputy Director of Education, Nasik. Mr. V.D. Hon submits that the entire attempt of the Deputy Director of Education was not supported by the State when it also filed an affidavit in Writ Petition No. 6052/2012. Mr. Hon brought to our notice the affidavit filed by Tukaram S/o. Namdeo Supe, Deputy Director of Education, Nasik in Writ Petition No. 6052/2012, wherein the deponent tenders an unconditional apology to this Court and states that a permission was granted to the respondent No. 4 before us to shift the very school, namely, Adarsh Madhyamik Vidyalaya, Khedale, Taluka Taloda, District Nandurbar to village Gautamnagar, Walwadi, Taluka and District Dhule. However, that permission was granted due to oversight and inadvertently. Therefore, that permission was cancelled on 02.11.2012. Mr. V.D. Hon, learned counsel, therefore, submits that there is absolutely no application of mind as to why the State has permitted same course and within a short time. Mr. Hon submits that all this smacks of total arbitrariness on the part of the authorities and equally the attempt to justify this illegal action is apparent in the affidavit-in-reply filed in this writ petition by the Joint Secretary, School Education Department. Mr. V.D. Hon, therefore, submits that the impugned order be quashed and set aside.

7. Mr. G.K. Thigale-Naik, learned A.G.P., who has filed an affidavit on behalf of the State, has submitted and relying on the same that the Department of School Education, Government of Maharashtra is following due procedure prescribed under the Government Resolution dated 09.06.2010 and Corrigendum issued on 24.09.2012. He submits that transfer of a school is a policy matter and therefore, it is open for the State to review and change its decisions from time to time in academic interests. In the present case, the proposal was received from the office of the Deputy Director of Education, Nasik. Thereafter, the requisite procedure was followed and after the Government granted approval on 31.07.2013, the impugned order has been passed. The Government cannot now recall that order and even otherwise, when it is a policy and suffers from no legal infirmity, Mr. Thigale submits, that the writ petition be dismissed.

8. The writ petition is contested by respondent No. 4. There is an affidavit filed by the respondent No. 4 and Mr. V.D. Sapkal, learned counsel, appearing for respondent No. 4, relying upon the contents therein, submits that firstly, there is no merit in the contention of Mr. V.D. Hon, learned counsel for the petitioner that the petitioner was entitled to be heard before an order of transfer was passed. There is no averment in the writ petition that the petitioner is so entitled in law. There is no averment that there is any adverse effect on the school of the petitioner and therefore, hearing should have been given to the petitioner. There is no provision by which the affected school has to be heard. He submits that the Hon''ble Supreme Court has time and again ruled that a competitor has no role to object to a business being set up by another individual when the State permits such a course. It does not violate the mandate of Article 19(1)(g) of the Constitution of India. The reliance is placed on the decision of the Hon''ble Supreme Court in the case of *The Nagar Rice and Flour Mills and Others Vs. N. Teekkappa Gowda and Bros. and Others*, and the earliest decision in the field, namely, *Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Others*, Reliance is also placed on the decision in the case of *Mithilesh Garg, Vs. Union of India and others etc. etc.*, For all these reasons, it is submitted by Mr. V.D. Sapkal that the writ petition be dismissed and particularly when in the affidavit, it is pointed out that there is a scope for more than one school in village Walwadi. The population of the said village is 45,000. There is no Secondary School other than that of the petitioner. The Zilla Parishad is not running a Secondary School, but runs a primary school. There is a report submitted by the Block Development Officer and copy of the same is relied upon. Further, report of the Circle Officer is also relied upon to support his argument.

9. We have, with the assistance of the learned counsel for the parties and learned A.G.P., perused the writ petition and all annexures thereto. We have also perused the affidavits-in-reply filed on record and the decisions brought to our notice.

10. First of all and to clear the ground, we must refer to the recent judgment of the Hon''ble Supreme Court in the case of *Indian Medical Association Vs. Union of India (UOI) and Others*, wherein His Lordship, the Hon''ble Shri Justice B. Sudershan Reddy, as His Lordship then was, speaking for the bench has rendered the conclusions of the Hon''ble Supreme Court on the matter and particularly what is the nature of the right conferred on an individual or a citizen in establishment of an Educational Institution. They read thus:

"59. In paragraph 91, of P.A. Inamdar, this Court enunciated one of the main holdings of TMA Pai as: "the right to establish an educational institution, for charity or for profit, being an occupation is protected by Article 19(1)(g)". In this regard, inasmuch as the majority in the 11 Judge bench in TMA Pai, along with those who partly dissented and partly concurred, clearly held that education could be an occupation under Article 19(1)(g) only when charitable in nature, we are of the opinion, and hold, that the observation in para. 91 in P.A. Inamdar that

education can be an occupation imbued with profit motive is not the ratio of the decision. One sentence or a phrase or an expression cannot be torn out of context and be characterized as the ratio decidendi.

135. Furthermore, certain other aspects of education as an occupation also have to be taken into account to assess the nature of content of the rights granted to "educators" under sub-clause (g) of clause (1) of Article 19. Note should also be made of the fact that the Court in TMA Pai has specifically characterized the nature of the occupation to be "charitable", and in fact specifically notes that private educational institutions have been started by educationists, philanthropists etc. This was so because "Education is a recognized head of charity".

136. A charitable activity, is also a philanthropic activity. Charity, the basis on which the charitable activity is undertaken, such as the setting up of, managing and operating educational institutions, is defined to include the following meanings: giving voluntarily to those in need, an institution or an organization for helping those in need, kindness & benevolence, tolerance in judging others and love of one's fellow men. In a similar vein, philanthropy involves a love of mankind. If one were to take a synoptic view of history of mankind, one would realize that educational institutions, as formal structures for learning, were invariably started by the State, or by citizens who had a great love for their fellow human beings. In societies which were homogeneous, and not hierarchically ordered, this love extended to all its members. The idea was that equipping as many youngsters as possible with knowledge would strengthen the society, bring in the benefits of enlightenment that darkness, caused by ignorance, prejudices and unfounded beliefs, denies to the individuals as well as the society. No philanthropist, with love for mankind, would want to educate a person who says that he or she wants to be enlightened only for personal benefit or for using the knowledge gained to perpetuate injustices in the society or strengthen inequality. Of course TMA Pai, by declaring that reasonable fees has to be collected, to cover capital costs, day to day operations etc., has brought in an element of financial viability. However, one should not then view that TMA Pai would have intended, when it accepted that education as an occupation could only be charitable in nature, that it would also be devoid of intrinsic and essential qualities such as love for mankind as the motivating factors in starting educational institutions.

137. However, in hierarchical societies, marked by endemic inequalities, and where hierarchy had ossified, this "love of mankind", which was the primary, and inherent, motive of education as a charitable or a philanthropic occupation, was extended only to individuals who belonged to the communities to which such philanthropists belonged to. Time, knowledge, and philosophical constructs that inform our love, for mankind change. Even societies in which race was used to impose horrific economic and social conditions on those who belonged to enslaved races, have changed, Great universities, such as Harvard which many

decades ago did not admit students from formerly enslaved races, or women, or those with other disadvantages, have with the march of time recognized that the very notion of education as a philanthropic activity would lose its motive force, and the essentiality of its purpose, of imparting liberal education that leads people from darkness to light and that its inner soul would be derogated from if individuals from other races, or women, or those who face social disadvantages are also not provided access. In this regard, many universities have also come to the view that one of their essential purposes lies in providing higher education to ensure that in every sphere of social action, in which choices are made that impact differentially on different segments of the society, there be diversity of representation from all segments of the society. This is recognized as necessary to enrich and strengthen democratic processes, by bringing diversity of views and ensuring that debate occurs in a reasoned and reasonable manner, which in turn integrates the society and polity. Knowledge has expanded by leaps and bounds, and not all of it can be taught at the stage of secondary school education. The ability to engage with this expanding knowledge, to auto-didactically keep pace with such expanding frontiers, is typically provided only at collegiate level. This implies that unless access is provided on a wide scale, across all swath of the population, the debates about social, political, economic and technological choices would be uninformed, and therefore also likely to be unreasoned and unreasonable, thereby threatening the democratic process and social integration that is vital for fraternity and unity of the nation threatened. Noting the pernicious influence of marketplace throngs that seek to subordinate the higher status of higher education, Frank Newman, Laura Couturier and Jamie Scurry write that from "the establishment of the first college in America in 1636, there has been an understanding that higher education, though it clearly provides private benefits, also served community needs.... steadily expanded from preparation of young men for leadership.... to preparation of a broad share of population for participation in the workforce and civic life...." (See *The Future of Higher Education - Rhetoric, Reality and the Risks of the Market*)."

11. A bare perusal of the conclusions and which have been reiterated from time to time would demonstrate that there is basic fallacy in the argument of Mr. V.D. Sapkal, learned counsel, that the individual's right to establish a school or educational institution can be equated with freedom of trade, business, guaranteed by Article 19(1)(g) of the Constitution of India. The education is and remains a charitable and philanthropic activity. If it is a service oriented activity and remains as such, then, one cannot claim the right in such absolute terms.

12. A Rice Mill cannot be equated with a school. There is no right, therefore, to object to a competitor coming in and carrying on similar trade or business activity. That is how even in a change of location of a Cinema Theatre, as clarified by the Hon'ble Supreme Court, the competitor has no locus standi to challenge grant of permission or has right of such nature so as to object to a rival coming up with an identical theatre and in the same area.

13. Equally, the right to object to stage carriage permits, which had been obtained by another private operator post liberalization, is something which cannot be equated with an activity of establishing an educational institution. Even in the case of *Mithilesh Garg, Vs. Union of India and others etc. etc.*, (cited *supra*), the Hon''ble Supreme Court held that the object is to encourage healthy competition and eliminate corruption.

14. Therefore, having cleared the ground, we now proceed to have a look at the Government Resolutions which are placed before us. The Government Resolution dated 9th June, 2010 itself clarifies that transfer is a permissible course and to safeguard and protect academic and educational interest of the students. Primarily, it is their interest which is at stake. However, while permitting the transfer, it has to be ensured that there is no inconvenience to the students and the staff of the existing school and which is to be transferred to another location and equally, such transfer must not result in an unhealthy competition. A report should be obtained, not from the Education Officer (Secondary), but from the Deputy Director of Education stating therein that there would not be any such unhealthy competition. We cannot, therefore, uphold the interference of any official other than those in-charge of the Department of Education in such matters. Therefore, reliance on the reports of the lower officials can hardly assist the respondent No. 4.

15. The further Government Resolution which is issued on 31st July, 2013 also takes care of this aspect. It is, therefore, futile to urge that the parties like the petitioner cannot object to the transfer, nor can they claim to be heard or raise any objection to this course. It is not as if that we are laying down as a matter of principle that while handling such matters, the existing schools ought to be given a personal hearing. However, depending on the facts and circumstances in each case, if a specific objection has been raised, then we do not see how a hearing could be ruled out before a decision to transfer another school at the same location is permitted. It is clear in this case that the petitioner has been objecting throughout. On one occasion, the Deputy Director of Education accepted his mistake and withdrew the order of transfer. It may be that it is now stated that the Deputy Director of Education passed an order inadvertently but such order had to be passed by the State Government and not by the Deputy Director of Education. However, fact remains that the petitioner has been objecting throughout and when such objection has been raised by the existing secondary school from the same village and existing for more than three decades. We do not see how we can accept the contention of Mr. V.D. Sapkal that there is no averment in the writ petition about such entitlement of being heard, nor there is a ground of a hearing being denied and therefore, we must reject the contentions of Mr. V.D. Hon, learned counsel for the petitioner. In the matters of above nature and when the academic and educational interests are kept in the forefront, then we do not accept any of these contentions in peculiar facts of this case.

16. We are of the view that the impugned order is vitiated for non-compliance with the principles of natural justice and equally, noncompliance with the Government Resolutions themselves. There is absolutely no discussion in the communication and it is difficult to term it as an order. What is relied upon is the first communication dated 1st August, 2013. That is from the Deputy Secretary in the Department of School Education and Sports, Government of Maharashtra. That refers to a letter from the Deputy Director, Nasik, dated 18th January, 2013. First of all, this letter could not have been relied upon by the State and in the facts peculiar to this case. The affidavit-in-reply was tendered by the Deputy Director of Education, Nasik on 27th June, 2013 in Writ Petition No. 6052/2012. A copy of the detailed affidavit-in-reply placed on record in that writ petition is annexed to the present writ petition as well. When we have perused the same, with the assistance of the learned counsel, we find that the State Government could not have relied upon any prior communication from this very Deputy Director of Education and in the detailed order dated 1st August, 2013.

17. Secondly, this communication cannot be said to be an order as is now termed in the affidavit-in-reply of the respondent No. 1. It is the communication to the Deputy Director of Education permitting the respondent No. 4 to relocate or transfer its school to village Walwadi, District Dhule. It cautions that the Deputy Director of Education must ensure that there is a consent given by the parent teachers to this transfer and that the transfer should not affect the future of the students or their academic interest adversely. We do not see how the State addresses such a communication to the Deputy Director of Education. It is a satisfaction of the State which is envisaged in the Government Resolutions dated 31.07.2013, 09.06.2010 and 17.02.2009. Therefore, it is the State which must record its satisfaction and opinion in its order permitting transfer and relocation of a school. If that is a permissible course, to be adopted by the State, then it is the State which must speak and not delegate any such powers and satisfaction to be recorded by it, to subordinate officials in the Department. The State has not recorded such satisfaction and which is apparent from this communication and for this additional reason, we find that the communication, stated to be an order, dated 1st August, 2013, deserves to be quashed and set aside.

18. There is no need to reiterate that a communication which cannot be termed as an order is now tried to be termed as an order and justified by the affidavit-in-reply. The order must speak for itself. The respondent No. 4 cannot say that the State was satisfied that the transfer, was a proper course. We would not hear this from an interested party and who is beneficiary of the State decision because it is obvious that it is taken at its instance. The affidavit-in-reply of the State, therefore, cannot be held to be a substitute for the satisfaction which has to be recorded and which must find place in the communication.

19. Once the order has been found to be vitiated in law and therefore, cannot be sustained, then the only course open for us is to allow this writ petition. It is accordingly allowed. The impugned order is quashed and set aside. All

consequences in law will follow. In the circumstances, there will be no order as to costs. Rule is made absolute accordingly.

20. At this stage Mr. V.D. Sapkal, learned counsel for the respondent No. 4 prays for stay of the order to enable the respondent No. 4 to challenge the order in the higher Court. It is submitted by Mr. Sapkal that the ad interim order passed by this Court in the present writ petition is of status quo and which does not disturb the communication and running of the respondent No. 4 at village Walwadi in Dhule District. Therefore, bearing in mind the interest of the students and at the end of the academic session, this Court must protect the respondent No. 4 or else not only the respondent No. 4 but the students would be adversely affected.

21. This request is opposed by Mr. V.D. Hon, learned counsel for the petitioner and he states on instructions that the petitioner is ready and willing to accommodate all the students of respondent No. 4 to complete the course and to enable them to appear at the ensuing examination, every possible assistance would be rendered. After having held that the State has not only once but twice permitted shifting of the school from village Khedle, Tq. Taloda, District Nandurbar to village Walwadi, District Dhule and contrary to its own policies and resolutions, then we cannot accept the request of Mr. V.D. Sapkal. The request for stay of the order is, therefore, refused.