

(2009) 09 BOM CK 0140

In the Bombay High Court

Case No : Writ Petition No. 4835 of 2002

Shikshan Prasarak Mandal

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 17-09-2009

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 20, 90(7)
Constitution of India, 1950 — Article 19(1), 21, 21A, 226, 26

Citation : AIR 2010 Bom 39 : (2009) 6 BomCR 1

Hon'ble Judges : Swatanter Kumar, C.J;D.Y. Chandrachud, J;A.M. Khanwilkar, J

Bench : Full Bench

Advocate : A.M. Joshi, for the Appellant; V.S. Masurkar, AGP and U.P. Warunjikar, for the Respondent

Judgement

Swatanter Kumar, C.J.—The Petitioner Gramvikas Shikshan Prasarak Mandal is a Public Charitable Trust as well a Society duly registered under the Public Trusts Act, 1950, and the Societies Registration Act, 1860, respectively, which claims that it is running one Secondary School from 5th to 12th standard at Talegaon Dhamdhere. The Deputy Director of Education, Pune Region, Pune and the Director of Education are responsible for and have overall control over educational activities in the Pune region and State of Maharashtra, respectively. The school run by the Petitioner was established and started in the year 1959 and there are nearly 1300 to 1500 students studying in the said school. According to the petitioner, the school has been showing good results in the academic courses. There is another secondary school at Vithalwadi which is at a distance of 4 kms., run by Pandurang Shikshan Prasarak Mandal. In fact, there are two other schools, one at Sanaswadi run by Nareshwar Shikshan Prasarak Mandal, and the other at Shirur run by Shirur Shikshan Prasarak Mandal, which are nearly 3 kms away from the Petitioners' school. The population of Talegaon Dhamdhere is nearly 10000 and the Petitioner's school is enough to cater to students from that area. While referring to the judgment of a Division Bench of this Court in the case of Gramvikas Shikshan Prasarak Mandal, Sondoli Vs. The

State of Maharashtra and others, , according to the Petitioner, another school cannot be permitted to come up within a distance of 5 kms of an already existing school. The grievance of the Petitioner is that the Respondents in discharge of their duties have granted the permission arbitrarily to Respondent Nos. 5 and 6 to run a school in Talegaon Dhamdhere, at a place which is not even an half km away from the Petitioner's school and also to another school at Shirur which is again at a distance of 3 kms. It is averred by the Petitioner that these Respondents had started schools with 8th, 9th and 10th Standards unauthorisedly and had started the 5th standard in their respective schools. This has resulted in an unhealthy competition and these schools are trying to attract students on the basis of caste and creed throwing all caution to wind which demonstrates political influence for grant of such permission. The Petitioner, being aggrieved, approached this Court on the ground that permission which has been granted gives rise to unhealthy competition and the authorities have granted permission on purely political considerations ignoring all norms and rules. The permission granted is further stated to be misconceived in law.

2. On the above premise, the Petitioners have prayed for setting aside the permission granted to Respondent Nos. 5 and 6 as well as for interim orders restraining the Respondents from imparting education in these institutions.

3. This Petition was contested by the Respondents who have filed a reply denying the contention that the permission granted to Respondent Nos. 5 and 6 was in accordance with law and the policy of the State.

4. When this Writ Petition came up for hearing before a Division Bench of this Court, the Division Bench vide its order dated 9th September, 2002 issued notices to the Respondents and while issuing the notice, the Court also directed the Assistant Government Pleader appearing for the State of Maharashtra to ascertain whether the procedure stated by the Court in the judgment of a Division Bench referred to in the case of Gramvikas Shikshan Prasarak Mandal v. State of Maharashtra and Ors., passed in Writ Petition No. 1773 of 2000 was followed before granting permission to Respondent Nos. 5 and 6. Finally, after some hearings, the matter came up before different Division Benches of this Court, and vide order dated 6th March, 2003, the Division Bench of this Court passed the following order :

Rule.

In view of the fact that there prima facie conflict between the two decisions of this Court one in Writ Petition No. 4172/2000 and another in Writ Petition No. 1773/2000 we deem it necessary to admit the petition and place it before my Lord the Chief Justice for constitution of appropriate larger bench. Request for interim relief is rejected for the present.

5. As is evident from the reading of the above order, the Court had directed the matter to be referred to a larger bench in view of the conflict between the two decisions of this Court. However, the Writ petition number was incorrectly typed

as Writ Petition No. 4172 of 2000 instead of Writ Petition No. 4172 of 2001. In view of the order of a Division Bench, this case has been placed before the Full Bench of this Court, though no question of law has been framed for reference to the Full Bench. Be that as it may, since the reference has been made on the basis that there is a conflict of judicial views between the two Division Benches, it is necessary for us to examine this aspect of the matter at the very threshold.

6. Out of the two judgments aforereferred, the case of Gramvikas Shikshan Prasarak Mandal came to be decided first by the Division Bench of this Court, the judgment of which was pronounced on 11th April 2000. That writ had been pending for some time. An application filed by the Petitioner in that case for obtaining sanction of the State Government to run the classes above 8th, 9th and 10th standards, was rejected for three reasons, which were as under :

- (i) the institution had not furnished Audit Reports for the previous two years;
- (ii) the managing committee of the Trust did not include 30% of women amongst its members; and
- (iii) the Trust had unauthorisedly commenced the running of the school without the permission of the State Government.

7. As would be clear from the above reasons the ground for rejection of that application was not that there was another school within a radius/distance of 5 kms. The students of that school were permitted to take examination through other schools, pending consideration of the application filed by the Petitioner. The Court while relying upon the judgment of the Supreme Court in the case of Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., , noticed that education until the attainment of the age of fourteen is a fundamental right under Article 21 of the Constitution of India and, therefore, need for expanding the infrastructure and to establish as many schools as possible to achieve that target. It appears that the Court had directed the State Government to formulate a scheme for granting sanction/recognition to the schools for imparting education of different classes. The Government put up a claim before the Court which dealt with the procedure as to how the applications were to be made, what were the conditions of recognition, refusal of recognition, withdrawal of recognition and it specifically noticed that there should be financial stability, existence of competent, reliable and proper management and all efforts should be made to avoid unhealthy competition between the Institutions.

8. In paragraph 8(7) of the said judgment, the Court noticed the scheme proposed by a Government Resolution which provided for a 'Master Plan' prepared by the Government and was ordered to be finalised by the State Government and then to place it before the High Court which should be implemented scrupulously. Suggestion No. 4 regarding Master Plan reads as under :

- (4) The existing Master Plan for Secondary and Higher Secondary schools will be

updated for the period 2000-2010. The conditions of 5 km distance prescribed for starting secondary schools will be relaxed only in the case of areas suffering from special hindrances and these are hilly, mountainous, river and tribal areas.

9. A bare reading of the above conditions shows that it is a condition which is self-explanatory and it itself provides for relaxation of the condition in certain circumstances. The said condition in the scheme has neither been projected as an absolute mandate which cannot be relaxed under any circumstances nor it is so recorded in the judgment of the Division Bench. The condition of 5 kms distance prescribed for starting a secondary school thus can be relaxed in the circumstances contained in the condition itself. A decision has to be taken by the Competent Authority with reference to the facts and circumstances of a given case. Furthermore, the master plan which was to be finalised as a scheme by the Government, of course, was expected to be adhered to. In other words, this scheme finds its origin from the judgment of the Court.

10. The Secondary School Code 2002, (hereinafter called as the "S.S. Code") itself is not a statutory document but is in the nature of an executive directions or guidelines. The provisions of grant-in-aid in the S.S. Code are merely executive instructions and do not have force of law and are in the nature of administrative instructions without any statutory force of law. Such a view was taken by the Supreme Court in the State of Assam and Another Vs. Ajit Kumar Sharma and Others, . This view was even expressed by the Supreme Court in the case of The State of Maharashtra and Another Vs. Lok Shikshan Sansatha and Others, . Giving the orders passed by the authorities under the S.S. Code, a character of enforceability, the Supreme Court held that these directions were enforceable under Article 226 of the Constitution of India though the S.S. Code is no statutory in character. Reference can be made to the decisions of the Supreme Court in the cases of Tikaram Vs. Mundikota Shikshan Prasarak Mandal and Others, and Francis John Vs. Director of Education and Others, . A Division Bench of this Court in Kobad Jahangir v. Farukh Sidheva 1990 MhLJ 883, again took the view that the contravention of rule of the Code can be challenged before the High Court. But the provisions of the S.S. Code are always executive or administrative instructions which are no statutory in character. The S.S. Code, Third Revised Edition - 2002, Chapter II deals with the Recognition, Organisation and Management of Schools. The conditions of recognition have been stated under Clause 3.2 of the said Chapter. The said Clause 3.2 provides that a school seeking recognition of the Department has to satisfy these criteria. None of these criteria contemplate any condition with regard to distance but empowers the Authorities concerned to take into consideration various aspects stated therein while granting or refusing to grant recognition to a school. It appears that the master plan projected in the judgment of the High Court in the case of Gramvikas Shikshan Prasarak Mandal (supra) under the head "Quota for School Permission", it was noticed that nearly 11000 habitations in the State are without primary education facility. As these habitations do not fulfill the existing criteria (i.e. 1.5 km vicinity and 200 population for general areas and 100 population

and 1 km for tribal, hilly and remote areas), the condition of distance and population is to be relaxed.

11. The Division Bench dealing with the case of Gramvikas Shikshan Prasarak Mandal (supra) had primarily referred to constitutional mandate which required or made it obligatory on the part of the State to provide primary and secondary education to all persons and particularly, while referring to the case of Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., , which had held the education till 14 years to be a fundamental right and issued the guidelines on which the State was expected to make full fledged scheme. The Division Bench noticed that institutions with little or no infrastructure, poorly equipped with unqualified staff were detrimental to the cause of education. In those circumstances, the Court held that the decision of the State Government to reject the application made by the Petitioner on the ground that it had been commenced unauthorisedly could not be faulted and while declining to interfere, granted the liberty to the Petitioner to make an application to the District Level Committee to be constituted by the State, for dealing with such application. This was the primary direction contained in that judgment.

12. In the case of Shriram Kreedha and Shikshan Prasarak Mandal, in Writ Petition No. 4172 of 2001, it appears that all these facts and position of law were not brought to the notice of the Division Bench. The Government had taken up a general plea before that Bench that there was an absolute bar and hence no other school can be granted permission within a radius of 5 kms from an existing school. The Bench held that distance could hardly be said to provide a rational basis for refusal to permit a school to be established. The Bench held as under:

...If providing education to all is the object, there appears to be no justification to protect the monopoly of an existing school on the mere pretext of unhealthy competition completely ignoring the need for a school, since the existing school may not be adequate for the large number of prospective students who aspire to be educated. In fact, in the field of education, a healthy competition may even be desirable. In the circumstances, we set aside the impugned order dated 9th August, 2001 (Exh. E) and direct the Respondent to reconsider the case of the petitioner.

13. As is obvious from the above decision that the Court in this judgment also stated no absolute proposition of law but it was a decision on the facts of the case in hand before it. The Division Bench had come to the conclusion that the condition of 5 kms could hardly be applied and justified in the facts of that case. We may notice that even the condition was not referred to in the judgment.

14. In our view, both the judgments of the Division Benches apparently show no conflict and in any case can hardly be said to be binding precedents. For a precedent to be binding, there has to be a reference to the facts, controversy in issue, discussion on statutory provisions, reasoning for coming to a conclusion and clear statement of law and principles settled or answered by the judgment.

These are the conditions which would have the effect of declaring the binding precedents for the Courts to follow.

15. A Full Bench of this Court in the case of Emkay Exports and Mrs. Kanchan S. Chaudhary, partner of Emkay Exports Vs. Madhusudan Shrikrishna, was concerned with the interpretation of application of Order 37 of the Code of Civil Procedure, 1908, where challenge was to an order granting conditional leave to defend the suit. The concerned court had noticed conflict between the two Benches of the Court and had made a reference to a larger bench. The Full Bench noticed that there was hardly any conflict between the two judgments and the judgments were not binding precedents so as to refer to a larger bench, the Full Bench held as under:

6. The concept of precedent has attained important role in administration of justice in the modern times. The case before the Court should be decided in accordance with law and the doctrines. The mind of the Court should be clearly reflecting on the material in issue with regard to the facts of the case. The reason and spirit of case make law and not the letter of a particular precedent. Halsbury's "The Laws of England", explained the word "ratio decidendi" as "It may be laid down as a general rule that that apart alone of a decision by a Court of Law is binding upon Courts of coordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the ratio decidendi." It is by the choice of material facts that the Court create law. The law so created would be a good precedent for similar subsequent cases unless it falls within the exceptions hereinafter indicated.

7. The doctrine of precedent relates to following or previous decisions within its limitations. It introduces the concept of finality and adherence to the previous decisions and while attaining it, it creates consistency in application of law. The later judgment should be similar to the earlier judgment, which on material facts are the same. Finding ratio decidendi is not a mechanical process but an art which one gradually acquires through practice. What is really involved in finding the ratio decidendi of a case is the process of abstraction. Ratio decidendi is a term used in contrast to obiter dictum which is not necessarily binding in law. According to Sir John Salmond, "a precedent is a judicial decision, which contains in itself a principle. The only principle which forms its authoritative element if often termed the `ratio decidendi'". The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large". According to Austin, the general reasons or principles of judicial decision abstracted from peculiarities of the case are commonly styled by writers on jurisprudence as `ratio decidendi'".

8. Amongst the principles of law governing the binding value of judgments, doctrine of precedent is not only a well accepted principle but is one of the most pertinent facets of judicial interpretation. A ruling of Bench of higher court is

considered to be binding on the lower courts and the courts having a smaller Bench structure. Earlier judgments are even taken to be binding on subsequent equi Bench unless and until reasons compelling for taking a divergent view are stated. To apply this principle, the court must examine by process of appropriate reasoning as to the applicability of the precedent cited before the court or even which of the views expressed by a higher court or even a larger Bench or even a Bench of equi strength is more aptly applicable to the facts and circumstances of the case in hand. The essence of law of precedent is its applicability on the basis of ratio decidendi. The importance and significance of adherence to law of precedent was emphasized by the Supreme Court in the case of S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others, .

9. The obligation upon the court to follow the precedent law is subject to well accepted limitation. These limitations play an effective role for helping the court to provide sound reasoning, wherever there are divergent view taken by equibenchs of the highest court of land. The Court would be guided by the settled principles in making up its mind whether the judgments cited before it is a precedent to be followed or not depending on the facts of a given case. Normally, the judgments pronounced by a later equi Bench would prevail provided it has not ignored or has not failed to notice the view of the earlier Benches. The law of precedent thus is a respected canon of judicial administration and subsequent Benches essentially must follow the views of the earlier Benches unless they fall within any of the stated exceptions. The Hon''ble Supreme Court in S.I. Rooplal (supra) held as under:

...Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every Presiding Officer of a Judicial Forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate Court is bound by the enunciation of law made by the superior Courts. A coordinate Bench of a Court cannot pronounce judgment contrary to declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement.

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We are indeed sorry to note the attitude of the tribunal in this case which after noticing the earlier judgment of a coordinate Bench and after noticing the judgment of this Court, has still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment thereby creating a judicial uncertainty in regard to the declaration of law involved in this case. Because of this approach of the latter Bench of the tribunal in this case, a lot of valuable time of the Court is wasted and the parties to this case have been put to considerable hardship....

10. The Hon''ble Apex Court further observed that a caution need to be taken while applying the principle of judicial precedents as decision of the court and its observations must be read in context in which they appear. In a judgment discussion is meant to explain and not to define. In this regard, reference can be made to the case of Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr. J.T. 2002(1)SC 484.

11. It is clear from the above dictum that precedents are to be applied with due regard to facts while adhering to the principles of "ratio decidendi". Precedents are described as, "Authorities to follow in determinations in Courts of Justice". Precedents have always been greatly regarded by the Sages of the Law. The Precedents of Courts are said to be the laws of the Courts; and the Court will not reverse a judgment, contrary to many Precedents. Even for a precedent to be binding, it cannot be without judicial decision or arguments that are of no moment. To be a good precedent, it has to be an adjudged case or decision of a court of competent jurisdiction considered as furnishing an example or authority for an identical or similar case or a similar question of law afterward arising. It is the ratio understood in its correct perspective that is made applicable to a subsequent case on the strength of a binding precedent. In a recent judgment, a Full Bench of this Court in the case of State of Maharashtra Vs. Prashram Jagannath Aute, , while referring to the binding precedents, held as under:

The ratio is variously defined to be the relation between two magnitudes of the same kind in terms of quality and quantity. Ratio decidendi is the reason for deciding as reasoning is the soul of decision making process. It is formulation of an opinion by the Judge which is necessary in the facts of the case for determination of the controversy. In the case of C.D. Kamdar v. State of Orissa (1985) Tax L.R. 2497, expressing its views in relation to the binding precedents, the Court held as under:

Mr. R. Mohanty, the learned Counsel for some of the petitioners submitted that the power of the Board u/s 90(7) of the Act is to levy fees simpliciter. He cited the case reported in (1978)34 CLT 122 (SC) (Laxmidhar Sahu v. Supdt. of Excise Berhampur) in support of the contention. Reading the entire judgment, the contention as raised by Mr. Mohanty, is not spelt out. A Decision is an authority only for what it actually decided and not for what may logically follow from it. Every judgment must be read as applicable to the particular factors proved, or assumed to be proved, since the generality of the expressions, which may be found there, are not intended to be expositions of the whole law but governed or qualified by particular facts of the case in which such expressions are to be found. See Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, . The case of Laxmikanta Sahu (supra) was considered by the Supreme Court in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, . In para 61 at page 1134 it has been observed that in that case it was expressly contended on behalf of the State of Orissa that the levy was a tax and not a fee. The decision being based on a concession did not

involve the determination of the point whether the fee levied u/s 90(7) of the Act is a fee simpliciter.

2. We have already indicated that the law in its due course changes its form and application but existence of reasoning with the changing law is a mandatory requirement of judicial process. *Ratio est legis anima, mutata legis ratione, mutatur et lex* is a maxim for the proposition that law must state reasons and reasons should have a reasonable nexus to the facts of the case. It is said that reason and authority are the two brightest lights of the world and thus it follows that providing of correct reasoning for every decision is the basic feature of rule of law.

12. In order to apply a judgment as a precedent, the relevant laws and earlier judgments should be brought to the notice of the court and they should be correctly applied. Mere observations in a previous judgment may not be binding on a subsequent Bench if they are not truly applicable to the facts and controversies in a subsequent case as per settled principle of "*ratio decidendi*." The rule of precedent, thus, places an obligation upon the Bench considering such judgments that the Court should discuss the facts and the law of both the cases and then come to a conclusion whether the principle enunciated in the previous judgment is actually applicable on facts and law to the subsequent case. This principle would equally apply when the Courts have to consider which of the two views expressed by earlier equi or other Benches is applicable to the subsequent case. The rule of precedent is not without exceptions. It has its own limitations. Besides that, the law changes with the changed circumstances and even good law may be rendered ineffective or unconstitutional because of passage of time, as reflected in the principle "*cessante ratione cessat ipsa lex*." Adopting this Maxim, the Supreme Court in the case of *State of Punjab and Another Vs. Devans Modern Brewaries Ltd. and Another*, , stated that, with changes that are bound to occur in an evolving society, the judiciary must also keep abreast of these changes in order that the law is considered to be good law. This is extremely pertinent especially in the current era of globalisation where the entire philosophy of society, on the economic front, is undergoing vast changes. Besides this well accepted precept, there are exceptions to the rule of precedent. There are judiciously accepted exceptions to the rule of precedent and they are decisions *per incuriam*, *subsilentio* and *stare decisis*. These principles explain when and where a precedent, which is otherwise a good law, necessarily need not be accepted in subsequent judgments if it fully satisfies essentials of these exceptions."

16. The analysis of the above enunciated principles show that a judgment would be applicable as precedent to the subsequent case only where *ratio decidendi* is squarely applicable to the facts of a subsequent case. The Courts or Tribunals are expected to follow the law of precedent subject to well accepted limitations. The basic object and purpose is to provide some reasoning and clear enunciations of law. Wherever there are divergent views of equi Bench, the judgment of the later

Bench would cover the field provided it is reasoned one, decides the controversies and applies to the facts of the case. None of the judgments aforementioned have discussed condition relating to distance of 5 km, circulars issued by the Government, and the policy framed. As such there is no clearly stated principle of law which would operate as a precedent. None of the Division Bench judgments have discussed the constitutional validity of the condition relating to 5 kms. radius which could be adopted as a binding precedent on its ratio decidendi. The various circulars issued and the policy framed by the State Government was not tested on the touchstone of constitutionality or being ultra vires of any statutory provision. In our humble opinion, the judgments do not state a principle of law which could operate as binding precedent. The judgments are primarily with reference to the facts of those cases. However, in the case of Gramvikas Shikshan Prasarak Mandal (supra), the court had directed the State to place before it the master plan which was finally to be declared by the State as a State policy in regard to the approval and recommendation of newly opened primary or secondary schools. The Division Bench in the case of Shriram Kreedha and Shikshan Prasarak Mandal (supra) had found that the order of the Government not permitting the school to be opened within 5 kms. radius of the existing schools had no rational and by a short judgment directed the respondents to consider the case of the petitioner afresh. In the case of Gramvikas Shikshan Prasarak Mandal, the Division Bench had commanded the Government in exercise of its writ jurisdiction to frame a proper policy in the form of master plan while outlining the acceptable norms on the suggestion of the Government. We have already noticed that this master plan was without any statutory enforceability which later on was taken as guidelines. The condition regarding restriction of 5 kms. radius has an element of flexibility or relaxation. It is certainly difficult for us to hold that there is any divergent view expressed in the judgments capable of causing contradiction of precedent in law. We have already noticed that the conditions and resolutions of the Government have not found mention in the consequential discussion or reasons for quashing or setting aside or enforcing a particular condition as that does not appear to be judicial intent of both the judgments. The rule provides for relaxation which has to be determined with reference to the facts and circumstances of a given case.

17. Another important facet of the case before us is that the Division Bench judgment of the Court in the case of Gramvikas Shikshan Prasarak Mandal (supra) came to be noticed by the Supreme Court in the case of Superstar Education Society Vs. State of Maharashtra and Others, , where delay in finalising the Master Plan could not be a bar for new schools being permitted and the Court held as under :"

7. Though notice was issued to the respondents and served, the writ petitioner in the PIL (Maharashtra Rajya Shikshan Sansthan Mahamandal) has not entered appearance. Though the State and its authorities did not challenge the order of the High Court, they supported the appellants and contended before us that the Order dated 16-5-2006 was validly made. It was submitted that the Secondary

Education Code governed the starting of secondary and higher secondary schools; and that permission was granted to 1495 schools by Orders dated 16-5-2006, only after the District Level Committees recommended grant of permission to those schools, after verifying that the applicants fulfilled the requirements of the Education Code; that all permissions were on "permanent nongrant basis" without any financial assistance and appropriate conditions were imposed to ensure that the schools were properly run; that the decision in Gramvikas Mandal required the master plan to be prepared only for Marathi medium schools and not for English medium or other nonmarathi medium schools and not for English medium or other nonmarathi medium schools and schools run by religious minorities; that the High Court had set aside the Order dated 16-5-2006 in regard to all 1495 schools, even though it related to a large number of schools which were not required to be covered by the master plan; and that the High Court had ignored the fact that its Aurangabad Bench had permitted the State Government to sanction schools on permanent unaided basis, even without the master plan, for the years 2004-2005 and 2005-2006. It was also contended that the High Court could not have quashed the permission granted to the 1495 schools, without hearing them and without impleading them as parties to the writ petition.

8. The objects of regulating permissions for new private schools are: (1) to ensure that they have the requisite infrastructure, (ii) to avoid unhealthy competition among educational institutions; (iii) to subject the private institutions seeking entry in the field of education to such restrictions and regulatory requirements, so as to maintain standards of education; (iv) to promote and safeguard the interests of students, teachers and education; and (v) to provide access to basic education to all sections of society, in particular the poorer and weaker sections; and (vi) to avoid concentration of schools only in certain areas and to ensure that they are evenly spread so as to cater to the requirements of different areas and regions and to all sections of society.

9. While the decision of the Bombay High Court in Gramvikas Mandal directed the formulation of a master plan by incorporating the suggestions made by the Court, it does not bar the grant of permission to schools before the master plan was finalised. At all events, the proposed master plan is not intended to apply to English medium schools, no Marathi schools and schools run by religious and linguistic minorities. We are also informed that the State Government has already constituted a committee under the chairmanship of Director of Education (Secondary & Higher Secondary). Maharashtra on 24-7-2006 for preparing a master plan.

10. A perusal of the Order dated 16-5-2006 shows that the permission has been granted only after the proposals/applications were evaluated by the District Level Committees/State Level committee and necessary recommendations were made by such committees. It is evident from the counter affidavit filed by the State of Maharashtra that these committees evaluate the proposals for schools by taking

note of all the relevant aspects including place (situation) of the proposed school - whether urban, rural, tribal, no tribal, etc.; population at the place of proposed school; number of primary/secondary schools within a radius of 5 km from the proposed school, and their distance to the proposed school; the enrolment figures relating to 7th and 8th standards within a 5 km area; distance from the similar existing schools within a 5 km radius; the built-up area of school; availability of facilities like sports ground; separate toilets for boys and girls, infrastructure like furniture (benches and tables); library; educational study material; financial position of the proposed school, etc. It is also seen that for 2004-2005 and 2005-2006 the Aurangabad Bench of the High Court permitted the State Government to grant permission to schools on permanent unaided basis.

18. With the above observations and reasoning, the Supreme Court set aside the judgment of the Nagpur Bench of the Bombay High Court which had quashed the permission granted to 1495 schools as the Court felt that it was denying access to large number of students aspiring for higher secondary education. The Supreme Court further issued the following directions:

The Government Order dated 16.5.2006 permitting new schools will, therefore, continue to be in force. We however make it clear that if any school is found to have floouted or not fulfilled the parameters prescribed by the Education Code or the conditions stipulated by the State Government in the Order dated 16.5.2006, the authorities of the State Government concerned will be at liberty to take appropriate action against the defaulting schools, including cancellation of the permission.

19. By order dated 16th May 2006, the Government had granted permission to nearly 1495 new primary, secondary and higher secondary schools in the State of Maharashtra. In the case of Maharashtra Rajya Shikshan Sanstha Mahamandal Vs. State of Maharashtra and Others, , the Nagpur Bench of this Court had set aside the said order as the Government had neither prepared the Master Plan nor fixed quota for grant of permission to open new schools year wise, thereby completely ignoring the directions given by this Court in the case of Gram Vikas Shikshan Prasarak Mandal (supra). In this regard, the Supreme Court in paragraph 11 of the judgment did not accept this view of the Nagpur Bench and observed that the High Court ought not to have quashed the permission granted to those 1495 schools without impleading the schools or without hearing them and it was not entirely correct to say that the resolution dated 16th May 2006 violated the order of the Court passed in the case of Gramvikas Shikshan Prasarak Mandal (supra) since a definite time frame was not fixed by the High Court in the case of Gramvikas Shikshan Prasarak Mandal (supra) for preparation and implementation of Master Plan. It could not be construed so strictly and the cases should be decided with reference to the facts of the case. The decision of the Supreme Court obviously would have some bearing on the matter in regard to ensuring condition of 5 km in relation to the schools which have applied for

permission/ recognition to commence their course.

20. To conclude this aspect of the case, we hold that there is no contradiction in law in the two Division Bench judgments of this Court. Both the judgments can be explained with reference to the facts in their respective cases. There is no noticeable conflict in the two Division Bench judgments while applying ratio decidendi in its correct perspective.

21. In T.M.A. Pai Foundation and Others Vs. State of Karnataka and Others, , the Supreme Court said that the expression "education" in the various provisions of the Constitution, means and includes education at all levels from the primary school level up to the postgraduate level. It includes professional education. The expression "educational institutions" means institutions that impart education, where "education" is as understood hereinabove. The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Articles 19(1)(g) and 26, and to minorities specifically under Article 30. All citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26, but this right is subject to the provisions of Articles 19(6) and 26(a). However, minority institutions will have a right to admit students belonging to the minority group in the manner as discussed in that judgment. This basic principle enunciated by the Supreme Court has been reiterated with greater emphasis and clarity in the subsequent judgments of the Court in the case of P.A. Inamdar and Others Vs. State of Maharashtra and Others, and Islamic Academy of Education and Another Vs. State of Karnataka and Others, . In other words, it is the right of a person to run an educational institution obviously subject to such limitations as are provided in law or in accordance with law.

22. By Eighty-sixth Amendment Act, 2002, Article 21A was introduced which provided for free and compulsory education to all children in the age group of 6 to 14 years as a fundamental right, but, in such manner as the State by law determine. This resulted in introduction of Right of Children to Free and Compulsory Education Bill, 2008 which was passed by the Rajya Sabha on 21st July, 2009. The object and reasons of this Bill can certainly throw some light on the subject with which we are concerned in the present case. The Statement and Objects and Reasons reads as under :

The crucial role of universal elementary education for strengthening the social fabric of democracy through provision of equal opportunities to all has been accepted since inception of our Republic. The Directive Principles of State Policy enumerated in our Constitution lays down that the State shall provide free and compulsory education to all children up to the age of fourteen years. Over the years there has been significant spatial and numerical expansion of elementary schools in the country, yet the goal of universal elementary education continues to elude us. The number of children, particularly children from disadvantaged groups and weaker sections, who drop out of school before completing elementary education, remains very large. Moreover, the quality of learning

achievement is not always entirely satisfactory even in the case of children who complete elementary education.

23. With this object, the Bill was introduced that the proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all.

24. This being the constitutional and legislative mandate, there was clear obligation on the part of the State of Maharashtra to fully implement the command of the Right of Children to Primary Education. It granted permissions to large number of schools as is obvious from the aforementioned facts to open up new primary and secondary schools but at the same time it was required of the State to act in accordance with the scheme formulated and judgment of the Court.

25. The judgment of the Nagpur Bench, in fact, was discussed by the Supreme Court on this principle in addition to the fact that the schools had not been provided any opportunity of hearing before the permission granted to them was quashed by the Bench. The view of the Division Bench of Bombay Bench in the case of Gramvikas Shikshan Prasarak Mandal was held to be not mandatory in absence of any specific direction of the court to the extent that it ought to have been implemented within any frame of time.

26. In the case in hand, the grievance of the petitioner was a very limited one that respondent Nos. 5 and 6 had been granted permission to commence the secondary schools at Talegaon Dhamdhere and Kesari in violation of the conditions of 5 kms. and it was directly affecting the development of the school of the petitioner while resulting in unhealthy competition as both these schools were at a distance of 3 kms. and number of other schools had already come up in the surrounding areas. The petitioner had prayed for issuance of a direction for cancellation of the permission granted to respondent Nos. 5 and 6 vide letter dated 22nd May, 2002. It may be noticed that the permission was renewed for the relevant academic years subject to 13 main conditions and 5 other conditions as stated in the letter. The conditions even related to following directions of the Government regarding admission, those contained in S.S. Code and rules relating to service conditions of its employees.

27. We do not consider it necessary to examine any further factual matrix of the case as that will have to be decided by the court of competent jurisdiction. We are primarily concerned with whether there is "prima facie conflict" between the two judgments of this Court aforereferred and whether the condition of 5 kms. radius is absolutely mandatory. At the cost of the repetition, we may notice that Supreme Court in the case of Superstar Education Society (supra) noticed that the permission in those cases was granted by the Government after evaluation by the concerned committees and did not enforce the condition of 5 kms. in its absolute terms and left it to the authorities to consider the ramification of this

condition while ensuring that the school follow the parameters and conditions prescribed by the Education Code as well as reserving liberty to the authorities to take appropriate action.

28. In the case of Govt. of A.P. and Another Vs. J.B. Educational Society and Another etc., , the Supreme Court clearly held as under:

...The State authorities alone can decide about the educational facilities and needs of the locality. If there are more colleges in a particular area, the State would not be justified in granting permission to one more college in that locality. Entry 25 of the Concurrent List gives power to the State Legislature to make laws regarding education, including technical education. Of course, this is subject to the provisions of Entries 63, 64, 65 and 66 of List 1. Entry 66 of List 1 to which the legislative source is traced for the AICTE Act deals with the general power of the Parliament for coordination, determination of standards in institutions for higher education or research and scientific and technical educational institutions and Entry 65 deals with the union agencies and institutions for professional, vocational and technical training, including the training of police officers, etc. The State has certainly the legislative competence to pass the legislation in respect of education including technical education and Section 20 of the Act is intended for general welfare of the citizens of the State and also in discharge of the constitutional duty enumerated under Article 41 of the Constitution.

29. In the case of Shree Damodar Kalvaibhav Education Society Vs. Director of Education, Goa and Another, , the Supreme Court without ambiguity stated the following principle:

7. The above provisions say that for starting a new class in a school or to open an additional division of a class, the school authorities shall make available certain physical facilities whereas starting of a new school is subject to satisfactory completion of several criteria. The Director of Education must be satisfied himself that the number of schools existing in the locality or in the neighbouring area where the new school is proposed to be opened, is sufficient to meet the needs of that locality. The Director of Education is also to consider whether the opening of a new school would be against the public interest or not. It is specifically stated that while permitting new schools, the Director of Education shall adopt the norms that no secondary school of that category within the radius of 5 kms. shall be there and unless the Director Education is satisfied that the existing school is overcrowded and there is no scope for further expansion and there is no easy access to the existing schools due to natural barriers like forest area, rivers with running water, or the proposed schools is entirely for the benefit of backward class community, Scheduled Caste or Tribal pupils.

8. The contention of the counsel for the appellant is that the appellant society wanted only to have a new class in the existing school, therefore, the norms laid down under Rule 31 are not applicable and Rule 32 alone should have been

looked into by the Director, Education. This contention is not tenable for various reasons.

30. In the light of the above stated principles and the fact that we have already expressed the view that there is no material conflict between the two Division Bench judgments of this Court in the eye of law as well as in view of the fact that the Government as yet has not framed a statutorily backed scheme on the basis of the master plan indicated in the judgment of the Division Bench of this Court in Gramvikas Shikshan Prasarak Mandal (supra), the condition of 5 kms. radius may not be enforceable in its absolute terms. In fact, the condition as noticed in the judgment of the Division Bench in the case of Gramvikas Shikshan Prasarak Mandal (supra) itself provides relaxation in certain cases. This having been stated as mere guideline to be followed by the State administration, it further provides enough leverage for the authorities to exercise their discretion while enforcing the condition of 5 kms. depending on the facts of a given case. It is expected of the authorities to evaluate every application in accordance with the Secondary Code, policy and the constitutional mandate. In order to truly achieve the constitutional mandate, the State Government has to apply this condition justly, fairly and liberally but with due caution. It will be for the authorities concerned to determine depending upon the population of the area and need of the students community to provide access to basic education while at the same time, discouraging concentration of schools in the same area avoiding unhealthy competition. The purpose of imposition of condition of 5 kms. radius cannot be said to be so sacrosanct to the extent that it will override larger public interest where the authorities feel the need of granting permission for a new school. There it can hardly be treated as an impediment for successful implementation and enforcement of the constitutional obligation placed upon the State to ensure free primary and secondary education. We have noticed with some emphasis that the condition of not permitting a new school within the radius of 5 kms. of existing school itself has provided for relaxation. That relaxation has to be construed liberally to achieve the greater object of imparting education as constitutional obligation of the State and a fundamental right of the students. This condition in stricto sensu cannot be construed as an absolute mandate without any exception. The performance of the constitutional and fundamental duty by the State would have to be placed at a much higher pedestal than the policy of the State which has statutory backing. In view of the above analysis, though no specific question has been formulated in the order of reference, we will prefer to state our conclusion as follows:

i) Condition No. 4 (relating to restriction of grant of permission for opening a new school within 5 kms. of an existing school) is not mandatory in absolute terms as it has an inbuilt element of relaxation. This condition as of now exists as a guideline and does not have any statutory backing. The competent authority while evaluating an application for grant of permission shall have to decide it on the facts of each case, keeping in view the population, need and strength of students and while avoiding unnecessary concentration of schools in an area

discouraging unhealthy competition but ensuring implementation of its constitutional obligation to provide education and recognizing rights of children to free and compulsory elementary education.

ii) We are of the considered view that there is no patent legal conflict between the two Division Bench Judgments of this Court as they do not in any terms lay down a binding precedent and can be read harmoniously with reference to the facts of each case.

31. Having answered the above question of law, we direct the matters to be placed before the learned Division Bench for its disposal in accordance with law.

32. Before we part with this matter, we consider it as the duty of the court to direct the State Government to frame its policy with a due statutory backing in the light of the Division Bench judgment of this Court in the case of Gramvikas Shikshan Prasarak Mandal and the principles of law stated by the Supreme Court in Superstar Education Society, without any further delay.