

(2004) 10 BOM CK 0053

In the Bombay High Court

Case No : Writ Petition No. 874 of 2004 and Notice of Motion No. 583 of 2004

Saurabh S. Pakale

APPELLANT

Vs

Maharashtra State Secondary and Higher Secondary
Education Board and Others

RESPONDENT

Date of Decision : 18-10-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Maharashtra Secondary and Higher Secondary Education Boards Act, 1965 — Section 18

Maharashtra Secondary and Higher Secondary Education Boards Regulations, 1977 — Regulation 89(3)

Citation : (2005) 2 BomCR 117

Hon'ble Judges : Bhandari Dalveer, C.J;Chandrachud D.Y., J

Bench : Division Bench

Advocate : K.K. Singhvi and M.M. Vashi, for the Appellant; Deepa Chavan and Kiran Gandhi, instructed by Little and Co., for the Respondent

Final Decision : Dismissed

Judgement

Chandrachud D.Y., J.—Upon passing the Xth Standard Secondary School Certificate Examination in 2001-02, the petitioner enrolled as a regular student in the XIth Standard at the Ramnarayan Ruia College. As a regular student, the petitioner failed in the XIth Standard Examination. The subjects chosen by the petitioner for the XIth standard included Electronics, a subject which is a part of the Vocational Stream. On 10th July, 2003, the petitioner filed an application for obtaining enrollment as a private candidate at the H.S.C. Examination to be held in March, 2004. Amongst the printed conditions that were accepted by the petitioner, was a specific conditions to the effect that he was prepared to select only those subjects which are allowed to be offered for the H.S.C. Examination by a private candidate. The petitioner, while filling the application form, accepted that he was aware that he was not eligible to offer technical and vocational subjects as a private candidate. The instructions formulated by the first

respondent "for guidance to persons wishing to apply for obtaining enrollment certificate as a private candidate for H.S.C. Examination" specifically provided that a private candidate may appear in any subject other than in technical and vocational subjects. In October 2003, the petitioner filed an application seeking permission to appear at the H.S.C. Examination to be held in March 2004. When the application filed by the petitioner was scrutinised by the Board in November, 2003 as a part of the general scrutiny of over 5 lakh application forms received for the ensuing examination, the Divisional Board while compiling the "pre-list", noted a discrepancy in that the petitioner had opted for Electronics, a subject which according to the Board, the petitioner was not entitled to choose as a private candidate. On 5th January, 2004, the Board directed the petitioner to correct the subjects in which he was seeking to appear at the ensuing examination since he was not entitled to opt for a vocational subject as a private candidate. The petitioner thereupon moved these proceedings under Article 226 of the Constitution inter alia for challenging the communication dated 5th January, 2004 and for a mandamus directing the First Respondent to permit him to appear at the H.S.C. Examination in the subjects of Electronics, Physics and Chemistry. A circular issued by the Divisional Secretary of the First Respondent on 6th June, 2003 has also been challenged.

II

2. The controversy in the present case revolves around the question as to whether a private candidate is entitled to appear at the H.S.C. Examination with a combination inter alia involving the subject of Electronics which is part of the Vocational Stream. The submission of Counsel appearing for the petitioner is that the statutory regulations that have been framed in pursuance of the provisions of the Maharashtra Secondary and Higher Secondary Education Boards Act, 1965 ("the Act"), do not contain any restriction of the kind that is sought to be imposed by the Board. The submission is that in the absence of a prohibition in the regulations, no such restriction as envisaged can be imposed and the circular which has been issued by the Divisional Secretary of the Board is contrary to the Regulations. The submissions is that even the Board has no power to impose such a restriction and consequently, the Divisional Secretary could not exercise any such power. Counsel for the petitioner asserts that there is a fundamental right to pursue education, a right which is guaranteed by Article 21 of the Constitution, and though such a right can be regulated in accordance with law, the regulations have not restricted the right of a private candidate to appear for the H.S.C. examination with a subject forming part of the Vocational Stream.

III

3. While considering the tenability of the submissions which have been urged on behalf of the petitioner, it would, at the outset, be necessary to advert to some of the relevant provisions of the Act. The Act was enacted to provide for the establishment of a State Board and Divisional Boards to regulate certain matters pertaining to Secondary and Higher Secondary Education in the State of

Maharashtra. Section 3 provides for the establishment of a State Board and of Divisional Boards. The power of the State Board in Section 18 of the Act inter alia includes advising the State Government on matters of policy relating to secondary or higher secondary education in general. The board is empowered to lay down guiding principles for determining curricula and syllabic, to prescribed standard requirements in respect of infrastructure for secondary schools and junior colleges, to prescribe textbooks and to prescribe the general conditions governing admission of regular and private candidates to the final examination and to specify the conditions regarding attendance and character on the fulfilment of which a candidate shall have a right to be admitted to and to appear at any such examination. These are some of the illustrations of the powers which are conferred upon the State Board amongst others. The powers of the Divisional Boards, in Section 19 inter alia include conducting of final examinations on behalf of the State Board in the areas of the jurisdiction of the Divisional Boards. By virtue of Section 34 of the Act, the State Government is empowered to issue directions to the State Board or to the Divisional Board on any of the matters specified in Clause (a) of Section 18 as it considers necessary. The State Government is also empowered by subsection (2) of Section 34 to address the State Board or any Divisional Board with reference to anything it has conducted or done, or is conducting or doing. Section 36 of the Act empowers the State Board to make regulations for the purpose of carrying into effect the provisions of the Act. The State Board is similarly empowered to frame bye-laws u/s 38.

4. The regulations framed by the Board define inter alia the eligibility of regular and private candidates to appear for the H.S.C. Examination. Under Regulation 88, which deals with the eligibility of regular candidates, a candidate attending the second year of junior college is eligible to appear for the Higher Secondary certificate examination to be held at the end of the second year of junior college on fulfilling several conditions, including the condition of meeting 75 percent attendance in the junior college which the student has attended. A regular candidate by the very nature of his enrollment is required to fulfil the conditions that have been prescribed in regard to attendance and practical work. The eligibility of a private candidate is then dealt with in Regulation 89. Sub-regulations (1), (2), (6) and (12) are material for the purpose of the present proceedings and provide as follows:

"(1) A candidate who has passed the Secondary School Certificate Examination of the State Board or any other equivalent public Examination of Boards outside the State can appear at the Higher Secondary Certificate Examination as private candidate three years after his passing the Secondary School Certificate Examination.

(2) If a candidate who desires to appear at the Higher Secondary Certificate examination as a private candidate under Clause (1) above, intends to offer subjects where practicals are prescribed, he shall complete the practical course prescribed for those subjects for first year and second year in a recognised junior

college. He shall attach the necessary certificate from the head of the recognised junior college of his having completed the practical course in those subjects for the two years along with his application.

(6) An applicant held eligible for enrollment as a private candidate will be issued an enrollment certificate which should be attached to the application for admission to the Higher Secondary Certificate Examination to be forwarded through the head of the junior college concerned. (12) The junior college forwarding the application of a private candidate should provide facilities for completing practicals in the subjects offered by the candidate in which practicals are prescribed for which the junior college may charge consolidated fee of Rs. 100/-."

On 17th August, 1977, the State Board passed a resolution approving the form for enrollment to appear as a private candidate. The form prescribed, specifically provides an undertaking by a student desirous of appearing as a private candidate to the effect that the student shall select only such subjects as are allowed to be offered at the H.S.C. Examination to a private candidate. On 9th August, 1978, the State Government issued a resolution by which it decided to provide the facility of pursuing certain vocational courses to students of the higher secondary classes from the academic year 1978-79 in some selected institutions both schools and colleges. The salient features of the scheme envisaged by the State Government included the selection of institutions by the Director of Technical Education, the grant of permission to certain institutions to provide education in vocational subjects and a maximum strength of 25 students for each unit. A further resolution was passed by the State Government on 31st July, 1979 clarifying inter alia that while selecting institutions, the Director of Education should ensure that the institution possesses requisite infrastructural facilities required for the successful implementation of Vocational Courses as laid down by the Maharashtra State Board of Secondary and Higher Secondary Education. The resolution recorded that the State Board has prepared the detailed syllabic of 23 vocational courses falling under five groups, namely, (1) Technical, (2) Commercial, (3) Agriculture, (4) Food Technology and (5) Fisheries. The resolution dealt with requirements of the staffing pattern, scales of pay and grant-in-aid to institutions.

5. On 23rd September, 1993, the State Board accordingly passed a resolution stipulating the conditions for students opting to appear for the H.S.C. Examination as private students. Private students are not permitted to opt for technical and vocational subjects. The State Board approved the contents and format of the application form for seeking an enrollment certificate, popularly known as "Form 17", by the aforesaid resolution. On 13th October, 1993, the State Board by its communication to its Divisional Boards including the first respondent furnished intimation of the resolution dated 23rd September, 1993 and forwarded the duly approved Form 17. Thereafter, the State Board has been issuing directions to the Divisional Boards from time to time. Every year, the

Divisional Boards including the first respondent intimate the aforesaid directions of the State Board by circular to each of the junior colleges falling under the jurisdiction of the respective boards. These instructions are also annexed to Form 17.

6. The regulations that have been framed by the State Board clearly envisage a distinction between regular and private candidates. The Board has submitted before us and in our view with a considerable degree of merit that regular candidates are expected to undergo a course of study at schools and colleges under the guidance and tutelage of qualified teachers. Besides being educated in formal academic instruction, a regular candidate is exposed to extra curricular activities, which promote the all round growth and development of personality. Some of those activities, the first respondent informs the Court, are compulsory. Regulation 88 has laid down the eligibility and other stipulations with reference to regular students. On the other hand, Regulation 89 clearly stipulates that a private candidate is a student who is not on the rolls of a Junior College in Maharashtra during the preceding three academic years. (The State Government is stated to have issued a direction reducing the period to two years). In *Master Kochikar Ketan Manohar and Others Vs. State of Maharashtra and Others*, , a Division Bench of this Court recognised that the facility of permitting students to appear privately was a concession granted to under-privileged students who are not able to attend school regularly for one reason or another, for instance, due to the fact that some of them are employed or unable to pay fees. The Division Bench observed that these students are permitted to appear for the examination provided they satisfy the conditions of eligibility which are laid down in the Regulations. This class is defined as an exception to the general body of regular students, who undergo a regular course of studies and subject themselves to the rigour of a regular course of education, where there is interaction between the teachers and participation in extra curricular activities. Regular students and private students are hence two clearly defined classes of students. While granting the facility of pursuing the secondary or higher secondary course to private students, it is lawful for the authorities to specify requirement that are consistent with maintaining the standards of education.

7. The Board has urged before us that the State Government introduced vocational education at the 10+2 level in pursuance of the recommendations of the Kothari Commission. The object of bifocal vocational education was that (i) students at the 10+2 level secured sufficient vocational training to be self employed, and (ii) students can pursue higher courses in specialised fields at the University level.

8. The salient features of vocational courses are thus:

i) Courses are designed specifically with a practical orientation. Practical training in the subject of study is the essential feature of the course. This practical orientation in a vocational course differs from conventional subjects wherein a weightage of specific marks is stipulated for practicals;

- ii) The weightage given for practical training at the examination exceeds the weightage of marks assigned in theoretical aspects of the subject;
- iii) Facilities for training at the institute imparting training in a vocational subject are a prerequisite and have a direct nexus to the number of students enrolled;
- iv) Every student due to the very nature of the vocational course has to be on the rolls of the institution as a regular student;
- v) Attendance by students at the practicals and tutorials is compulsory; and
- vi) Admission is based strictly on merit. Specifically with reference to the subject of electronics it has been stated that a candidate is assessed for 200 marks, out of which the practicals carry 120 marks. The study of the subject requires attendance in a laboratory for long periods of time which would necessitate attendance by students on a regular basis at an educational institution.

9. The Board, it has been urged, merely conducts Examinations for these courses for the specified number of seats. The seat allocation to each institute is controlled by the Directorate of Vocational Training and Education based on the availability of facilities and trained teachers. The cut off percentages for admission to these courses has been extremely high. The learned Counsel appearing for the Board has, therefore, submitted that Regulation 89(3) specifically defines the eligibility of a private candidate as a candidate who was not on the roll of junior college in the State of Maharashtra for the last three academic years. Hence it has been submitted that a private candidate cannot opt for a vocational course which needs student-teacher interaction and full time regular and practical training. By their very nature, vocation and technical subjects require training in those disciplines at recognised institutes and, as such, they are necessarily a part of formal education. The number of seats in each institution for vocational subjects and technical subjects is directly linked to the facilities provided by the institution. The allocation of a specific number of seats for each institution imparting Vocational and Technical Education as decided by the Director of Vocational and Technical Education would be rendered obsolete if the courses of study were made open to private candidates. The examinations in vocational and technical training subjects are conducted pursuant to the policy of Government to make the aforesaid subjects available for a regular course of study.

10. The arguments advanced by Counsel for the Board cannot be brushed aside. These are matters relating to education and, it is well settled that in academic matters, the Court exercising jurisdiction under Article 226 of the Constitution would not interfere save in a clear case of arbitrariness or one in which the action that is pursued is ultra vires the governing statute or regulations. Section 18 of the Act to which a reference has already been made, defines the powers and duties of the State Board. By Clause (f) of Section 18, the State Board is empowered to prescribe the general conditions governing admission of regular and private candidates to the final examination and to specify conditions

regarding attendance and character on the fulfilment of which a candidate shall have the right to be admitted to and to appear at any such examination. There can be no gainsaying the fact that the powers vested in the Board in Section 18 are coupled with a duty. These regulatory powers have to be exercised in the interest of the maintenance and enhancement of educational standards. The Board in the exercise of its executive powers, is entitled to take decisions, to issue circulars, and to implement its decisions in furtherance of the objects prescribed by the Act. The regulations which have been framed in pursuance of the provisions of Section 36 cannot be regarded as preventing the board from issuing directives for the proper conduct of examinations as long as there is no infraction of a statutory or regulatory mandate. The effort of the Court in a matter such as the present, must be to render a harmonious interpretation of the powers and functions of the Board so that the fulfilment of the salutary statutory object underlying the conferment of those powers is not defeated.

11. An administrative instruction, it is well settled, cannot be inconsistent with statutory provisions or with delegated legislation which owes its legitimacy to statute. The streams, as it is said, cannot rise above the source. An executive instruction which contravenes statutory provisions or subordinate legislation is hence not valid. However, while interpreting legislation and, as in the present case, delegated legislation, the Court must have a robust appreciation of the fact that the law maker and his delegate cannot always perceive of all eventualities that may arise in the actual implementation of law. When a regulatory body is set up, with wide ranging powers and duties such as those that have been envisaged for the State and Divisional Boards of Education in Maharashtra, the legislature does have in contemplation the fact that it is for those bodies which administer the law to iron out the creases in the practical application of law to education. When the regulation is silent, the Court would not readily assume that the exercise of powers by the State or Divisional Boards was intended to be excluded. Such an interpretation is manifestly not warranted for it would denude the Board of essential functions necessary to implement the law in the interest of education and the maintenance of educational standards. If, there is no specific prohibition imposed by the statute or by the regulations and the Board has taken a decision in accordance with a principle which is non-discriminatory and which bears a reasonable nexus to the due exercise of its statutory powers, the writ Court would be loathe to restrain the Board from implementing its decision.

12. In the present case, a scheme for vocational and technical training has been envisaged by the State Government in its two resolutions of 9th August, 1978 and 31st July, 1979. Vocational training is unlike a conventional subject in which practical training may be one component of the over all curriculum. The essence of vocational training is its practical content. Hence, the very nature of the subject requires a continuous affiliation of the student to an educational institution which is permitted to impart instruction in those subjects. The resolutions of the Government postulate permission being granted to identified institutions with a demonstrable infrastructure and facility for conducting such

courses. Admissions are monitored by the directorate for vocational and technical training. These courses are highly sought after, where the percentage for admissions is unusually high. The entire scheme for vocational training will be rendered as under if the Court were to override the decision of the State Board of Secondary and Higher Secondary Education by permitting private students to enroll for vocational courses. In so far as petitioner is concerned, he failed in the XIth Standard Examination. Ordinarily, such a student would have to repeat the year as a regular student. The petitioner sought to obviate this by seeking admission as a private student. The petitioner was clearly on notice of the fact that he would be entitled to appear only in such subjects in which a private candidate could appear at the H.S.C. examination. Form 17 clearly put the petitioner on notice that he would not be eligible to offer technical and vocational subjects. That being the position, the relief which has been sought by the petitioner cannot be granted. The Court exercising jurisdiction under Article 226 of the Constitution would not grant relief, the effect where of would be to override a bonafide decision of an expert academic body conceived in the best interest of the system of imparting education. The petitioner has been subject to the same uniform and non discriminatory principle applied to all private students since the inception of vocational courses. In pursuance of the interim order of the Court, the petitioner was permitted to appear in February, 2004, for the subjects of Electronics, Physics and Chemistry. By a subsequent interim order, the result was directed to be declared. The petitioner has failed in Mathematics and Statistics. Since we have come to the conclusion that the petitioner is not entitled to any relief in the petition, it would in the very nature of things be impermissible for the Court to grant further relief which has now been sought in the Notice of Motion. With the dismissal of the petition, the Notice of Motion (N.M. 583 of 2004) must also stand rejected. We have heard arguments on the main writ petition with the consent of Counsel and have proceeded to dispose it of by this judgment.

13. We, therefore, do not find merit in the petition. The petition and the Notice of Motion accordingly stand dismissed. There shall be no order as to costs.