**IN THE HIGH COURT OF BOMBAY (AURANGABAD BENCH)**

Writ Petition Nos. 6136, 6153 and 6186 of 2010

Decided On: 17.08.2012

Appellants: **Sau. Laxmibai Shantaram Doke Samajvikas Prathisthan, At : 6, Parag Plaza, Savedi Road, Near Lokmat Bhawan, Ahmednagar, District : Ahmednagar, Through its Secretary, and Founder Member Shri Haridas Shantaram Doke, Age : 51 Years, Occupation : Agriculture & Business, R/o. At & Post : Ahmednagar, District : Ahmednagar and Shri Haridas Shantaram Doke, Age : 51 Years, Occupation : Agriculture & Business (Founder Member of Shri Sai Vidyalaya, Dokenagar, Near Nirmal Nagar, At : Savedi, Ahmednagar, District : Ahmednagar, and Petitioner No. 1 and Trustee of Petitioner No. 1.), R/o. At & Post : Ahmednagar, District : Ahmednagar**
**Vs.**
Respondent: **The State of Maharashtra (Through its Secretary, The Department of School Education & Sports), Mantralaya, Bombay - 32, The Education Officer (Secondary), Zilla Parishad, Ahmednagar, District : Ahmednagar, Director of Education, Maharashtra State, Pune and Union of India, [Through Secretary, Department of School Education & Literacy, Ministry of Human Resources Development, New Delhi**
[Alongwith Writ Petition No. 6155 of 2010]

**Hon'ble Judges/Coram:**
B.P. Dharmadhikari and Sunil P. Deshmukh, JJ.

**JUDGMENT**

**B.P. Dharmadhikari, J.**

Rule. Rule made returnable forthwith. Heard by consent.

1. In W.P. 6136 of 2010, the Petitioner has commenced a Marathi medium primary school in 2008l. Arguments are advanced on the strength of this petition in remaining petitions. However, we find that in W.Ps. 6153, 6155 & 6186 of 2010 the very same petitioner institution has started Marathi medium secondary schools. Permission was sought after the Schools were already established in 2008. Rejection of such permission vide communication dated 4.6.2010 in WPs. 6136,6153,6155 & 6186/10 by the State and letter of Education Officer (Primary), Zilla Parishad, Ahmadnagar dated 28.5.2010 in WP 6136/10 and the letter dated 7.6.2010 by Education Officer (Secondary), Zilla Parishad, Ahmadnagar in WP 6153,6155/10 and dated 18.6.2010 in WP 6186 of 2010 are questioned in these matters. All these petitions also contain a prayer to declare part of Section18(1),18(5),19(1) & 19(5) of the Right of Children to Free & Compulsory Education Act,2009 (referred to as 2009 Act, hereafter) to the extent the same do not allow to "establish or function a school without obtaining a certificate of recognition" ultra-vires & violative of Art. 19(1) (g) of the Constitution of India & Art. 19(2) of the 2009 Act itself. By other prayers, a direction to issue provisional certificate of recognition to respective Schools to enable them to run/function is also sought. Perusal of the communication dated 28.5. 2010 at Exh. H in WP 6136 of 2010 shows that Petitioner had applied in pursuance of the circular dated 29.4.2008 and State Government has informed its policy decision dated 16.6.2009 that primary schools permitted on permanently no grant basis in mediums other than English were to be brought on grant by deleting word "permanent" from the permission. Hence, there was no policy permitting primary schools in other mediums except English medium schools to be established on permanent no grant basis. It is also informed that State had decided to consider population, number of existing schools, gross enrolment ratio etc. & had undertaken School mapping as per medium of instruction. A new policy was thus being chalked out & after examining the need of the particular area as per such School Mapping, the proposals for establishing a School as per need would be invited. Letter of dated 4.6.2010 is common in all these matters. It contains same reasons as briefly disclosed in forwarding letter and in addition also mentions Right of Children to Free & Compulsory Education act,2009 as an additional circumstance necessitating the School Mapping. It also rejects all proposals received whether with positive recommendations of either both or only one of the Committees ie District Level Committee or the State Level Committee or without such recommendation as also report received after cross verification were all considered and all proposals to start Marathi medium schools were rejected after individual scrutiny.

2. In WP 6153 of 2010, communication dated 28.5.2010 impugned in this matter is not by Education Officer but by the desk officer. Communication dated 7.6.2010 is the forwarding letter sent by the Education Officer(Sec) enclosing the impugned letter dated 4.6.2010 with it. This letter is same as mentioned above. In WP 6186/2010, impugned communication dated 18.6.2010 is the forwarding letter sent by the Education Officer(Sec) enclosing the impugned letter dated 4.6.2010 with it. Contents of both these letters are same as mentioned above. In WP 6155 of 2010, impugned communication dated 7.6.2010 is the forwarding letter sent by the Education Officer(Sec) enclosing the impugned letter dated 4.6.2010 with it. Both these letters are on same lines as stated above.

3. On 14.7.2010, this Court issued notices in the matter but observed-"No interim relief at this stage". On 8.10.2010, prayer for interim relief not to take coercive steps to stop functioning/running of the Schools as the same was without permission, was rejected after observing that its grant would tantamount to staying operation of sub-section 5 of Section 18 of 2009 Act. Looking to the arguments advanced orally, we found it proper to decide the petitions finally & permitted learned Counsel for Petitioners to file written notes of arguments after hearing him for some time. Those written notes are filed on 17.7.2012 & learned Counsel again attempted to rely upon the judgment of larger bench of the Hon. Apex Court in Society for Unaided Private Schools of Rajasthan vs. Union of India reported at   : (2012) 6 SCC 1. After hearing him, he was also allowed to place the additional written notes by 24.7.2012 & case was to be closed for judgments. Same are filed on 23.7.2012.

4. Nobody appeared for the petitioners on 24.7.2012 though matter was called out twice. We have perused those notes & closed the matters for judgment.

5. In other similar matters because of the judgment in Asha Seva Bhavi Sanstha Vs. State of Maharashtra Through its Secretary, School Education and Sports Department & ors. --  : 2010 (3) Bom. C.R. 429 = 2010 (3) All M.R. 536, the Division Bench of this Court has observed that the impugned decision of the State reflected in the Government Resolution dated 20th July, 2009 to cancel all the proposals for permission to start "Marathi medium" schools by issuing one executive fiat or blanket order on the premise that such proposals can be considered only after the enforcement of the perspective plan, is illegal and unconstitutional being discriminatory and arbitrary and also suffers from the vice of non-application of mind. The State Government, had by impugned Government Resolution dated 20th July, 2009, decided to terminate all those proposals (about 6028) as cancelled or rejected on the ground that permission could not be granted until a comprehensive plan (perspective plan/ master plan) is prepared with the assistance of experts. Further, depending upon the requirement of the school and considering the policy regarding grant of permission to start a school, the sub-committee of State Cabinet was to examine the proposals and take decision regarding permission for a new school. This GR is/was outcome of the 16th June, 2009 cabinet meeting which forms basis of the impugned communications dated 4.6.2010 in all these petitions. This decision dated 4.6.2010 is common in all matters & were assailed in WP 7472 & 4493 of 2010 before the Division Bench at Aurangabad. In judgment dated 7.9.2010 delivered therein, in paragraph 17 this Bench has noted the statement by learned Government Pleader that two circulars or communications dated 4.6.2010 pertaining to Secondary Schools & Primary Schools were withdrawn by the State Government. In view of this position, in other similar matters, we have disposed of the challenges by permitting the respective petitioners to submit fresh challenges & its fresh consideration as per law now prevailing as in the meanwhile on 16-3-2012 a Full Bench of this Court in Shikshan Mandal, through the Secretary Dr. R.G. Prabhune & ors. Vs. State of Maharashtra & Ors.--2012(2) Mah.L.J. 948 has answered the question referred to it. Not only this, but State Government also pointed out that its School Mapping exercise is over & a new perspective plan has come into force. However, here as the Schools have already started functioning, this course was opposed by the learned Counsel for petitioner who urged that permission to start a school on permanent no grant basis was not at all necessary. Hence, this contention & the challenge to some provisions of the 2009 Act need to be evaluated. In judgment dated 7.9.2010 this Court has in operative part para 20(a) observed that the school will not be actually started till provisional recognition is granted to it by following clause (h) of paragraph 82 in Asha Seva Bhavi Sanstha judgment.

6. Full Bench of this Court in Shikshan Mandal, through the Secretary Dr. R.G. Prabhune & ors. Vs. State of Maharashtra & Ors. has noted the stand of State Government in affidavit that:-

2. With regard to the Question No. (i), I say that the judgment of the Hon'ble Court Apex Court in the case M.G. Pandke Vs. Municipal Council, Hinganghat, the provisions of Secondary Schools Code have statutory status in view of the provisions of Maharashtra Secondary Education Board Regulations, 1966 (Maharashtra Regulations) framed under Section 37 of the said Act. This position in law is binding on everybody. In the light of this Judgment, I submit that the provisions of Secondary Schools Code have statutory status. The State Government is actively considering to constitute a Committee to update the provisions of Secondary Schools Code. At that time, providing express statutory status to the Code shall be considered.

& concluded that even according to Government of Maharashtra the Secondary Schools Code has statutory status. Question No. (i) whether the Secondary Schools Code has acquired statutory force because of reference made to the provisions of the Secondary Schools Code in the Regulations framed under the Maharashtra Secondary and Higher Secondary Education Boards Regulations, the M.E.P.S. Act referred to it has thus been answered accordingly. It also notes that the State Government does not differentiate between the Marathi Medium School and other language Schools, be it a Primary School or a Secondary School, in so far as making of application for establishing a school is concerned. Question No. (ii) is answered accordingly by the Full Bench. Full Bench in para 10 observes that statements in the above said affidavit made it clear that in the application which is to be made for permission to start a school, the Applicant is not required to indicate whether the school will seek grant-inaid or not. Question No. (iii) is answered accordingly by it. Question No. (iv) & (v) are important for present controversy & those questions & answers thereto by the Full Bench are:-

(iv) If the Bombay Primary Education Act does not apply to the entire State of Maharashtra, which is the law governing establishment of primary schools in the area to which the Bombay Primary Education Act does not apply?

(v) Are all the provisions of the 2009 Act enforceable in the absence of any Rules being framed by the State Government under that Act?

So far as Question No. (iv) is concerned, a clear stand has been taken by the State Government that after enactment of the Rights to Education Act and the Rules framed thereunder, in so far as establishment of Primary school in the entire State of Maharashtra is concerned, it is governed by the provisions of the Rights to Education Act and the Rules framed thereunder. So far as Question

(v) is concerned, that question no longer survives for consideration as now admittedly Rules under the Rights to Education Act have been framed."

Question (vi) and its answer are :--

(vi) Can an application be made under the Secondary Schools Code for recognition of a school without first seeking permission of the Department to start a school?

12. So far as Question No. (vi) is concerned, it is common ground before us that now establishment and recognition of Secondary School will be governed by the provisions of the Secondary Schools Code, which we have held to be binding on all recognised schools, and therefore, recognition to the schools will be governed by that Code and it is clear from the provisions of the Secondary Schools Code that it is only those schools which have been permitted by the Government to establish can apply for recognition. Therefore, it is necessary for the person who wants to establish a Secondary School to apply to the Department for permission to establish a school.

7. Full Bench has also found it necessary to consider the mapping exercise undertaken by the State & at the end of its order it observes:-

13. It was submitted before us that in so far as evaluation and recognition of the existing Primary School as also the question of grant of permission to establish a Primary School are concerned, existence of Mapping/Master Plan is necessary. In the affidavit dated 1st March, 2012 filed on behalf of the State Government in paragraph 10 following statement has been made,

10. In so far as, the time period for Mapping is concerned, it is submitted that the State Government has proceeded to complete the Master Plan by carrying out the Mapping in right earnest. However, taking into consideration the fact that the Act of 2009 was brought into force on 1st April, 2010 and that the Rules were framed on 11th October, 2011 and in view of the topographic variations in Maharashtra, Mapping process has taken longer time than expected. However, the State Government has already prepared and notified the Draft Master Plan and invited objections and suggestions over the same. The State Government has received, as many as about 1,300 objections and suggestions. Considering the voluminous objections and suggestions received, substantial time was also required to consider the same. The State Government has considered the said objections and suggestions and has prepared a detailed report about the same and the same was placed before the Cabinet of Ministers. The Cabinet of Ministers, however, has directed that the remarks/suggestions from the Planning Department, Finance Department and the Department of Law and Judiciary be obtained on the proposal. The file was, therefore, forwarded to the concerned departments and the process of finalisation of Master Plan is expected to take another three months. "

14. It is, thus, clear that the State Government proposes to finalise the Master Plan within a period of three months and then take up the applications that may be made for establishment of the Primary School and for evaluation and recognition of the Primary School for consideration.

15. The Office will now place these matters before the appropriate Division Bench for further orders.

8. This Full Bench therefore expressly negates the contention that petitioner is free to start a secondary school at any place he chooses & permission of the State Government is not necessary for it. Law as laid down in M.G. Pandke vs. Municipal Council Hinganghat   : 1993 Supp(1) SCC 708 has been relied upon to gather that provisions of the Secondary School Code have a statutory force. This finding is not even urged to be wrong before us. The alternate submission that this finding of Full Bench can not be extended to a primary school (in WP No. 1631/2010) as there is no legislation like Secondary School Code in force to govern grant of permission to open the primary school is equally misconceived. Full Bench itself has noted that in such a situation, it is 2009 Act & Rules framed thereunder which apply. Petitioner before us has only one primary school & other three schools with which we are concerned are the secondary schools. Petitioner has never moved under 2009 Act & all his proposals which have been rejected are prior to coming into force of said Act. He did not even wait for permission of State but his 4 schools have already started functioning. But in the light of arguments advanced, we have to consider whether the petitioner has any such fundamental right to open such schools anywhere he pleases without prior permission of the State Government.

9. Entire emphasis by the petitioner to point out fundamental right to establish the school & no need to seek any permission therefore is on the Division Bench judgment of this Court in Asha Seva Bhavi Sanstha. The Division Bench in paragraph 82 has recorded its conclusions as under :--

82. To sum up, we conclude that:

(a) Right to establish an educational institution of its choice on permanent no grant basis, is a fundamental right guaranteed to all the citizens within the meaning of Article 19(1)(g) of the Constitution of India.

(b) That fundamental right, however, cannot be confused with the right to ask for recognition of the School.

(c) The proposals for recognition of the school to be established by the private management on "permanent no grant basis and not receiving any other aid whatsoever" from the Government, will henceforth have to fulfill the conditions specified, amongst others, in Sections 12, 19, 25 read with Schedule of the Act of 2009 and of the Rule 3.2 of the Code (for Secondary/Higher Secondary School) or Rule 107 of the Rules of 1949 (for Primary School), as the case may be, and also in the recognition order itself.

(d) Indeed, it will be open to the State to impose strictest terms and conditions including, interalia, mentioned by us in Paragraph 67 above, fulfillment whereof can be made precondition for grant of recognition and continuation thereof, by the private schools to be established and run on no grant in aid basis and without receiving any other aid whatsoever from the Government. The terms and conditions, however, will have to be reasonable restrictions and in the interests of the general public.

(e) Not reproduced.

(f) Not reproduced.

(g) Not reproduced.

(h) Initially provisional recognition shall be granted to the unaided private Secondary/Higher Secondary School, if it fulfills the conditions specified in Act of 2009 and Rule 3.2 of the Code for grant of recognition, as provided in Rule 4.1 of the Secondary Schools Code; and recognition shall be granted to unaided private primary school, if it fulfills the conditions specified in Act of 2009 and Rule 107 of the Rules of 1949, as provided in Section 39 of the Act of 1947 read with Rule 107 of the Rules of 1949.

(i) Not reproduced.

(j) The pre-existence of a perspective plan or inclusion of the location in the perspective plan or School Development Plan, as the case may be, for considering the proposal for recognition of the "private unaided schools" -on permanent no grant in aid basis or not receiving any other aid from the Government whatsoever, cannot be a condition precedent.

(k) Not reproduced.

(l) Not reproduced.

(m) We further hold that the provisions of the Secondary Schools Code relating to permission under Rules 2.1 to 2.14 of the Code and Rule 106 of the Rules of 1949 to start a school would apply only to the proposals for establishing a school on "grant in aid basis or receiving any other aid" from the Government. However, even after grant of permission, such School shall not function or run until the grant of recognition, as per Section 18 of the Act of 2009. Only on this interpretation the constitutional validity of the above said provisions and the opening part of Rule 107(1) of the Rules of 1949 can be saved.

(n) We also hold that the State shall forthwith consider the proposals of all the private institutions "for grant of recognition" for Marathi medium School -on permanent no grant in aid basis and not receiving any other aid from the Government whatsoever, in the given locality on its own merits and in accordance with law.

(o) That be done expeditiously and the decision so taken be communicated to the concerned Management, in any case, not later than 31st May 2010, so that, if recognition were to be granted, the concerned School can commence at the beginning of the academic year 2010-2011, from June 2010.

(p) Not reproduced.

(q) We therefore allow all these Petitions on the above terms.

10. We have already noted above the answers given by the Full Bench where it notices that the State Government does not make any difference between the Schools receiving or not receiving grant in aid and an applicant like petitioner is not required to disclose in his application whether he needs grant or not. It also noted that State Government accepted the provisions of Secondary School Code to be statutory. It also noted need of master plan as pointed out to it. It is not necessary for us to reiterate the same here. Petitioner has contended that this Full bench judgment does not consider the binding precedents like T.M.A. Pai Foundation vs. State of Karnataka - 2002 AIR SCW 4957, Modern Dental College, Research I Centre vs. State of M.P. -  : (2009) 7 SCC 751, Superstar Education Society Vs. State of Maharashtra-(  : 2008)3 SCC 315 of Hon. Apex Court or then law as laid down earlier by this High Court in Laxmi Education Society vs. State of Maharashtra-  : 2010(1) All.M.R. 680, Gram Vikas Shikshan Prasarak Mandal vs. State of Maharashtra-AIR 2000 Bom. 437. Gramvikas judgment of this Court is looked into by Hon. Apex Court in Superstar Education Society Vs. State of Maharashtra-(supra) and Hon. Apex Court holds that absence of master plan does not disable State Government from granting the permission to open new school. It is therefore for State Government to examine the need & to grant or reject the permission. Hence, this law does not help present petitioner in any way. But then we do not find it necessary to appreciate these contentions in more details here as it is not the case of the present petitioner that he did comply with the requirements mandated by Asha Seva Bhavi and could have been given recognition as he complied with paragraph 82 (d) &(h) therein. There is no effort even before this court to show such compliance. Judgment in Asha Seva Bhavi was delivered on 8.4.2010. Later Division Bench judgment at Aurangabad in WP 7472 & 4493 of 2010 is dated 7.9.2010 and it granted parties time to supply additional information. There is no such step brought on record by the petitioner. On the contrary in paragraph 10 of writ petition filed in July 2010, petitioner pleads that it complied with provisions of the Secondary School Code as it held the field then. They only state that petitioner is ready & willing to abide by the norms under 2009 Act within time stipulated therein. In paragraph 14 & 15 there is express reference to judgment dated 8.4.2010 in Asha Seva Bhavi Sanstha. Then petition proceeds to assail the provisions of 2009 Act itself. What steps have been taken to comply with obligations cast by 2009 Act in past 2 years after filing of writ petitions is also not added to the pleadings. On the contrary, without bothering to obtain even provisional approval as per orders dated 7.9.2010, petitioner continued & has managed to run all 4 Schools despite rejection of interim relief by this Court. Petitioner did not find it necessary to stop its activities or seek leave of this Court to comply with 2009 Act. Thus petitioner has failed to show its bonafides and challenged both the State law & Central law obviously in roving attempt to continue to run all the four Schools. Thus, challenge being made in these facts sans bonfides. Petitioner who had every opportunity to effect compliance with directions in Asha Seva Bhavi Sanstha, deliberately did not do so & is trying to continue with his illegal schools by taking recourse to it. It can not be permitted to do so and hence, it is not necessary for us to look into his challenge to the Full Bench judgment.

11. The following observations of the Hon. Apex Court on right to establish an unaided school are important. In Society for Unaided Private Schools of Rajasthan v. Union of India : ,(2012) 6 SCC 1:-

34. The next question that arises for determination is whether Section 12(1)(c) of the 2009 Act impedes the right of the non-minority to establish and administer an unaided educational institution?

35. At the outset, it may be noted that Article 19(6) is a saving and enabling provision in the Constitution as it empowers Parliament to make a law imposing reasonable restriction on the Article 19(1)(g) right to establish and administer an educational institution while Article 21A empowers Parliament to enact a law as to the manner in which the State will discharge its obligation to provide for free and compulsory education.

36. If Parliament enacts the law, pursuant to Article 21A, enabling the State to access the network (including infrastructure) of schools including unaided non-minority schools would such a law be said to be unconstitutional, not saved under Article 19(6)? Answer is in the negative.

36.1. Firstly, it must be noted that the expansive provisions of the 2009 Act are intended not only to guarantee the right to free and compulsory education to children, but to set up an intrinsic regime of providing the right to education to all children by providing the required infrastructure and compliance with norms and standards.

36.2. Secondly, unlike other fundamental rights, the right to education places a burden not only on the State, but also on the parent/guardian of every child [Article 51-A(k)]. The Constitution directs both burdens to achieve one end: the compulsory education of children free from the barriers of cost, parental obstruction or State inaction. Thus, Articles 21A and 51-A(k) balance the relative burdens on the parents and the State. Thus, the right to education envisages a reciprocal agreement between the State and the parents and it places an affirmative burden on all stakeholders in our civil society.

36.3. Thirdly, the right to establish an educational institution has now been recognised as a fundamental right within the meaning of Article 19(1)(g). This view is enforced by the opinion of this Court in T.M.A. Pai Foundation4 and P.A. Inamdar8 that all citizens have a right to establish and administer educational institutions under Articles 19(1)(g) and 26 but that right is subject to the provisions of Articles 19(6) and 26(a). The constitutional obligation of the State to provide for free and compulsory education to the specified category of children is coextensive with the fundamental right guaranteed under Article 19(1)(g) to establish an educational institution.

36.4. Lastly, the fundamental right to establish an educational institution cannot be confused with the right to ask for recognition or affiliation. The exercise of a fundamental right to establish and administer an educational institution can be controlled in a number of ways. Indeed, matters relating to the right to grant of recognition and/or affiliation are covered within the realm of statutory right, which, however, will have to satisfy the test of reasonable restrictions [see Article 19(6)].

Thus, from the scheme of Article 21A and the 2009 Act, it is clear that the primary obligation is of the State to provide for free and compulsory education to children between the age 6 to 14 years and, particularly, to children who are likely to be prevented from pursuing and completing the elementary education due to inability to afford fees or charges. Correspondingly, every citizen has a right to establish and administer educational institution under Article 19(1)(g) so long as the activity remains charitable. Such an activity undertaken by the private institutions supplements the primary obligation of the State. Thus, the State can regulate by law the activities of the private institutions by imposing reasonable restrictions under Article 19(6).

37. The 2009 Act not only encompasses the aspects of right of children to free and compulsory education but to carry out the provisions of the 2009 Act, it also deals with the matters pertaining to establishment of school(s)as also grant of recognition (see Section 18). Thus, after the commencement of the 2009 Act, the private management intending to establish the school has to make an application to the appropriate authority and till the certificate is granted by that authority, it cannot establish or run the school. The matters relevant for the grant of recognition are also provided for in Sections 19,25read with the Schedule to the Act. Thus, after the commencement of the 2009 Act, by virtue of Section 12(1)(c) read with Section 2(n)(iv), the State, while granting recognition to the private unaided non-minority school, may specify permissible percentage of the seats to be earmarked for children who may not be in a position to pay their fees or charges.

"Conclusion (according to Majority)

64. Accordingly, we hold that the Right of Children to Free and Compulsory Education Act, 2009 is constitutionally valid and shall apply to the following:

(i) a school established, owned or controlled by the appropriate Government or a local authority;

(ii) an aided school including aided minority school(s)receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category; and

(iv) an unaided non-minority school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority.

65. However, the said 2009 Act, and in particular Sections 12(1)(c) and 18(3)infringes the fundamental freedom guaranteed to unaided minority schools under Article 30(1) and, consequently, applying the R.M.D. Chamarbaugwalla v. Union of India14 principle of severability, the said 2009 Act shall not apply to such schools.

65-A. This judgment will operate from today. In other words, this will apply from academic year 2012-2013.However, admissions given by unaided minority schools. prior to the pronouncement of this judgment shall not be reopened.

12. In its partly dissenting judgment Hon. Apex Court observes:-

96. The right to establish and administer educational institutions, according to Pai Foundation4, comprises right to admit students, set up a reasonable fee structure, constitute a governing body, appoint staff, teaching and non-teaching and to take disciplinary action. So far as private unaided educational institutions are concerned, the Court held that maximum autonomy has to be with the management with regard to administration, including the right of appointment, disciplinary powers, admission of students and the fee to be charged, etc. and that the authority granting recognition or affiliation can certainly lay down conditions for the grant of recognition or affiliation but those conditions must pertain broadly to academic and educational matters and welfare of students and teachers. The Court held that the right to establish an educational institution can be regulated but such regulatory measures must be in general to ensure proper academic standards, atmosphere and infrastructure and prevention of maladministration. The necessity of starting more quality private unaided educational institutions in the interest of general public was also emphasised by the Court by ensuring autonomy and non-regulation in the school administration, admission of students and fee to be charged.

115. Pai Foundation as well as Inamdar took the view that laws of the land including rules and regulations must apply equally to majority as well as minority institutions and minority institutions must be allowed to do what majority institutions are allowed to do. Pai Foundation4 examined the expression "general laws of the land" in juxtaposition with "national interest" and stated in para 136 of the judgment that: (SCC p. 578)

136. ... General laws of land applicable to all persons have been held to be applicable to the minority institutions also, for example, laws relating to taxation, sanitation, social welfare, economic regulations, public order and morality.

251. Right to establish and administer and run a private unaided educational institution is the very openness of personal freedom and opportunity which is constitutionally protected, which right cannot be robbed of or coerced against his will at the threat of non-recognition or non-affiliation. Right to establish a private unaided educational institution and to make reasonable profit is recognised by Article 19(1)(g) so as to achieve economic security and stability even if it is for charity.

252. Rights protected under Article 19(1)(g) are fundamental in nature, inherent and are sacred and valuable rights of citizens which can be abridged only to the extent that is necessary to ensure public peace, health, morality, etc. and to the extent of the constitutional limitation provided in that article. The reimbursement of fees at the Government rate is not an answer when the unaided private educational institutions have no constitutional obligation and their constitutional rights are invaded.

13. In Govt. of A.P. v. J.B. Educational Society,   : (2005) 3 SCC 212, the appeals before the Hon. Apex Court were filed by the State of Andhra Pradesh challenging the decision of the Division Bench of the High Court of Andhra Pradesh in Writ Appeals partly confirming the judgment of the learned Single Judge and holding Section 20(3)(a)(i) of the Andhra Pradesh Education Act, 1982 (in short "the A.P. Act") to be void and inoperative and that the State Government had no legislative competence to pass such a legislation as the State provision was in the field already occupied by the enactment made by Parliament, namely, the All India Council for Technical Education Act, 1987 (hereinafter being referred to as "the AICTE Act"). It was held that in view of Section 10 of the AICTE Act with regard to establishment of technical institutions in general, the said special enactment legislated by Parliament would prevail over the A.P. Act to the extent of its repugnancy. The writ petitioners in High Court were private educational institutions wanting to establish engineering colleges in the State of Andhra Pradesh. They applied to the authorities under the AICTE Act and approval was granted to them for the academic year 1997-98 by the AICTE Council. They made applications under Section 20 of the Act for permission to establish the institution. The permission was rejected on the ground that the writ petitioners had been seeking permission to establish colleges in the places where already there were a number of colleges and that the State Government was not satisfied about the educational needs of that locality. In that view of the matter, permission was declined. Aggrieved by the same, the writ petitions were filed. The A.P. Act is a consolidating and amending Act made by the State Legislature with the object of reforming, organising and developing educational system in the State and to provide for matters connected therewith or incidental thereto. This legislation had received the assent of the President. Under Section19 of the A.P. Act, educational institutions are classified into three categories, namely, State institutions, local authority institutions and private institutions and granting of permission for the establishment of educational institutions is governed by Section 20. This section was amended by Act 27 of 1987 wherein it was provided that no educational institutions shall be established except in accordance with the provisions of the Act. The State Government is authorised to appoint by notification a competent authority for such area as may be specified in the notification. Sub-section (1) of Section 20 provides that the competent authority appointed by the State Government shall from time to time, conduct a survey for the purpose of identifying the educational needs of the locality under its jurisdiction and thereafter it shall issue notification through the local newspapers calling for applications from the educational agencies desirous of establishing educational institutions. Educational agency means any body of persons including that of religious or linguistic minority entrusted with the establishment and maintenance of a private educational institution or a minority educational institution, as the case may be. Any educational agency applying for such permission has to satisfy the authority concerned that there is need for providing educational facilities to the people in the locality. The petitioners in the writ petitions contended that in view of Section 10 of the AICTE Act, no permission of the State Government under Section 20 of the Act was required as the field is completely covered by the AICTE Act. It was argued that once the approval was granted by the Council, the State Government cannot refuse permission on the ground that the proposed educational institution may not sub serve the educational needs of the locality. The learned counsel for the State, on the other hand, contended that Section 20 of the A.P. Act and Section 10 of the AICTE Act operate in different fields, there is no conflict between these provisions and that they are not repugnant to each other and the decision of the Division Bench is erroneous. It was also contended by the appellant's counsel that the State Legislature has legislative competence to pass the enactment and that, in view of Entry 25 of the Concurrent List, the State alone would be competent to say whether an institution should be established in an area to serve the educational needs of that locality. In this background, Hon. Apex Court has observed that :-

21. The educational needs of the locality are to be ascertained and determined by the State. Having regard to the Regulations framed under the AICTE Act, the representatives of the State have to be included in the ultimate decision-making process and having regard to the provisions of the Act, the writ petitioners would not in any way be prejudiced by such provisions in the A.P. Act. Moreover, the decision, if any, taken by the State authorities under Section 20(3)(a)(i) would be subject to judicial review and we do not think that the State could make any irrational decision about granting permission. Hence, we hold that Section 20(3)(a)(i) is not in any way repugnant to Section 10 of the AICTE Act and it is constitutionally valid.

14. In Govt. of A.P. v. Medwin Educational Society,   : (2004) 1 SCC 86, Hon. Apex Court has observed:-

42. The role of the State in the matter of establishment of professional colleges by the minority community as also private agencies came up for consideration before an eleven-Judge Bench of this Court in T.M.A. Pai Foundation v. State of Karnataka. The Court in no uncertain terms held that the right to establish and administer educational institutions although is available to all citizens under Articles 19(1)(g) and 26 and to the minority under Article 30 of the Constitution but the same is subject to reasonable restrictions.

45. One of us (Sinha, J.) however, keeping in view that therein not only cases of medical colleges but also professional colleges were in question, observed that grant of the essentiality certificate may not be the sole criterion. It was further noticed that in the case of State of Maharashtra the expression "technical education" occurring in Article 371(1)(c) of the Constitution of India as regards distinction between medical education and technical education did not come up for consideration therein. It was, however, held: (SCC pp. 769-70, paras 134-35)

Local needs

134. It is difficult to define precisely what would constitute 'local needs'. Mr Venugopal refers to the Medical Council of India Regulations, 1999 for the purpose of showing the requirements necessary to be considered by the State Government for the grant of the essentiality certificate. The State Government alone would be in a position to determine local needs which may be based, for instance, in the case of doctors, on the ratio of doctors to the population of the State. Other factors such as the percentage of the relevant minority in the State, the number of minority professional colleges belonging to that particular linguistic/religious minority in the State, percentage of poorer and backward sections in the State, total number of professional colleges therein, contends Mr Venugopal, would be relevant factors. This may be so, but similarly there are many more factors that would contribute to local needs. The criteria laid down in MCI Regulations no doubt provide for some guidelines for the purpose of determination of local needs but the same cannot be said to be exhaustive. Local needs would vary from State to State. Even development of a backward area may be a local need. Absence of good educational institutions in a particular area may also be a local need. The State may, in pursuit of its policy for the development of the people, consider it expedient to encourage entrepreneurs for establishing educational institutions in remote and backward areas for the benefit of the local people. Local needs, therefore, cannot be defined only with reference to the State as a unit. For good reasons the State may not like to establish professional colleges or institutions only in their capitals.

Essentiality certificate

135. Although local needs, thus, may have to be determined keeping in view the factors enumerated therein but it must also be noticed that no essentiality certificate is required to be given by the State in relation to engineering and other professional colleges. While laying down the law based on interpretation of a Constitution as well as a judgment, we cannot take a myopic view and hold that 'local needs' must be referable to the medical education. Furthermore, it may be difficult to give a restrictive meaning to the expression 'local needs' i.e. keeping the same confined to the area where the educational institution is sought to be established inasmuch as the right of minority extends to the entire State and, thus, the local needs may also have direct nexus having regard to the need of the State.

46. The upshot of the aforementioned discussions is that, in our opinion, the High Court has committed a manifest error in holding that the State has no role to play in the matter of identification of location of the sites where the medical colleges are proposed to be established. While granting an essentiality certificate, particularly having regard to the local needs, the State, in our considered view, has a positive role to play but the same would not mean that the State Government's say is final as ultimately final recommendations have to be made by the Medical Council of India and the Dental Council of India, as the case may be, where after the final decision has to be taken by the Central Government.

15. Even in T.M.A. Pai Foundation v. State of Karnataka,   : (2002) 8 SCC 481, Hon. Apex Court has observed that :--

143. This means that the right under Article 30(1) implies that any grant that is given by the State to the minority institution cannot have such conditions attached to it, which will in any way dilute or abridge the rights of the minority institution to establish and administer that institution. The conditions that can normally be permitted to be imposed, on the educational institutions receiving the grant, must be related to the proper utilization of the grant and fulfilment of the objectives of the grant. Any such secular conditions so laid, such as a proper audit with regard to the utilization of the funds and the manner in which the funds are to be utilized, will be applicable and would not dilute the minority status of the educational institutions. Such conditions would be valid if they are also imposed on other educational institutions receiving the grant.

16. In 2009 Act and the Right of Children to Free & Compulsory Education Rules,2010 (referred as 2010 Rules) framed thereunder by the Central Government also an obligation is cast upon the State to provide for schools in the neighbourhood. Distances of 1 Km. to 3 Kms. are also stipulated to explain its scope in Rule 6. In densely populated areas, appropriate government or local authority have to consider providing of more than one neighbourhood school. Shri Gatne, learned Counsel also submitted that the State government has decided to promote self-financed & sustaining Schools and a bill for that purpose is under consideration. All these factors show the effort of Central as also State Government to resolve the important problem like access to education & making it available to poor/weak constituents or sectors in Society. In Superstar Education Society Vs. State of Maharashtra-(supra) relied upon by him, the Hon. Apex Court has pointed out need to regulate grant of permissions to new private schools to avoid unhealthy competition. Permissions given to 1495 new schools on permanent no grant basis has been upheld & State Government is given liberty to initiate action against these schools if provisions of Education Code or conditions imposed by the State are breached by them. These developments emphasize need of power to balance diverse interests in larger public interest. There is need of power & the right with State Government to find out whether a new school is or is not needed in the vicinity of an existing school being run at the cost of public revenue by a government, local authority or a public trust. The distance between two schools or available adjacent school may not always be an irrelevant factor while evaluating such need & the State Government is best suited for undertaking that exercise. Its school mapping or perspective plans are the pre-decided norms to infuse transparency therein. Moreover, its decision is always subject to review in appropriate jurisdictions. Full Bench of this court in Shikshan Mandal, through the Secretary Dr. R.G. Prabhune & ors. Vs. State of Maharashtra & Ors. (supra) has already taken note of this school mapping exercise & perspective plan.

17. The challenge that unless & until the School is established & starts functioning first, the compliances mandated by S. 19 or 18 of 2009 Act can not be made or examined springs from the wrong reading of the provisions. It is not in dispute that said Act also applies to existing Schools. The schools already operating are given time of three years to achieve compliance with this mandate. When S.18 & 19 are read together, it becomes clear that Schools already established can not continue to function after the stipulated time limit allowed to report compliance. New Schools not established & coming up for the first time are under obligation to comply from day one ie they can not be established unless & until they prepare to fulfill the obligations cast by the schedule. Words establish & function therefore govern different contingencies. Section 2 defines school to mean any recognized school imparting elementary education and thus when S. 19 of 2009 Act gives such school time of three years to achieve compliance, it is obvious that S. 2 envisages existing legal recognition i.e. under other law & from some other agency or authority. Said recognition & existence of a school therefore has to be valid in the eyes of law. In other words, an unauthorized or illegal School can not claim entitlement to said breathing period. Here, the petitioner has got one primary school & three secondary schools, and none is permitted & recognized by appropriate government viz. State Government. Hence, petitioner has no right & can not claim period of three years to report compliance with 2009 Act. The petitioner has to apply under 2009 Act & Rules framed thereunder for grant of recognition & then only it can establish any school imparting elementary education. It is admitted by petitioner that all its four school are functioning since 2008 without any recognition from the State government which is appropriate government under 2009 Act. Petitioner has also not moved any application for grant of recognition under S. 18 of 2009 Act till date. It has also not shown that it has fulfilled or at least attempted to comply with the terms & conditions stipulated in schedule of 2009 Act. We are therefore not examining the question whether S.18 of 2009 Act is a provision which supersedes all other legal provisions in any other statute regulating grant of permission to open the school or then it only imposes some additional obligations on the schools of elementary education functioning otherwise than as per law. Perusal of 2009 Act does not prima facie show that it repeals any state enactment or instrument regarding grant of permissions or recognitions. But then we are not recording any conclusive finding on this issue. However as petitioner who has not started his schools as per law in 2008, is trying to rely upon the subsequent enactment and is attempting to justify non-compliance therewith by demonstrating (alleged)practical difficulties in implementing the scheme under S. 18 & 19 of 2009 Act without moving any application within last about two & half years showing willingness to comply, has no face & cause to advance such arguments. There is no inconsistency within the scheme and it is obvious that the compliance agreed to be made needs to be proved after the actual teaching commences. The fact that definition of elementary education in 2009 Act covers standards from 1 to 8 while state-law stipulated standards up to 4th or 7th only as part of primary education has got no bearing on this aspect. We do not find it necessary to delve more into this aspect in present matters at the instance of the petitioner. The challenge to validity of part of S.18 & 19 is thus rejected. No part of Section 18(1),18(5),19(1) & 19(5) of the Right of Children to Free & Compulsory Education Act,2009 (referred to as 2009 Act, hereafter) can be seen as ultra-vires & violative of Art. 19(1)(g) of the Constitution of India & Section 19(2) of the 2009 Act itself and provisions therein which do not allow to "establish or function a school without obtaining a certificate of recognition" have not been demonstrated to be so in present matters.

18. Promissory estoppel or doctrine of legitimate expectation is being invoked because the State Government invited applications and the proposals of petitioner were recommended by the District Level Committee as also State Level Committee. Petitioner claims to have made huge investment on infrastructure and has altered his position. Very same petitioner has challenged before us the validity of S. 18 & 19 of 2009 Act on the ground that it puts cart before the horse. When it was / is convenient, it pleads impossibility & on other hand estoppel or expectation also. This Court has expressly rejected interim orders as its grant was / is in breach of sub-section 5 of Section 18 of 2009 Act & even today those Schools are going on. Obviously, teaching & non-teaching staff has been employed & students are also admitted. Fees also ought to have been recovered as proposed schools were to be on permanent no grant basis. Thus, with deliberation petitioner has taken the risk & also exposed several innocent persons to it. Petitioners are trying to capitalize on 2009 Act to work out a right in their favour. State Government has also pointed out obligations cast by said Act as a reason inducing it to cancel that invitation/exercise & to proceed to formulate a new policy. Judgment dated 7.9.2010 in WP 7472 & 4493 of 2010 the Division Bench of this Court has noted this. Petitioner can not expect any relief which runs contrary to law by invoking such concepts. There is no effort to explain this entitlement. We therefore find no substance in plea of estoppel or legitimate expectation being raised. In view of the Full Bench, law noted above & conduct of present petitioner, we also do not find it necessary to place the matter before the larger bench. In the result no case is made out warranting interference. Rule is discharged in all matters. Writ petitions are thus dismissed. Costs of Rs. 5000/- per petition payable by petitioner to State.