

AGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10347 OF 2012

1. Rashtriya Shikshan Sangh,
through its President / Chairman,
at & Post: Siddhewadi, Taluka Miraj,
District : Sangli.
2. Shivajirao Bapu Shendge Primary
Ashram Shala, through its
Head Mistress, Post: Siddhewadi,
Taluka Miraj, District Sangli.
3. Kai. Sou. Draupadi Dhadas Madhyamik
Ashram Shala, through its
Head Mistress, Post: Siddhewadi,
Taluka Miraj, District Sangli.
4. Bhim Smruti Prathamik Ashram Shala,
through its Head Mistress,
Subhash Nagar, Taluka Miraj,
District : Sangli. ... Petitioners

Versus

1. State of Maharashtra,
through the Secretary, Department of
Social Justice, Cultural Affair Sports &
Special Assistance, Mantralaya,
Mumbai – 400 032
2. The Social Welfare Officer,
Block-A, Zilla Parishad, Sangli.

3. Special District Social Welfare Officer,
Sangli, District : Sangli.
4. The Director,
Directorate of V.J.N.T. & Other
Backward Class & Special Backward
Class, Maharashtra State, Pune.
5. The Commissioner,
Tribal Development Department,
Maharashtra State Adivashi
Ayuktalaya, Nashik.
6. Mr. Popat Bhimrao Jadhav,
At & Post : Chinake,
Taluka Sangola, District Solapur. ... Respondents.

WITH
INTERIM APPLICATION NO. 2422 OF 2020
IN
WRIT PETITION NO. 10347 OF 2012

- Prakash Rangrao Jadhav & Others ... Applicants.
V/s.
Rashtriya Shikshan Sangh, through
President / Chairman & Others ... Respondents.

WITH
CIVIL APPLICATION NO. 687 OF 2019
IN
WRIT PETITION NO. 10347 OF 2012

- The Director, Directorate of VJNT,
OBC & SBC Welfare, Pune ... Applicant.
V/s.
Rashtriya Shikshan Sangh, through
President / Chairman ... Respondents.

Mr. Anil V. Anturkar, Senior Advocate, with Mr. Ranjit D. Shinde, i/b Mr. I.M. Khairdi, for the Petitioner in WP No. 4185/2014.

Mr. S.S. Pakale, i/b Avinash R. Belge, for the Petitioner in WP No. 10347/2012 & for Respondent No. 9 in WP No. 4185/2014.

Mr. Rajaram Deshmukh, for the Petitioner in WP No. 4033/2016.
Mr. N.C. Walimbe, AGP, for the Respondents-State.

Mr. N.V. Bandiwadekar, i/b Mr. Raju M. Yamgar, with Mr. Nikhil R. Devkar, & Ms. Bharti G. Lokhande, for Respondent No. 6 in WP No. 10347/2012.

**CORAM : SUNIL B. SHUKRE, AND
AMIT BORKAR, JJ.**

**RESERVED ON : 25th FEBRUARY 2022.
PRONOUNCED ON : 26th FEBRUARY 2022.**

JUDGMENT: (Per Amit Borkar, J.)

1. By this petition under Articles 226 and 227 of the Constitution of India, the Petitioners are challenging orders dated 9th October 2012 passed by Respondent No. 1 along with order dated 27th February 2012 passed by Respondent No. 4 withdrawing recognition of Petitioner No. 2 to 4 schools purportedly under Clauses 7(1) to 7(4) of the Secondary School Code, Rule 109 (2) of the Bombay Primary Education Rules, 1949 and powers conferred by Government Resolutions (“GRs”) dated 21st November 1995 and 19th December 1995.

2. Since the present petition is being disposed of on the limited ground of lack of exercise of power and breach of procedure prescribed, only those relevant facts for adjudication of the said issues are stated herein under.

3. In the year 1993, Petitioner No. 1 – Society was granted permission to start primary school initially on a no-grant basis. The recognition was granted to the school started by Petitioner No. 1 by GR dated 20th March 1995. Two schools were thereafter permitted by the Respondents – Authorities.

4. On 20th December 2020, Respondent No. 3 made a surprise visit to Petitioner Nos. 2 to 4 schools and submitted a report for cancellation of their recognition of Respondent No. 1. Respondent No. 1 rejected proposal for cancellation of recognition of Petitioner Nos. 2 to 4 – Schools. Respondent No. 4 again directed Respondent No. 3 to submit a fresh report regarding the cancellation of recognition of Petitioners No. 2 to 4 schools. Respondent No. 3 submitted a report to Respondent No. 4 regarding the cancellation of recognition of Petitioner Nos. 2 to 4 schools. Respondent No. 4, in pursuance of the said report, issued a show-cause notice to the Petitioners, to which the Petitioners replied. Pending the said proceedings, regular inspection of Petitioner Nos. 2 to 4 school on 17th September 2011 carried out. Respondent No. 4 on the basis of the inspection report dated 3rd February 2012, 4th February 2012 and

another report dated 24th March 2012 submitted by Respondent No. 3 and complaints made by Respondent No. 6 passed order of cancellation of recognition of Petitioner Nos. 2 to 4 by order dated 27th February 2012.

5. Petitioners challenged the said order by way of appeal before Respondent No. 1, which was dismissed on 5th May 2012 by Respondent No. 1. Being aggrieved by the order dated 5th May 2012, Petitioners filed Writ Petition No. 4544 of 2012 before this Court. This Court by order dated 5th May 2012 remanded the matter back to Respondent No. 1. Respondent No. 1 heard Petitioners and again dismissed the Appeal of Petitioners. Therefore, the Petitioners have filed the present petition challenging the order dated 9th October 2012 passed by Respondent No. 1 and the original order dated 27th February 2012.

6. This Court, by order dated 8th February 2012, issued Rule and refused to grant interim relief in favour of the Petitioners.

7. Respondents Nos. 1 to 5 have filed a reply stating that Ashram School Code is not in existence. Cancellation of recognition for Primary Ashram School is governed by the Rules under Bombay Primary Education Rules, 1949. The Secondary School Code governs the cancellation of recognition for Secondary Ashram School. The procedure laid down under both is different and is followed in the present case. It is stated that though the provisions of

the Bombay Primary Education Rules, 1949 and Secondary School Code are made applicable, the officers of the Education Department are not under the control of the Social Justice Department and, therefore, for administrative convenience, the power of cancellation of recognition of Primary Ashram School has been conferred upon the Director of Social Welfare by GR dated 21st November 1995 and Corrigendum dated 12th December 1995. Respondent No. 1 by GR dated 19th December 1995 has conferred powers of cancellation of recognition upon the Director of Social Welfare. The said reply has explained the reasons for the cancellation of recognition. Since the petition is being disposed of on the ground of power of Respondent No. 4 to pass the order, it is not necessary to burden the judgment with facts on the merits of the matter.

8. We have heard learned Advocates for the parties. Mr. Pakale, learned Advocate for the Petitioners broadly made three submissions: First, the impugned order of cancellation of recognition is without the authority of law as the Respondent No. 4 has no power to pass the order of cancellation of recognition; Second, the order dated 27th February 2012 is in breach of principles of natural justice and in any case without following the procedure laid down under Rule 109(2) of the Bombay Primary Education Rules, 1949 and Clauses 7(1) to 7(4) of the Secondary School Code; and Third, the impugned order is passed with mala fide purpose at the instance of Respondent No. 6.

9. Mr. Walimbe learned AGP supported the impugned order by stating that Respondent No. 1 has been duly authorized by GR dated 21st November 1995 along with Corrigendum dated 12th December 1995 and GR dated 19th December 1995. He submitted that the purpose of conferring power on Respondent No. 4 was administrative in nature as the officers of the Education Department are not under the control of the Social Justice Department.

10. Mr. Bandiwadekar learned Advocate for Respondent No. 6, submitted that neither the provisions of the Bombay Primary Education Rules, 1949 nor the provisions of the Secondary School Code are applicable and, therefore, Respondent No. 4 was justified in passing the order in exercise of the power conferred under GRs dated 21st November 1995 and 19th December 1995. He submitted that the Ashram School Code would govern the parties' rights.

11. We have carefully scrutinized the impugned order. On perusal of the impugned order, it appears that there are four sources of power mentioned in the impugned order which are GRs dated 21st November 1995 and 19th December 1995, Rule 109 (2) of the Bombay Primary Education Rules, 1949 and Clauses 7(1) to 7(4) of the Secondary School Code.

12. On consideration of the submissions made by parties, the issue which arises for consideration is as to whether in the exercise of powers under Article 162 of the Constitution of India Respondent

No. 1 was justified in passing GRs dated 21st November 1995 and 19th December 1995 when the field is already occupied by the statutory Rules in the form of Bombay Primary Education Rules, 1949 and Secondary School Code which has been held to have statutory force by the Full Bench of this Court in the case of *Shikshan Mandal and others v. State of Maharashtra & Others*.¹ To decide the said issue, this Court must examine Article 162 of the Constitution of India, which reads as under:

“162. *Extent of executive power of State.—*

Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.”

13. Article 162 deals with the executive powers of the State. Reading of the said Article makes it clear that the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. The proviso clause to the said Article also states that in any matter with respect to which the Legislature of State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited to, the

¹ 2012 (2) Mh.L.J. 948.

executive power expressly conferred by any law made by the Parliament.

14. The power of the State Government to issue executive directions is confined to filling up the gaps or covering the area which otherwise has not been covered by the existing statutory Rules, and such instructions or orders must be subservient to the statutory Rules. The executive power of the State under Article 162 of the Constitution of India is co-extensive with the legislative power, and when the field of law is occupied by a Legislative Act, the exercise of executive power is not available. The Government cannot supersede statutory Rules by administrative instructions. Still, if the Rules are silent on any particular point, the Government can fill the gaps by framing Rules and issuing instructions not inconsistent with the already-framed Rules. In *R.N. Nagarajan v. State of Mysore*,² the Supreme Court has observed that it is necessary to mention that if there is a statutory rule or an Act on the matter, the executive must abide by that Act or Rule and it cannot in exercise of the executive power under Article 162 the Constitution ignore or act contrary to that Rule. A Constitution Bench of the Supreme Court in *Ram Javva Kapoor v. State of Punjab*,³ held:

“The State in exercise of its executive powers is charged with the responsibility and duty of carrying on the general administration of the State so long as the State Government does not go against the provisions of the Constitution or any law the width and amplitude of its

² AIR 1966 SC 1942.

³ AIR 1955 SC 549.

executive powers cannot be circumscribed. If there is no enactment covering a particular aspect certainly the Government can carry on the administration by issuing administrative directions or instructions until the Legislature makes a law in that behalf.

15. In the facts of the present case, Rule 109(2) of the Bombay Primary Education Rules, 1949 provides for detailed procedure for withdrawal of recognition by conferring power on Competent Authority as defined under the said Rules and lays down the detailed procedure for withdrawal of recognition. Even under the Secondary School Code, which has statutory force, the power of withdrawal of recognition has been conferred on the authority stated thereunder. Once the statutory Rules confer powers on a specified authority, the State Government could not have under its executive power under Article 162 pass a GR to confer power on Respondent No. 4 as the exercise of the power of withdrawal of recognition was already occupied by Rule 109(2) of the Bombay Primary Education Rules, 1949, and Clauses 7(1) to 7(4) of the Secondary School Code. In our opinion, GRs dated 21st November 1995 and 19th December 1995 could have been passed when the Rules do not have gaps regarding the power of withdrawal of recognition and are covered field by the said Rules. Therefore, it is clear that the impugned Government Orders not only cover the area covered by the legislature by enacting Rules and code.

16. Mr. Bandiwadkar learned Advocate for Respondent No. 6,

relying on Government Resolutions dated 21st November 1995 and 19th December 1995, submitted that Ashram School Code are executive instructions issued by the Government of Maharashtra in the exercise of powers under Article 162 of the Constitution of India. He submitted that the Government Resolutions dated 21st November 1995 and 19th December 1995 are also executive instructions that confer power on Respondent No. 4 to pass impugned order and, therefore, Respondent No. 1 was justified in conferring power on Respondent No. 4 to withdraw recognition of Petitioner Nos. 2 to 4. We are not impressed by the said submission. Reading of Government Resolutions dated 21st November 1995 and 19th December 1995 makes it clear that Respondent No. 4 is conferred with the power conferred on Competent Authority under Rule 109(2) of the Bombay Primary Education Rules, 1949. Though the said Government Resolutions confers power on Respondent No. 4, the power conferred on the Authority under Ashram School Code has not been conferred on Respondent No. 4. Government Resolution dated 19th December 1995 confers power on Authority under Clauses 7.1 to 7.4 of the Secondary School Code on Respondent No. 4. We are, therefore, of the considered opinion that the Secondary School Code, having recognized as a Code having statutory flavour, the power under the said Code could not have been conferred on Respondent No. 4 in the exercise of power conferred under Article 162 of the Constitution of India. Therefore, even though it is assumed that Ashram School Code governs the rights of the Petitioners, still Respondent No. 4 does not get the

power to withdraw recognition of Petitioner Nos. 2 to 4 deriving its power under Government Resolutions dated 21st November 1995 and 19th December 1995. In our opinion, Ashram School Code is nothing but a mere compendium of departmental instructions which does not have the force of law as it has not been issued under Article 162 of the Constitution of India and has not been authenticated as required under Article 166 of the Constitution of India in the name of the Governor. Even if it is assumed that Ashram School Code applies to the Petitioners, the authority conferred with power to withdraw recognition of Ashram School is the Commissioner, Tribal Development Department. Undisputedly, Respondent No. 4 is not the authority conferred with power under Ashram School Code. Therefore, we are satisfied that the exercise of power by Respondent No. 4 by virtue of the power conferred by the GR was without authority. Consequently, we hold that the impugned order dated 27th February 2012 passed by Respondent No. 4 is without jurisdiction.

17. The next contention of the Petitioner is that the Respondent No. 4, while passing the impugned order, has not followed the procedure laid down under Rule 109(2) of the Bombay Primary Education Rules, 1949 and Clauses 7(1) to 7(4) of the Secondary School Code. In the reply affidavit filed by Respondent Nos. 1 to 5, there is no averment that Respondent No. 4 has followed the procedure laid down under the said Rules and the Code. We have scrutinized Rule 109(2) of the said Rules as also Clauses 7(1) to 7(4) of the said Code, and we are satisfied that Respondent No. 4 has not

followed procedure contemplated under the said Rules and Code. Under the said Code and the Rules, the Competent Authority or the Designated Officer needed to grant the opportunity of hearing in the manner specified under the said provisions. Respondent No. 4 has failed to comply with the said procedure. We are, therefore, of the considered opinion that the impugned order is passed in breach of principles of natural justice.

18. During the pendency of this petition, this Court by order dated 23rd September 2019 directed Member Secretary, District Legal Services Committee, Sangli to cause an inspection of the Ashram Schools established by the Petitioners and submit a report within six weeks from the date of order. It was directed that the inspection would be concerning the number of students and infrastructure available, including the condition of infrastructure. Accordingly, the report is submitted before this Court. We have scrutinized the said report, which gives a list of infrastructure available with Petitioner Nos. 2 to 4 schools. It has been stated that no students are presently studying with Petitioner Nos. 2 to 4. In the ordinary course, the consequence of setting aside the order of withdrawal of recognition would be to grant permission to the school to enroll students and conduct classes. In the facts of the present case, the report submitted by the Member Secretary, District Legal Services Committee, Sangli needs to be scrutinized by the Competent Authority under the relevant Code to ascertain as to whether Petitioner Nos. 2 to 4 schools have sufficient infrastructure and qualified staff to run

Petitioner Nos. 2 to 4 schools. Moreover, there are serious allegations of non-payment of salary, not maintaining service books and other allegations; it is, therefore, necessary that the Respondents be given the opportunity to re-investigate the allegations against Petitioners and to pass fresh orders in relation to cancellation of recognition of Petitioner Nos. 2 to 4 in accordance with the law.

19. In the result, we pass the following order:

- a) The impugned orders dated 27th February 2012 and 27th December 2012 passed by Respondent No. 4 are quashed and set aside;
- b) The Respondents shall hold a fresh inquiry into the allegations against the Petitioners after following applicable provisions of law and shall complete the same within three months from the date of this order;
- c) The Petitioners shall not restart their schools until the conclusion of an inquiry into the charges levelled against them, and the Authorities under relevant law are satisfied with the availability of necessary infrastructure and qualified staff.

20. The Writ Petition is disposed of in these terms. No costs.

21. In view of disposal of the Writ Petition, nothing survives in the interlocutory applications and the same are disposed of as infructuous.

(AMIT BORKAR, J.)

(SUNIL B. SHUKRE, J.)